

立法會
Legislative Council

LC Paper No. CB(4)900/14-15
(These minutes have been seen
by the Judiciary Administration)

Ref : CB4/SS/8/14

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

**Minutes of the second meeting
held on Thursday, 9 April 2015, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

- Members present** : Hon Dennis KWOK (Chairman)
Hon Abraham SHEK Lai-him, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon WONG Ting-kwong, SBS, JP
Hon Paul TSE Wai-chun, JP
Hon LEUNG Kwok-hung
Hon SIN Chung-kai, SBS, JP
- Members absent** : Hon Ronny TONG Ka-wah, SC
Hon TANG Ka-piu, JP
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan
- Public Officers attending** : Item I
Judiciary Administration

Ms Wendy CHEUNG
Assistant Judiciary Administrator (Development)

Miss Yan LEUNG
Senior Administrative Officer (Development)

Department of Justice

Mr Francis KWAN
Senior Assistant Law Officer (Civil Law)

Mr David GROVER
Assistant Law Officer (Civil) (Acting)

Mr Allen LAI
Senior Government Counsel

Ms Phyllis POON
Senior Government Counsel

Miss Yvonne CHEUNG
Senior Government Counsel (Acting)

**Attendance by
Invitation**

Competition Commission

Mr Philip MONAGHAN
Executive Director (General Counsel)

Mr Alexander LEE
Manager (Competition Affairs)

**Clerk in
attendance**

: Miss Mary SO
Chief Council Secretary (4)2

**Staff in
attendance**

: Mr Timothy TSO
Assistant Legal Adviser 2

Ms Cindy CHAN
Senior Council Secretary (4)2

Miss Vivian YUEN
Legislative Assistant 4(2)

Action

I. Meeting with the Judiciary Administration, the Administration and the Competition Commission

- LC Paper No. CB(4)720/14-15(01) -- Judiciary Administration ("JA")'s paper entitled "Comments of the Legal Professional Bodies on the Draft Rules for the Competition Tribunal and the Judiciary's Responses"
- LC Paper No. CB(4)720/14-15(02) -- JA's paper entitled "Possible Further Streamlining of Procedures for Bringing Follow-on Actions to the Competition Tribunal"
- LC Paper No. CB(4)720/14-15(03) -- Letter dated 27 March 2015 from the Commerce and Economic Development Bureau ("CEDB") responding to the Legislative Council ("LegCo") Secretariat's letter dated 19 March 2015
- LC Paper No. CB(4)720/14-15(04) -- Letter dated 30 March 2015 from the Competition Commission responding to the LegCo Secretariat's letter dated 20 March 2015
- LC Paper No. CB(4)720/14-15(05) -- Marked-up of the proposed amendments to the Rules of the High Court (Cap. 4 sub. leg. A) prepared by the Legal Service Division (Restricted to members)
- LC Paper No. CB(4)739/14-15(01) -- JA's letter dated 2 April 2015 responding to the matters raised in the letter dated 26 March 2015 from the Assistant Legal Adviser of the LegCo Secretariat

Action

Papers previously issued

- LC Paper No. CB(4)632/14-15(01) -- JA's paper entitled "Brief on the Proposed Competition Tribunal Rules and other Related Rules"
- LC Paper No. CB(4)632/14-15(02) -- JA's paper entitled "Comparison of the Key Differences in the Procedures of the Competition Tribunal and the Court of First Instance"
- LC Paper No. CB(4)632/14-15(03) -- JA's paper entitled "Broad Comparison of the Key Procedures of the Competition Tribunal, the Lands Tribunal and the Small Claims Tribunal"
- LC Paper No. CB(4)632/14-15(04) -- JA's paper entitled "Rules and Procedures Applicable to the Competition-related Courts in Selected Common Law Jurisdictions"
- LC Paper No. CB(4)632/14-15(05) -- Letter dated 5 March 2015 from the CEDB providing the following requested information:
- (a) relationship between the contravention of the First Conduct Rule under section 6 of the Competition Ordinance ("CO") (Cap. 619) and the Second Conduct Rule under section 21 of CO; and
 - (b) procedures for members of the public to seek remedies due to contravention in the

requirements of CO.

