

# 立法會

## *Legislative Council*

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### **Subcommittee on Rules of the High Court (Amendment) Rules 2015 (Commencement) Notice and Five Items of Subsidiary Legislation Related to Competition Ordinance Gazetted on 17 July 2015**

#### **Background brief**

#### **Purpose**

This paper provides background information on the Rules of the High Court (Amendment) Rules 2015 (Commencement) Notice ("RHC Notice") and five items of subsidiary legislation related to the Competition Ordinance (Cap. 619) gazetted on 17 July 2015. It also summarizes the major views and concerns expressed by members of the Subcommittee on Four Subsidiary Legislation Related to Competition Ordinance Gazetted on 18 February 2015 ("the Subcommittee"), Panel on Economic Development ("the Panel") and the Bills Committee on Competition Bill ("the Bills Committee") during previous discussions on the subject.

#### **Background**

2. 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 undertakings<sup>1</sup> 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 rule<sup>2</sup>, the second conduct rule<sup>3</sup> and the merger rule<sup>4</sup>, which

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<sup>1</sup> "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".

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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).

are collectively known as the "Competition 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 the establishment of the Competition Commission ("the Commission") and the Competition Tribunal ("the Tribunal")<sup>5</sup> before the Competition Rules come into force. The provisions relating to the establishment, functions and powers of the Commission (including the issue of the guidelines ("the Guidelines"))<sup>6</sup> and the establishment and constitution, jurisdiction and powers, and practice and procedure of the Tribunal came into operation on 18 January and 1 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. The Communications Authority ("CA") has a concurrent jurisdiction with the Commission to enforce Cap. 619 in relation to the anti-competitive conduct of certain businesses operating in the broadcasting and telecommunications sectors.

4. As part of the Government's preparatory work, four items of subsidiary legislation, namely the Competition (Application of Provisions) Regulation ("C(AP)R"), the Competition (Disapplication of Provisions) Regulation ("C(DP)R"), the Competition (Turnover) Regulation ("C(T)R") and the Competition Ordinance (Commencement) Notice 2015, were gazetted in February 2015. The Competition Ordinance (Commencement) Notice 2015 commenced the operation of sections 3, 4 and 5 of Cap. 619 on 17 April 2015 to enable the making of C(AP)R and C(DP)R.

5. Other provisions in Cap. 619 have yet to come into operation. They include provisions on (a) the first and second conduct rules; (b) complaints and investigations; (c) enforcement powers of the Commission; (d) review by the Tribunal; (e) enforcement before the Tribunal; (f) private actions; (g) concurrent jurisdiction relating to telecommunications and broadcasting; (h) indemnities and offences; and (i) the Schedules to Cap. 619 relating to various matters including general exclusions from the conduct rules, mergers, orders that may be made by the Tribunal in relation to mergers and contraventions of Competition

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<sup>5</sup> The Tribunal is a superior court of record established under Cap. 619 having primary jurisdiction to hear and adjudicate on cases brought by the Commission, follow-on private actions, alleged contravention of a conduct rule as a defence raised in proceedings before the Court of First Instance, as well as reviews of certain determinations of the Commission/Communications Authority.

<sup>6</sup> 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 meetings on 24 November 2014 and 27 April 2015, the Panel was briefed on the preparation and consultation of the draft Guidelines and further revision. Members may wish to refer to the corresponding paper and minutes of the meetings (LC Paper Nos. CB(4)166/14-15(05), CB(4)370/14-15, CB(4)822/14-15(03) and CB(4)1153/14-15) for further information.

Rules, and matters that must be provided for in the Memorandum of Understanding ("MOU")<sup>7</sup>.

