

**For discussion
on 17 March 2015**

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

**Comparison of the Key Differences in the Procedures of the
Competition Tribunal and the Court of First Instance**

PURPOSE

This paper sets out the key differences in the procedures proposed for the Competition Tribunal (“the Tribunal”) and those adopted by the Court of First Instance (“the CFI”) of the High Court.

BACKGROUND

2. At the meeting of the Panel on Administration of Justice and Legal Services on 16 February 2015 when discussing the draft procedural rules for the Tribunal, Members requested that the Judiciary Administration provide, among others, more information on the key procedural differences between the Tribunal and the CFI.

OVERVIEW

3. Section 144(1) of the Competition Ordinance (“CO”) (Cap. 619) provides that the Tribunal may decide its own procedures and may, so far as it thinks fit, follow the practice and procedure of the CFI in the exercise of its civil jurisdiction. Pursuant to section 144(3), the Tribunal is to conduct its proceedings with as much informality as is consistent with attaining justice.

4. As explained in the paper on “Brief on the Proposed Competition Tribunal Rules and other Related Rules”, the Judiciary seeks to harmonize the procedures for the Tribunal and the CFI as far as desirable and practicable. In general, for aspects of the Tribunal procedures which are different from those of the CFI or of particular significance, the Judiciary has proposed to prescribe them in the Competition Tribunal Rules (“CTR”). For Tribunal procedures which are similar to the CFI, instead of reproducing all the relevant provisions of the Rules of the High Court (Cap. 4A) in the CTR, the Judiciary has suggested a general provision in the CTR (rule 4) indicating that where there is no provision in the CO and the CTR for a matter, the RHC apply

to all proceedings before the Tribunal, so far as they may be applicable to that matter.

5. Moreover, the Judiciary has suggested in rule 4(3) of the CTR that the Tribunal may, in a particular case, dispense with the application of the RHC if the Tribunal considers that doing so will enable the Tribunal to conduct its proceedings expeditiously and with as much informality as is consistent with attaining justice, save costs and is consistent with attaining justice or is otherwise in the interests of justice.

KEY PROCEDURAL DIFFERENCES

6. The key differences in the procedure between the Tribunal and the CFI can broadly be grouped under the following areas :

- (a) commencement of proceedings;
- (b) case management;
- (c) intervention;
- (d) discovery and inspection of documents;
- (e) confidential treatment of information;
- (f) rules of evidence;
- (g) review of reviewable determinations;
- (h) validity of originating documents;
- (i) direction to file pleadings; and
- (j) miscellaneous differences.

We will set out the details in the ensuing paragraphs.

Commencement of Proceedings

7. Under Order 5, rule 1 of the RHC, subject to the provisions of any written law and of the RHC, civil proceedings may be begun by writ or originating summons in the CFI. Alternatively, under Order 5, rule 5 of the RHC, proceedings may be begun by originating motion or

petition in the CFI only if under any written law the proceedings in question are required or authorized to be so begun.

8. As regards the Tribunal, for the sake of informality, the Judiciary proposes the use of relatively simple and general forms to enable parties to set out their grounds of application and response in a succinct manner. There are generally two modes of commencement of proceedings for the Tribunal. One is an originating notice of application or originating notice of claims, using Form 1 or 8 of the Schedule of CTR. The other is an application for leave to apply for a review of the reviewable determinations of the Competition Commission and the Communications Authority (“CA”) (hereafter collectively called “the Commission”) using Form 7.

Case Management

9. Both the CFI and the Tribunal would take a proactive approach in case management to help ensure the expeditious handling of cases as necessary. In general cases, in the CFI, the case management powers are mainly exercised by the Registrar until after the case has been set down for trial. On the other hand, for the Tribunal, having regard to the possible scale and complexity of competition cases, the Judiciary envisages that the arrangements in the Tribunal would be similar to the specialist lists in the CFI in that interlocutory matters to be heard in chambers, unless otherwise directed, will be handled by the Member of the Tribunal (i.e. a Judge) and not by the Registrar. In other words, Members of the Tribunal will take the driving seat. Furthermore, it is intended that a specific Member of the Tribunal will be assigned at the outset to take continuing charge of a case from its inception to conclusion.

10. The case management provisions for the Tribunal are similar to those of the CFI in that both largely rely on Order 25 of the RHC. However, for the Tribunal, as indicated in rule 25 of the CTR, the Judiciary has proposed that certain rules in Order 25 of the RHC do not apply. For example, the procedures for taking out case management summons and conferences under the RHC do not apply. By doing so, the Tribunal will have a more flexible case management procedure. The Tribunal will actively and continuously manage a case and initiate case management actions as soon as possible.

Intervention

11. Intervention by interested parties is possible in proceedings in the CFI. Specifically, parties who have some interest which is directly related to or connected with the subject-matter of an action may be added as a party under Order 15, rule 6(2) of the RHC.

