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2 April 2015


Assistant Legal Advisor
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong
(Attn: Mr Timothy TSO)

Dear Mr TSO,

Draft Competition Tribunal Rules

Thank you for your letter of 26 March 2015 seeking clarifications on various matters relating to the captioned draft rules. The response to these issues is set out in the attached paper. The soft copy has been sent to you through the e-mail address "jmylee@legco.gov.hk". The Chinese version of the paper will follow.

Yours sincerely,


(Ms Wendy CHEUNG)
for Judiciary Administrator

c.c. Secretary for Justice - (Attn: Mr Francis Kwan
Mr David Grover
Mr Allen Lai
Ms Phyllis Poon
Miss Yvonne Cheung)

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

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

**Responses to the Issues Raised by the Assistant Legal Advisor
on the Draft Competition Tribunal Rules**

PURPOSE

This paper sets out the Judiciary's responses to the issues raised by the Assistant Legal Advisor in his letter of 26 March 2015.

RESPONSES

General

In paragraph 8 of the Brief on Proposed Competition Tribunal Rules and other Related Rules (LC Paper No. CB(4)632/14-15(01)) it is stated that in preparing the draft Competition Tribunal Rules (the Rules), the Judiciary has taken into account the rules and practice applicable to similar proceedings in other relevant common law jurisdictions, e.g. the United Kingdom, Australia and Canada. It is noted that during the drafting and scrutiny of the Competition Bill and its subsidiary legislation, reference has also been made to the relevant Act and Orders/Regulations of Singapore. Please explain why no reference has been made to the relevant rules of Singapore (e.g. Competition (Appeals) Regulations) in preparing the Rules.

2. In preparing the draft rules for the Competition Tribunal ("the Tribunal"), the Judiciary has made reference to a number of overseas jurisdictions. The Judiciary has not only examined their court procedural rules (if any), but also visited some of them to understand better their regimes and actual operations.

3. In deciding which jurisdictions for such close examination, the Judiciary has taken into account the similarity of their competition regimes with that in Hong Kong, the commonality of their general court procedures with ours, and their experience in handling competition cases.

4. The Judiciary has examined the procedures for the United Kingdom ("UK") closely mainly because the UK has dedicated procedural rules for the competition-related courts/tribunals and their courts/tribunals have been handling competition-related cases for many years. Their system is a well-tested one. The similarity of our court system with theirs in general is also very important.

5. As regards the European Union ("EU"), they also have long experience in implementing the competition regime. But since the competition regime of the UK and EU (an inquisitorial model) is different from that in Hong Kong (a prosecutorial model), the Judiciary has also decided to examine the procedures for Australia which has a similar competition regime to that in Hong Kong.

6. In comparison, Singapore is a relatively new player in terms of competition matters. According to the Judiciary's limited understanding, the Competition Commission of Singapore ("CCS"), like their counterparts in UK, is both the investigator and adjudicator in competition cases (i.e. an inquisitorial model). Appeals against the decisions of the CCS are taken to the Competition Appeal Board ("CAB") which consists of members appointed by the relevant Minister on the basis of their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment. CAB's procedures are governed by Competition (Appeal) Regulations. Given the differences in the competition regimes and the appeal arrangements of Singapore and Hong Kong, the Judiciary has not adopted the Competition (Appeal) Regulations as part of its model.

Rule 2

What is the meaning of "intervener" in paragraph (a) of the definition of party under Rule 2(1)? Does it mean a person who is granted leave to intervene in the proceedings under Rule 20? Does it include the Competition Commission (the Commission) who is granted leave to intervene under Rule 21?

7. An intervener, as defined in rule 2(1) of the Competition Tribunal Rules ("CTR") refers to any person, including the Competition Commission ("the Commission"), being granted leave by the Tribunal to

intervene in the proceedings under rule 20 or rule 21 of the Rules. Also, section 120(4) of the Competition Ordinance (Cap. 619) expressly provides that if the Commission intervenes in proceedings under that section, the Commission becomes a party to the proceedings and has all the rights, duties and liabilities of a party.

Rule 4

Rule 4(1) provides that where the Competition Ordinance (Cap. 619) and the Rules make no provision for a matter, the Rules of the High Court (Cap. 4A) apply to all proceedings before the Competition Tribunal (the Tribunal), so far as they may be applicable to that matter. If both the Rules and Cap. 4A have provisions for a matter, please clarify whether the Rules would prevail in such circumstances under Rule 4.

8. If both the CTR and the Rules of the High Court (Cap. 4A) have provisions for a matter, according to the operation of rule 4 of the CTR, in general, the CTR would prevail over Cap. 4A for that matter.

