

Guide to proceedings in the Competition Tribunal: Reviewing a reviewable determination

This leaflet is designed to provide you with a brief outline of the practice and procedure of reviewing a reviewable determination in the Competition Tribunal (“the Tribunal”).

The principal governing legislation is the Competition Ordinance, Cap. 619 (“CO”). The practice and procedure of the Tribunal is mainly governed by the Competition Tribunal Rules (“CTR”) and the Competition Tribunal Practice Directions (“CTPD”) No.1 and No.2. Where the CO and CTR make no provision for a matter, the Rules of High Court (“RHC”) apply to all proceedings, so far as they may be applicable to that matter. Therefore, you should read CTR, CTPD as well as the relevant RHC for full details.

This leaflet is for general reference only and should not be treated as a complete or authoritative statement of law or the practice of the Tribunal. Whilst every effort has been made to ensure that the information provided in this leaflet is accurate, it does not constitute legal or other professional advice. The Judiciary cannot be held responsible for the content of this publication.

1. What should be considered before applying for leave to review a reviewable determination?

If you are a litigant in person, it is advisable that you read this pamphlet carefully before you commence proceedings for reviews.

Reviewing a reviewable determination

You should ask yourself the following questions before applying for leave to review a reviewable determination:

1. Am I entitled to apply for leave to review a reviewable determination?
2. Am I within time to apply for leave?
3. What are the expenses?
4. Can I afford the time?
5. Will I need a solicitor?

1.1 Am I entitled to apply for leave to review a reviewable determination?

First of all, check if the determination which you would like to review falls within the definition of reviewable determination as defined in section 83 of the CO. If so, you then have to ascertain if you are a person or undertaking falling within section 85(1) of the CO. If not, then you must satisfy the Tribunal that you have a sufficient interest in the reviewable determination as provided for by section 85(2) of the CO before you can apply.

1.2 Am I within time to apply for leave?

An application for the review of a reviewable determination must be made within 30 days after the day on which the determination was made. The Tribunal may extend the time limit provided that there is a good reason for doing so and no injustice would be caused as a result of the extension. In any event, an application for review may not be made more than 3 years after the day of the determination.

1.3 What are the expenses?

You will usually need to pay a filing fee to the Tribunal to start your action.

You may also need to obtain a report from an expert and ask this expert to come to the Tribunal to give evidence on your behalf. You will have to pay expert's expenses and charges.

If you engage a solicitor or barrister, you will usually have to pay for fees and the expenses yourself. If you lose, you may have to bear the expenses of the respondent.

1.4 Can I afford the time?

You will need to take time to prepare your case. For example, you will have to put together copies of all relevant documents or spend time

getting statements from witnesses. You will probably be required to attend hearings at the Tribunal.

1.5 Will I need a solicitor?

You may act by a solicitor or in person. If a company is the applicant, it will need a solicitor to represent it.

Please be reminded that legal aid is **not** available to proceedings before the Tribunal. You may be able to get free legal advice through the Free Legal Advice Scheme of the Duty Lawyer Service at some District Offices. For details, please refer to the website of the Duty Lawyer Service at <http://www.dutylawyer.org.hk>. The pro-bono scheme of the Bar Association may also give you some help. Its office is situated at LG2 Floor of the High Court Building.

Where the parties are limited companies

If any of the parties is a limited company, it has to be represented by a solicitor unless leave is granted by the registrar of the Tribunal (“the Registrar”) for a director to represent the company. The application has to be made to the Registrar. It has to be supported by affidavit or affirmation made by its director exhibiting a board resolution of the company authorizing the director to represent the company in the proceedings. The reasons should be stated and the documents in support must be exhibited. Whether to grant the leave or not is purely the discretion of the Registrar. The applicant cannot appeal against this decision.

You may make enquiries about the application from our staff member at the Tribunal Registry.

2. Preparation for the proceedings

2.1 If you have to resort to the Tribunal to solve the disputes and you have to act in person, then you should get full preparation for the proceedings.