### **The Subsidiary Legislation**

6. Six items of subsidiary legislation were gazetted and tabled at LegCo on 17 July and 14 October 2015 respectively.

#### Competition Tribunal Rules (Commencement) Notice, Competition Tribunal Fees Rules (Commencement) Notice, Competition Tribunal Suitors' Funds Rules (Commencement) Notice and RHC Notice

7. These four notices respectively appoint 14 December 2015 as the day on which the Competition Tribunal Rules ("CTR"), the Competition Tribunal Fees Rules ("CTFR"), the Competition Tribunal Suitors' Funds Rules ("CTSFR") and the Rules of the High Court (Amendment) Rules 2015 ("RHCR") will come into operation. CTR prescribes the practice and procedure to be followed in the Tribunal in all matters with respect to which the Tribunal has jurisdiction and any matters incidental or relating to that practice or procedure. CTFR prescribes the fees payable in connection with the applications to the Tribunal and proceedings in the Tribunal so that the fees for similar matters or items in the High Court and the Tribunal are standardized at the same levels. CTSFR provides for the administration of the suitors' funds kept by the Tribunal established under Cap. 619. RHCR amends the Rules of the High Court (Cap. 4A) to provide for primarily the practice and procedure in the Court of First Instance ("CFI") of the High Court for the transfer of proceedings between the Tribunal and CFI.

8. Before the tabling of the four Rules, a subcommittee<sup>8</sup> was formed to study them in their draft form and amendments suggested by members have been suitably incorporated in the four items of subsidiary legislation when they were gazetted. Members may refer to the Subcommittee's report issued on 20 May 2015 (LC Paper No. CB(4)1016/14-15) for further information.

#### Competition Ordinance (Commencement) (No. 2) Notice 2015

9. The Competition Ordinance (Commencement) (No. 2) Notice 2015 ("the Notice") is made by the Secretary for Commerce and Economic

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<sup>7</sup> Under sections 161 of Cap. 619, the Commission and CA must prepare and sign a MOU for the purpose of co-ordinating the performance of their functions under Cap. 619. Before signing any MOU or any amendment to it, the Commission and CA must consult LegCo.

<sup>8</sup> Subcommittee to Study the Proposed Subsidiary Legislation on the Procedures to be Adopted by the Competition Tribunal.

Development under section 1(2) of Cap. 619 to provide that the uncommenced provisions of Cap. 619 will come into operation on 14 December 2015.

10. The Commission has completed its drafting and consultation of the Guidelines as required under Cap. 619 and published the finalized Guidelines in July 2015. With the above progress, the Government considers that Cap. 619 can fully commence operation on 14 December 2015.

### Competition (Fees) Regulation

11. The Competition (Fees) Regulation ("C(F)R") is made by the Chief Executive under section 164 of Cap. 619 after consultation with the Executive Council to prescribe the amount of fees payable for the making of certain applications to the Commission or CA under Cap. 619.

12. Section 159 of Cap. 619 provides that CA may perform the functions of the Commission under Cap. 619 in so far as they relate to the conduct of undertakings that are licensees under the Telecommunications Ordinance (Cap. 106) or the Broadcasting Ordinance (Cap. 562), or persons whose activities require them to be licensed under Cap. 106 or Cap. 562, or persons exempted from Cap. 106. Moreover, section 160 of Cap. 619 provides for the transfer of competition matter between the Commission and CA.

13. In considering the levels of fees to be charged, the Commission has taken into account fees payable to other regulatory authorities in Hong Kong, fees charged by competition authorities in other jurisdictions and the Government's "user pays" principle. The prescribed fees which are set out in the Schedule to C(F)R are summarized below –

<b>Types of application</b>	<b>Specified amount per application (HK\$)</b>
Application under section 9(1) or 24 for a decision as to whether an agreement or conduct is excluded or exempt from the application of the first or second conduct rule (except an application for exclusion from the application of the first conduct rule on the ground of an agreement enhancing overall economic efficiency) <sup>9</sup>	50,000

<sup>9</sup> Under sections 9(1), 24(1) and Schedule 1 to Cap. 619, exclusions or exemptions from the application of the first and second conduct rules which are not provided on the ground of agreements enhancing overall economic efficiency include agreements or conducts which (a) are for compliance with legal requirements; (b) are for services of general economic interest; (c) result in a merger; (d) are of lesser significance; (e) fall under the exemption provided by a block exemption order; (f) fall under exemption provided by an order made by the CE in Council on the ground of public policy or avoidance of conflict with international obligations; or (g) fall under the disapplication provided for statutory bodies or specified persons or specified persons engaged in specified activities.