Annex B to LC Paper No. CB(4)493/14-15(03) for the meeting of the Panel on Administration of Justice and Legal Services on 16 February 2015 -- Marked-up of the proposed amendments to the Rules of the High Court (Cap. 4 sub. leg. A)

LC Paper No. CB(4)632/14-15(06) -- Background brief prepared by the LegCo Secretariat

The Subcommittee deliberated (index of proceedings attached at **Annex**).

Briefing by JA and the Competition Commission

2. At the invitation of the Chairman,

(a) Assistant Judiciary Administrator (Development) ("AJA(Dev)") briefed members on LC Paper Nos. CB(4) 720/14-15(01)-(02); and

(b) Executive Director (General Counsel), Competition Commission briefed members on LC Paper No. CB(4) 720/14-15(04).

3. In respect of the proposed changes to rule 93 and Form 8 of the draft Competition Tribunal Rules ("CTR") to allow a follow-on action to be brought by filing an originating notice of claim (i.e. Form 8 in the Schedule to the draft CTR) together with a separate statement of claim containing confidential information as referred to in paragraph 17 of LC Paper No. CB(4) 720/14-15(02), Assistant Legal Adviser 2 ("ALA2") enquired whether the definition of "originating document" under rule 2(1), read together with rules 55 and 56, of the draft CTR could accurately reflect the policy intent that a person might, without leave of the Competition Tribunal ("the Tribunal"), only search for, inspect and obtain a copy of Form 8 but not also the separate statement of claim filed which might contain confidential information.

4. AJA(Dev) agreed to amend the definition of "originating document" under rule 2(1) of the draft CTR to clarify what type(s) of document(s) would be regarded as "originating document". The issue would be considered not just for follow-on actions, but also for the other types of proceedings that might be brought before the Tribunal.

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Scrutiny of the draft CTR

Rule 2 - Interpretation

5. ALA2 said that JA had confirmed in its letter of 2 April 2015 (LC Paper No. CB(4)739/15-15(01)) that an intervener, as mentioned in paragraph (a) of the definition of "party" under rule 2(1) of the draft CTR, referred to any person, including the Competition Commission ("the Commission"), being granted leave by the Tribunal to intervene in the proceedings under rule 20 or rule 21 of the draft CTR. For the sake of clarity and to align with the drafting of paragraph (b) of the definition of "party" under rule 2(1) of the draft CTR, ALA2 suggested that the meaning of "intervener" in paragraph (a) of the definition of "party" under rule 2(1) of the draft CTR should be revised to clearly spell out that "intervener" referred to any person, including the Commission, who were granted leave by the Tribunal to intervene in the proceedings under rule 20 or rule 21 of the draft CTR.

JA

6. AJA(Dev) agreed to clarify the meaning of "intervener" by providing a new definition for this term under rule 2(1) of the draft CTR.

Rule 4 - Application of Rules of the High Court ("RHC") (Cap. 4A)

7. Members noted that rule 4(1) of the draft CTR provided that where the Competition Ordinance (Cap. 619) ("CO") and the CTR made no provision for a matter, RHC applied to all proceedings before the Tribunal, so far as the RHC might be applicable to that matter. AJA(Dev) explained that if both the RHC and the CTR had provisions for a matter, the CTR would in general prevail over RHC for that matter according to the operation of rule 4 of the CTR. However, there were two kinds of refinements to the CTR, i.e. partial application and partial disapplication of Cap. 4A. In respect of partial application of Cap. 4A, for some matters, whilst there were provisions in the CTR that modified or differed from Cap. 4A, certain parts of an Order in Cap. 4A might still be applicable to that matter. For example, in rule 16 of the CTR, whilst subrule (1) and (2) would apply to Tribunal proceedings, Order 11 of Cap. 4A applied to the service of all documents out of the jurisdiction. As to partial disapplication of Cap. 4A, for some other matters, whilst Cap. 4A provisions were generally applicable to Tribunal proceedings, certain parts or the whole of the relevant Cap. 4A Order were not applicable in relation to that matter because of the different requirements of the CTR. For example, in rule 17 of the CTR, subrule (2) indicated that "Order 13 of the RHC does not apply to any proceedings".