12. Given the potential implications of the Tribunal's decisions on the relevant sector(s) and the related consumers etc., the Judiciary considers it necessary to introduce a more specific and elaborated procedure to facilitate early intervention by interested parties. Rules 19 and 20 of the CTR provide for the procedure relating to intervention by a person having a sufficient interest in the proceedings.

13. Besides, section 120 of the CO provides that the Commission may, with the leave of court, intervene in Tribunal proceedings involving alleged contravention or involvement in a contravention of a conduct rule. An application for leave should be made in the prescribed form. Rule 21 of the CTR provides for the detailed procedures for such intervention.

14. In general, for the types of proceedings falling within rule 19(1) of the CTR where we consider that intervention (whether by interested parties or the Commission) would be more likely, the Registrar will publish a public notice with relevant information of the case so that any intended intervener may apply to intervene within 28 days of the notice.

15. Where intervention is permitted, the Tribunal will give directions for the conduct of the intervention. For interveners other than the Commission, the extent and nature of the intervention permitted and the directions necessary will depend on the particular circumstances of the case. For the Commission, according to section 120 of the CO, if intervention is allowed, the Commission will from the date of the grant of leave become a party to the proceedings and has all the rights, duties and liabilities of a party to the proceedings.

Discovery and Inspection of Documents

16. There is automatic discovery in proceedings begun by writ in the CFI¹. Discovery is automatic upon close of pleadings.

¹ Order 24, rules 1 and 2 of the RHC refer.

17. In contrast, the Judiciary does not suggest automatic discovery of documents for proceedings in the Tribunal. Instead, parties need to apply to the Tribunal for discovery and production of documents (rule 24 of the CTR). This is similar to the position of proceedings begun by originating summons or petition in the CFI. This helps save the costs and efforts of the parties concerned, and ensures that discovery takes place only insofar as it is necessary for the fair disposal of the case and is proportionate. Further, this will enable the Tribunal to consider whether confidential and sensitive information, which may be fairly common for competition cases, should be required to be disclosed.

18. Pursuant to rule 24(3) of the CTR, in deciding whether to order discovery of documents, the Judiciary suggests that the Tribunal take into account all the circumstances of the case, including the following :

- (a) the need to secure the furtherance of the purposes of the CO as a whole;
- (b) whether the information contained in the document sought to be discovered or produced is confidential;
- (c) the balance between the interests of the parties and other persons; and
- (d) the extent to which the document sought to be discovered or produced is necessary for the fair disposal of the proceedings.

Confidential Treatment of Information

19. The CFI has inherent jurisdiction for confidential treatment of information, though the RHC has no express provision on this matter. For example, with the court's agreement, confidential information may be redacted from documents to be made available to the other parties and/or the public.

20. As commercially sensitive or confidential information may be commonly encountered in competition cases, the Judiciary has proposed in rule 37 of the CTR that a party may apply to the Tribunal for confidential treatment of the whole or part of any document to be disclosed/being disclosed by itself or any party in connection with any proceedings. In other words, if confidential treatment is accorded to a

document, while the Tribunal will have full access to the document, some parties may not be given the full version of the document.

21. Confidential treatment is only to be accorded to information that genuinely requires to be protected. According to rule 37(6) of the CTR, in deciding whether to grant confidential treatment of a document, the Tribunal will take into account all the circumstances of the case, including the following :

- (a) the public interest;
- (b) for any commercial information relating to an undertaking – the legitimate business interests of the undertaking;
- (c) for any information relating to the private affairs of a natural person – the interests of the natural person; and
- (d) the interests of justice.

Rules of Evidence

22. For the CFI, subject to the provisions of the RHC, the Evidence Ordinance (Cap. 8) and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses *shall* be proved by the examination of the witnesses orally and in open court².

23. For the Tribunal, section 147 of the CO provides that save for certain proceedings³, the Tribunal is not bound by the rules of evidence and may receive and take into account any relevant evidence (including hearsay evidence) or information, whether or not it would be otherwise admissible in a court of law. According to the Government, this enables the Tribunal to consider evidence collected from diverse sources. The Judiciary has further suggested in rule 35 of the CTR that the evidence of witnesses at the hearing of any proceedings *may* be taken orally on oath or affirmation, or by affidavit, declaration or otherwise as the Tribunal thinks fit.

² Order 38 rule 1 of the RHC refers.

³ The exceptional proceedings are those in which the Commission applies for an order for (a) a pecuniary penalty order under section 93; and (b) a financial penalty order under section 169.

Review of Reviewable Determinations

24. In the CTR, the procedure of the leave application for review of reviewable determinations is very similar to that of the leave application for judicial review, but some simplification is suggested to save efforts and legal costs.

25. For example, in the CFI, after leave for application for judicial review is granted, the applicant needs to submit another document as the application for review. But, pursuant to the proposed rule 62 of the CTR, unless the Tribunal otherwise directs, a leave application for review of reviewable determination would stand as an application for that review.

