

LEGISLATIVE COUNCIL BRIEF

Competition Ordinance
(Chapter 619)

COMPETITION (APPLICATION OF PROVISIONS) REGULATION

COMPETITION (DISAPPLICATION OF PROVISIONS) REGULATION

INTRODUCTION

At the meeting of the Executive Council on 10 February 2015, the Council ADVISED and the Chief Executive ORDERED that -

- A
- (a) the Competition (Application of Provisions) Regulation at **Annex A** should be made under section 5(1)(a) of the Competition Ordinance (“CO”) (Cap. 619) to apply the key provisions to six statutory bodies; and
 - (b) the Competition (Disapplication of Provisions) Regulation at **Annex B** should be made under section 5(1)(b) of the CO to disapply the key provisions to seven non-statutory bodies.
- B

JUSTIFICATIONS

Legal framework for applying the key provisions to statutory bodies

2. The CO, enacted by the Legislative Council (“LegCo”) on 14 June 2012, provides a legal framework to tackle anti-competitive conduct in three major areas described as the first conduct rule, the

second conduct rule and the merger rule^{Note (1)}. Section 3(1) of the CO provides that the key provisions do not apply to a statutory body. Those key provisions are Part 2 (relating to the first and second conduct rules), Part 4 (relating to the enforcement powers of the Competition Commission), Part 6 (relating to the enforcement before the Competition Tribunal), and Schedule 7 (relating to the merger rule) of the CO. The Chief Executive in Council (“CE in Council”) may, under section 5(1)(a) of the CO, make regulation to apply the key provisions to any statutory body, only if he is satisfied that all four criteria set out in section 5(2) of the CO are met. The four 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.

Application of the key provisions to six identified statutory bodies

3. During the deliberation of the then Competition Bill in 2012, we briefed LegCo that the Administration intended to apply the key provisions of the CO to six statutory bodies on the ground that they meet the criteria of section 5(2) of the Bill^{Note (2)}. The six statutory bodies are

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Note (1) The first conduct rule (section 6 of the CO) prohibits agreements, concerted practices as well as decisions of an association of undertakings that have the object or effect to prevent, restrict or distort competition in Hong Kong. The second conduct rule (section 21 of the CO) prohibits an undertaking with a substantial degree of market power from abusing that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in Hong Kong. The merger rule, which applies only to mergers involving undertakings directly or indirectly holding carrier licences issued under the Telecommunications Ordinance (Cap. 106), prohibits against mergers or acquisitions that have, or are likely to have, the effect of substantially lessening competition in Hong Kong (section 3 of Schedule 7 to the CO).

Note (2) The criteria in clause 5(2) of the Bill are the same as those now set out in section 5(2) of the CO.

- (i) **Ocean Park Corporation** (established under the Ocean Park Corporation Ordinance (Cap. 388));
- (ii) **Federation of Hong Kong Industries** (established under the Federation of Hong Kong Industries Ordinance (Cap. 321));
- (iii) **The general committee of the Federation of Hong Kong Industries** (established under the Federation of Hong Kong Industries Ordinance (Cap. 321));
- (iv) **Matilda and War Memorial Hospital** (incorporated under the Matilda and War Memorial Hospital Ordinance (Cap. 1035));
- (v) **Kadoorie Farm and Botanic Garden Corporation** (established under the Kadoorie Farm and Botanic Garden Corporation Ordinance (Cap. 1156)); and
- (vi) **The Helena May** (incorporated under The Helena May Incorporation Ordinance (Cap. 1021)).

4. The Administration reminded the six statutory bodies in early August 2014 of the plan to apply the key provisions of the CO to them, and invited them to provide supplementary information if they wish to. After reviewing the feedback from the six bodies, the Administration considers the six statutory bodies have satisfied the four criteria set out in section 5(2) of the CO.

Legal framework for disapplying the key provisions to non-statutory bodies

5. Section 5(1)(b) of the CO 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. This section applies to bodies which are not statutory bodies, and provides a mechanism to disapply the key provisions of the CO to these bodies where there is a justifiable cause to do so.

Disapplication of the key provisions to seven identified non-statutory bodies

6. The Administration considers that it is in the public interest for the key provisions of the CO to be disappplied to seven non-statutory bodies. The seven bodies, which are all market or platform operators regulated under the Securities and Futures Ordinance (“SFO”)(Cap. 571), are as follows -

recognized exchange companies (“RECs”)^{Note (3)}

- The Stock Exchange of Hong Kong Limited (“SEHK”); and
- Hong Kong Futures Exchange Limited (“HKFE”)

recognized clearing houses (“RCHs”)^{Note (4)}

- Hong Kong Securities Clearing Company Limited (“HKSCC”);
- HKFE Clearing Corporation Limited (“HKCC”);
- The SEHK Options Clearing House Limited (“SEOCH”); and
- OTC Clearing Hong Kong Limited (“OTCC”)

recognized exchange controller (“RXC”)^{Note (5)}

- Hong Kong Exchanges and Clearing Limited (“HKEx”)

7. These seven non-statutory bodies are engaged in economic activities and are undertakings in the context of the CO. They control and operate all local exchanges and clearing houses. Unlike other

Note (3) An REC is a company that is recognized by the Securities and Future Commission (“SFC”) as an exchange company under the SFO (e.g. a company recognized by the SFC to operate a stock market or a futures market in Hong Kong). There are currently only two RECs, i.e. (i) the SEHK, which operates Hong Kong’s only stock market, and (ii) the HKFE, which operates Hong Kong’s only futures market.

