

**For discussion
on 9 April 2015**

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

**Possible Further Streamlining of Procedures
for bringing Follow-On Actions to the Competition Tribunal**

PURPOSE

This paper responds to the questions and issues which are relevant to the Judiciary as raised by Members at the first meeting on 17 March 2015.

BACKGROUND

2. Section 110 of the Competition Ordinance (Cap. 619) (“the CO”) provides for follow-on right of action. A person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule has a right of action against any person who has contravened or is contravening the rule and any person who is, or has been, involved in that contravention.

3. Section 110 of the CO also indicates that subject to section 113, such a follow-on claim may only be made in proceedings brought in the Competition Tribunal (“the Tribunal”). Section 113 enables a transfer of proceedings from the Court of First Instance (“CFI”) to the Tribunal.

4. Part 5 of the draft Competition Tribunal Rules (“CTR”) covers the proposed procedures for making a claim in a follow-on action to which section 110 of the CO applies.

NATURE OF FOLLOW-ON ACTIONS

5. The Judiciary expects a wide spectrum of disputes in follow-on actions. The simplest types will be very similar to damages claims handled by the CFI in which liability is not seriously in dispute. At the other end of the spectrum would be cases involving disputes raising difficult factual and legal questions of causation in respect of large

claims¹.

6. As such, the Judiciary considers that the possible complexity of a follow-on action should not be under-estimated. It is unlikely to be just about a consumer suing an entity for buying goods at higher than a competitive price. More often, it will be a claim by a business entity against another commercial entity as in usual commercial litigation. The establishment of anti-competitive conduct does not necessarily mean that the question of liability has been resolved in a follow-on action. Even if the Tribunal has made certain findings of facts concerning infringement of a conduct rule, a defendant in a follow-on action may still raise the defence that the conduct so found did not cause the loss or damage suffered by the plaintiff, like in any contract or tort claim, or that the defendant is not a person involved in the contravention. These are the inherent difficulties in commercial litigation as well as competition litigation which cannot be overcome by procedural simplicity.

7. For those cases where causation is not in dispute, the plaintiffs are still required to prove the precise extent of their loss and the quantification of loss in monetary terms. This will not be an issue that can be resolved earlier in the enforcement process between the Competition Commission (“the Commission”) and the defendant, because it is not relevant there; nor will the private plaintiffs as such be parties to the earlier enforcement proceedings. As such, it will not be legally appropriate for a list of victims to be drawn up at the enforcement stage by or for the Tribunal as proposed by some of the Members at the meeting.

APPROACHES AND PROPOSED PROCEDURES

8. In formulating the draft procedures for follow-on actions in the CTR, the Judiciary needs to take into account the need for the Tribunal to be provided with all the relevant information for the fair disposal of the case, while trying to enable the Tribunal to conduct its proceedings with as much informality as is consistent with attaining justice. The Tribunal also needs flexibility to handle cases of varying scale, nature and complexity.

9. With the above objectives, we have put forward the Tribunal’s

¹ Please see *2 Travel Group Plc v Cardiff City Transport Services Ltd* [2012] CAT 19 as an example.

procedures for follow-on actions on the basis of the following two approaches :

- (a) simplifying the procedures and minimizing the information sought at different stages as far as possible, without compromising the provision of essential information which may subsequently delay the proceedings; and
- (b) the Tribunal should be provided with adequate powers to expedite the follow-on cases as necessary depending on, among others, the complexity, nature and claim amount of the case.

Simplifying Procedure and Minimizing Information Sought

10. On the basis of the first approach of simplifying the procedures and minimizing the information sought as appropriate, the Judiciary has proposed the use of forms in Part 5 of the CTR to enable parties to set out their grounds of application and response in a succinct manner.

11. Besides, the Judiciary is mindful of the need to keep the information sought to a minimum at each of the relevant stages to avoid any front-loading of costs. For example, while rule 94 specifies the information required if a person intends to seek the Tribunal's permission to bring a follow-on action before the period within which the relevant appeal (if any) is determined, rule 93 of the CTR provides for the information required for a normal follow-on claim. The differences in the two types of applications are as follows :

- (a) the information required in rule 94 (i.e. Form 1 etc.) focuses on why a certain follow-on action needs to be brought earlier than usual and the main concern is about timing. The information required is likely to be relevant to that question alone and therefore brief; and
- (b) the information required in rule 93 (i.e. Form 8 etc.) focuses on the basis of the claim made and amount of damages sought etc. The information required may be rather more detailed.