9. But, to avoid doubt, there are two kinds of refinements to the CTR as follows :

- (a) *partial application of Cap. 4A* : for some matters, while there are provisions in the CTR that modify, or differ from, Cap. 4A, certain parts of an Order in Cap. 4A may still be applicable to that matter. Such an arrangement is clearly spelt out in the relevant rules of the CTR. For example, in rule 16, while subrule (1) and (2) of the CTR will apply to Tribunal proceedings, subrule (3) clearly states that “Subject to this rule, Order 11 of Cap. 4A applies to the service of all documents out of the jurisdiction”; and
- (b) *partial disapplication of Cap. 4A* : for some other matters, while Cap. 4A provisions are generally applicable to Tribunal proceedings, certain parts or the whole of the relevant Cap. 4A Order are not applicable in relation to that matter because of the different requirements of the CTR. Again, it is clearly spelt out in the proposed CTR. For example, in rule 17, subrule (2) of the CTR indicates that “Order 13 of Cap. 4A does not apply to any proceedings”.

10. The above proposed arrangements would minimize the extent of Cap. 4A provisions which need to be copied into the CTR, while allowing for flexibility to introduce informality and other adaptations into Tribunal proceedings.

Rule 6

Please clarify the meaning of "rule of practice" in Rule 6(1).

11. The expression "rule of practice" means the practice (in the sense of custom or usage) of the court. This includes the Practice Directions ("PDs") and any other rule of practice under the common law.

12. In fact, this term is also used in at least 6 provisions in other Hong Kong legislation. They include section 4 of the Copyright (Border Measures) Rules (Cap. 4F), rule 203 of the Bankruptcy Rules (Cap. 6A), rule 74 of the Criminal Appeal Rules (Cap. 221A), rule 12 of the Criminal Procedure (Applications under section 16) Rules (Cap. 221G), rule 12 of the Application for Dismissal of Charges Contained in a Notice of Transfer Rules (Cap. 221K) and section 4 of the Trade Mark (Border Measures) Rules (Cap. 362F).

Rule 13

Is it necessary for a party to apply for an order for substituted service under Rule 13(8)? Is the party required to file an affidavit? Please clarify, with examples, the meaning of "reasonable efforts" in Rule 13(8). Please also clarify if Rule 4 (substituted service) of Order 65 of Cap. 4A applies.

13. It is necessary for a party to first apply for an order for substituted service under rule 13(8) before the Tribunal makes such an order. The application should be supported by affidavit.

14. This term of "reasonable efforts" is used in many other existing legislative provisions relating to substituted service, e.g. rule 9 of the Lands Tribunal Rules (Cap. 17A), rule 20 of the District Court Equal Opportunities Rules (Cap. 336G), rule 6 of the Labour Tribunal (General) Rules (Cap. 25A) and rule 6 of the Small Claims Tribunal (General) Rules (Cap. 338A).

15. One possible example is that if the person to be served is a director of a company, a directorship search is expected in order to find out if such person is a director of any other company. If so, service can be effected through any new address that may be revealed.

16. For clarification, rule 4 of Order 65 of Cap. 4A does not apply to the Tribunal proceedings.

Rule 19

Rule 19(1) provides that the Registrar of the Tribunal must publish a notice in a manner that the President of the Tribunal may direct as soon as practicable after certain events as stated in that subrule. What is/are the anticipated manner(s) of publication of such a notice?

17. In considering the manners of publication of the notice under rule 19 of the CTR, the Judiciary will strive to publicize the proceedings concerned as widely as reasonably practicable so that parties with potentially sufficient interest should be able to get to know the proceedings and consider whether to apply for intervention.

18. At this stage, the Judiciary considers that the notice may be placed on the Tribunal's webpage and posted at the Tribunal's premises etc.

Rule 20

Rule 20(1) provides that a person (other than the Commission) who has a sufficient interest in the matters to which any proceedings relate may apply for leave to intervene in the proceedings. Please clarify, with examples, the meaning of "sufficient interest".

19. The precise scope of the term "sufficient interest" has to be developed by the Tribunal in its jurisprudence. Without compromising the future development of jurisprudence in this regard, the Judiciary takes an initial view that in general this ought to be an interest which is directly related or connected with the subject matter of an action or application.

Rule 27

Rule 27 provides that the Tribunal may direct the parties to file pleadings at any stage of the proceedings as it thinks fit. Under what circumstances would the Tribunal so direct? Please give examples for Members' reference.

20. In general, for informality, the Judiciary has suggested the use of forms, rather than technical pleadings, for proceedings in the Tribunal. The flexibility suggested in rule 27 of the CTR is to cater for proceedings (a) which will benefit from the presence of pleadings, such as complicated proceedings where the issues are not readily identifiable from the documents required by the rules to be filed; and (b) certain proceedings transferred from the Court of First Instance.

