

LEGISLATIVE COUNCIL BRIEF

Competition Ordinance (Cap. 619)

Competition (Turnover) Regulation Competition Ordinance (Commencement) Notice 2015

INTRODUCTION

As part of the preparatory work before the full implementation of the Competition Ordinance (“the Ordinance”) (Cap. 619), the Secretary for Commerce and Economic Development (“SCED”) made on 12 February 2015 –

- (a) the Competition (Turnover) Regulation (Annex A) in exercise of the power under section 163 of the Ordinance; and
- (b) the Competition Ordinance (Commencement) Notice 2015 (Annex B) in exercise of the power under section 1(2) of the Ordinance.

JUSTIFICATIONS

2. The Ordinance, enacted on 14 June 2012, provides a legal framework to tackle anti-competitive conduct in all sectors. The Ordinance provides for general prohibitions in three major areas described as the first conduct rule, the second conduct rule and the merger rule.

3. The Ordinance was designed to be implemented in phases. The Administration, the Judiciary and the Competition Commission (“Commission”) have been working on the preparatory work necessary for the full commencement of the Ordinance. On the part of the Administration, the Competition (Turnover) Regulation (“the Regulation”) and the Competition Ordinance (Commencement) Notice 2015 (“the Notice”) are subsidiary legislation that needs to be made to prepare for the full implementation of the Ordinance.

Competition (Turnover) Regulation

4. Section 163 of the Ordinance provides that the SCED may make a regulation to provide for the determination of the turnover of an undertaking. 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 the Ordinance, namely, the first conduct rule does not apply to an agreement between undertakings which does not involve serious anti-competitive conduct if their combined turnover for the relevant turnover period does not exceed \$200 million; and 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. Turnover is also the measurement for determining the cap on pecuniary penalties under section 93 of the Ordinance. 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.

5. It is necessary to specify, by way of a regulation, 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 the Ordinance, and other related issues such as the determination of turnover of undertakings that consist of two or more undertakings and that each prepares accounts, and undertakings that receive any sum from a public body by way of grant, subsidy or similar financial assistance. Having drawn reference from the Hong Kong Accounting Standards and overseas competition laws, the Regulation is made under section 163 of the Ordinance to provide for the above matters.

Competition Ordinance (Commencement) Notice 2015

6. The Ordinance was designed to be implemented in phases. In 2012, the Competition Ordinance (Commencement) Notice 2012 was made to commence certain provisions in order to facilitate preparatory work for the implementation of the Ordinance, including the setting up of the Commission and the Competition Tribunal. Since then, the Administration, the Judiciary and the Commission have been working on the preparatory work necessary for the full commencement of the Ordinance.

7. On the part of the Administration, apart from the Regulation at Annex A, in order to prepare for the full implementation of the Ordinance, the Chief Executive in Council also made the Competition (Application of Provisions) Regulation to apply the key provisions¹ of the Ordinance to six statutory bodies, and the Competition (Disapplication of Provisions) Regulation to disapply the key provisions to seven non-statutory bodies². The Notice is made to provide for the commencement of the empowering and related provisions relating to the Competition (Application of Provisions) Regulation and the Competition (Disapplication of Provisions) Regulation, which will come into operation when their empowering provisions come into operation. These empowering and related provisions are section 3 (Application to statutory bodies), section 4 (Application to specified persons and persons engaged in specified activities) and section 5 (Regulations) of the Ordinance. The Notice brings the above three sections of the Ordinance into operation on 17 April 2015.

THE REGULATION AND THE NOTICE

8. The Regulation at Annex A provides for the determination of turnover of an undertaking for the purpose of section 93 of, and sections 5 and 6 of Schedule 1 to, the Ordinance; and contains provisions relating to undertakings that consist of two or more undertakings and each of those undertakings prepares accounts, as well as undertakings that receive any sum from a public body by way of grant, subsidy or similar financial assistance. The Regulation also specifies the turnover period for the purpose of sections 5(4) and 6(3) of Schedule 1 to the Ordinance.

9. The Notice at Annex B brings the empowering and related provisions relating to the making of the Competition (Application of Provisions) Regulation and the Competition (Disapplication of Provisions) Regulation, i.e. sections 3, 4 and 5 of the Ordinance, into operation on 17 April 2015.

¹ The 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 Ordinance.

² The Competition (Application of Provisions) Regulation and the Competition (Disapplication of Provisions) Regulation, on which a separate Legislative Council Brief has been issued, will be published in the Gazette and tabled at the Legislative Council at the same time as the Competition (Turnover) Regulation and the Competition Ordinance (Commencement) Notice 2015.