8. AJA(Dev) explained that the above proposed arrangements would minimize the extent of Cap. 4A provisions which needed to be copied into the

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CTR, whilst allowing for flexibility to introduce informality and other adaptations into Tribunal proceedings.

Rule 13 - Method of service of originating documents

9. ALA2 said that JA had advised in LC Paper No. CB(4)739/15-15(01) that it was necessary for a party to first apply for an order for substituted service under rule 13(8) of the CTR before the Tribunal might make such an order and that the application should be supported by affidavit. JA had also clarified that rule 4 (substituted service) of Order 65 of Cap. 4A did not apply to the Tribunal proceedings. In the light of this, ALA2 suggested and AJA(Dev) agreed to amend rule 13(8) of the draft CTR to specify that a party must first apply for an order for substituted service before the Tribunal might make such an order and that such application should be supported by affidavit.

Rule 20 - Intervention by third party (other than Commission)

10. Mr SIN Chung-kai noted that rule 20(1) of the draft CTR provided that a person (other than the Commission) who had a sufficient interest in the matters to which any proceedings related might apply for leave to intervene in the proceedings. Mr SIN sought clarification on the meaning of "sufficient interest" and whether consumers who were aggrieved by an anti-competition conduct being considered by the Tribunal would be considered to have a sufficient interest in the proceedings.

11. AJA(Dev) replied that the precise scope of the term "sufficient interest" in the CTR had to be developed by the Tribunal in its jurisprudence. Without compromising the future development of jurisprudence in this regard, the Judiciary took an initial view that in general this ought to be an interest which was directly related to or connected with the subject matter of an action or application. Hence, it could not be ruled out that affected consumers might intervene in the proceedings for having a sufficient interest. AJA(Dev) pointed out that the term "sufficient interest" was also used in other local legislation with no definition.

12. At the request of the Chairman, AJA(Dev) undertook to:

- (a) examine the arrangements of the competition-related courts in other overseas common law jurisdictions to see (i) whether there was any caselaw about the term "sufficient interest"; and (ii) whether they had a more refined definition of "sufficient interest" in their related procedural rules; and
- (b) subject to the research on (a) above, examine whether relevant provisions in the CTR, such as rule 20(1) indicating that a person

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(other than the Commission) having a sufficient interest in the proceedings of the Tribunal might intervene in the proceedings of the Tribunal, should be refined.

Rule 22 - Addition of parties

13. Mr SIN Chung-kai noted that rule 22(1) of the draft CTR provided, amongst others, that the Tribunal might, on the application of a person, permit the person or any other person to substitute any party to the proceedings. Mr SIN expressed concern about whether this would allow a defendant to apply to the Tribunal for a person to substitute the plaintiff.

14. Senior Assistant Law Officer (Civil Law) responded that the substitution under rule 22(1) of the draft CTR should generally be granted by the Tribunal in case of death or other reasons such as a party to the proceedings had become mentally incapacitated or the party had delegated his/her powers to another person to represent on his/her behalf, after considering the facts of and reasons for the application.

15. At the request of the Chairman, AJA(Dev) undertook to provide more information, caselaw or otherwise, about the possible scenarios where a party might be substituted under Order 15, rule 7 of Cap. 4A.

JA

Rule 29 - Composition of Tribunal and Appointment of Assessor

16. The Chairman asked whether the President and the Deputy President of the Tribunal must sit together to hear and determine an application made to the Tribunal.

17. AJA(Dev) responded in the negative. According to section 145(1) of the CO, an application to the Tribunal might be heard and determined by a Tribunal constituted by the President, the President with one or more other members appointed by the President who were all judges of the Court of First Instance ("CFI") of the High Court, or one or more other members appointed by the President.

