

立法會

Legislative Council

LC Paper No. LS20/19-20

Further Report by Legal Service Division on Subsidiary Legislation Gazetted on 11 October 2019

Members may recall from LC Paper No. LS1/19-20 dated 23 October 2019 and issued to Members vide LC Paper No. CB(2)46/19-20 ("First Report") that the Legal Service Division ("LSD") was scrutinizing the legal and drafting aspects of L.N. 120 to L.N. 128 and L.N. 130 to L.N. 133, and seeking further clarifications from the Administration on certain matters. This paper sets out LSD's further observations on the relevant Legal Notices.

L.N. 120 to L.N. 125 relating to public bus routes

2. As Members may recall, L.N. 120 to L.N. 125 respectively update the schedules of bus routes of five franchised bus companies to reflect the route changes made from 1 January 2018 to 30 April 2019. According to the relevant franchise documents uploaded onto the Transport Department's website,¹ apart from The Kowloon Motor Bus Company (1933) Limited, the names of the other four franchised bus companies do not contain the word "the". Upon LSD's enquiry, the Transport and Housing Bureau ("THB") has clarified that the use of the definite article "the" to precede the name of a franchised bus company in section 2 of the Schedule of Routes Orders is grammatically sound, and is unlikely to cause any misunderstanding or to affect the validity of L.N. 120 to L.N. 125.

L.N. 126 - Inland Revenue (Double Taxation Relief with respect to Taxes on Income and Prevention of Tax Evasion and Avoidance) (Republic of Estonia) Order

3. L.N. 126 gives effect to the arrangements in the Agreement between the Government of the Hong Kong Special Administrative Region of the

¹ https://www.td.gov.hk/en/transport_in_hong_kong/public_transport/buses/index.html.

People's Republic of China and the Government of the Republic of Estonia for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance ("Estonia Agreement") and its Protocol for the purposes of affording relief from double taxation and exchanging information in relation to any tax imposed by the laws of Hong Kong or Estonia.

4. LSD has asked the Administration to clarify the following:
 - (a) The reason for not listing in the Estonia Agreement or its Protocol set out in the Schedule to L.N. 126 the oversight bodies of Estonia (i.e. the courts, the National Audit Office and the Parliament of Estonia) as in the case of other similar orders made under the Inland Revenue Ordinance (Cap. 112); and
 - (b) whether the Estonia Government is required to seek the written agreement from the Hong Kong Government in relation to the addition of other authorities as the oversight bodies in Estonia.

5. The Financial Services and the Treasury Bureau ("FSTB") has explained as follows:
 - (a) Given that the Convention on Mutual Administrative Assistance in Tax Matters ("Convention") had already entered into force in both Hong Kong and Estonia, the Estonia Government and the Hong Kong Government agreed that the Estonia Agreement should follow the relevant provisions of the Model Tax Convention on Income and on Capital ("Model Tax Convention") and the Convention under which oversight bodies are not listed separately.
 - (b) There is no requirement under the Model Tax Convention and the Convention on the contracting parties to reach an agreement as to what authorities can be regarded as oversight bodies. All oversight bodies are subject to the same safeguards which are also applicable to the tax authorities for protecting taxpayers' privacy and confidentiality of the information exchanged.

L.N. 127 and L.N. 128 – Prevention and control of pollution from ships

6. As stated in paragraphs 15 to 17 of our First Report, L.N. 127 and 128 amend the Merchant Shipping (Prevention of Oil Pollution) Regulations (Cap. 413A) and the Merchant Shipping (Prevention of Pollution by Garbage) Regulation (Cap. 413O) respectively to implement the latest requirements set out in Annexes I and V to the International Convention for the Prevention of Pollution from Ships, 1973 ("MARPOL"). Upon LSD's request, THB has provided copies of the latest texts of Annexes I and V to MARPOL as amended by the relevant resolutions of the International Maritime Organization.² Members may contact LSD if they wish to study the latest texts of Annexes I and/or V.

L.N. 129 – Public Bus Services (Amendment) Regulation 2019

7. As noted in paragraphs 10 and 11 of our First Report, L.N. 129 will allow either one passenger to carry two compressed oxygen cylinders, or two passengers to each carry one such cylinder, for self-medical use at any one time on board a franchised bus without specifying any maximum capacity of such cylinder. However, it is stipulated in regulation 74(1) of the Dangerous Goods (General Regulations) (Cap. 295B) that the maximum capacity for each compressed oxygen cylinder for which a licence is not required under the Dangerous Goods Ordinance (Cap. 295) is five litres. It is further noted that under regulation 11(d) of the Public Bus Services Regulations (Cap. 230A), a driver and a conductor of a bus, when acting as such, must take all reasonable precautions to ensure the safety of passengers in or on or entering or alighting from the bus; and that by virtue of regulation 25(3) of Cap. 230A, any person who without reasonable excuse contravenes regulation 11(d) commits an offence and is liable to a fine of \$3,000 and to imprisonment for six months.