Validity of Originating Documents

26. For the purpose of service, an originating document by the filing of which proceedings are commenced in the CFI is valid in the first instance for 12 months beginning with the date of its issue⁴.

27. Under rule 18(1)(a) of the CTR, on the other hand, the Judiciary suggests prescribing a shorter validity period of 6 months for cases before the Tribunal because of several considerations.

28. First of all, the Judiciary takes the view that the issue of validity is unlikely to arise in the case of applications for review of reviewable determinations (i.e. Part 3 of the CTR) since an application must normally be filed within 30 days after the day on which the determination was made. Once leave is given, the relevant papers will have to be served within 7 days (rule 64 of the CTR). Likewise, the issue is unlikely to be of much relevance to enforcement proceedings brought by the Commission (i.e. Part 4 of the CTR) since it is not expected that the Commission will issue proceedings unless there is an intention to serve them forthwith.

29. The issue therefore mainly concerns follow-on actions (i.e. Part 5 of the CTR). For such actions, the Judiciary has suggested a shorter validity period of 6 months because of the following reasons :

- (a) there will already have been an enforcement stage in which the relevant determinations on any anti-competitive behavior

⁴ Order 6, rule 8 and Order 46, rule 8 of the RHC refer.

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 to be commenced, a substantial period of time will have lapsed since the underlying events. In these circumstances, the sooner such a case is dealt with, the better;

- (b) given the commercial nature and the importance of competition cases to the relevant industry or the general public, cases before the Tribunal should be dealt with as expeditiously as is reasonably practicable; and
- (c) the need for expedition seems also to be 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 earliest date on which it can be brought. This is half of the 6-year limitation period for claims brought in the courts based on the usual causes of legal actions, such as claims for damages in contract or tort as provided by section 4 of the Limitation Ordinance (Cap. 347).

Direction to File Pleadings

30. In the CFI, for actions begun by writ, unless the court gives leave to the contrary or a statement of claim is indorsed on the writ, the plaintiff must serve a statement of claim on the defendant. Similarly, a defendant who gives notice of intention to defend an action must, unless the Court gives leave to the contrary, serve a defence on every other party to the action who may be affected⁵.

31. In general, for informality, the Judiciary does not suggest that the Tribunal adopt strict rules on the filing of pleadings, except for follow-on actions. But, the Judiciary has proposed in rule 27 of the CTR that the Tribunal may direct the parties to file pleadings at any stage of the proceedings as it thinks fit. This flexibility is to cater for proceedings which will benefit from the presence of pleadings and certain proceedings transferred from the CFI.

⁵ Order 18 of the RHC refers.

Miscellaneous Differences

32. There are also a few minor differences between the Tribunal and the CFI as follows :

- (a) jury trial : while the RHC stipulates that a cause or matter, or any question or issue, may be tried before a judge with a jury or any other mode provided in the order⁶ , there is no jury trial in the Tribunal;
- (b) searching of documents : with some exceptions, parties to a CFI proceeding may search for documents of the related proceedings without leave of the court⁷. However, for the Tribunal, the Judiciary has proposed in rules 55 and 56 of the CTR that parties to proceedings in the Tribunal need to obtain leave from the Tribunal to search and inspect documents other than the originating documents and the Tribunal's judgments or orders. This provides better safeguards for the protection of confidential and sensitive information contained in the documents;
- (c) interrogatories : Order 26 of the RHC on interrogatories is generally applicable to Tribunal proceedings. There is however one exception as provided for under rule 26 of the CTR. While a party may serve on any other party interrogatories relating to any proceedings without leave of the CFI, one may not do the same without the leave of the Tribunal. This is to streamline the procedures and to ensure that only such interrogatories which are considered to be necessary either for disposing fairly of the case or for saving costs would be allowed;
- (d) service out of the jurisdiction : in the Tribunal, according to rule 16 of the CTR, a party has to obtain leave for the service of originating document, summons, notice and order out of the jurisdiction. On the other hand, in the CFI, service of a writ out of the jurisdiction is permissible without the leave of the court if each claim made by the writ is a claim which by virtue of any written law the CFI has power to hear and

⁶ Order 33, rule 2 of the RHC refers.

⁷ Order 63, rule 4 of the RHC refers.

determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the CFI or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction⁸; and

- (e) third party notice : for the Tribunal, pursuant to rule 23 of the CTR, a party may not issue a notice under Order 16, rule 1(1) or 8(1) of the RHC (“Third Party Notice”) without the leave of the Tribunal. For the CFI, leave is similarly required, unless the Third party Notice under Order 16, rule 1(1) of the RHC is issued before the defendant serves his defence⁹. Leave, however, is not required for Third Party Notice issued under Order 16, rule 8(1) of the RHC. The proposed leave requirements for the Tribunal seek to enable its better management of cases at an early stage of the proceedings.

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⁸ Order 11, rule 1(2) of the RHC refers.

⁹ Order 16, rule 1(2) of the RHC refers.