Application under section 9(1)(a) for a decision as to whether an agreement is excluded from the application of the first conduct rule on the ground of an agreement enhancing overall economic efficiency	100,000
Application under section 15 for the issue of a block exemption order in respect of a particular category of agreement	500,000
Application for a decision as to whether a merger is, or a proposed merger would (if completed) be, excluded from the application of the merger rule or Schedule 7 to Cap. 619	500,000

14. C(F)R provides for different charging mechanisms in relation to the applications made to the Commission and CA –

- (a) for an application made to the Commission, a fee of the specified amount is payable on the making of the application subject to the discretion of the Commission to reduce, waive or refund the fee in whole or in part (section 3 of C(F)R);
- (b) for an application made to CA, it will charge a fee which is equal to the costs and expenses incurred by CA in making a decision on the application or in relation to the processing of the application but shall not exceed the specified amount in the Schedule to C(F)R which does not provide for a discretion for CA to reduce, waive or refund any fees (section 5 of C(F)R);
- (c) if the Commission or CA declines to consider the application, the fee paid will be refunded or no fee will be charged (sections 3(2) and 5(4) of C(F)R); and
- (d) sections 4 and 6 of C(F)R provide for the liability to pay the fee for an application if it is transferred from the Commission to CA, and vice versa.

15. According to the Administration<sup>10</sup>, the Commission consulted stakeholders including the major chambers of commerce and small and medium enterprises associations on the fee proposal in April 2015. Two of the submissions suggested that the Commission should consider handling

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<sup>10</sup> Paragraph 15 of the LegCo Brief issued by the Commerce and Economic Development Bureau on Competition (Fees) Regulation (File ref: CITB CR 05/62/43/9).

applications free of charge and one suggested lower fees, but all supported that if fees are chargeable, the Commission should be given discretion to reduce, waive or refund the fees.

### **Views and concerns of Members and the public**

16. The Bills Committee held a total of 38 meetings between 2010 and 2012 during which members noted the Administration's intent to implement the Competition Bill in phases after its enactment to allow sufficient time for setting up the Commission and the Tribunal, and preparing the Guidelines before the Competition Rules coming into force. At its meeting on 27 April 2015, the Panel was informed about the Administration's schedule for tabling the Notice at LegCo. Members' views, including a LegCo question raised at a Council meeting, are summarized in ensuing paragraphs.

#### Law compliance and enforcement

17. Some members opined that businesses were pressing ahead to adjust themselves in accordance with Cap. 619, and cautioned the Commission to avoid taking a high-hand approach on enforcement. The Commission advised that different enforcement actions would be applied to minor and serious anti-competitive acts. In specific circumstances, Cap. 619 required the issue of warning notices, for example.

18. An enquiry was raised if the Commission would propose any advance rulings on matters covered by Cap. 619. The Commission advised that Cap. 619 did not provide formal procedures for the issue of advance rulings. Nevertheless, it had engaged many stakeholders concerning the application of Cap. 619 to enhance their understanding that their business practices should be adjusted in accordance with Cap. 619. This engagement process was expected to continue in the early period after the full implementation of Cap. 619.

19. A member expressed concern that the Tribunal might not concur with the Guidelines on interpreting Cap. 619, and hence SMEs following the Guidelines might be found to be contravening Cap. 619 by the Tribunal. The Commission assured that such situation would probably never happen as the Commission was the only one to take an undertaking to the Tribunal. In cases that the Tribunal disagreed with the Guidelines' interpretation of Cap. 619, the Commission would consider and revise the Guidelines as appropriate. In addition, the Commission had to bear the legal costs so incurred if the Tribunal ruled in favour of the undertaking brought before it. Any undertaking could also apply for judicial review of the Commission's determination as prescribed by Cap. 619.

