For information
on 9 April 2015

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

Comments of the Legal Professional Bodies on the Draft Rules for the Competition Tribunal and the Judiciary's Responses

BACKGROUND

At the meeting on 17 March 2015, Members requested a copy of the comments of the Hong Kong Bar Association ("Bar Association") and the Law Society of Hong Kong ("Law Society") on the draft rules for the Competition Tribunal and the Judiciary's responses.

LEGAL PROFESSIONAL BODIES' VIEWS

2. The relevant extract of exchanges between the Bar Association and the Judiciary is at **Annex A**, while that between the Law Society and the Judiciary is at **Annex B**.

Judiciary Administration
March 2015

Annex A

Comments of the Bar Association on the Draft Rules for the Competition Tribunal and the Judiciary's Responses

On 15 July 2014, the Judiciary issued a consultation paper to the Bar Association and other stakeholders inviting their comments on, among others, the four sets of the draft rules relating to the Competition Tribunal.

2. On 4 October 2014, the Bar Association sent to the Judiciary the following relevant comments :

"*Introduction*

1. The Hong Kong Bar Association ("HKBA") makes this Submission in respect of the Judiciary's Consultation Paper on the Proposed Subsidiary Legislation and President's Directions for the Competition Tribunal.

2. The proposed Competition Tribunal Rules are the proposed subsidiary legislation to be enacted s 158 of the Competition Ordinance (Cap 619) that are to serve, together with the practice and procedure of the Court of First Instance as modified under s 144 of the Competition Ordinance, as the procedural rules of the Competition Tribunal.

3. Amendments have been proposed to the Rules of the High Court ("RHC") to provide for procedures for proceedings transferred between the Competition Tribunal and the Court of First Instance, as well as the procedures for applications to the Court of Appeal.

4. The proposed President's Directions of the Competition Tribunal are to be made by the President of the Competition Tribunal pursuant to s 136(3) of the Competition Ordinance as to the arrangement of the business of the Tribunal. According to the Consultation Paper, the President's Directions are not to have statutory force but are intended to set out matters of detailed procedure and provide guidance to parties and the public.

Competition Tribunal Rules ("CTR")

5. Rule 4 of the CTR provides in r 4(1) that the RHC apply to all proceedings of the Competition Tribunal "except to the extent that any provision of the RHC (a) is expressly excluded by these Rules; or (b) is not consistent with the Ordinance or these Rules". The HKBA considers that apart from these scenarios of exclusion or exception, there is the possibility that a rule or provision in the RHC is simply irrelevant to the subject matter or operation of either the Competition Ordinance or the CTR. Such a provision does not apply because, even with any necessary modifications, it has no relevant application to the proceedings and business of the Tribunal.

6. Rule 6 of the CTR refers to non-compliance with "any rule of practice that is in force". The HKBA considers that there is a need to clarify the meaning and scope of this expression. It is not readily understood whether this refers exclusively to the President's Directions or also to a rule of practice under the common law or pursuant to other source of prescription.

7. Rule 25(1) of the CTR, which concerns the right of audience before the Competition Tribunal, purports to permit a party to be represented by a counsel or solicitor having a right of audience before the Court of First Instance in its civil jurisdiction or "any other person allowed with the leave of the Tribunal to appear on the party's behalf' (emphasis supplied). The HKBA is seriously concerned that although this provision may have followed the wording of r 26 of the Lands Tribunal Rules (Cap17 sub leg A), its purported empowerment of the Tribunal to grant leave to "any person" other than a counsel or solicitor having a right of audience before the Court of First Instance in its civil jurisdiction to appear on the party's behalf will enable overseas counsel to seek leave of the Tribunal to appear on behalf of a party without obtaining ad hoc admission in Hong Kong from the Chief Judge of the High Court under s 27(4) of the Legal Practitioners Ordinance (Cap 159) or give the impression that overseas counsel can do so. Paragraph 37 of President's Direction No 1 does not dispel this concern since it is simply concerned with "[legal] representatives with a right of audience before the Tribunal". The HKBA therefore suggests that r 25 of the CTR be modified to add a proviso to make it clear that "any other person allowed" would mean

that if such a person is counsel or advocate from an overseas jurisdiction and not having the general right of audience before the Court of First Instance in its civil jurisdiction, he or she would require ad hoc admission under s 27(4) of the Legal Practitioners Ordinance.

8. Rule 32 of the CTR is concerned with the confidential treatment of information. President's Direction No 2 is drafted to provide guidance in greater detail for applications for confidential treatment of information in a document. This President's Direction sets out different types of such applications and specifies the procedure for each type. One type of application catered for in the President's Direction is an application for confidential treatment of an originating document (paras 11 to 13). The HKBA finds the drafting of r 32(1) of the CTR could be improved to make it clear that an originating document may also be the subject matter of an application for confidential treatment, albeit that the relevant application ought to be made before filing. The present draft of "[a] party who has filed a document (other than an originating document), or intends to file or use a document in connection with proceedings before the Tribunal, may apply for..." could give the impression that originating documents are excluded from being the subject matter of such applications.

9. Rule 91 is headed "Response by defendant". For consistency with the text of the rule, it should instead be "Defence by defendant".”

3. On 27 November 2014, the Judiciary issued the following responses, among others, to the Bar Association :

“Rule 4 of the draft CTR does not cover the possibility that a rule or provision in the Rules of High Court (“RHC”)(Cap. 4A) is simply irrelevant to the subject matter or operation of the Competition Ordinance (“CO”)(Cap. 619) or the CTR. Such an RHC provision does not apply, even with any necessary modifications, as it has no relevant application to the proceedings and business of the Competition Tribunal (“the Tribunal”). (Para. 5 of the comments)

We agree with you that RHC provisions which are not relevant to the subject matter or operation of either the CO or the CTR should

not apply to Tribunal proceedings. While this is probably self-evident, in the light of your comments, we will refine rule 4(1) along the following line to better reflect such exclusion:

"Where the Ordinance or these Rules makes no provision for a matter, the RHC apply to all proceedings before the Tribunal, so far as they may be applicable to that matter."

2. We have also provided more guidance in this regard in the revised draft Practice Direction ("PD") No.1 on "Proceedings before the Tribunal".

3. In addition, because of the comments of the other stakeholders, we have sought to provide more guidance on the applicability of the RHC in general. Without affecting the Tribunal's authority to refine the procedures on a case-by-case basis as provided for by rule 4 of the draft CTR, we have endeavoured to set out some illustrations of the applicability or otherwise of specific Orders of the RHC in the revised draft PD No. 1. We hope that the PD serves to provide further guidance in how the RHC apply to the Tribunal proceedings.

Seek clarification on whether the expression "any rule of practice that is in force" in rule 4 refers exclusively to the Practice Directions ("PDs") or also to a rule of practice under the common law or pursuant to other source of prescription. (Para.6 of the comments)

4. We can confirm that the expression "rule of practice" means the practice (in the sense of custom or usage) of the court. This includes the PDs and any other rule of practice under the common law. In fact, this term is also used in at least 6 provisions in other Hong Kong legislation.

Suggest that rule 25 be modified to make it clear that "any other person allowed" to represent a party before the Tribunal would mean that if such a person is a counsel or an advocate from an overseas jurisdiction not having the general right of audience before the Court of First Instance ("CFI") in its civil jurisdiction, he or she would require ad hoc admission under the Legal Practitioners Ordinance ("LPO")(Cap. 159). (Para.7 of the comments)

5. We appreciate your concern. We should first clarify that the Tribunal expects that, in general, only qualified legal professionals or overseas lawyers properly admitted on ad hoc basis can represent a party. The Tribunal will only grant leave under rule 25(1)(b)(ii) to allow other persons to represent a party in exceptional circumstances.

6. As regards overseas counsel, we should also clarify that it is not our intention to allow overseas counsel without ad hoc admission under the LPO to represent a party. To remove any such doubt and in the light of your comments, we have proposed changes to the draft PD No. 1 to make it clear that overseas counsel will not be allowed to represent a party unless they have been granted ad hoc admissions under the LPO. It does not seem necessary to include this into the CTR as this is a general requirement.

