

立法會

Legislative Council

LC Paper No. CB(4)124/15-16

Ref: CB4/SS/17/14

Paper for the House Committee meeting on 30 October 2015

Report of the 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

Purpose

This paper reports on the deliberations of the Subcommittee 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 ("the Subcommittee").

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 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

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).

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")⁵ 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"))⁶ 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

⁵ 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.

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 meetings on 24 November 2014 and 27 April 2015, the Panel on Economic Development 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")⁷.

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 subcommittee⁸ 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 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.

⁷ Under section 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.

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

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. Other preparatory work such as the establishment of the Commission, the Tribunal, and making of necessary subsidiary legislation have also been largely completed. 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 –

Types of application	Specified amount per application (HK\$)
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) ⁹	50,000

⁹ 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 Administration¹⁰, 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

¹⁰ 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).

submissions suggested that the Commission should consider handling 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.

The Subcommittee

16. At the House Committee meeting held on 9 October 2015, members agreed that a subcommittee should be formed to study the six items of subsidiary legislation in detail.

17. Under the chairmanship of Hon Andrew LEUNG Kwan-yuen, the Subcommittee held one meeting. The membership list of the Subcommittee is in **the Appendix**.

Deliberations of the Subcommittee

18. Members note that the preparatory work have been largely completed along with ongoing general publicity and in general welcome the full commencement of Cap. 619 as early as possible.

C(F)R

Different charging mechanisms

19. Members have noted that C(F)R provides for different charging mechanisms in relation to the applications made to the Commission and CA as stated in paragraph 14 above. In gist, the Commission charges a fee of the specified amount upon receipt of an application and has a discretion to reduce, waive or refund the fee in whole or in part. CA, on the other hand, will charge a fee which is equal to the costs and expenses incurred by it in processing an application and is not given the aforesaid discretion.

20. Addressing a concern about the different charging mechanisms, the Administration has explained that the charging of fees up front by the Commission would deter frivolous applications and reduce the risk of difficulty in recovering fees after the applications have been processed (especially in cases of adverse decisions). If the cost involved in processing an application is lower than the specified amount, the Commission is prepared to exercise the discretion to refund part of the collected fee to reflect the cost. The Administration further advises that such discretion is not to be given to CA due to the cost-recovery principle adopted by the Office of Communications Authority, the

executive arm of CA and the actual collector of the fees, which operates as a trading fund.

21. There is an enquiry about the criteria to be taken by the Commission in exercising the aforesaid discretion. The Commission has advised that it will publish guidance outlining such criteria, and relevant factors to be considered would include the appropriateness of waivers or reductions for certain undertakings if the fees are too burdensome having regard to the financial position and scope of operation etc., the extent of general public interest or benefit arising from the application, for example, the fee might be waived if a case with wide benefits will become a precedent, and whether it would be possible for each of its members to contribute to the fee if the application is a trade association, etc.

Levels of the specified amounts

22. Noting the specified amount per case for different types of application as detailed in paragraph 13 above, some members have considered the levels quite high, and requested the fees be lowered in particular during the initial stage of implementation.

23. The Administration has explained that while it is not expected to fully recover cost in every case, the specified amount would generally reflect the complexity of the cases and resources needed to handle them. Moreover, instead of making an application, undertakings may assess for themselves whether their agreements, conducts or mergers are in compliance with the Competition Rules clearly set out in Cap. 619. In case they are under investigation by the Commission or CA, the Commission or CA will automatically apply the exclusion or exemption criteria before arriving at decisions on whether certain agreements, conducts or mergers have contravened the Competition Rules. Therefore, undertakings do not necessarily have to make any applications and pay the specified amount in order to benefit from the exclusions and exemption provisions.

24. The Administration has further advised that undertakings may also consult the Commission verbally or in writing for general advice if they have doubts on whether and how the exclusion or exemption provided in Cap. 619 may relate to their agreement, conduct or merger. While noting the Commission would provide the advice free of charge, some members are concerned about the legal binding effect of the advice. The Administration has stressed that it is the responsibility of undertakings to comply with the law, the consultation aims at assisting the undertakings in gaining a better understanding of the provisions with the aid of the Commission's detailed Guidelines with examples, and assessing whether their agreement, conduct or merger has met the exclusion or exemption criteria.

Review of the levels of fees

25. Some members still consider the levels of fees to be charged too high and unaffordable to small and medium enterprises, and have requested the Administration to review the levels of fees after actual implementation for a period of time. In response, the Commission has highlighted that it strongly encourages all potential applicants to approach the Commission for initial consultation, which is provided free of charge, prior to submitting applications, so that advice could be given on whether making an application is really needed. Such consultation may enable undertakings, especially the small and medium enterprises, to gain a better understanding of the legal requirement without having to incur any application fees. The Administration has noted the Subcommittee's request for it to review the levels of fees in light of implementation experience and report to LegCo in due course.

Recommendation

26. The Subcommittee supports the six items of subsidiary legislation studied by it.

Advice sought

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

**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**

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 Cyd HO Sau-lan, JP
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP
Hon Martin LIAO Cheung-kong, SBS, JP

(Total : 7 members)

Clerk Ms Debbie YAU

Legal Adviser Mr Timothy TSO