Rule 30 - Right of audience

18. Members noted that apart from the fact that a party to the proceedings might appear in person and represent himself/herself in the proceedings, the party might be represented by a counsel or solicitor having a right audience before the CFI in its civil jurisdiction, a company director with the Tribunal's leave if the party was a body corporate, as well as any other person allowed with the leave of the Tribunal or. Members further noted that if a counsel or an

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advocate from an overseas jurisdiction not having the general right of audience before CFI in its civil jurisdiction, he or she would require ad hoc admission under the Legal Practitioners Ordinance (Cap. 159) ("LPO") before he or she could represent a party in the proceedings.

19. At the request of the Chairman, AJA(Dev) undertook to:

JA

- (a) provide information on which rule(s) of Cap. 4A and/or other courts/tribunals on which rule 30(1)(b) of the draft CTR was based;
- (b) consider amending rule 30 of the draft CTR to specify that overseas lawyers must be properly admitted on an ad hoc basis before they could represent a party to the proceedings of the Tribunal, instead of relying on a Practice Direction;
- (c) consider allowing applications for ad hoc admissions of foreign lawyers under the LPO be handled by members of the Tribunal, instead of CFI judges; and
- (d) examine whether there was a need to revise rule 30(1)(b)(ii) of the CTR to make it clearer that the intent of the rule was to permit persons other than counsel or solicitor having a right of audience to represent a party to the proceedings of the Tribunal.

Rule 40 - Frivolous or vexatious proceedings

JA

20. Upon enquiries by the Chairman and ALA2, AJA(Dev) agreed to clarify whether Order 32A (Vexatious Litigants) of Cap. 4A (which was based on section 27 of the High Court Ordinance (Cap.4)) would be applicable to the Tribunal so that the Tribunal might make an order against a person who had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.

Rule 44 - Interlocutory order for purposes of section 155(2) of Ordinance (where appeal lies as of right)

JA

21. ALA2 suggested and AJA(Dev) agreed to consider providing a definition of an "unless" order referred to in rule 44(2)(g) of the draft CTR to make it more easily-understood by the general public.

II. Date of next meeting

22. Members agreed to hold the next meeting on 14 April 2015 at 8:30 am to continue scrutiny of the draft CTR, the proposed amendments to Cap. 4A, the

draft Competition Tribunal Fees Rules, and the draft Competition Tribunal Suitors' Funds Rules.

23. There being no other business, the meeting ended at 12:40 pm.

Council Business Division 4
Legislative Council Secretariat
30 April 2015

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

**Proceedings of the second meeting
on Thursday, 9 April 2015, at 10:45 am
in Conference Room 3 of the Legislative Council Complex**

Time Marker	Speaker(s)	Subject(s)	Action required
Meeting with the Judiciary Administration ("JA"), the Administration and the Competition Commission			
000431 – 001611	Chairman JA Mr Philip MONAGHAN	Briefing by JA on its paper entitled "Comments of the Legal Professional Bodies on the Draft Rules for the Competition Tribunal and the Judiciary's Responses" (LC Paper No. CB(4)720/14-15(01))	
001611 - 003250	Chairman JA ALA2	Briefing by JA on its paper entitled "Possible Further Streamlining of Procedures for Bringing Follow-on Actions to the Competition Tribunal" (LC Paper No. CB(4)720/14-15(02)) JA agreed to amend the definition of "originating document" under rule 2(1) of the draft Competition Tribunal Rules ("CTR") to clarify what type(s) of document(s) would be regarded as "originating document".	JA to amend (paragraph 4 of the minutes refers)
003250- 004218	Chairman Mr Philip MONAGHAN JA	Briefing by the Competition Commission on its letter dated 30 March 2015 to the Subcommittee (LC Paper No. CB(4)720/14-15(04))	
Scrutiny of the draft CTR			
004218- 004710	Chairman JA ALA2	<i>Rules 1 and 2</i> JA agreed to clarify the meaning of "intervener" by providing a new definition for this term under rule 2(1) of the draft CTR.	JA to amend (paragraph 6 of the minutes refers)
004710- 004745	Chairman JA	<i>Rule 3</i>	
004745- 005118	Chairman JA ALA2	<i>Rule 4</i>	
005118- 005334	JA	<i>Rules 5 to 12</i>	