Suggest that the drafting of rule 32(1) be improved to make it clear that an originating document may also be the subject matter of an application for confidential treatment, albeit that the relevant application ought to be made before filing of the document. (Para.8 of the comments)

7. We agree with you that the drafting of rule 32 can be improved to make it clear that an originating document can also be the subject matter of an application for confidential treatment. We will revise the rule accordingly.

8. Separately, in the light of the other stakeholders' comments, we will also refine rule 32 to allow for possible applications for confidential treatment in respect of other parties' documents. We have also provided more guidance in the draft PD No. 2 on "Confidential Information" refers.

<u>Suggest that the heading of rule 91 be changed from "Response by defendant" to "Defence by defendant". (Para. 9 of the comments)</u>

9. We have no difficulty with the proposed textual changes.

Discovery of Leniency documents

10.At the suggestion of some other stakeholders, we will provide a new rule in the CTR to empower the Tribunal to refuse as appropriate an order for discovery of documents such as those relating to the leniency agreements. Key factors that the Tribunal may take into account will include the need to secure the furtherance of the purposes of the Ordinance as a whole, the balance between the interests of the parties and other persons (including a party to the leniency agreement), whether the information contained in the document sought to be discovered or produced is confidential, as well as the extent to which the document sought to be discovered or produced is necessary for the fair disposal of the matter, etc."

4. On 24 December 2014, the Bar Association confirmed that they have no further comments as follows :

"I refer to your letter of 27 November 2014 setting out the views of the Judiciary in response to the Comments of the Hong Kong Bar Association dated 4 October 2014.

The views of the Judiciary were considered at the Bar Council Meeting held on 23 December 2014. The Bar Council has no further comments on the Consultation Paper."

Judiciary Administration
March 2015

Annex B

Comments of the Law Society on the Draft Rules for the Competition Tribunal and the Judiciary's Responses

On 15 July 2014, the Judiciary issued a consultation paper to the Law Society and other stakeholders inviting their comments on, among others, the four sets of the draft rules relating to the Competition Tribunal.

2. On 2 September 2014, the Law Society sent to the Judiciary the following relevant comments :

> *"The Law Society has considered the Consultation Paper and the proposed subsidiary legislation, in particular the draft Competition Tribunal Rules ("CTR") and the President's / Practice Directions. The Law Society has the following comments.*
>
> *1. Overall procedure*
>
> *1.1 As a general observation, the Law Society notes that under Section 144(3) of the Competition Ordinance Cap 619 ("CO") "the Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice" and that under Section 147, other than proceedings for a pecuniary or financial penalty, the Tribunal is not bound by rules of evidence and may receive and take into account any relevant evidence or information.*
>
> *1.2 The Telecommunications (Competition Provisions) Appeal Board Guidelines on Practice and Procedure (2010) likewise provide at 23(1) that "The Appeal Board should seek to avoid formality in all hearings and meetings and conduct the hearing in such manner as it considers most appropriate for the clarification of the issues before it and generally to achieve the just, expeditious and economical handling of the proceedings." Further the Appellant in such proceedings may be represented by any legally qualified representative.*
>
> *1.3 In contrast, despite some references to informality, the CTR are heavily based on High Court procedure, as reflected in the general adoption of the Rules of the High Court ("RHC") save where*

expressly excluded by, or otherwise inconsistent with, the CO or the CTR. The apparent requirement for hearings to be governed by the same rules as the High Court with respect to rights of audience further emphasise that rather more formality, complexity and cost is likely in practice. The Tribunal's power to dispense with the application of the RHC under certain specific conditions is noted, but leaves uncertainty of procedure.

1.4 The Law Society understands the desire to avoid prolixity, but having decided to adopt the RHC in this way (as opposed to a standalone document), a proper assessment of the CTR is more difficult and ambiguities cannot be ruled out. There remain grey areas in the CTR where it is unclear whether the relevant Orders of the RHC (or which parts of them) have been excluded. It is also unclear whether and to what extent provisions of the RHC will be modified to suit the Tribunal. Disputes arising from these questions before the Tribunal are foreseeable.

1.5 The requirement for various applications to be supported by an affidavit (e.g.in Part 3) also apparently overrides the intent of Rule 30 and the preferred approach for the Tribunal to give directions on evidence and other matters at an initial hearing (e.g. in Part 4). Further, the relatively large number of specified forms as well as the differences in procedure required depending on the nature of the application is likely to lead to greater cost than would otherwise be the case were more informal procedures to be adopted.

A. COMPETITION TRIBUNAL RULES

Part 1 – Preliminary

2. Rule 2 (Interpretation)

2.1 In the light of the proposed amendments to Section 156 of the Ordinance under the Competition (Amendment) Bill, it would be appropriate to include temporary registrars, etc. within the definition of "Registrar".

3. Rule 4 (Application of RHC)

3.1 For the reasons set out above, the Law Society is of the view that Rule 4 as drafted is likely to lead to costly and unnecessary disputes over the proper procedure to be adopted before the Tribunal. If the current approach is maintained, further clarity is required, amongst other things, in respect of when the Tribunal may dispense with the application of the RHC. We suggest the "consistent with attaining justice" requirement apply to the whole of Sub-rule 4(3)(b), and that the word "otherwise" should be inserted after the word "Tribunal" in Sub-rule 4(3)(c).

Part 2 - All Proceedings before the Tribunal

4. Rule 7 (Mode of commencement of proceedings)

4.1 Rule 7 provides that, unless otherwise specified, Form 1 of the Schedule must be used for commencing proceedings before the Tribunal. Form 1, per Note 6, requires that the grounds on which relief is sought must be supported by affidavit. It is not clear where this requirement comes from. Form 1 will primarily be used in enforcement actions under Part 4 where the Tribunal may give directions under Rule 74 as to the filing of evidence (including the filing of affidavits). Enforcement actions will necessarily be complex and will often require a combination of fact and expert evidence to properly establish the evidential basis for a claim. Given the complexity and necessary time required to prepare such evidence, it is not appropriate to require an affidavit at the outset.

4.2 It seems that this requirement is better met by the making of a Statement of Truth in support of claims and equivalent documents, as provided under the UK Competition Appeal Tribunal Rules and RHC (and reflected in paragraph 53 of the President's Practice Direction No 1).

5. Rule 14 (Notice to be given by Tribunal)

5.1 In Rule 14(c), the Law Society proposes the word "any" be added between "in" and "other manner".

6. Rule 16 (Duration and renewal of originating document)

6.1 There does not appear to be any particular policy reason why the validity of originating documents filed for commencing proceedings should be 6 months compared to 12 months as in the Court of First Instance ("CFI"). For the sake of consistency, the validity period for originating documents for both proceedings begun in the Tribunal and in the CFI should be 12 months.

7. Rule 17 (Publication of notice of application or proceedings)

7.1 Section 76(2) of the Ordinance should be included as one of the applications for which notice must be published in Sub-rule 17(1)(a). Further, the notice published under Sub-rule 17(1)(d) should also state the action number of the CFI proceedings transferred to the Tribunal.

8. Rule 18 (Intervention by third party (other than the Commission)

8.1 Sub-rule 18(3) states that an application for intervention must be in writing and contain certain details. It is not clear whether this should be set out in a letter or under a summons in Form 2 since this is the form specified for intervention by the Commission under Rule 19.

9. Rules 18-20 (Intervention and Addition of parties)

9.1 It is not clear whether the procedure to add parties under this rule is an alternative or in addition to intervention under Rules 18 and 19. Either way, the words "Without affecting" at the beginning of Rule 20 should be changed to "Notwithstanding". Otherwise the procedures of Rules 18 and 19 might be deemed to apply under rule 20.

10. Rule 21 (Case Management)

10.1 Sub-rule 21(1) refers to the setting down of milestone dates for the pre-trial review and trial. As a matter of principle, the term "hearing" may be more appropriate than "trial" for proceedings before the Tribunal, which are brought by application as opposed to

writ or originating summons. It is noted that Section 145 of the Ordinance refers to the "hearing" of applications.

10.2 In respect of Sub-rule 21(2), it is unclear how the provisions of Order 25 will apply to the proceedings in the event that a case management summons is not required. Further clarity on this point is required.