You need to:

1. Gather the evidence to support your case.
2. Prepare the originating notice of application (Form 7 of the CTR) and other necessary document as required by the CTR or as directed by the Tribunal.
3. Attend the Tribunal from time to time for the proceedings before trial.
4. Comply with the Tribunal orders. If you fail to do so without good reason, the Tribunal may enter judgment against you without a trial.
5. Prepare documents including witness statements and expert reports, if any, in accordance with the procedures and directions of the Tribunal.
6. Before trial, you have to put all relevant documents into bundles for the trial.
7. Lodge your bundles of documents with the Tribunal before trial.
8. If necessary, you may apply for witness summons to make sure your witnesses attend. You should do so at least 3 weeks before the trial, otherwise there may not be sufficient time to serve the witness summons on your witnesses.
9. You must be punctual for the trial. If you are absent, the trial will proceed in your absence.

10. At the trial, you have to follow the guidance of the Tribunal.
11. Whether or not you are legally represented or acting in person, you should explore the possibility of settling the disputes without going to the Tribunal. You may make proposals to the other side for settlement. This does not mean that you admit that your case is weak. It is only proposing a practical solution to solve the disputes.
12. If you have settled your dispute, you should inform the Tribunal immediately, particularly when your case has been set down for trial.

The practice to be observed

2.2 You should also observe the following practice:

1. You have to pay the prescribed fee for filing documents.
2. Whilst the Tribunal staff will give you assistance in the filing of documents, they would not give legal advice to you. If you wish to have legal advice, you have to consult your own lawyer. Tribunal staff can help you on the usual procedures, give you the forms you need and assist you to fill them in. But they cannot give you legal advice. For example, they cannot tell you if you have a good case.
3. The parties are entitled to use Chinese or English in their pleadings or other documents. The Tribunal may, on a party's application or on its own motion, order that all the proceedings be in Chinese or in English. Alternatively, the Tribunal may order a party to provide translation of the documents for the other party. The costs for the translation of the documents will be in the cause unless the Tribunal directs otherwise.

4. You should NEVER unilaterally contact the judge by any means in the course of the proceedings or relating to the matter. You should address your letters to the clerk to the judge or Registrar. You should also send a copy of the letter to the other party as well.
5. You should read the explanatory notes of the forms carefully before you complete them.
6. You should also remember that when you file a document with the Tribunal, you have to send a copy of that document to the other party or parties as well in order to give him or them notice. For the same reason, you should check your mailbox to see if the other party or parties have sent you documents. This is your own duty. You have no excuse for not doing this and tell the Tribunal that you have no notice of a document at the hearing.
7. You will only be required to attend the Tribunal upon notice or by summons.
8. You may make inquiries at the Tribunal Registry.
9. You have to observe the deadlines set by the Tribunal about the various steps in the preparation of the case. You may lose the case or suffer other serious consequences if you fail to observe these deadlines. Unless there are very good reasons, the Tribunal will not change the date of the trial.
10. Be punctual for the hearing or trial. You do not have to bring your witness to the Tribunal for the hearings before trial unless the Tribunal has made an order. For the trial, you have to come to the Tribunal with your witnesses. You should also bring along the bundles of documents and the original documents for the inspection of the

Tribunal or the other party. If you fail to arrange your witnesses to attend trial, the trial may proceed in the absence of your witnesses.

11. At the hearing or trial, you should act according to the direction of the judge. The parties will take turns to make speeches. When the other party is making a speech, you should not interrupt even if you disagree. You may take notes of your disagreement and put forward your arguments when your turn comes. The judge may also set a time limit for you to make a speech or to ask questions of a witness.
12. You should behave properly in the Tribunal. You must not use abusive language or remarks. Although the atmosphere during the argument will sometimes become heated or even emotional, you should bear in mind that the best way to put forward your arguments is to speak in a calm, cool and polite manner.
13. After the hearing or trial, if the judge delivers the judgment and the reasons orally, you should not interrupt even if you do not agree with the judge. You may seek leave to appeal or appeal against the judge's decision depending on the nature of the order made by the judge.