LEGISLATIVE TIMETABLE

10. The legislative timetable for the Regulation and the Notice is –
- | | |
|------------------------------------|------------------|
| Publication in the Gazette | 18 February 2015 |
| Tabling at the Legislative Council | 25 February 2015 |

IMPLICATIONS

11. The Regulation is in conformity with the Basic Law, including the provisions concerning human rights. It does not affect the binding effect of the Ordinance. It has no civil service, financial, productivity, environmental, sustainability or family implications. On economic implications, it helps to prepare for the implementation of the Ordinance, which would contribute to enhancing competition and economic efficiency.

PUBLIC CONSULTATION

12. We consulted the LegCo Panel on Economic Development on 24 November 2014 on the legislative proposal on the determination of turnover. The Panel indicated support for the proposal.

PUBLICITY

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

ENQUIRIES

14. 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 (Turnover) Regulation

(Made by the Secretary for Commerce and Economic Development under section 163 of the Competition Ordinance (Cap. 619))

1. Commencement

This Regulation comes into operation on 17 April 2015.

2. Determination of turnover of undertaking

- (1) For the purpose of section 93 of the Ordinance, 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 in Hong Kong after deduction of the following (if any)—
 - (a) sales rebates;
 - (b) taxes directly related to the revenues.
- (2) For the purpose of sections 5 and 6 of Schedule 1 to the Ordinance, 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, whether in Hong Kong or outside Hong Kong, after deduction of the following (if any)—
 - (a) sales rebates;
 - (b) taxes directly related to the revenues.
- (3) For subsections (1) and (2)—
 - (a) if an undertaking receives 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 is to be recognized as

an amount derived by the undertaking from the undertaking's ordinary activities; and

- (b) if an undertaking consists of 2 or more undertakings and each of those undertakings prepares accounts, the total gross revenues of the undertaking are the total gross revenues of all those undertakings, but no account is to be taken of revenues resulting from the transactions between those undertakings.

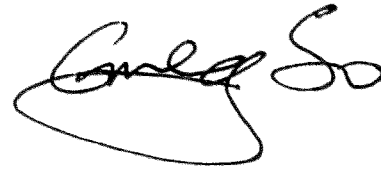
3. Specification of turnover period for purpose of section 5(4) of Schedule 1 to Ordinance

- (1) For an undertaking referred to in section 5(4)(a)(i) or (b)(i) or (ii) of Schedule 1 to the Ordinance, the turnover period is the preceding calendar year.
- (2) For an undertaking referred to in section 5(4)(a)(ii) of Schedule 1 to the Ordinance, the turnover period is the financial year of the undertaking that ends in the preceding calendar year.
- (3) In this section—
preceding calendar year (對上公曆年) has the meaning given by section 5(5) of Schedule 1 to the Ordinance.

4. Specification of turnover period for purpose of section 6(3) of Schedule 1 to Ordinance

- (1) For an undertaking referred to in section 6(3)(a)(i) or (b)(i) or (ii) of Schedule 1 to the Ordinance, the turnover period is the preceding calendar year.
- (2) For an undertaking referred to in section 6(3)(a)(ii) of Schedule 1 to the Ordinance, the turnover period is the financial year of the undertaking that ends in the preceding calendar year.
- (3) In this section—

preceding calendar year (對上公曆年) has the meaning given by section 6(4) of Schedule 1 to the Ordinance.



Secretary for Commerce and
Economic Development

12 February 2015

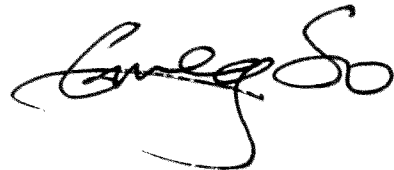
Explanatory Note

This Regulation provides for the determination of the turnover of an undertaking and specifies the turnover period for the purposes of the Competition Ordinance (Cap. 619) (*Ordinance*). Turnover and turnover period are the measurements of eligibility for exclusion under section 5 (agreements of lesser significance) and section 6 (conduct of lesser significance) of Schedule 1 to the Ordinance. Turnover is also the measurement to determine the cap on pecuniary penalties imposed under section 93 of the Ordinance.

2. Section 1 provides for the commencement of the Regulation.
3. Section 2 provides for the determination of the turnover of an undertaking for the purpose of section 93 of, and sections 5 and 6 of Schedule 1 to, the Ordinance. Section 2 also contains provisions relating to the following undertakings—
 - (a) undertakings that receive 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; and
 - (b) undertakings that consist of 2 or more undertakings and each of those undertakings prepares accounts.
4. Section 3 specifies the turnover period for an undertaking referred to in section 5(4) of Schedule 1 to the Ordinance.
5. Section 4 specifies the turnover period for an undertaking referred to in section 6(3) of Schedule 1 to the Ordinance.

Competition Ordinance (Commencement) Notice 2015

Under section 1(2) of the Competition Ordinance (Cap. 619), I appoint 17 April 2015 as the day on which sections 3, 4 and 5 of the Ordinance come into operation.



Secretary for Commerce and
Economic Development

12 February 2015