

**Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000**

**Securities and Futures Bill
Market Misconduct Tribunal - Presenting Officer**

INTRODUCTION

In response to Members' comments made at the Bills Committee meeting on 8 May 2001, we undertook to provide further information on the role of the Presenting Officer before proceedings of the Market Misconduct Tribunal (MMT) to be created under Part XIII of the Securities and Futures Bill (SF Bill). The MMT is modeled on the existing Insider Dealing Tribunal (IDT) set up under the Securities (Insider Dealing) Ordinance (SIDO) (Cap. 395).

2. Under the SIDO, the Financial Secretary (FS) initiates IDT proceedings to inquire into insider dealing. The IDT appoints a counsel, nominated by the Secretary for Justice (SJ), to assist it in the inquiry. Similarly, under the SF Bill, the FS will initiate MMT proceedings. The SJ will appoint a Presenting Officer to present a market misconduct case to the MMT, thus making the MMT more independent in conducting the proceedings. This change is introduced as a result of the Court of Appeal ruling on the Paragon Case¹.

¹ In one of the cases related to the IDT inquiry into trading in the shares of Paragon Holdings Limited (*Dato Tan Leong Min and Tan Fo King v IDT 1992 2HKC, Civil Appeal, No. 162 of 1998*), the Court of Appeal made some observations about the role of the counsel assisting the IDT -

"It is obviously desirable and indeed necessary for the Tribunal and counsel to meet before the inquiry opens and to discuss the procedure, relevant lines of inquiry and potential problems and for the counsel to interview witnesses or investigate various avenues of importance. Once the inquiry starts, the position changes. Although they are counsel to the inquiry, they are in a special position. They must not abuse this special role and become part of the Tribunal. Although therefore matters of investigatory nature and procedural matters may be the subject of discussion with the Tribunal, they should be rare. Further, they must not frustrate the public nature of the inquiry and have discussions behind closed doors unless it is essential. Put simply, counsel are under a duty not to get involved in the judicial function of the Tribunal, or the decision-making process and to ensure that all things are done openly, publicly and fairly, unless, as I said, it is essential to have a meeting in the absence of the parties and the public.

...

The reason why...the Tribunal is empowered to appoint counsel to act for it, is to remove the impression of hostility and unfairness which would be created if the...Tribunal itself conducted the process of eliciting the facts on which it has to base its conclusions. The appointment of counsel for the...Tribunal removes this impression; if any such impression remains, it shifts to the shoulders of counsel for the...Tribunal "

IDT COUNSEL

3. Section 18 of the Schedule to the S(ID)O provides that the IDT can appoint a legal officer nominated by the Secretary for Justice or other lawyer to act as counsel for it. All the other powers of the IDT are to be exercised by the IDT itself and the S(ID)O is silent on the actual role of the counsel assisting the IDT or his relationship with the IDT. The problem with this is that there was an immediate conflict between, on the one hand, counsel's duty to the Tribunal to assist it personally as its legal adviser and, on the other, his obligation to remain independent and apart from it during the collection and evaluation of evidence.

4. Since the comments of the Court of Appeal in the Paragon Case, IDTs have largely adopted a more conservative procedure and have kept their counsel at arms length.

MMT PRESENTING OFFICER

5. Clause 243(4) and (5) of the SF Bill provides that the Secretary for Justice will appoint a legal officer or another lawyer as Presenting Officer to conduct any given market misconduct proceedings instituted by the Financial Secretary before the MMT under clause 244.

6. The role of the Presenting Officer will be clearly spelt out in the SF Bill. Its role will also be made more independent of the MMT compared to the counsel assisting the IDT, in the light of the comments made by the Court of Appeal in the above case.

7. Clause 20 of Schedule 8 provides that the Presenting Officer will present available evidence to the MMT, including evidence the MMT asks him to present, to enable the MMT to reach an informed decision about whether and what type of market misconduct has occurred.

8. Under clause 14 of Schedule 8 and clause 244, the Financial Secretary must, when starting proceedings before the MMT, give a written statement containing details of which market misconduct provisions are alleged to have been infringed and sufficient brief particulars to disclose reasonable information about the nature and essential elements of the alleged market misconduct. Under clause 16 of Schedule 8, the Presenting Officer may in the course of proceedings apply to the MMT to have further statements made so that the MMT may identify another person who appears to have engaged in market misconduct but who is not identified in the original statement.

9. As preserved from the S(ID)O, under clauses 245 and 246, the Presenting Officer will also be able to apply to the MMT for it to exercise its powers to receive evidence, direct the SFC to investigate further on its behalf and make other orders regulating the proceedings. The Presenting Officer will also be able to apply to the MMT for proceedings or part of them to be held in private (clause 25 of Schedule 8).

10. Under clause 257, the Secretary for Justice will be able to appeal an MMT decision. (At present only a person identified as an insider dealer or otherwise identified and so punished by the IDT or made subject to a costs order or identified in the IDT's report may appeal an IDT decision.) In practice, the Presenting Officer will normally be involved in the conduct of such appeals on behalf of the Secretary for Justice.

**Financial Services Bureau
13 September 2001**