

立法會

Legislative Council

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Paper for the House Committee

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

Purpose

This paper reports on the deliberations of the Subcommittee on Four Subsidiary Legislation Related to Competition Ordinance Gazetted on 18 February 2015 ("the Subcommittee").

Background

2. 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 and distorting competition in Hong Kong. Cap. 619 provides for general prohibitions in three major areas of anti-competitive conduct (described as the first conduct rule², the second conduct rule³ and the merger rule⁴, which are collectively known as the "Competition

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".

² The first conduct rule under section 6 prohibits undertakings from making or giving effect to arrangements or decisions or engaging in concerted practices that have as their object or effect the prevention, restriction or distortion of competition in Hong Kong.

³ The second conduct rule under section 21 prohibits undertakings that have a substantial degree of market power in a market from engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong.

⁴ The merger rule under section 3 of Schedule 7 prohibits mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong. This rule only applies to mergers involving undertakings directly or indirectly holding carrier licences issued under the Telecommunications Ordinance (Cap. 106).

Rules" in Cap. 619) as well as the institutional arrangements and penalty provisions for their enforcement.

3. The Administration implements Cap. 619 in phases after its enactment to allow sufficient time for setting up the Competition Commission ("the Commission") and the Competition Tribunal ("the Tribunal") and preparing the guidelines⁵ ("the Guidelines") before the Competition Rules come into force. The provisions relating to the establishment and operation of the Commission and the Tribunal had come into force in January and August 2013 respectively. According to the Administration, such arrangements would 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.

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 the Guidelines⁶ 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.⁷

The subsidiary legislation

5. Four items of subsidiary legislation made under Cap. 619 were gazetted and tabled at LegCo on 18 and 25 February 2015 respectively.

⁵ 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.

⁶ 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.

⁷ 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.

Competition (Application of Provisions) Regulation (L.N. 36 of 2015)

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 body⁸. 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 in Council ("CE-in-Council") may, by regulation, apply the Key Provisions to (i) any statutory body; or (ii) 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. The criteria 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.

8. The Competition (Application of Provisions) Regulation ("C(AP)R") is made to apply the Key Provisions to the following six 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));

⁸ "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)".

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

Competition (Disapplication of Provisions) Regulation (L.N. 37 of 2015)

9. Section 5(1)(b) of Cap. 619 provides that the CE-in-Council may, by regulation, disapply the Key Provisions to (i) any person, or (ii) any person, to the extent that the person is engaged in an activity specified in the regulation.

10. The Competition (Disapplication of Provisions) Regulation ("C(DP)R") is made 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 ("SEHK");
- (b) Hong Kong Futures Exchange Limited ("HKFE");
- (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.

11. According to paragraphs 7 to 10 of the LegCo Brief on C(AP)R and C(DP)R (File Ref: CITB CR 05/62/25/14), 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.

Competition (Turnover) Regulation (L.N. 38 of 2015)

12. The Competition (Turnover) Regulation ("C(T)R") is made by the Secretary for Commerce and Economic Development ("SCED") under

section 163 of Cap. 619 to 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 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, a concerted practice, or a decision of an association of undertakings that does not involve serious anti-competitive conduct if their combined turnover for the relevant turnover period does not exceed \$200 million⁹. 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% 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. C(T)R 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. The said regulation will come into operation on 17 April 2015.

Competition Ordinance (Commencement) Notice 2015 (L.N. 39 of 2015)

16. The Competition Ordinance (Commencement) Notice 2015 ("the Notice") is made by SCED under section 1(2) of Cap. 619 to provide for the commencement of the empowering and related provisions relating to the making of C(AP)R and C(DP)R (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.

⁹ If a decision of an association of undertakings is involved, the relevant criteria are that the total gross revenues of all the members of the association for the relevant turnover period do not exceed \$200 million.

The Subcommittee

17. At the House Committee meeting held on 27 February 2015, members agreed that a subcommittee should be formed to study the four items of subsidiary legislation in detail.