Hence, the Judiciary does not consider it appropriate to combine the information required under rules 93 and 94 (i.e. Forms 8 and 1 etc.) to avoid a plaintiff having to, even before permission is granted, incur

additional costs by providing the detailed information for a follow-on action under rule 93 (including that in Form 8) which may or may not be needed after all.

Tribunal's Powers for Flexibility

12. At the meeting on 17 March 2015, Members suggested that the Judiciary consider whether the Tribunal should be given more powers to expedite its procedures as necessary, especially for claims of smaller amounts.

13. The Judiciary shares the view that the Tribunal should be provided with adequate powers to flexibly handle cases of different complexity, nature and claim amounts so that simpler cases may be handled more quickly. In this regard, the Judiciary has proposed that the Tribunal be given the following powers :

- (a) the Tribunal would in general have a lot of room to be flexible under the draft CTR, e.g. use of summary judgment (Order 14 of the Rules of the High Court ("RHC") (Cap. 4A) as applicable under rule 4 of the CTR) and limiting scope of discovery of documents (rule 24 of the CTR); also, automatic general discovery does not apply to Tribunal proceedings;
- (b) pursuant to rule 97 of the CTR, a direction hearing is proposed to be held right after the initial rounds of submission of information by the plaintiff and the defendant so that the Tribunal may decide on the best procedures which may be tailor-made having regard to the needs of the case concerned. For example, the Tribunal may adjust the extent of discovery of documents by taking into account, among others, the amount of the claim concerned;
- (c) on the basis of rule 4(3) of the CTR, the Tribunal is given powers to dispense with the application of the RHC. This provides flexibility for the Tribunal to see if certain steps may be skipped or simplified as necessary and appropriate; and
- (d) pursuant to rule 6 of the CTR, in general, the Tribunal needs not hold any proceedings to be void even if there has been any non-compliance with the procedural rules; and

- (e) the Tribunal may according to rule 9 of the CTR, for example, allow consolidation of cases if it appears to the Tribunal that some common questions of law or fact arise, the reliefs sought arise out of the same act or series of acts, the reliefs are sought against the same party or it is otherwise desirable for some other reason. The Tribunal may make such a consolidation order of its own motion or on application. Besides, representative actions or test cases, which have been used in the CFI, may also be considered by the Tribunal.

14. The Judiciary considers the above proposed powers wide enough for the Tribunal to expedite the procedures for follow-on actions as necessary, having regard to the complexity, nature and claim amount etc. of the case.

15. Experience shows that litigants in person at various levels of courts, including those of the CFI, District Court or the Small Claims Tribunal, are able largely to follow the requirement of stating their cases on a claim form, statement of claim or a defence. If they really have difficulties, the courts may frame the issues for them. The Tribunal will do the same in respect of its proceedings.

PROPOSED CHANGES

16. At the meeting on 17 March 2015, Members suggested that the Judiciary consider further simplifying the procedures and/or the information sought for follow-on actions, especially in respect of rules 93 and 94 of the CTR.

17. The Judiciary has carefully considered the suggestion. The room for further streamlining is in fact rather limited. The best that the Judiciary may think of is to allow for possible integration of the information to be sought under rule 93(1) to facilitate submission. Specifically, the Judiciary suggests that the originating notice of claim (i.e. Form 8 in the Schedule) required under rule 93(1)(a) may be combined with the statement of claim required under rule 93(1)(b) under appropriate circumstances (e.g. if the plaintiff has no commercially sensitive information for disclosure). More guidance is also proposed to Form 8 so that the litigants would have a better idea of what a statement of claim should normally cover. The proposed changes to Rule 93 and Form 8 of the CTR are at the [Annex](#).

WAY FORWARD

18. Subject to Members' views, the Judiciary will incorporate the proposed changes to the draft CTR as set out at the **Annex**.