8. As it is unclear whether a bus driver or conductor who pursuant to L.N. 129 allows a passenger to board a bus with one or more oxygen cylinder exceeding five litres without a licence, or in breach of any term or condition endorsed on a licence, granted under section 6 of Cap. 295 would run the risk of being prosecuted under the Public Bus Services Ordinance (Cap. 230), Cap. 295, or their respective subsidiary legislation, LSD has sought clarification from the

² Resolutions MEPC.266(68) and MEPC.277(70).

Administration on how L.N. 129 is to operate. THB's reply is summarized below:

- (a) L.N. 129 does not impose any particular limit on the capacity of an oxygen cylinder carried by a public bus passenger for self-medical use;
- (b) nor does L.N. 129 seek to alter any potential criminal or civil liabilities of a bus driver, a conductor or a passenger under other legislative provisions, including those under Cap. 295, Cap. 230, or their respective subsidiary legislation;
- (c) it is practically difficult and thus not common for patients requiring oxygen therapy to carry cylinders with water capacity exceeding 1.7 litres or weighing more than 1.7 kilogrammes. It is therefore highly unlikely that passengers would bring oxygen cylinders of more than five litres' water capacity for self-medical use when travelling on franchised buses; and
- (d) the Transport Department will remind all the franchised bus operators of the relevant legal provisions under Cap. 295, its subsidiary legislation and Cap. 230A, and will partner with the bus operators to launch a public education programme to ensure that bus drivers and staff, as well as passengers and the general public, understand L.N. 129 and the relevant legal provisions.

L.N. 130 to L.N. 133 relating to Investor Compensation Fund

9. L.N. 130 to L.N. 132 are made to amend the relevant rules to enhance the Investor Compensation Fund ("ICF") regime. In relation to L.N. 130, it is noted that under section 4(1)(a) of the Securities and Futures (Investor Compensation—Claims) Rules (Cap. 571T) (as amended by section 5 of L.N. 130), if a qualifying client of a specified person sustains a loss, as a result of default committed on or after the "appointed day" (i.e. a day to be appointed by the Securities and Futures Commission ("SFC") by notice published in the Gazette pursuant to section 13 of Cap. 571T) by the specified person in relation to any specified securities or futures contracts or related assets, the qualifying client may claim compensation from ICF in respect of the loss.

By G.N. 1221 of 2003, SFC appointed 1 April 2003 as the appointed day for the purposes of Cap. 571T.

10. LSD has asked the Administration the reason for referring to "appointed day" in L.N. 130 instead of "1 April 2003". In reply, SFC has clarified that the notice published pursuant to section 13 of Cap. 571T is not subsidiary legislation. It is, however, clear to the investing public that the ICF regime, together with its related rules including Cap. 571T, all came into operation on 1 April 2003. The reference to the appointed day has been in place for over 15 years and has not raised any concerns or ambiguity. Thus, SFC is of the view that no amendment is required to be made to replace "appointed day" with "1 April 2003" in L.N. 130.

11. Regarding L.N. 133, LSD has asked the Administration the reason for taking 16 years to start the process of winding up the Dealers Deposit Scheme ("DDS") which had ceased to operate since 2003. FSTB has explained that the original section 76 of Part 1 of Schedule 10 to the Securities and Futures Ordinance (Cap. 571) ("Section 76") did not provide for the transitional arrangement of the Securities Margin Financiers' Security Fund which formed part of the funds of DDS. Section 76 was subsequently amended under the Securities and Futures (Amendment) Ordinance 2012 to provide for such transitional arrangement, thereby enabling the winding-up of DDS. According to SFC, since the compensation schemes established before the commencement of Cap. 571 have been replaced by the ICF regime since 2003, there is no imminent need to wind up DDS.

12. With the above clarifications, LSD has no further queries on L.N. 130 to L.N. 133.

Concluding observations

13. Subject to Members' views on the matters discussed in paragraphs 3 to 5 and 7 to 11 above relating to L.N. 126, L.N. 129, L.N. 130 and L.N. 133, no difficulties have been identified in relation to the legal and drafting aspects of the above items of subsidiary legislation.

14. Under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the period for amending the 20 items of subsidiary legislation gazetted on 11 October 2019 (i.e. L.N. 120 to L.N. 139) will expire at the Council meeting of 13 November 2019. Members wishing to move a motion under section 34(4) of Cap. 1 to extend that period to the Council meeting of 4 December 2019 are invited to note that the deadline for giving notice of such motion under Rule 29(3) of the Rules of Procedure is **Friday, 8 November 2019**, and may contact LSD for assistance.

Prepared by

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