18. Under the chairmanship of Hon Andrew LEUNG, the Subcommittee held two meetings. At the second meeting held on 24 March 2015, the Subcommittee accepted the application of Hon Ronny TONG for late membership. The membership list of the Subcommittee is in **Appendix I**.

19. To allow more time for the Subcommittee to scrutinize the subsidiary legislation, a motion has been moved by the Chairman at the Council meeting of 25 March 2015 to extend the scrutiny period of the subsidiary legislation to the Council meeting of 15 April 2015.

Deliberations of the Subcommittee

Competition (Application of Provisions) Regulation (L.N. 36 of 2015)

20. Some members welcome C(AP)R as it is more appropriate for the Commission to determine whether a particular body is in breach of the Competition Rules or otherwise based on the outcome of investigation.

Competition (Disapplication of Provisions) Regulation (L.N. 37 of 2015)

21. There is a concern that disapplying the Key Provisions of Cap. 619 to any person may undermine the legal effect of the legislation unless the bodies concerned are regulated by another piece of legislation containing competition provisions like the seven non-statutory bodies under C(DP)R which are regulated by Cap. 571.

22. The Subcommittee has noted the Administration's advice that C(DP)R applies to the seven non-statutory bodies in their entirety. These non-statutory bodies are regulated by the Securities and Futures Commission ("SFC") in accordance with Cap. 571, which included competition as one of its objectives of regulation. However, C(DP)R does not include subsidiary companies of these bodies.

23. A member has cited the case of *Silver v New York Stock Exchange* (373 U.S. 341 (1963)) whereby the Supreme Court in the United States ("US") has ruled that the duty of self-regulation imposed upon the New York Stock

Exchange by the Securities Exchange Act of 1934 does not exempt it from the antitrust laws of US, and asked about the Administration's consideration of this case.

24. The Administration has advised that the seven non-statutory bodies under C(DP)R are already regulated under Cap. 571 which includes competition as one of its objectives of regulation. The disapplication arrangement will prevent any regulatory ambiguity that may otherwise arise as a result of their activities being subject to regulation under both Cap. 571 and Cap. 619. The Administration refers to various overseas practices, for example, the US courts has found that where there are legislation regulating the conduct of security exchanges, such legislation may take precedence over antitrust laws. Moreover, the Financial Conduct Authority and Competition and Markets Authority in the United Kingdom ("UK") have concurrent jurisdiction in competition issue in relation to financial services markets. The SFC is establishing a regular dialogue with the Commission to share experience in regulating competition matters.

Competition (Turnover) Regulation (L.N. 38 of 2015)

25. The Subcommittee has noted from the Administration that it has drawn reference from the Hong Kong Accounting Standards ("HKASs") and overseas competition laws when making C(T)R. HKASs are issued by the Hong Kong Institute of Certified Public Accountants under section 18A of the Professional Accountants Ordinance (Cap. 50). Under section 380 of the Companies Ordinance (Cap. 622), a company's financial statements for a financial year must comply with the accounting standards applicable to the financial statements.

Definition of "ordinary activities"

26. Members have raised concerns on the meaning of "ordinary activities" in section 2 of C(T)R. According to the Administration, the use of the term "ordinary activities" in section 2 of C(T)R is a concept familiar to the accounting profession and generally applied in the auditing of accounts. Revenue from "ordinary activities" for the purpose of C(T)R includes revenue arising from the use by others of entity assets yielding interest, royalties and dividends, apart from the sale of goods and/or rendering of services, with reference to the Hong Kong Accounting Standard 18 ("HKAS 18") on Revenue.

27. Some members have enquired whether transactions of properties and foreign currencies, and distribution of bonus or dividends are regarded as "ordinary activities". The Administration has responded that it would depend on the nature of business of the undertaking concerned. For example, if the

business of an undertaking involves purchasing of properties for resale or investment in equity for dividends, the transactions of such properties or such dividends would constitute/be considered as the revenue arising from its "ordinary activities".

28. The Subcommittee has sought examples of revenue not considered as arising from "ordinary activities". According to the Administration, they include contributions from equity participants, and amounts collected on behalf of the principal by an agent.