11. Rule 24 (Composition of Tribunal and Appointment of Assessor)

11.1 Section 141(1) of the CO envisages that the Tribunal may appoint more than one assessor. Sub-rule 24(3) should therefore be amended to read:

"(3) Any member of the Tribunal conducting a hearing may, on application or of his or her own motion, direct that the hearing is to be conducted with or without <u>one or more</u> specially qualified assessor<u>s</u>."

12. Rule 25 (Rights of audience)

12.1 The rights of audience before the Tribunal are analogous to those before the CFI or "any other person with leave of the Tribunal". It is not clear whether this provision is intended to exclude solicitors not having higher rights of audience in all cases. This would be in contrast to the procedure before the Telecommunications (Competition Provisions) Appeal Board. Such a provision would itself be somewhat anti-competitive! There is no evidence that solicitors are likely to be any less knowledgeable in this new area of law and any concern about the procedural advocacy skills of solicitors should not carry any weight given that procedural informality is expressly mandated under Section 144(3) of the CO. Moreover the additional cost of employing barristers and solicitors in every case is inconsistent with Rule 4 (3)(b) CTR.

12.2 The Law Society accepts that it may be desirable for rights of audience to be consistent between the Tribunal and the CFI where proceedings are transferred, but most proceedings will originate with the Tribunal under its more informal procedure.

12.3 In this regard, the Law Society notes that during the course of consultation for the Competition (Amendment) Bill 2014, it was suggested that the Law Society had agreed to limited rights of audience before the Tribunal. The Law Society clarifies that this is not the case as the Law Society simply did not comment on this issue at that time in our response to that consultation exercise.

12.4 There is also at a conceptual flaw in the drafting. The draft CTR refers to representation by "counsel or solicitors having rights of audience before the CFI in its civil jurisdiction ... " (Rule 25(1)(b)). "Counsel" does not mean barrister; it is a term for any advocate with the right to appear in the superior court, and therefore would include solicitor-advocates. The conceptual distinction between "counsel" and "barrister" has clearly been made in the UK. Strictly without prejudice to the above position, the Law Society suggests that this part of the rule should be amended to read: a party may be represented by "barristers or solicitors having rights of audience before the CFI in its civil jurisdiction ... "

13. Rule 26 (Disposal of proceedings)

13.1 Sub-rule 26(3)(c) should be amended to read:
"(c) on the application of the applicant appearing, enter its decision; or"

14. Rule 32 (Confidential treatment of information)

14.1 As drafted, Rule 32 allows a party who has filed a document to apply for an order to treat the whole or part of the document as confidential. It should be considered whether it would be desirable for the scope of Rule 32 to be extended to cover the scenario where a party seeks an order of confidentiality over a document filed (or intended to be filed) by another party to the proceedings.

14.2 Extending the scope of Rule 32 in this manner may potentially cover, by way of example, a document obtained by the Commission under its powers to search and seize evidence and intended to be used under enforcement proceedings. There may also be cases in which various parties to proceedings may be party to an agreement, and

which one party wishes to file, but in respect of which a different party wishes to claim confidentiality.

15. Rule 34 (Orders made by consent)

15.1 The consent procedure in Order 42, Rule 5A of the RHC envisages categories of orders and judgments that may be drawn up by consent of the parties and entered by the court. Rule 34 instead provides that consent orders "must be sent to the Tribunal for approval". This suggests greater oversight of consent orders by the Tribunal than by the CFI. In keeping with the informality consideration in Section 144(3) of the Ordinance, the consent procedure in Rule 34 does not appear warranted.

15.2 Rule 34 should clarify whether it is intended to supersede the consent procedure in Order 42, Rule 5A of the RHC, or whether it instead broadens that consent procedure. In any event, Rule 34 should clarify the appropriate level of scrutiny for the Tribunal in considering whether to approve consent orders (for example, whether the Tribunal will only consider whether the order is coherently drafted, or whether it will consider the overall merits of the order).

16. Rule 35 (Frivolous or vexatious proceedings, etc)

16.1 It is unclear whether a separate rule on frivolous or vexatious proceedings is required, as Rule 35 substantially follows Order 18, Rule 19 of the RHC and the modifications would be considered "necessary modifications" pursuant to Sub-rule 4(2)(a).

17. Rule 40 (Procedure on application for leave to appeal)

17.1 The reference in Sub-rule 40(1) to "Order 59 rule 2B(4) of the RHC" should refer to "Order 59, rule 2BA(2) of the RHC", reflecting the proposed amendments to Order 59 of the RHC.

18. Rule 49 (Translation of document to be used in Tribunal)

18.1 Sub-rule 49(4) provides that, should a serving party refuse to provide a translation of a document it serves on requesting party, the requesting party may apply to the Tribunal for an order that the

serving party must provide the requesting party with a translation of the document. Sub-rule 49(7) should clarify whether the costs of the application by the requesting party are considered included in "costs of, and incidental to, providing a translation".

19. Rule 52 (Amendment of documents)

19.1 The words "applies to" in Sub-rule 52(2) should be changed to "includes". Otherwise it would place a limit on what documents may be amended.

19.2 Further, the Law Society queries whether it is appropriate that the amendments to documents must, in all cases, be subject to the Tribunal's approval. Order 20 of the RHC envisages the amendment of originating processes and pleadings without leave and similar provisions may be applied to proceedings before the Tribunal. We also propose that documents may be amended by consent of the parties, where appropriate.

Part 3 - Review of Reviewable Determinations

20. Rule 54 (Interpretation of Part 3)

20.1 As a general observation (unless we have misunderstood the context), it would appear that the respondent to applications for leave to apply for a review of reviewable determinations will in all circumstances be the Commission. If not, greater clarity is required as to who would otherwise be the respondent.

21. Rule 55 (Application for leave)

21.1 Rule 55 includes a mandatory requirement for filing an affidavit in support of an application for leave to review a reviewable determination. Such an application must be made within 30 days unless time is extended under Sub-rule 55(3). It would generally in practice be wholly unrealistic for a supporting affidavit to be prepared (except in the most simple of cases) within the 30 day time limit. For example, leave to review the issue of a block exemption would need to be substantiated by substantial evidence including economic evidence. We therefore propose that evidence should not be

required at the leave stage unless and until so ordered upon directions being given (including as to any time extension) in relation to the application. A new Rule would be required to reflect this.

Part 4 - Applications for Enforcement before Tribunal

22. Rule 68 (Interpretation of Part 4)

22.1 Similar to our observation in relation to Rule 54, it would appear that the applicant in applications for enforcement before the Tribunal will in all circumstances be the Commission. If not, greater clarity should be provided.

23. Rule 77 (Interim orders)

23.1 The Law Society queries whether urgency alone should be a sufficient pre-condition for an application for an interim order to be made ex-parte under Sub-rule 77(3). Given the potentially very serious consequences for such orders, the Law Society suggests that it should necessary for the party seeking to apply for an interim order ex-parte to show compelling reasons why, even in urgent cases, the application should not be heard inter-partes.

24. Rule 85 (Hearing in public)

24.1 Rule 85 of the draft CTR provides that applications for disqualification orders or leave to participate in the affairs of the company may be heard before the Registrar, although the Registrar may transfer an application to be heard before a member of the Tribunal. Considering the potential impact on the subject of disqualification orders, we suggest that it is inappropriate for such applications to be heard before the Registrar. We instead recommend that all such applications are heard before a member of the Tribunal.

Part 5 - Follow-on Actions

25. Follow-on actions transferred to the Tribunal

25.1 Section 110(2) of the CO envisages that follow-on actions may potentially be brought by way of proceedings transferred to the

Tribunal under Section 113 of the CO. Part 5 should therefore contain provisions to deal with such follow-on actions begun in the CFI.

26. Discovery from the Commission

26.1 In respect of follow-on actions, much of the evidence that establishes contraventions of a conduct rule would foreseeably be in the possession of the Commission (for example evidence gathered during the course of the Commission's investigations). In order to alleviate the potential administrative burden on the Commission arising from third-party discovery claims, it may be advisable for the CTR to include provisions in Part 5 to deal with discovery. Examples of such provisions may include:

26.1.1 discovery should only be sought from the Commission when the documents cannot be reasonably obtained from another party; and

26.1.2 the Tribunal may refuse to order the discovery of documents on the basis of public interest. By way of example, the leniency regime is an important aspect of the Commission's investigation powers and the Tribunal may consider that the disclosure of documents relating to leniency agreements would be to the detriment of the Commission's investigations.