3. The Forms in the Schedule to the CTR

- 3.1 There are several forms in the Schedule to the CTR. You have to use the appropriate form as prescribed by the CTR to commence or conduct proceedings in the Tribunal. For example, you have to use Form 7 to apply for leave to review a reviewable determination. For making an interlocutory application, you have to use Form 2. The relevant forms can be obtained from the staff members of the Tribunal Registry. Alternatively, you may download the forms from the Tribunal website.

3.2 You should read the explanatory notes to the forms carefully before you complete a form. They give you the guidelines for completing the forms. If you have any doubt, you should consult your own lawyer.

4. Applying for leave to review a reviewable determination

4.1 Reviewing a reviewable determination involves two separate stages. You have to make an ex parte application for leave to make an application to review. Only if leave is granted will the Tribunal hear full arguments from all parties.

4.2 The one who applies for leave is called the applicant and the competition authority is called the respondent.

4.3 An application for leave to apply for a review of a reviewable determination under section 84(2) of the CO must be made ex parte by filing (a) a notice in Form 7 in the schedule to the CTR setting out the relief sought; and (b) an affidavit in support of the application.

4.4 If the leave application is not made within the time prescribed in section 88(1) of the CO, the originating notice of application filed must set out the extension of time sought under section 88(2) of the CO and the grounds for that extension.

4.5 The applicant must, within 1 day after making the application for leave, serve on the respondent all the documents that have been filed.

4.6 Please also read paragraphs 73 to 87 of the CTPD No.1.

5. Service of the originating notice of application

5.1 Rule 13 of the CTR governs service of an originating document including the originating notice of application.

5.2 An originating document required to be served on a person under the CTR is duly served if—

(a) a copy of the document is served personally on the person;

(b) where the person is within the jurisdiction—

(i) a copy of the document is sent by registered post addressed to the person at the person's usual or last known address; or

(ii) if there is a letter box for that address, a copy of the document enclosed in a sealed envelope addressed to the person is inserted through the letter box; or

(c) a copy of the document is served by such method as directed by the Tribunal under rule 13(8) of the CTR.

5.3 You have to prove by affidavit the service of the originating notice of application. In the affidavit, you have to state that the sealed copy of the originating notice of application has been served on a date (including the day of the week) by you personally on the respondent. If the service was by post or by insertion through the letter box, the affidavit will have to state that the document has not been returned through the post and that it will come to the respondent's knowledge within 7 days from the date of posting. If you have an agent to serve the document, your agent has to make such an affidavit.

5.4 The applicant should pay attention to the notes in the originating notice of application. In particular, the applicant should state the address for service in Hong Kong.

6. Determination of the leave application

6.1 The application may be determined with or without a hearing. If a hearing is required, it will be heard in open court.

6.2 The Tribunal may invite the putative respondent to take part in the leave application by making written submission or attending a hearing.

6.3 If the Tribunal grants leave to make an application for a review of a reviewable determination, it may (a) specify the grounds in respect of which leave is granted; and (b) impose terms (including those relating to costs and security) that the Tribunal thinks fit.

6.4 If leave is refused, the applicant may appeal to the Court of Appeal against the decision within 28 days after the day on which the decision is made.

7. Application for Review

7.1 If leave to make an application is granted, unless the Tribunal otherwise directs, the application for leave is to stand as an application for that review, and the application for that review is regarded as having been made on the date on which the application for leave is made. The

Tribunal may give directions as to the further conduct of the application for the review when it grants leave to make the application or at any time after that.

7.2 The applicant must, within 7 days after the day on which the leave was granted, serve on (a) the respondent and the interested parties that the Tribunal may direct (i) the order granting the leave; and (ii) any directions given by the Tribunal under rule 62(3) of the CTR; and (b) the interested parties that the Tribunal may direct all the documents that have been filed under rule 60(1) of the CTR.