21. In complicated proceedings, depending on the way in which the documents already required by the rules have been prepared, heavily intertwined facts and evidence including economic evidence may cause difficulty in identifying the real issues between the parties and the questions which the Tribunal has to resolve. If pleadings are directed to be filed, parties have to follow the established rules of pleading, e.g. stating all relevant material facts but not law or evidence, and the pleading must be as brief as the nature of the case admits etc. The parties and the Tribunal would therefore have a clearer and more succinct picture of the cases they have to deal with.

Rule 42

Rule 42(6) provides that no further evidence may be received on the hearing of the appeal except on special grounds. Please clarify, with examples, what "special grounds" are.

22. Rule 42(6) follows the practice in Court of First Instance (Order 58, rule 1(5) of Cap. 4A refers). The expression "special grounds" is also

used in Order 59, rule 10(2) of Cap. 4A and requires the conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489 to be satisfied¹.

Rule 44

Please clarify the meaning of 'an "unless" order' in Rule 44(2)(g).

23. An "unless" order is a court order which specifies the sanction which will apply in the event that the conditions set out in the order are not complied with or there is a material failure to comply with the terms of the order by the specified time. Such orders facilitate the exercise of the court's case management discretion and the enforcement of procedural deadlines.

24. "Unless" orders are commonly made by the Judges and Judicial Officers in the Court of First Instance. Relevant details of them are provided in a PD issued by the Judiciary².

Rules 53 and 54

Under Rule 53(5) and (6), documents prepared for use by or filed in the Tribunal in any proceedings may be in either official language, and a party may file any document to be served on another party or person in either official language. A party served with a document may request for a translation of the document into the other official language or apply to the Tribunal for an order in accordance with the procedures under Rule 54. Please explain to Members the rationale for the arrangement under Rules 53 and 54.

¹ The conditions are as follows :

- (a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the hearing(s) of the lower court;
- (b) the evidence must be such that, if given, would probably have an important influence on the result of the case, though it need not be decisive; and
- (c) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

Details are set out in paragraph 59/10/8 of the Hong Kong Civil Procedure 2015.

² The relevant PD is PD16.5 titled "peremptory orders".

25. For just and expeditious disposal of the proceedings, it is a well-established practice in the Court of First Instance, District Court and Lands Tribunal, among others, to allow documents for a court proceeding to be prepared in either official language. This is to enable a party to prepare the documents in an official language that he/she is most familiar with.

26. On the other hand, when this filing party serves the document on another party (“the served party”), the served party may not be familiar with the language chosen by the filing party. In the interest of justice, the courts may allow the served party to request the filing party to provide a translation of the document into a language with which the former is more familiar. Therefore, the filing party may have to provide a translation if so ordered.

27. Similar requirements can be found in sections 3 and 4 of the High Court Civil Procedure (Use of Language) Rules (Cap. 5C), section 3 of District Court Civil Procedure (General) (Use of Language) Rules (Cap. 5A) and rule 3A of the Lands Tribunal Rules (Cap. 17A).

Rules 70 and 71

Under Rules 70 and 71(1), the relevant application(s) must be made by filing a summons. Are these applications governed by any particular Order of Cap. 4A?

28. For rule 70 on stay of execution of reviewable determinations, the applications will be akin to applications for interim stay pending an application for judicial review under Order 53, rules 3(10) and 8 of Cap. 4A. Order 53, which applies specifically to judicial review proceedings, does not, however, apply as such to the applications to the Tribunal.

29. As regards rule 71 about “case stated”, there is no procedure to bring such cases from the Court of First Instance by way of case stated to the Court of Appeal (“CA”). However, such procedure is available to certain tribunals to refer a question of law to the CA for decision³ or to appeals from certain boards or tribunals to the CA. Please see Order 61 of Cap. 4A. For

³ For example, section 53C of the Building Ordinances (Cap. 123) and section 36 of the Air Pollution Control Ordinance (Cap. 311).

the Tribunal, only parts of the Order 61 of Cap. 4A are applicable (please see rule 71(6) of the CTR).

Rules 87 and 88

Under Rule 87, the applicant may, within 21 days after the day on which the affidavit in opposition is served under Rule 85 file an affidavit in reply to the affidavit in opposition, and serve a copy of the affidavit in reply on the respondent. However, it is noted that the usual period within which a reply has to be filed under other rules (e.g. Rules 67, 77 and 96) is 28 days. Please explain why a period of 21 days is adopted in Rules 87 and 88.

30. The procedures for handling applications for disqualification orders and applications for leave to participate in company's affairs in the Rules have been proposed with reference to the existing arrangements under the Companies (Disqualification of Directors) Proceedings Rules (Cap. 32K).

31. For consistency with rule 7 of Cap 32K in which a period of 21 days is allowed for the applicant to provide any further evidence after receiving the respondent's evidence in opposition to the application, the Judiciary has suggested in rules 87 and 88 of the CTR a period of 21 days for an applicant to file and serve an affidavit in reply.