27. Cartels and third party proceedings

27.1 A defendant to a follow-on action as a member of a cartel is likely to attempt to bring other members of the cartel into the proceedings by way of a third party notice for contribution. Whilst Rule 20 contemplates the addition of parties, it is unclear how this Rule interacts with Order 16 (Third Party and Similar Proceedings) of the RHC with respect to third party proceedings. Clarification on this interaction is recommended. In addition, it may be appropriate for the CTR to contain rules specific to follow-on actions on how such third party proceedings are to be brought, as well as rules for the case management of both the third party proceedings and the main follow-on action.

28. Summary disposal of follow-on actions

28.1 The Law Society has noted above that Rule 35 (Frivolous or vexatious proceedings, etc) may not be warranted. Nonetheless, the Law Society suggests that Part 5 of the CTR should include specific provisions for the summary disposal of follow-on actions that are not supported by reasonable grounds. By way of example, a follow-on action should be struck out where there is no determination that the defendant has contravened a conduct rule.

29. Rule 94 (Consolidation of follow-on actions)

29.1 Rule 94 provides for the consolidation of multiple pending follow-on actions. The Law Society suggests that parties to follow-on actions to be consolidated should be given an opportunity to provide representations on the appropriateness of the consolidation.

Part 6 - Proceedings Transferred from CFI

30. As a general comment the CTR should provide greater clarity on the overall conduct of actions that are transferred in part to the Tribunal from the CFI. At present, it is unclear whether the originating CFI actions will be stayed entirely or in part pending the determination of the competition law issues before the Tribunal. It is also unclear whether the Tribunal will consider the rules of evidence to apply in proceedings that are transferred from the CFI. It would be desirable for such issues to be addressed in the CTR (or, alternatively, the President's Directions).”

3. On 27 November 2014, the Judiciary issued the following responses, among others, to the Law Society :

“Overall Procedure

The draft Competition Tribunal Rules (“CTR") are heavily based on the High Court procedure and the right of audience requirement is similar to that of the High Court. This may mean more formality, complexity and cost in practice. The Tribunal’s power to dispense with the application of the Rules of the High Court (“RHC”)(Cap. 4A)

under certain specific conditions may also leave uncertainty of procedure.
There remain grey areas in the CTR where it is unclear whether the relevant orders of the RHC (or which parts of them) have been excluded. It is also unclear whether and to what extent provisions of the RHC will be modified to suit the Tribunal. Disputes are foreseeable. (Para. 1.3 to 1.4 of the submission)

Before we respond to your views, we should first explain the rationale of our proposed general approach adopted in the draft CTR on the application of the RHC.

Rationale of the Proposed Approach

2. *In devising the present proposed general approach, we have taken into account the following policy objectives :*

(a) the need for the Competition Tribunal ("the Tribunal") to conduct its proceedings with as much informality as is consistent with attaining justice as set out in section 144(3) of the Competition Ordinance ("CO") (Cap. 619);

(b) the desire to avoid prolixity of the CTR;

(c) the desire to have a set of rules with which users, including members of the Tribunal, will be relatively familiar; and

(d) the need for certainty.

3. *These objectives do not all point in the same direction. For example, informality may suggest having a simple set of rules or as few rules as possible, but it may not be very clear whether the resultant rules can provide sufficient certainty and guidance to litigants on what to do or expect in specific circumstances. In the end, everything may become "at large".*

4. *Moreover, the Tribunal will need to handle cases of different nature, with some of them being very similar to actions in the Court of First Instance ("CFI") (e.g. follow-on actions). On the other hand, cases brought by the Competition Commission ("the Commission")*

are of a public nature and we need to ensure that there are proper procedures to handle them.

5. *As such, we need to formulate the CTR after balancing the need for informality and for certainty as well as the need for proper procedures to handle complicated cases and cases similar to CFI actions. After careful deliberation, we have put forward the present proposed approach in rule 4 of the draft CTR principally because :*

(a) the RHC is an established set of rules with which most users of the Tribunal are likely to be familiar. Legal practitioners appearing before the Tribunal are most likely to be experienced in CFI procedures;

(b) there is extensive scope for the transfer of proceedings between the Tribunal and the CFI under sections 113 and 114 of the CO;

(c) in terms of its jurisdiction and powers as well as its set-up and composition, the Tribunal is most close to the CFI; and

(d) section 144(1) of the CO expressly contemplates that the Tribunal "may, in so far as it thinks fit, follow the practice and procedure of the CFI in the exercise of its civil jurisdiction …".

6. *In substance, we also note that the approach in the draft CTR is similar to that in some other existing legislation where the rules and practice of the CFI are adopted. They include section 10 of the Lands Tribunal Ordinance (Cap.17), section 99(1) of the Bankruptcy Ordinance (Cap. 6), rule 210 of the Companies (Winding-up) Rules (Cap.32H) and rule 3 of the Companies (Unfair Prejudice Petitions) Proceedings Rules (Cap. 622L). In particular, section 10 of the Lands Tribunal Ordinance provides:*

> *"The Tribunal may, so far as it thinks fit, follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction, and for this purpose, has the same jurisdiction, powers and duties of the Court of First Instance in respect of such practice and procedure."*

7. *Similarly, rule 210 of the Companies (Winding-up) Rules (Cap. 32H) provides:*

> *"In all proceedings in or before the court ... where no other provision is made by the Ordinance or rules, the practice, procedure and regulations shall, unless the court otherwise in any special case directs, be in accordance with the rules and practice of the court."*

Proposed Changes

8. *Having said that, we appreciate your concerns. After careful deliberation on the views of the Law Society and some other stakeholders, on balance, we suggest refining sub-rule 4(1) of the draft CTR along the following line to better clarify the relationship of the CTR and the RHC :*

> *"Where the Ordinance or these Rules makes no provision for a matter, the RHC apply to all proceedings before the Tribunal, so far as they may be applicable to that matter."*

9. *In addition, we have sought to provide more guidance on the applicability of the RHC. Without affecting the Tribunal's authority to refine the procedures on a case-by-case basis as provided for by rule 4 of the draft CTR, we have endeavoured to set out some illustrations of the applicability or otherwise of specific Orders of the RHC in the revised draft Practice Direction ("PD") No. 1 on "Proceedings before the Tribunal". We hope that the PD serves to provide further guidance in how the RHC apply to the Tribunal proceedings.*

Suggest providing further clarity, among other things, in respect of when the Tribunal may dispense with the application of the RHC. Also suggest adding "consistent with attaining justice" requirement to the whole of subrule 4(3)(b) and inserting "otherwise" after the word "Tribunal" in subrule 4(3)(b)". (Para. 3.1 of the submission)

10. *We have no difficulty with your proposed refinements to subrule 4(3) in principle. We will consider how best to refine the subrule.*

The requirement for various applications to be supported by an affidavit (e.g. in Part 3 of the CTR) apparently overrides the intent of rule 30 (mode of taking evidence) and the preferred approach for the Tribunal to give directions on evidence and other matters at an initial hearing (e.g. in Part 4 of the CTR). Further, the relatively large number of specified forms as well as the differences in procedure required depending on the nature of the application is likely to lead to greater cost. (Para.1.5 of the submission)

11. *While rule 30 allows the Tribunal different modes of taking evidence, we believe that it is appropriate to provide in the first instance in certain cases, e.g. in applications for review of reviewable determinations, how the evidence should be filed given the need for expedition and that the requirement of affidavit is unlikely to impose any real burden. We note your general concerns about the time allowed for filing evidence for different proceedings, particularly in the review of reviewable determinations in Part 3 of the CTR. We will respond specifically in paragraphs 62 to 67 below.*

12. *As regards specified forms, we are mindful of the need to minimize their number, and at the same time to ensure that different forms are provided to cater for fundamentally different purposes. We have sought to consolidate the forms before putting them forward for consultation.*

13. *Given your comments, we have reviewed the forms again. It appears difficult for us to further consolidate them. In fact, there are only seven forms in total. Three of them are for the originating processes for very different categories of applications (namely, reviewable determinations, follow-on actions and others). The rest are for various interlocutory applications relating to summons, witnesses and notice of appeal from Registrar, which are not much different from those used in the CFI. The forms thus serve very different functions and we consider that further attempt to consolidate them will result in the form or forms being overly general and unhelpful as a source of guidance. That said, we may refine the forms as necessary in the light of actual experience later.*