7.3 Where you have to serve on a limited company, you can serve the document by leaving it at its registered office.

7.4 Where you have to serve on an individual or a business run by a sole proprietor or partnership, you can adopt any one of the ways of service mentioned under section 5 above. However, for service on a partnership business, you can also serve the document on any one of the partners or on the person having control or management of the business at the principal place of business of the partnership, or you can mail it to that address by registered post.

7.5 You have to prove by affidavit or affirmation (i.e. a document by which you have to make an oath) the service of the documents aforesaid in the way as explained under section 5 above.

7.6 The respondent must, within 28 days after the day on which the documents are served, file and serve a response and an affidavit in opposition.

7.7 The applicant may, within 28 days after the day on which the response and affidavit in opposition are served, file and serve an affidavit in reply.

8. Stay of execution of a reviewable determination

8.1 An application for a stay of execution of a determination under section 89(2) of the CO must be made by filing a summons and an affidavit in support of the application.

9. The evidence and burden of proof

9.1 Each party to the proceedings must collect evidence to support his case. Generally speaking, the burden of proof is on the party who makes the allegation. Evidence can be in various forms, including testimony from witnesses, documents, photographs, objects, audio or video tapes or discs or electronic data contained in any tapes or discs etc. It is usually adduced by way of affidavits.

10. Interlocutory proceedings

10.1 Before the matter goes to trial, you may have to go through interlocutory proceedings. They are designed to ensure that preparations are properly done and evidence is put in place for the matter to be tried by the Tribunal. They include case management hearings or interlocutory applications.

Case management hearing

10.2 Case management directions may be given at the time when leave to apply for review is granted or at any time after that. In such hearing, the Tribunal would give a timetable for preparation of the case. The Tribunal would set various deadlines for the parties to comply with directions before the trial. The Tribunal can also fix the trial date in such a hearing.

Interlocutory applications

10.3 Particular applications may be taken out by a party before the trial. The usual applications for these proceedings include:

- (1) application for extension of time for complying with certain directions under the rules or the order of the Tribunal;
- (2) application for leave to file further affidavit or documents;
- (3) application to stay the execution of a reviewable determination; or
- (4) application for documents to be disclosed (discovery of documents) from the other party.

10.4 You should think carefully before taking out interlocutory applications as they may cause delay in getting to trial or wasting costs.

10.5 Interlocutory application is made by summons in Form 2, supported by affidavits or affirmations, to be filed with the Tribunal and served on the other party.

- 10.6 The Tribunal may give directions for the filing of affidavit or affirmation to oppose the application, and for the applicant to file an affidavit and affirmation in reply.
- 10.7 The summons will be heard by a judge or the Registrar on a date fixed by the Tribunal. At the hearing, no witness should be called to give evidence unless the Tribunal has specifically ordered it.
- 10.8 At the end of the hearing, the judge or Registrar will make an order or give a judgment. The judge or Registrar may order costs against the party who fails at the hearing. The costs may be ordered to be paid at the end of the main hearing or to be paid forthwith.

11. Assistance that you can get from this leaflet

- 11.1 The purpose of this leaflet is to introduce to litigants in person the broad outlines of the proceedings on reviewing a reviewable determination in the Tribunal. It is designed to give information about the proper procedures of the proceedings, the manner the parties should present their case, evidence and other materials to the Tribunal. This will also assist the Tribunal hearing the matter so that the judge does not have to explain the procedures described here again to the litigant in person in the course of the proceedings.
- 11.2 The leaflet is not intended to be a summary of the practice, the CTR or the RHC. They only give guidelines on the procedures generally. For details and further information, you should refer to the rules

themselves. The CTR can be found in Chapter 619D of the Laws of Hong Kong. You should also refer to the CTPD as well. The English and Chinese versions of these documents can be found at the Tribunal website. You may make enquiry with the staff member at the Tribunal Registry.

11.3 The leaflet does not purport to state any views on substantive law.

Judiciary

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