Rule 93

According to section 144(3) of Cap.619, the Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice. However, Rule 93(1) provides that 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, and (b) a statement of claim. It is noted that a follow-on action may be brought under section 110 of Cap. 619 by a person who has suffered loss or damage as a result of any act that has already been determined to be a contravention of a conduct rule. It is further noted that the plaintiff is already required to state in paragraph 7 of Form 8 concisely the nature of claim and the relief sought. In the circumstances, please explain to Members why it is necessary for the plaintiff of a follow-on action to file a formal statement of claim in addition to Form 8 (whereas proceedings under other Parts of the Rules may be commenced by filing only a relevant Form in the Schedule).

32. Form 8 as originally proposed required only bare heads of information to show what the action was broadly about. The Judiciary has originally proposed that the plaintiff of a follow-on action file a statement of claim, setting out the details of his claim, in addition to Form 8 so that any confidential information (such as commercially sensitive information) in the former may be kept from members of the public. This is because under rule 56 of the CTR, any person (not necessarily a party to the proceedings concerned) may search for, inspect and obtain a copy of the originating document filed in respect of the proceedings. For follow-on actions, Form 8 will be the originating document. For the statement of claims, a non-party can only see it with the Tribunal's leave as required under rule 56(1)(c) of the CTR.

33. As regards the proceedings under the other Parts of the CTR, the Judiciary expects that the litigants concerned are more likely to be represented by lawyers. Legal professionals may be expected to know whether and when to apply for confidentiality treatment of the originating documents under rule 37 of the CTR. Hence, filing of the relevant form, with any supporting affidavit as necessary, will generally suffice.

34. On the suggestion of the sub-committee at the meeting on 17 March 2015, the Judiciary has proposed to allow Form 8 to be combined

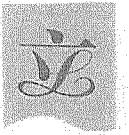
with the statement of claim at the plaintiff's option (which may be opted e.g. if the plaintiff has no commercially sensitive information to include in the statement of claim). More guidance has also been proposed in Form 8 so that litigants would have a better idea of what a statement of claim should normally cover. More details can be found in the paper on "Possible Further Streamlining of Procedures for bringing Follow-On Actions to the Competition Tribunal" issued to the subcommittee for the meeting on 9 April 2015.

Rule 97

Is a case management summons in Rule 97 governed by any relevant Order of Cap.4A (e.g. Order 25)?

35. Case management summons in rule 91 are governed by Order 25 of Cap. 4A. Rule 25 of the CTR about case management is also relevant.

**Judiciary Administration
April 2015**



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26 March 2015

Ms Wendy CHEUNG
Assistant Judiciary Administrator (Development)
Judiciary
Administrative Services
Development Division
Lower Ground 2nd Floor, High Court Building,
38 Queensway, Hong Kong

Dear Ms CHEUNG,

Draft Competition Tribunal Rules

We are scrutinizing the legal and drafting aspects of the subject Rules. We would be grateful if you could clarify the following matters.

General

In paragraph 8 of the Brief on Proposed Competition Tribunal Rules and other Related Rules (LC Paper No. CB(4)632/14-15(01)), it is stated that in preparing the draft Competition Tribunal Rules (the Rules), the Judiciary has taken into account the rules and practice applicable to similar proceedings in other relevant common law jurisdictions, e.g. the United Kingdom, Australia and Canada. It is noted that during the drafting and scrutiny of the Competition Bill and its subsidiary legislation, reference has also been made to the relevant Act and Orders/Regulations of Singapore. Please explain why no reference has been made to the relevant rules of Singapore (e.g. Competition (Appeals) Regulations) in preparing the Rules.

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leave to intervene in the proceedings under Rule 20? Does it include the Competition Commission (the Commission) who is granted leave to intervene under Rule 21?

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Please clarify the meaning of "rule of practice" in Rule 6(1).

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Is it necessary for a party to apply for an order for substituted service under Rule 13(8)? Is the party required to file an affidavit? Please clarify, with examples, the meaning of "reasonable efforts" in Rule 13(8). Please also clarify if Rule 4 (substituted service) of Order 65 of Cap. 4A applies.

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circumstances would the Tribunal so direct? Please give examples for Members' reference.

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Rule 97

Is a case management summons in Rule 97 governed by any relevant Order of Cap. 4A (e.g. Order 25)?

We would appreciate it if you could let us have your reply (in both Chinese and English and with soft copy to Miss Joey LEE at jmylee@legco.gov.hk) before the next meeting of the Subcommittee (tentatively fixed to be held on 9 April 2015).

Yours sincerely,



(Timothy TSO)
Assistant Legal Adviser

c.c. DoJ (Attn: Ms Phyllis POON, Sr Govt Counsel (By Fax: 2845 2215))

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