Note (4) An RCH is a company that is recognized by the SFC as a clearing house under the SFO (e.g. a clearing house for the clearing and settlement of transactions in securities, futures contracts or over-the-counter (“OTC”) derivatives). There are currently four RCHs, i.e. (i) the HKSCC, which provides clearing and settlement services for transactions in securities (other than stock options); (ii) HKCC, which provides clearing and settlement services for transactions in futures contracts; (iii) the SEOCH, which provides clearing and settlement services for transactions in stock options; and (iv) the OTCC, which provides clearing and settlement services for OTC derivative transactions.

Note (5) An RXC is a company that is recognized by the SFC as a controller of an REC or RCH under the SFO. As RECs and RCHs are important market infrastructures for the securities and futures market, and systemically important to the stability and security of Hong Kong’s financial markets, it is necessary to ensure that their controller is also subject to regulation under the SFO. Currently, HKEx is the only RXC. It is the holding company of all existing RECs and RCHs (holding 75% of OTCC, and 100% of each of SEHK, HKFE, HKSCC, HKCC and SEOCH).

non-statutory bodies regulated under the SFO, these seven bodies are a key part of Hong Kong's financial market infrastructure – they provide the core trading and clearing platforms for the securities, futures and derivatives markets in Hong Kong, and administer the rules relating to the operation of those markets and platforms. They are therefore systemically important to the financial stability and security of Hong Kong. The importance of the seven non-statutory bodies to the development of a safe and efficient financial infrastructure in Hong Kong is reflected in the duties and functions imposed on them under the SFO. In particular, all RECs, RCHs and RXCs are required by the SFO to act in the interest of the public, and must, in discharging their duties, ensure that the interest of the public prevails where it conflicts with their own interest^{Note (6)}. Additionally, the SFO requires that: (i) RECs shall ensure, so far as reasonably practicable, orderly, informed and fair markets in securities or futures contracts that are traded on the stock or futures market they operate or through the facilities of the RECs concerned^{Note (7)}; (ii) RCHs shall ensure, so far as reasonably practicable, that there are orderly, fair and expeditious clearing and settlement arrangements for any transactions in securities, futures contracts or OTC derivatives cleared or settled through their facilities^{Note (8)}; (iii) both RECs and RCHs shall ensure that their business and operation risks are prudently managed^{Note (9)}; (iv) both RECs and RCHs shall operate their facilities in accordance with non-statutory rules made by them and approved by the Securities and Futures Commission (“SFC”)^{Note (10)}; and (v) an RXC shall ensure that the statutory duties placed on the RECs and RCHs that it controls referred to in (i) to (iv) above are complied with^{Note (11)}.

8. The seven non-statutory bodies are already regulated under the SFO, which provides a specially calibrated regime for regulating RECs, RCHs and RXCs. The regulatory objectives of the SFC under section 4 of the SFO include, among other things: (i) to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry; (ii) to assist in maintaining the stability of the financial system; and (iii) to protect the interest of members of the investing public. Additionally, section 6(2) of the SFO states that in pursuing its regulatory objectives and performing its functions, the SFC shall have regard to, among other factors, the principle that competition among persons carrying on activities regulated by the SFC under any of

Note (6) See sections 21(2), 38(2) and 63(2) of the SFO.

Note (7) See section 21(1) of the SFO.

Note (8) See section 38(1) of the SFO.

Note (9) See sections 21(1) and 38(1) of the SFO.

Note (10) See sections 21(3), 24(8), 38(3) and 41(8) of the SFO.

Note (11) See section 63(1) of the SFO.

the relevant provisions should not be impeded unnecessarily. Section 76 of the SFO further provides that an REC, RCH or RXC may not impose any fees unless those fees are specified in its rules and have the approval of the SFC. In approving such fees, the SFC is required under section 76 to have regard to, among other things, first, the level of competition in Hong Kong for the matter for which the fee is to be imposed, and secondly, the level of fee imposed by another REC, RCH or RXC, or any similar body outside Hong Kong, for the same or a similar matter to which the fee relates.

9. The SFO takes a preventive approach in its regulation of RECs, RCHs and RXCs as it requires SFC's approval for all their rules and fees before they can be implemented and imposed. As a result, the practices and activities of the seven non-statutory bodies, which are largely set out in their rules, will have been approved by the SFC before they are implemented. Moreover, in the event that practices and activities previously approved need to be changed or modified, the SFC has sufficient power to require such change or modification^{Note (12)}. The SFC also has power to require RECs, RCHs and RXCs to cease any practices or activities that have not been previously approved or that raise regulatory concern. In the process of exercising this regulatory oversight, competition is an element in a balance of factors to be considered by the SFC to ensure a safe and efficient financial infrastructure in Hong Kong.