A. COMPETITION TRIBUNAL RULES

Part 1 – Preliminary

Rule 2 (Interpretation) : Suggest including temporary registrars, etc. within the definition of "Registrar" in rule 2 to align with the proposed amendments to section 156 of the CO in the Competition (Amendment) Bill 2014. (Para.2 of the submission)

14. *In the light of your comments, we have reviewed the definition of "Registrar" in the CTR having regard to the Competition (Amendment) Ordinance 2014 ("the Amendment Ordinance") just enacted in November 2014.*

15. *Under section 156B(2) (added by section 8 of the Amendment Ordinance), a senior deputy registrar has the same jurisdiction and power as the Registrar of the Tribunal. Under section 156B(4), a deputy registrar has the same jurisdiction and power as the Registrar of the Tribunal.*

16. *Under section 156C, a temporary registrar has all the jurisdiction and power of the Registrar of the Tribunal. Similarly, a temporary senior deputy registrar has all the jurisdiction and power as a senior deputy registrar, and a temporary deputy registrar has all the jurisdiction and power as a deputy registrar.*

17. *In other words, under sections 156B and 156C, the power that a Registrar may exercise can be exercised by a senior deputy registrar, a deputy registrar or their temporary counterparts. We understand that Committee Stage Amendments had been introduced to delete the references to "senior deputy registrar and/or a deputy registrar" in the original proposed sections 151A(6), 151B(9), 151C(5), 156D and 156E.*

18. *In the light of these latest developments and for consistency sake, we consider that the definition of "Registrar" in the CTR should preferably be simplified to mean the "Registrar of the Tribunal". We will not refer to senior deputy registrar, deputy registrar or temporary registrar etc. in the definition.*

Part 2 – All proceedings before the Tribunal

Rule 7 (Mode of commencement of proceedings) : Suggest that Note 6 of Form 1 be amended so that an affidavit will not be required at the outset. It is because Form 1 will primarily be used in enforcement actions for which the Tribunal may give directions under Rule 74 as to the filing of evidence. Moreover, it is going to take time to prepare evidence for such enforcement actions. (Paras.4.1-4.2 of the submission)

19. *We appreciate your concerns. In fact, rule 70 of Part 4 of the draft CTR about the mode of application for enforcement actions does not require the filing of affidavit. Note 6 of Form 1 is therefore not entirely correct as far as these enforcement actions are concerned. However, as an affidavit may be required for other originating applications to which Form 1 is applicable (e.g. stand-alone applications for disqualification orders), we need to keep Note 6 in the Form but with modifications making it clear that an affidavit is only needed if so required under the relevant rules for the specific type of applications in question.*

Rule 14 (Notice to be given by Tribunal) : Suggest adding "any" between "in" and "other manner" in rule 14(c) regarding the notice to be given by the Tribunal. (Para. 5.1 of the submission)

20. *We have no difficulty with this textual change and will revise the rule accordingly.*

Rule 16 (Duration and renewal of originating document) : For consistency with the CFI, the validity period for originating documents for proceedings begun in the Tribunal should be 12 months instead of the presently proposed 6 months. (Para.6.1 of the submission)

21. *We have suggested a shorter valid period for cases before the Tribunal because of several considerations.*

22. *First of all, the issue does not arise in the case of applications for review of reviewable determinations since an application must normally be filed within 30 days and once leave is given, the relevant*

papers will have to be served within a short time. Likewise, the issue is unlikely to be of much relevance to enforcement proceedings brought by the Commission since it is not expected that the Commission will issue proceedings unless there is an intention to serve them forthwith. It is therefore mainly to private actions that the issue may have significance.

23. *In follow-on actions, there will already have been an enforcement stage in which the relevant determinations were sought and made. The intended plaintiff will have had ample time to consider his options. By the same token, by the time such an action is commenced, a substantial period of time will have lapsed since the underlying events occurred. In these circumstances, the sooner such a case is dealt with, the better.*

24. *Secondly, given the commercial nature and the importance of competition cases to the industry/public, we consider that cases before the Tribunal should be dealt with as expeditiously as is reasonably practicable.*

25. *Thirdly, the need for expedition is also indicated by the fact that under section 111(3) of the CO, there is a time limit of 3 years for a follow-on action to be initiated after the relevant determination has been made. This is half of the usual 6-year limitation period for the usual causes of action in the courts, such as claims for damages in contract or tort cases as provided by section 4 of the Limitation Ordinance (Cap. 347).*

26. *In the light of your views, we have reviewed the proposed arrangement, but, on balance, we consider it appropriate to retain this shorter period of validity for Tribunal cases.*

Rule 17 (Publication of notice of application or proceedings) : Suggest including proceedings under section 76(2) of the CO (for apparent failure to comply with requirements of infringement notice) as one of the applications for which notice must be published in subrule 17(1)(a) (for possible intervention). Further, the notice published under subrule 17(1)(d) (about proceedings transferred from the CFI) should state the action number of the CFI proceedings. (Para.7.1 of the submission)

27. *Our understanding is that there is no separate dedicated type of proceedings to deal with a failure to comply with the requirements of an infringement notice under section 76(2) of the CO. What section 76(2) does is to make it clear that, in circumstances where that section applies, the Commission is at liberty to bring proceedings in the Tribunal. It is when those proceedings are commenced as permitted by section 76(2) that a notice for such proceedings will be published as provided by the present draft sub-rule 17(1)(a).*

28. *For transferred proceedings from the CFI, we confirm that the action number will be included in the notice. For clarity, we have spelt out such requirement in the revised draft PD No. 1.*

Rule 18 (Intervention by third party (other than the Commission)) : Seek clarification on whether an application for intervention by parties other than the Commission should be set out in a letter or under a summons in Form 2. (Para.8.1 of the submission)

29. *We have indicated in rule 19 that the Commission should use Form 2 (summons) to apply for an intervention because of the requirement for a "prescribed form" set out in section 120 (3) of the CO. For other parties, there is no such requirement in the CO. Hence, to enhance flexibility, we have not prescribed any form. For example, in cases of uncontroversial intervention, the request to intervene may be simply in writing. We have indicated in the draft PD No. 1 that a letter to the Registrar will suffice. For contentious cases, Form 2 should be used.*

Rule 18-20 (Intervention and Addition of parties) : Seek clarification on whether the procedure to add parties under rule 20 is an alternative or in addition to intervention under rules 18 and 19. Either way, suggest changing "Without affecting" in rule 20 to "Notwithstanding", or else the procedures of rules 18 and 19 might be deemed to apply under rule 20. (Para.9.1 of the submission)

30. *We confirm that the process of addition of parties is separate from and independent of that for intervention. The drafting counsel has advised that the existing expression "Without affecting" reflects this policy intention. If we use "Notwithstanding", this may carry the meaning that rule 20 would override rules 18 and 19.*

Rule 21 (Case Management) : "Hearing" may be a more appropriate term than "trial" in subrule 21(1) about the setting down of milestone dates for the pre-trial review and trial. It is because cases before the Tribunal are brought by application as opposed to writ or originating summons. Section 145 of the CO also refers to "hearing" of applications. (Para.10.1 of the submission)

31. *Rule 21 seeks to set out the detailed procedures for a proceeding before the Tribunal and "trial" means the main hearing. It is different from "hearing "in general". If we replace "trial" with "hearing", this may not reflect the particular step that we have in mind.*

32. *Moreover, legal advice suggests that "trial" appears to be a more appropriate term in subrule 21(1). The word "trial" in the narrower sense may mean substantive hearings of "writ actions", but the word is now more commonly and broadly used to refer to the final determination of actions or proceedings commenced by other originating processes or applications.*

33. *So, on balance, we prefer keeping the word "trial" in subrule 21(1).*

Rule 21 (Case Management) : Seek clarification on how the provisions of Order 25 of the RHC will apply to the proceedings in the event that a case management summons is not required as envisaged under rule 21(2). (Para.10.2 of the submission)

34. *Our intention is that the spirit under Order 25 of the RHC will still apply even when there is no case management summons. The Tribunal will actively manage a case and to that end indicate the target date for substantive hearing of a matter. In other words, the provisions set out in Order 25 of the RHC would still be applicable but the expression "case management summons" would need to be replaced as appropriate with "case management sessions".*