29. Members have discussed on the way(s) to set out the principles/criteria on the classification of an activity as "ordinary" or otherwise in the relevant provisions of C(T)R, for instance, by –

- (a) defining the term "ordinary activities";
- (b) drawing a clear reference to HKAS 18; or
- (c) modelling the practice of UK to make provisions similar to the one provided in the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 ("the UK Order 2000") which reads "[t]he provisions of this Schedule shall be interpreted in accordance with generally accepted accounting principles and practices".

30. Some members have remarked that LegCo is not empowered to scrutinize HKAS 18 and cautioned against making reference to it in respect of the use of "ordinary activities" in C(T)R as this will over-ride the LegCo's power to amend the subsidiary legislation.

31. In response to members' concerns, the Administration has agreed to add a new subsection under section 2 of C(T)R, i.e. section 2(4), to the effect that the total gross revenues of an undertaking are to be calculated in accordance with generally accepted accounting principles. Please see paragraphs 41 to 45 for further details.

Determination of turnover

32. Section 2 of C(T)R provides that for the purposes of section 93 of or sections 5 and 6 of Schedule 1 to Cap. 619 –

"in determining the turnover of an undertaking, the total gross revenues of the undertaking are the amounts derived by the undertaking from the

undertaking's ordinary activities [...] after deduction of the following (if any) –

- (a) sales rebates;
- (b) taxes directly related to the revenues."

33. Some members have requested the Administration to set out the scope of coverage of "sales rebates" and "taxes directly related to the revenues" in detail. According to the Administration, the wordings are modeled on the UK Order 2000 and the Singapore Competition (Financial Penalties) Order 2007. Following overseas experience, it does not consider it necessary to further define the terms in C(T)R.

34. Some members have asked whether the word "amounts" in section 2 of C(T)R includes the measurement of revenue received in both monetary and non-monetary rewards. There is also a concern about the confusion caused by the meaning of the terms "amounts" and "sum" under section 2(3)(a) of C(T)R. According to the Administration, the use of the word "amounts" in C(T)R does not preclude the measurement of revenue received in non-monetary form, following the generally accepted accounting principles. To address the concern on the use of the word "sum", the Administration proposes to replace the expression "any sum" under section 2(3)(a) by "any grant, subsidy or similar financial assistance" to enhance its clarity. Please refer to paragraph 40 for details.

35. In this connection, a member has asked about the scope of "grant, subsidy or similar financial assistance" under section 2(3)(a) of C(T)R. The Administration has explained that, for example, if an undertaking receives Government subsidy in return for a contractual obligation to provide homes for the elderly, the subsidy is to be recognized as an amount derived by the undertaking from its ordinary activities. However, if a one-off financial assistance is provided by the Government without a contractual obligation to supply goods or services, the financial assistance is not to be regarded as deriving from the undertaking's ordinary activities.

36. The Subcommittee also takes note of the Administration's view on members' suggestion of making specific provisions as those in the UK Order 2000 on the determination of turnover for "credit institutions", "financial institutions" and "insurance undertakings". The Administration has explained that with the proposed new section 2(4), it is not necessary to include specific provisions for the determination of the turnover of these undertakings. Moreover, HKAS 18 has provided the accounting guidance on revenue arising

from rendering of services and included a range of examples to illustrate how various services income would be recognized as revenue.

Turnover for pecuniary penalties

37. As turnover is a measurement for determining the cap on pecuniary penalties under section 93 of Cap. 619, some members have asked whether the amounts derived from the local sale of goods exporting to overseas should form part of the turnover. The Administration explains that the turnover obtained in Hong Kong will in practice include sales to customers in Hong Kong as well as export sales made from Hong Kong, which is also the practice in Singapore.

38. As regards the maximum amount of pecuniary penalty imposed in relation to conduct that constitutes a single contravention which may not exceed 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, the Subcommittee has noted the Administration's view that the cap should have sufficient deterrent effect.