10. The RECs, RCHs and RXC play a key role in maintaining Hong Kong's position as an international financial centre. The Administration is satisfied that the RECs, RCHs and RXC should continue to be regulated under the SFO framework. The proposed disapplication will ensure this and prevent any regulatory ambiguity that might otherwise arise as a result of their activities being subject to regulation under both the SFO and the CO. The SFC is establishing a regular dialogue with the Competition Commission to discuss competition matters relating to RECs, RCHs and RXC.

Note (12) For example, under sections 23(3) and 23(5) and sections 40(4) and 40(6) of the SFO, the SFC may request the RECs and RCHs to amend originally approved rules in the manner and within the period specified in the request, and if they fail to do so, the SFC may make or amend the rules instead of the RECs and RCHs.

THE REGULATIONS

11. The Competition (Application of Provisions) Regulation applies the key provisions to the six statutory bodies listed in paragraph 3 above. The Competition (Disapplication of Provisions) Regulation disapplies the key provisions to the seven non-statutory bodies listed in paragraph 6 above.

LEGISLATIVE TIMETABLE

12. The legislative timetable is –

Publication in the Gazette	18 February 2015
Tabling at the Legislative Council	25 February 2015

IMPLICATIONS OF THE PROPOSALS

13. The proposals are in conformity with the Basic Law, including the provisions concerning human rights. They do not affect the binding effect of the CO. They have no civil service, financial, productivity, environmental, sustainability or family implications. On economic implications, the proposals seek to strike a balance between the need to maintain fair competition in the market and the need to safeguard public interest.

PUBLIC CONSULTATION

14. There was an extensive discussion of various elements of the then Competition Bill at the Bills Committee during the legislative process. We consulted the LegCo Panel on Economic Development on 24 November 2014 on the proposals to apply the key provisions to the six statutory bodies and to disapply the key provisions to the seven non-statutory bodies. The Panel indicated support for the legislative proposals. We also briefed the Competition Commission on the proposed Regulations.

PUBLICITY

15. A press release will be issued on 18 February 2015. A spokesperson will be available to answer media and public enquiries.

ENQUIRIES

16. Enquiries relating to this brief can be addressed to Mr Sam Hui, Principal Assistant Secretary for Commerce and Economic Development (Commerce and Industry), at 2810 2858.

Commerce and Economic Development Bureau
16 February 2015

Competition (Application of Provisions) Regulation

Section 1

1

Competition (Application of Provisions) Regulation

(Made by the Chief Executive in Council under section 5(1)(a) of the Competition Ordinance (Cap. 619))

1. Commencement

This Regulation comes into operation on the day on which section 5(1)(a) of the Competition Ordinance (Cap. 619) comes into operation.

2. Statutory bodies specified for purpose of section 3(2)(a) of Ordinance

The provisions referred to in section 3(1) of the Ordinance apply to the statutory bodies specified in the Schedule.

Competition (Application of Provisions) Regulation

Schedule

2

Schedule

[s. 2]

Statutory Bodies Specified for Purpose of Section 3(2)(a) of Ordinance

1. Ocean Park Corporation.
2. Matilda and War Memorial Hospital.
3. Kadoorie Farm and Botanic Garden Corporation.
4. The Helena May.
5. Federation of Hong Kong Industries.
6. The general committee of the Federation of Hong Kong Industries.

Clerk to the Executive Council

COUNCIL CHAMBER

2015

Explanatory Note

The object of this Regulation is to apply the provisions referred to in section 3(1) of the Competition Ordinance (Cap. 619) to the statutory bodies specified in the Schedule to this Regulation.

Competition (Disapplication of Provisions) Regulation

Section 1

1

Competition (Disapplication of Provisions) Regulation

(Made by the Chief Executive in Council under section 5(1)(b) of the
Competition Ordinance (Cap. 619))

1. Commencement

This Regulation comes into operation on the day on which section 5(1)(b) of the Competition Ordinance (Cap. 619) comes into operation.

2. Persons specified for purpose of section 4(1)(a) of Ordinance

The provisions referred to in section 3(1) of the Ordinance do not apply to the persons specified in the Schedule.

Competition (Disapplication of Provisions) Regulation

Schedule

2

Schedule

[s. 2]

Persons Specified for Purpose of Section 4(1)(a) of Ordinance

1. The Stock Exchange of Hong Kong Limited.
2. Hong Kong Futures Exchange Limited.
3. Hong Kong Securities Clearing Company Limited.
4. HKFE Clearing Corporation Limited.
5. The SEHK Options Clearing House Limited.
6. OTC Clearing Hong Kong Limited.
7. Hong Kong Exchanges and Clearing Limited.

Clerk to the Executive Council

COUNCIL CHAMBER

2015

Explanatory Note

The object of this Regulation is to disapply the provisions referred to in section 3(1) of the Competition Ordinance (Cap. 619) to the persons specified in the Schedule to this Regulation.