Rule 24 (Composition of Tribunal and Appointment of Assessor): Suggest amending rule 24(3) to reflect that the Tribunal may appoint more than one assessor. (Para.11.1 of the submission)

35. *We have no difficulty with your suggestion and will refine rule 24(3) accordingly.*

Rule 25 (Rights of audience) : It is not clear whether "any other person with leave of the Tribunal" under rule 25(1)(b)(ii) is intended to exclude solicitors not having higher rights of audience in all cases. If so, this would be in contrast to the procedure before the Telecommunications (Competition Provisions) Appeal Board. There is no evidence that solicitors are likely to be any less knowledgeable in this new area of law and any concern about the procedural advocacy skills of solicitors should not carry any weight given that procedural informality is mandated under section 144(3) of the CO. Moreover, the additional cost of employing barristers and solicitors in every case is inconsistent with rule 4(3)(b). It may be desirable for rights of audience to be consistent between the Tribunal and the CFI where proceedings are transferred. (Paras.12.1-12.3 of the submission)

36. *We should first clarify that the Tribunal expects that, in general, rights of audience in the Tribunal would be co-extensive with those in the CFI, i.e. barristers and solicitors may appear before the Tribunal in chambers and before the Registrar of the Tribunal sitting in chambers or in open court, but only barristers or solicitors having a higher right of audience before the CFI in its civil jurisdiction may*

appear before the Tribunal sitting in open court (e.g. trials). The Tribunal will only grant leave under rule 25(1)(b)(ii) to allow other persons (i.e. persons other than qualified practitioners) to represent a party in exceptional circumstances.

37. *As explained to the Legislative Council ("LegCo") when they scrutinized the Competition (Amendment) Bill 2014, even though section 144(3) of the CO provides that the Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice, it is <u>not</u> considered to be a valid ground for making any exceptional arrangement for all solicitors, rather than solicitor advocates only, automatically to have full rights of audience before the Tribunal which is pitched at the level of the CFI and exercises concurrent jurisdiction with the CFI in certain respects. It should also be noted that section 144(1) of the CO stipulates that while the Tribunal may decide its own procedures, it may follow the practice and procedure of the CFI and for this purpose has the same jurisdiction, powers and duties of the CFI.*

38. *The main concern is that there must be the highest standards of advocacy before the superior courts, including the Tribunal. This is essential to the administration of justice in an adversarial system. Cases to be handled by the Tribunal are likely to be similar in nature, scale and complexity to complex commercial cases in the CFI. It is considered essential that only practitioners with the necessary experience and expertise in advocacy be granted full rights of audience before the Tribunal. There is an established procedure for solicitors to gain full rights of audience upon accreditation.*

39. *The LegCo just endorsed the Competition (Amendment) Bill 2014 in November 2014 by which higher right of audience in the Tribunal is extended to solicitor advocates only, rather than solicitors in general. This is consistent with and a reflection of the present policy relating to higher rights of audience.*

40. *As pointed out above, following the practice in the CFI, solicitors will have right of audience in the Tribunal for (i) hearings in chambers by members; and (ii) hearings in open court/chambers by the Registrar.*

Rule 25 (Rights of audience) : There is a conceptual flaw in the drafting of rule 25(1)(b). "Counsel" does not mean barrister. It is a term for any advocate with the right to appear in the superior court, and therefore would include solicitor advocates. Such distinction has been made in the UK. Suggest replacing "counsel" with "barrister". (Para.12.4 of the submission)

41. *It seems to us there is no clear indication that "counsel" does not mean barrister in Hong Kong. The phrase "counsel or solicitor" is used in a very large number of local legislation.*

42. *We note that "counsel" is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) to mean "a person admitted before the Court of First Instance to practise as counsel." According to the Higher Rights of Audience Rules (Cap 159AK), "solicitor advocates" are not admitted to practise as counsel as defined under section 3 of Cap. 1, but are granted with higher rights of audience on application.*

43. *We note that the phrase "barrister or solicitor" is also sometimes used in legislation and we have no in principle objection to it. However, and more importantly, the primary legislation, i.e. the CO, uses the term "counsel" in distinction to "solicitors": e.g. sections 44, 58 and 128. We consider that the CTR as subsidiary legislation made under the CO should follow the same terminology. We also consider that the expression "counsel or solicitor having a right of audience before the CFI in its civil jurisdiction" in rule 25(1)(b) should be clear enough to mean barristers and solicitor advocates. We therefore do not suggest amending this rule.*

Rule 26 (Disposal of proceedings) : Suggest amending rule 26(3)(c) so that if any party to the proceedings does not appear, the Tribunal may on the application of the applicant appearing, "enter its decision" rather than "enter judgment again the respondent absent from the proceedings". (Para.13.1 of the submission)

44. *In the light of your concern, we suggest refining rule 26(3)(c) along the line that "on the application of the applicant appearing, enter judgment against the respondent absent from the proceedings, or make the decision the Tribunal thinks fit".*

Rule 32 (Confidential treatment of information) : Suggest extending rule 32 to cover the scenario where a party seeks an order of confidentiality over a document filed (or intended to be filed) by another party to the proceedings. The expanded rule may potentially cover, for example, a document seized by the Commission. It may also cover cases in which various parties to proceedings may be party to an agreement, and which one party wishes to file, but in respect of which a different party wishes to claim confidentiality. (Paras.14.1-14.2 of the submission)

45. *We agree with your suggestion. We will refine rule 32 to cater for the possibility that a party may apply to the Tribunal for an order of confidentiality over a document filed (or intended to be filed) by another party to a proceeding. We have also provided guidance in the revised PD No.2 on "Confidential Information".*

Rule 34 (Orders made by consent) : Rule 34 provides that consent orders "must be sent to the Tribunal for approval". This suggests greater oversight of consent orders by the Tribunal than by the CFI (under Order 42, rule 5A of the RHC). It does not seem warranted. Suggest clarifying the level of scrutiny for the Tribunal in this rule. (Paras.15.1-15.2 of the submission)

46. *We are grateful that you have pointed this out. We have examined rule 34 again. We have come to a view that there should be different treatment for different types of cases.*

47. *For follow-on actions and transferred proceedings from the CFI (under Parts 5 and 6 of the CTR respectively) which are similar to CFI proceedings, Order 42, rules 4, 5 and 5A of the RHC will apply.*

48. *However, for proceedings which are of a public nature and with potentially more serious or wider consequences (i.e. review of reviewable determinations and enforcement actions under Parts 3 and 4 of the CTR respectively), we consider it desirable that consent orders are not simply entered without the Tribunal having sight of them. While it may be that in the vast majority of cases the Tribunal will simply make the order sought by consent, there may be concern in*

special cases arising from case management or other considerations which needs to be addressed.

49. *We will refine rule 34 to make the distinction accordingly.*

Rule 35 (Frivolous or vexatious proceedings, etc.) : Not sure if rule 35 on frivolous or vexatious proceedings is required as it substantially follows Order 18, rule 19 of the RHC. (Para. 16.1of the submission)

50. *We note that strictly speaking, rule 35 is not essential because one can rely on the relevant RHC provisions through the operation of rule 4.*

51. *However, on balance having regard to the importance of this power and for the avoidance of doubt, and because it is a power of the Tribunal on which emphasis was placed during the legislative process of the primary legislation, we consider it desirable to have a separate rule clearly setting out the scope of the Tribunal's jurisdiction in respect of frivolous or vexatious proceedings.*

Rule 40 (Procedure on application for leave to appeal) : The reference in rule 40(1) should refer to "Order 59, rule 2BA(2) of the RHC" instead of "Order 59, rule 2B(4) of the RHC" to reflect the proposed amendments to the RHC in the same exercise. (Para. 17.1of the submission)

52. *We agree with the proposed change and will incorporate it accordingly.*

Rule 49 (Translation of documents to be used in Tribunal) : sub-rule 49(4) provides that should a serving party refuse to provide a translation of a document it serves on requesting party, the requesting party may apply to the Tribunal for an order that the serving party must provide the requesting party with a translation of the document. Suggest that sub-rule 49(7) clarify whether the costs of the APPLICATION by a party requesting for a translation of a document are included in "costs of, and incidental to, providing a translation" under rule 49(7)". (Para. 18.1of the submission)

53. *In line with the CFI arrangements, if the translation of a document is provided by consent, the parties will agree on the costs. If they fail to do so, the costs would be in the cause of the proceedings. For contested applications, the Tribunal will make the necessary orders as to costs. In any event, the costs of the application are not normally regarded as "cost of, and incidental to, providing a translation" under sub-rule 49(7).*

Rule 52 (Amendment of documents) : Suggest replacing "applies to" in sub-rule 52(2) with "includes" to avoid limiting the documents that can be amended. (Paras.19.1of the submission)

54. *We appreciate your concern. We will improve the drafting of sub-rule 52(2) along the line of "the documents mentioned in sub-rule (1) include the documents filed in the CFI…."*.