Guidance to be provided by the Commission

39. Some members have also asked whether any guidelines will be issued by the Commission for the purpose of determining the turnover of an undertaking. The Administration has confirmed the Commission's intention to provide further guidance on turnover assessment in accordance with section 131 of Cap. 619, which provides that the Commission may do all such things as appear to it to be necessary, advantageous or expedient for it to do for, or in connection with, the performance of its functions. The Commission's guidance notes on turnover will make reference to prevailing accounting principles and experience of comparable competition jurisdiction, and include practical examples of how turnover can be determined by reference to typical audited accounts of undertakings.

Proposed amendments

40. The Subcommittee notes the amendments proposed by the Administration to C(T)R (**Appendix II**). Members have not raised any question on the proposed amendment to section 2(3)(a).

41. Members have exchanged views with the Administration on the proposed new section 2(4) which reads "Subject to this section, the total gross revenues of an undertaking are to be calculated in accordance with generally accepted accounting principles". The Administration advises that it is drafted

with reference to section 7H of the Telecommunications Ordinance (Cap. 106) and section 17(2) of the Broadcasting Ordinance (Cap. 562).

42. The Subcommittee notes that the applicable turnover of an undertaking in the relevant Order of UK and Singapore is limited to "the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities". However, C(T)R does not have such a reference relating to "the sale of products and the provision of services". The Administration refers to HKAS 18, which states that revenue could arise from the use by others of entity assets yielding interest, royalties and dividends, apart from that arising from the sale of goods and the rendering of services. The Administration confirms that the policy intent of C(T)R in the calculation of an undertaking's turnover is not limited to revenue arising from the sale of goods and the rendering of services.

43. There is a concern that the relevant accounting practice (consistent with generally accepted accounting principles) would in practice be specified under both section 7H of Cap. 106 and section 17(2) of Cap. 562, whereas it would not be so specified under C(T)R. Moreover, in section 17(2) of Cap. 562, there is a reference to "generally accepted accounting principles in Hong Kong" whereas "in Hong Kong" is not mentioned in the proposed new section 2(4).

44. The Administration explains that since Cap. 619 could regulate conduct of undertakings established in Hong Kong as well as outside Hong Kong, the proposed new section 2(4) was drafted so that it can be applicable to various types of undertakings, including those that are established outside Hong Kong which may not be subject to the accounting principles in Hong Kong.

45. Some members support the proposed new section 2(4) which sets out the framework of calculation of an undertaking's turnover. The present drafting is adequate to cover the total gross revenue of an undertaking and allow flexibility for the Tribunal to exercise judgement having regard to the facts of the case in question, for instance, the Tribunal may refer to Hong Kong's accounting principles on cases involving Hong Kong's undertakings.

Recommendation

46. The Subcommittee supports the four items of the subsidiary legislation and the Administration's proposed amendments to C(T)R (**Appendix II**).

Advice sought

47. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 4
Legislative Council Secretariat
2 April 2015

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

Membership list

Chairman Hon Andrew LEUNG Kwan-yuen, GBS, JP

Members Hon Jeffrey LAM Kin-fung, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Ronny TONG Ka-wah, SC
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

(Total : 13 members)

Clerk Ms Debbie YAU

Legal Adviser Mr Timothy TSO

Interpretation and General Clauses Ordinance

Resolution

(Under section 34(2) of the Interpretation and General Clauses Ordinance
(Cap. 1))

Competition (Turnover) Regulation

Resolved that the Competition (Turnover) Regulation, published in the Gazette as Legal Notice No. 38 of 2015 and laid on the table of the Legislative Council on 25 February 2015, be amended as set out in the Schedule.

Schedule

Amendments to Competition (Turnover) Regulation

1. Section 2 amended (determination of turnover of undertaking)

(1) Section 2(3)(a)—

Repeal

“any sum from a public body by way of grant, subsidy or similar financial assistance in return for a contractual obligation to supply goods or services to a third party, the sum”

Substitute

“from a public body any grant, subsidy or similar financial assistance in return for a contractual obligation to supply goods or services to a third party, the grant, subsidy or financial assistance”.

(2) After section 2(3)—

Add

“(4) Subject to this section, the total gross revenues of an undertaking are to be calculated in accordance with generally accepted accounting principles.”.