CONSULTATION PAPER ON
THE PROPOSED SUBSIDIARY LEGISLATION AND
PRESIDENT'S DIRECTIONS FOR THE COMPETITION TRIBUNAL

SUBMISSIONS

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)[1] 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] http://www.cedb.gov.hk/ctb/eng/telecom/Guidelines_on_Practice_&_Procedure.pdf

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. <u>COMPETITION TRIBUNAL RULES</u>

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 one or more specially qualified assessors."

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).

B. PRESIDENT'S / PRACTICE DIRECTIONS

31. As a general observation, the Practice Directions should provide guidance on the appropriate stage at which a party must challenge the jurisdiction of the Tribunal (for example, whether the respondent must raise a jurisdiction challenge in its response or by a specified form).

32. Paragraph 32 (Conduct of hearing)

32.1 Guidance as to circumstances under which final hearings may be held in chambers open to the public may be given as such would allow representation by qualified solicitors in appropriate circumstances. Likewise under **paragraphs 69 and 71** (applications for leave or to set aside leave to review a reviewable determination), where it is not understood why such an application should be made in open court as opposed to in chambers open to the public.

33. Paragraph 37 (Representation)

33.1 The Law Society commented above on rights of audience (paragraph 12 herein). Sub-rule 25(1)(b)(ii) provides that a party may be represented by "any other person allowed with leave of the Tribunal to appear on the party's behalf". Apart from any other consideration as to limiting rights of audience before the Tribunal, guidance may be provided as to such other person as may appear.

34. Paragraph 40 (Case summary)

34.1 The Law Society notes the requirement to file a "case summary" so that the Registrar can publish a notice based on the summary as required under Rule 17 of the CTR. However, it seems that the basis for a party providing such a summary is not expressly set out in the CTR. A specific requirement to file a case summary should be included in the CTR so that parties are aware of the necessary filing requirements in each case.

The Law Society of Hong Kong
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