Judiciary Administration
March 2015

**Proposed Changes to Rule 93 and Form 8
of the Draft Competition Tribunal Rules**
(subject to drafting refinements)

93. Mode of commencing follow-on actions

- (1) A follow-on action must be brought by filing ~~at the same time~~—
 - (a) an originating notice of claim in Form 8 in the Schedule endorsed with a statement of claim; ~~and/or~~
 - (b) an originating notice of claim in Form 8 in the Schedule together with a separate statement of claim if that statement of claim contains confidential information.
- (2) The originating notice of claim must specify the decision of the specified court or admission in a commitment on which the plaintiff relies to establish a contravention of a conduct rule.
- (3) The statement of claim must specify the particular part of the or commitment referred to in subrule (2) which determines or admits that a relevant act is a contravention of a conduct rule.
- (4) The plaintiff must serve on the defendant a copy of the originating notice of claim and, if applicable, the statement of claim filed under subrule (1).
- (5) In this rule—

specified court (指明法院) means—

 - (a) the Tribunal;
 - (b) the CFI;
 - (c) the Court of Appeal; or
 - (d) the Court of Final Appeal.

Form 8

(Form for the action under Part 5 of the Competition Tribunal Rules)

ORIGINATING NOTICE OF CLAIM

[rule 93]

CT^{note 1} _____ of _____

IN THE COMPETITION TRIBUNAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

Competition Tribunal No. _____ of _____

Between

A.B. Plaintiff

And

C.D. Defendant

Originating Notice of Claim

1. (Name, description and address of the Plaintiff)
2. (Name, description and address of the Defendant)
3. (State the date and decision of the Competition Tribunal/Court of First Instance/Court of Appeal/Court of Final Appeal or the admission in a commitment and the date of acceptance by the Competition Commission on which the Plaintiff relies to establish a contravention of a conduct rule)^{note 2}
4. (State how the relevant period as specified in section 111(1) of the Competition Ordinance has been satisfied)
5. (Specify the leave granted to commence the follow-on action under section 111(2) of the Competition Ordinance, if applicable)

6. (Identify the relevant findings in the decision/admission on the basis of which the claim for damages is made)^{note 3}

7. (State concisely the nature of claim and the relief sought)^{note 4}

8. (Statement of claim)^{note 5}

Dated this day of 20.....

Plaintiff/Solicitors for the Plaintiff

Name and address of the solicitors for the Plaintiff in Hong Kong for service:

To: The Registrar, Competition Tribunal and [name and address of the Defendant]

Issued from the Registry of the Competition Tribunal this day of 20.....

Note: 1. This Notice may not be served later than 6 months beginning with the above date unless its validity is extended by the Competition Tribunal.

~~2. The Plaintiff must file together with this form a separate statement of claim setting out the material facts and relief sought.~~

2. The statement of claim must be verified by a statement of truth in accordance with O. 41A of the Rules of the High Court (Cap. 4 sub. leg. A).

Registrar

^{note 1} Insert the appropriate prefix.

^{note 2} See section 110(3) of the Competition Ordinance. If there is any appeal against the decision relied on, state the references and the result of the appeal.

^{note 3} See section 110(3) of the Competition Ordinance.

^{note 4} State the relief sought (see section 112 of, and Schedule 3 to, the Competition Ordinance) including costs of the proceedings and the amount of damages

sought, if applicable. It is not necessary to complete item 7 if the statement of claim is endorsed under item 8.

note 5 The Plaintiff must either—

(a) endorse the statement of claim by setting out the material facts, nature of claim and relief sought (see section 112 of, and Schedule 3 to, the Competition Ordinance) including costs of the proceedings and the amount of damages sought, if applicable; or

(b) file a separate statement of claim under rule 93(1)(b) of the Competition Tribunal Rules if the plaintiff wishes to maintain the confidentiality of any information contained in the statement. Otherwise, the plaintiff will need to apply for confidential treatment of the information in this Notice under rule 37 of the Competition Tribunal Rules.

A person may inspect and obtain a copy of this Notice under rule 55 or 56 of the Competition Tribunal Rules.