Rule 52 (Amendment of documents) : Not sure whether the amendments to documents must, in all cases, be subject to the Tribunal's approval. Order 20 of the RHC envisages the amending of originating processes and pleadings without leave and similar provisions may be applied to proceedings before the Tribunal. Also propose that documents be amended by consent of the parties as appropriate. (Paras. 19.2 of the submission)

55. *According to Order 20, rules 1 and 3 of the RHC, a plaintiff may, without the leave of the court, amend the writ or pleadings once before the pleadings in the action begun by the writ are deemed to be closed. Otherwise, any amendments of documents require the court's permission. So, the present leeway in CFI proceedings for a party to amend documents without leave is fairly limited.*

56. *For the Tribunal, we have not only taken into account the arrangements for the CFI, but also other considerations. For example, we envisage that the Tribunal will take an active role in case management. Amendments to documents should, in light of this, be kept within the Tribunal's purview as far as possible. Moreover, having a uniform arrangement across-the-board for all stages of a proceeding will reduce the complexity of the rules.*

57. *So, on balance, we prefer to keep the present requirement in rule*

58. *For amendments agreed by parties, they can of course be handled as consent applications.*

Part 3 – Review of Reviewable Determinations

Rule 54 (Interpretation of Part 3) : Seek confirmation on whether the respondent to applications for leave to apply for a review of reviewable determinations will in all circumstances be the Commission. If not, greater clarity is required as to who would otherwise be the respondent. (Para. 20.1 of the submission)

59. *We expect that the respondent to applications for leave to apply for a review of reviewable determinations should be the Commission (including in this context the Communications Authority).*

60. *Separately, under section 85(2) of the CO, an interested party may also apply to the Tribunal for a review of a reviewable determination. Under such circumstances, the original private "parties" to a decision, commitment or agreement etc. set out in section 85(1) of the CO will not be regarded as the respondent. It is the decision-maker who will be the respondent, though other parties interested in the determination may be named as "interested parties" in the application for review.*

61. *Taking into account drafting considerations, we prefer keeping the expression "respondent" in rule 54, rather than hard-coding it as "the Commission". But, for clarity, we have explained in the revised draft PD No.1 that "respondent" in relation to an application for leave for review of reviewable determinations means the person who*

is named as a respondent in the application and whose decision is the subject of the application for review.

Rule 55 (Application for leave) : It would generally in practice be wholly unrealistic for a supporting affidavit to be prepared within the 30 day time limit. For example, leave to review the issue of a block exemption would need to be substantiated by substantial evidence including economic evidence. Propose that evidence should not be required at the leave stage unless and until so ordered upon directions (including as to any time extension) being given in relation to the application. (Para. 21.1 of the submission)

62. *In the light of your comments and the views of the other stakeholders, we have reviewed the proposed time limits for various documents to be submitted to the Tribunal.*

63. *For applications for leave to review a reviewable determination, we believe that there is a legislative intent for such review proceedings to be dealt with expeditiously as reflected by the 30 days' time limit in section 88(1) of the CO for applications to be made. This suggests the evidence should be filed as early as is reasonably practicable.*

64. *Furthermore, we consider that the requirement for leave, to be meaningful, must mean that the applicant has to set out his case in concrete details at the outset, so that the Tribunal can decide if leave should be granted. As provided under section 84(3) of the CO, in deciding whether to grant leave, the Tribunal has to assess the prospect of success of the review.*

65. *For various reviewable determinations set out under section 83 of the CO, we believe that the applicant would probably have been liaising with the Commission for a considerable period of time before the Commission makes a decision. We therefore consider that it should be possible for the applicant to put together an application for review within the time suggested. Besides, not all reviews will involve economic evidence.*

66. *For the example that you have given, i.e. review of the issue of a block exemption order based on economic grounds, it is possible that*

the applicant may wish to file economic evidence. But a block exemption order is unlikely to be issued all of a sudden. As stated in part 11 of the draft guidelines of the Commission on applications (exclusions and exemptions), it is a process involving many steps. Part 12 suggests relevant persons affected will be engaged before the order is issued. Assuming that these guidelines are finally issued in substantially the same form, it seems that the relevant persons will have had a considerable amount of time to make representations to the Commission before a block exemption order is issued or refused. It seems unlikely that they will be "starting from scratch" in seeking a review when the block exemption order is issued.

67. *We therefore take the view that cases where the 30 days is "wholly unrealistic" may be the exception rather than the rule. But, to cater for special circumstances, we have set out in the revised draft PD No. 1 that where there are special circumstances requiring the evidence to be supplemented afterwards, the applicant should seek leave from the Tribunal to do so. The Tribunal will have general powers under rule 45 to extend time if necessary.*

Part 4 – Applications for Enforcement before Tribunal

Rule 68 (Interpretation of Part 4) : Similar to the observations on rule 54 above, seek confirmation on whether the applicant in applications for enforcement before the Tribunal will in all circumstances be the Commission. If not, greater clarity should be provided in rule 68. (Para. 22.1 of the submission)

68. *In line with the general drafting convention, we have used the generic expression of "applicant" in rule 68. This will also maintain flexibility.*

Rule 77 (Interim orders) : Not sure if urgency alone should be a sufficient pre-condition for an application for an interim order to be made ex-parte under sub-rule 77(3). Given the potentially very serious consequences for such orders, suggest that the party should show compelling reasons, even in urgent cases, why the application should not be heard inter-partes. (Para. 23.1 of the submission)

69. *We have re-considered this having regard to your comments. While the original draft is based on Order 29, rule 1(2) of the RHC, we agree with you that the Tribunal should normally consider additional factors other than urgency when considering whether an application can be made ex-parte. For clarity, we will refine rule 77(3) to provide that ex-parte application can only be made when the case is urgent and when there are special justifications/circumstances.*

Rule 85 (Hearing in public) : Considering the potential impact on the subject of disqualification orders, suggest that applications for disqualification orders or leave to participate in the affairs of the company to be heard before a member of the Tribunal, instead of the Registrar. (Para. 24.1 of the submission)

70. *We have prepared rule 85 of the CTR on the basis of the similar procedures set out in rule 8 of the Companies (Disqualification of Directors) Proceedings Rules (Cap. 32K). In particular, for proceedings under Cap 32K, the hearing shall in the first instance be held before the Registrar as required under rule 8(2), though it also provides for the possibility for the Registrar to refer a case to a judge as necessary (rule 8(5)(a) of Cap 32K refers).*

71. *We consider that the nature of such disqualification applications etc. before the Tribunal is similar to those conducted under Cap 32K before the CFI. We therefore consider it preferable to align the arrangements. Besides, as provided for under sub-rule 85(2) of the CTR, the Registrar of the Tribunal may transfer the application to be heard by a member or members of the Tribunal if he or she thinks fit.*

Part 5 – Follow-on Actions

Follow-on actions transferred to the Tribunal : As section 110(2) of the CO envisages that follow-on actions may potentially be brought by way of proceedings transferred to the Tribunal under section 113 of the CO, suggest that Part 5 of the CTR contain provisions to deal with such follow-on actions begun in the CFI. (Para. 25.1 of the submission)

72. *While it is possible that follow-on cases may be transferred from the CFI, we do not expect that there would be many such cases. Even if there are such cases, the provisions in Part 6 of the CTR governing proceedings transferred from the CFI should be wide enough to cater for such follow-on cases.*

73. *In particular, rule 96(3) of Part 6 provides that the Tribunal may give any directions about the further conduct of the proceedings transferred from the CFI, including the procedures to be adopted in the proceedings. The Tribunal should therefore be able to give directions on the appropriate procedures for such follow-on cases. We consider that there is no need for dedicated provisions in Part 5 of the CTR for this purpose.*

Discovery from the Commission : For follow-on actions, much of the evidence that establish contraventions of a conduct rule would foreseeably in the possession of the Commission. To alleviate the potential burden on the Commission arising from third-party discovery claims, suggest that provisions be included in Part 5 of the CTR to deal with such discovery. For example, discovery should only be sought from the Commission when the documents cannot be reasonably obtained from another party and the Tribunal may refuse to order the discovery of document on public interest grounds. (Para. 26.1 of the submission)

74. *We have carefully considered your views and similar comments made by the other stakeholders.*

75. *According to section 110(1) of the CO, there must be a determined contravention (i.e. a decision of the Tribunal / Court or admission under section 110(3)(e) of the CO) before there is any right of follow-*

on action. As contravention of the conduct rules is already established, we expect that there would be in general less need for discovery from the Commission in respect of follow-on actions than there would be if there were "stand-alone" actions.