### Education and assistance provided by the Commission

20. At the Council meeting on 23 October 2013, a Member raised a question about, among others, how the authorities would help the business sector, particularly small and medium enterprises ("SMEs"), to prepare for the full implementation of Cap. 619. In reply, the Administration advised that the Commission would promote public understanding of Cap. 619, and encourage the business community to develop risk management systems, good practices and internal controls as tools to achieve compliance. In addition, it would further study measures to promote the continuous compliance by the business community in light of the experience accumulated after the implementation of Cap. 619.

21. Some members expressed concerns whether the public as well as SMEs could fully understand the Guidelines prepared by the Commission under Cap. 619 given their technical nature, and requested the Commission to step up its publicity on them as well as deploy more manpower resources to receive complaints and answer enquiries. As many of conventional business practices might tantamount to price-fixing, the Commission should understand the industries' norms and practices, and enhance its communication and promotions with various industries to explain what "practices" should be eliminated.

22. The Commission advised that it had supplemented the Guidelines with brochures and releases containing simple do's and don'ts for dissemination among SMEs through trade associations. It had also engaged SMEs and their associations/chambers about the Guidelines' application. It would focus future publicity work on SMEs and issue easy-to-understand brochures to apprise them of their rights and obligations under Cap. 619.

23. During the discussion at one of the Subcommittee meetings, the Administration advised that when making the C(T)R, it had communicated with the Commission which intended to publish, among others, guidance notes to facilitate enforcement of Cap. 619, including guidance notes on turnover assessment with practical examples of how turnover could be determined by reference to typical audited accounts of undertakings.

### Review of Cap. 619

24. Members of the Bills Committee had stressed the need for a review of Cap. 619 in three to five years' time after its enactment. Some members opined that the review on the competition law should cover, but not limited to, the differential treatment of hardcore and non-hardcore conduct, the cap on pecuniary penalty, the de minimis arrangements, private action rights and merger control. The Administration undertook to conduct a review of the operational experience and effectiveness of the competition law in a few years'

time after its enactment. It considered that the exact timing of the review should be determined after the coming into effect of the law, when the institutional framework was in place and as Hong Kong built up its own case law under Cap. 619.

### C(F)R

25. According to paragraph 15 of the relevant LegCo Brief (file ref.: CITB CR 05/62/43/9), the Commission had consulted stakeholders on C(F)R in April 2015 by inviting feedbacks from major chambers of commerce and SME associations. Four written submissions were thereafter received, with two of them suggested that the Commission should consider handling applications free of charge and one preferred lower fees, while all supported that the Commission should be given discretion to reduce, waive or refund the fees if fees were chargeable. The Commission also consulted the Panel at its meeting on 27 April 2015 during which members did not raise any objection to the proposal.

### **Latest position**

26. At the meeting of the House Committee held on 9 October 2015, Members agreed that a subcommittee should be formed to study RHC Notice and the five items of subsidiary legislation related to Cap. 619 gazetted on 17 July 2015 in details.

### **Relevant papers**

27. A list of the relevant papers which are available on the LegCo Website (<http://www.legco.gov.hk>) is in **the Appendix**.



## List of relevant papers

Issued by	Meeting date/ Issue date	Paper
Panel on Economic Development	24 November 2014	<a href="#">Competition Commission's paper</a> <a href="#">Minutes</a>
	27 April 2015	<a href="#">Competition Commission's paper</a> <a href="#">Minutes</a>
Bills Committee on Competition Bill	23 May 2012	<a href="#">Report</a>
Subcommittee on Four Subsidiary Legislation Related to Competition Ordinance Gazetted on 18 February 2015	2 April 2015	<a href="#">Report</a>
Subcommittee to Study the Proposed Subsidiary Legislation on the Procedures to be Adopted by the Competition Tribunal	20 May 2015	<a href="#">Report</a>
Legislative Council Secretariat	27 August 2015	<a href="#">Legal Service Division Report</a>
Commerce and Economic Development Bureau	15 July 2015	<a href="#">Legislative Council Brief on Competition Ordinance (Cap. 619) Competition Ordinance (Commencement) (No. 2) Notice 2015</a>
	15 July 2015	<a href="#">Legislative Council Brief on Competition Ordinance (Cap. 619) Competition (Fees) Regulation</a>