Time Marker	Speaker(s)	Subject(s)	Action required
005334-005646	Chairman JA ALA2	<i>Rule 13</i> JA agreed to amend rule 13(8) of the draft CTR to specify that a party must first apply for an order for substituted service before the Competition Tribunal ("the Tribunal") made such an order and that such application should be supported by affidavit.	JA to amend (paragraph 9 of the minutes refers)
005646-005850	JA	<i>Rules 14 to 19</i>	
005850-010857	Chairman JA DoJ Hon SIN Chung-kai	<i>Rule 20</i> JA undertook to: (a) examine the arrangements of the competition-related courts in other overseas common law jurisdictions to see (i) whether there was any caselaw about the term "sufficient interest"; and (ii) whether they had a more refined definition of "sufficient interest" in their related procedural rules; and (b) subject to the research on (a) above, examine whether relevant provisions in the CTR, such as rule 20(1) indicating that a person (other than the Competition Commission) having a sufficient interest in the proceedings of the Tribunal might intervene in the proceedings of the Tribunal, should be refined.	JA to provide responses in writing (paragraph 12 of the minutes refers)
010857-010917	JA	<i>Rule 21</i>	
010917-012300	Chairman JA DoJ Hon SIN Chung-kai	<i>Rule 22</i> JA undertook to provide more information, caselaw or otherwise, about the possible scenarios where a party might be substituted under Order 15, rule 7 of the Rules of the High Court (Cap. 4A).	JA to provide responses in writing (paragraph 15 of the minutes refers)
012300-012508	JA	<i>Rules 23 to 28</i>	
012508-012724	Chairman JA	<i>Rule 29</i>	
012724-014149	Chairman JA Hon Paul TSE Wai-chun	<i>Rule 30</i> JA undertook to: (a) provide information on which rule(s) of Cap. 4A and/or other courts/tribunals on which rule 30(1)(b) of the draft CTR was based;	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>(b) consider amending rule 30 of the draft CTR to specify that overseas lawyers must be properly admitted on an ad hoc basis before they could represent a party to the proceedings of the Tribunal, instead of relying on a Practice Direction;</p> <p>(c) consider allowing applications for ad hoc admission of foreign lawyers under the Legal Practitioners Ordinance (Cap. 159) be handled by members of the Tribunal, instead of judges of the Court of First Instance of the High Court; and</p> <p>(d) examine whether there was a need to revise rule 30(1)(b)(ii) of the CTR to make it clearer that the intent of the rule was to permit persons, other than counsel or solicitor having a right of audience, to represent a party to the proceedings of Tribunal.</p>	<p>JA to provide responses in writing (paragraph 19 of the minutes refers)</p>
014149-014256	JA	<i>Rules 31 to 34</i>	
014256-014850	Chairman JA Hon Paul TSE Wai-chun	<i>Rule 35</i>	
014850-015011	Chairman JA	<i>Rules 36 to 39</i>	
015011-015139	Chairman ALA2	<i>Rule 40</i>	
015139-015253	JA	<i>Rules 41 to 43</i>	
015253-015611	Chairman ALA2	<p><i>Rule 44</i></p> <p>JA agreed to consider providing a definition of an "unless" order referred to in rule 44(2)(g) of the draft CTR to make it more easily-understood by the general public.</p>	<p>JA to consider amending (paragraph 21 of the minutes refers)</p>
015611-015739	ALA2 JA	<p><i>Rule 40</i></p> <p>JA agreed to clarify whether Order 32A (Vexatious Litigants) of Cap. 4A (which was based on section 27 of the High Court Ordinance (Cap.4)) would be applicable to the Tribunal so that the Tribunal might make an order against a person who had habitually and persistently and without any reasonable ground instituted vexatious legal proceedings.</p>	<p>JA to provide a response in writing (paragraph 20 of the minutes refers)</p>
015739-015838	Chairman JA	<i>Rule 45</i>	

Time Marker	Speaker(s)	Subject(s)	Action required
015838-015910	Chairman	Date of next meeting	

Council Business Division 4
Legislative Council Secretariat
30 April 2015