76. *Nevertheless, we have taken on board your suggestion by providing a new rule in the CTR to empower the Tribunal to refuse as appropriate an order for discovery of documents such as those relating to the leniency agreements. Key factors that the Tribunal may take into account will include the need to secure the furtherance of the purposes of the Ordinance as a whole, the balance between the interests of the parties and other persons (including a party to the leniency agreement), whether the information contained in the document sought to be discovered or produced is confidential, as well as the extent to which the document sought to be discovered or produced is necessary for the fair disposal of the matter, etc.*

Cartels and third party proceedings : A defendant to a follow-on action as a member of a cartel is likely to attempt to bring other members of the cartel into the proceedings by way of a third party notice for contribution. Seek clarification on how rule 20 regarding addition of parties would interact with Order 16 of the RHC (on Third Party and Similar Proceedings). Also, suggest that rules specific to follow-on actions be included in the CTR on how such third-party proceedings are to be brought and the rules for the case management of both the third party proceedings and the main follow-on actions. (Para. 27.1 of the submission)

77. *Rule 20 of the CTR deals with addition or substitution of parties, not with third party or similar proceedings. In light of your comments and in order to make more explicit provisions for third party or similar proceedings, we propose to add a new rule in the CTR to set out the application of Order 16 of the RHC in relation to such proceedings in the Tribunal. In general, follow-on actions in the Tribunal are similar in nature to CFI civil actions and can be expected to be conducted similarly.*

Summary disposal of follow-on actions : while rule 35 on frivolous or vexatious proceedings may not be warranted, suggest including in Part 5 of the CTR specific provisions for the summary disposal of follow-on actions that are not supported by reasonable grounds. (Para. 28.1 of the submission)

78. *As explained in paragraphs 50 to 51 above, we intend to retain rule 35 in the draft CTR governing frivolous or vexatious proceedings. As such, rule 35 can be relied on for the summary disposal of follow-on actions that are not supported by reasonable grounds, including, for example, an action where there is no determination that there has been a contravention of a conduct rule.*

Rule 94 (Consolidation of follow-on actions) : Suggest that parties to follow-on actions to be consolidated be given an opportunity to provide representations on the appropriateness of the consolidation. (Para. 29.1 of the submission)

79. *It is unlikely that the Tribunal will make a consolidation order of its own motion without affording the parties concerned a chance to make representations. This reflects the requirements of natural justice and the usual practice of the courts. In fact, according to experience, it is normally the parties who will make the consolidation applications. We therefore do not consider it necessary to provide for any explicit rule for this purpose.*

Part 6 - Proceedings transferred from CFI

Suggest making clear in the CTR or the PD issues such as (i) whether the originating CFI actions will be stayed entirely or in part pending the determination of the competition law issues before the Tribunal; and (ii) whether the rules of evidence will apply in proceedings that are transferred from the CFI. (Para. 30 of the submission)

80. *For a proceeding transferred from the CFI to the Tribunal, the question as to whether the original CFI action will be stayed entirely or in part would depend on the actual circumstances of a particular case. There is no hard and fast rule. Maximum flexibility needs to be allowed and guidance will be given by the court at the direction*

hearing for transfer. We have accordingly clarified this in the revised draft PD No. 1.

81. *Regarding the question on rules of evidence, pursuant to section 113(4) of the CO, the practice and procedure of the Tribunal applies to the proceedings transferred from the CFI."*

4. On 30 December 2014, the Law Society provided the following comments :

"I am given to understand that at the meeting, our representative again pointed out the need for flexibility in filing an affidavit in support of an application for leave to review a reviewable decision and we believe the point was taken. As such, we have no further comments at the moment."

5. On 19 January 2015, the Judiciary issued the following responses to the Law Society :

"Rule 55 (Application for leave): suggest that more flexibility be given to the requirement of filing an affidavit in support of an application for leave to review a reviewable determination.

We note that a similar point has been raised by the Law Society in the first round of comments. We have further considered this suggestion carefully.

2. As explained by the Judiciary in our response paper and at the meeting of the Competition Tribunal Users' Committee on 15 December 2014, we believe that the applicant for a review of reviewable determination is unlikely to be starting from scratch on the day when the Competition Commission/Communications Authority issues its determination. If the applicant can put together a sufficiently detailed application within 30 days for the Competition Tribunal ("the Tribunal") to consider whether or not to grant leave (which is required by the Competition Ordinance (Cap. 619)), he/she should be able to file at least a verifying affidavit exhibiting the principal documents relied upon. As we have explained, where there is justification, time may be sought for filing further evidence beyond the verifying affidavit and there may be an opportunity to supplement

the evidence. The draft Practice Direction ("PD") No.1 on "Proceedings before the Tribunal" (at the Annex) has been further revised to make that clear.

3. Given the Law Society's views as elaborated at the meeting on 15 December 2014, we have further indicated in the PD No. 1 that the Tribunal will decide upon or after granting leave whether a Case Management Conference is necessary in such review cases."

6. On 4 February 2015, the Law Society provided the following comments :

"Thank you for your letter of 19 January 2015, on your further consultation on the Proposed Subsidiary Legislation and Practice Directions for the Competition Tribunal.

2. The Law Society notes that the Judiciary have retained the short time period for filing of an affidavit in support of an application for leave to review a reviewable decision. Your clarification that further evidence may be filed after the 30-day deadline, and only a verifying affidavit is expected with the application, is helpful (paragraph 2, Encl I to your said letter)- we now have a better idea of the disposition of the Competition Tribunal towards granting extensions of time to file further evidence on an application for review under section 88(2) of the Competition Ordinance.

3. On the other hand, the Law Society takes note of those references in the current draft on legal representation at the Competition Tribunal (e.g. paragraphs 42- 44 of the Practice Directions and Rules 25 and 28 of the draft Rules per se), and reiterate that there should be no limitation to the rights of audience of solicitors before the Competition Tribunal - see our submissions of 2 September 2014 (para 12.1- 12.4). In this regard, by way of comparison, solicitors do have the rights of audience in, for example,

- *the Lands Tribunal (Rule 26, Lands Tribunal Rules Cap 17 A) and*
- *the Solicitors Disciplinary Tribunal (section 24 of the Legal Practitioners Ordinance, Cap 159).*

4. For the sake of consistency and fairness, we ask a formulation similar to either of the above to be put in place in, where relevant, the Competition Tribunal Rules and the Practice Directions.

5. We also notice that the current redraft still retains the use of the word "Counsel" when this generic term should encompass barrister and also solicitors appearing before the Tribunal. A better choice of word should be "barristers". Please rectify the above.

6. Lastly, there is a typo in the Sub-rule 20A(l) of the latest draft Competition Tribunal Rules (Encl II). The reference therein should be to "rule 8(1) of the RHC" and not to "rule 18(1) of the RHC". Please amend the said typo.”

7. The Judiciary did not issue any further responses to the Law Society as the points raised in paragraphs 3 to 5 above had been raised before in the Law Society’s submission to the Judiciary dated 2 September 2014. The Judiciary had nothing to add to its responses issued to the Law Society dated 27 November 2014.

Judiciary Administration
March 2015