



Department
for Business
Innovation & Skills

**COMPETITION APPEAL TRIBUNAL
(CAT) RULES OF PROCEDURE:
REVIEW BY THE RT HONOURABLE
SIR JOHN MUMMERY**

Consultation

FEBRUARY 2015

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Competition Appeal Tribunal (CAT): Review by the Right Honourable Sir John Mummery

The Government invited the Right Honourable Sir John Mummery to lead an independent review of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372). The aim of the review was to deliver new improved Rules to strengthen the appeal process against a background of reforms to competition law, and to ensure the Rules cover a wide variety of functions exercised by the CAT. This will enable proceedings to be handled in a cost-effective way whilst ensuring the process is streamlined, speedy and efficient.

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This consultation is relevant to the Judiciary, Legal profession and Business.

Foreword from Jo Swinson MP, Minister for Employment Relations & Consumer Affairs

The Competition Appeal Tribunal (CAT) is held in high regard as a specialist appeal body with expert knowledge and experience of reviewing economic regulation and competition decisions and we believe the CAT's functions are an integral and essential element of the wider UK competition regime.

Government proposed reforms to appeal bodies in its consultation, Streamlining Regulatory and Competition Appeals, in 2013 and committed to review the governance of the CAT. We published the Triennial Review of the Competition Appeal Tribunal in November 2014 and asked the Right Honourable Sir John Mummery to carry out an independent review of The Competition Appeal Tribunal Rules 2003 (SI 2003/1372) ("the Rules").



Over the years there have been many changes to the competition landscape but, other than an amendment in 2004 in relation to appeals under the Communications Act 2003 (SI 2004/2068)¹, the Rules have not been reviewed since the CAT's creation in 2003. Government considers the time is right to review the CAT's Rules of Procedure as its jurisdiction is expanding and further changes are imminent as a result of the Consumer Rights Bill.

Following his review, Sir John Mummery submitted a report² to the Secretary of State (SoS) setting out his recommendations to ensure that the Rules continue to provide a framework to enable the CAT to manage cases flexibly, efficiently, proportionately and, where possible, consistently. To accompany the Rules he has recommended that the CAT's Guide to Proceedings be revised to reflect the Rule changes.

Government agrees with Sir John Mummery's view that the revised Rules confer on the CAT all the powers it reasonably needs to achieve its objectives and give practical effect to the Governing principles. This is very much in line with the central role of case management in the Civil Procedure Rules (CPR) Part 3 which gives the court general powers for effective case management, costs management and costs capping.

¹ <http://www.catribunal.org.uk/240/Rules-and-Guidance.html>

² <https://www.gov.uk/government/publications/competition-appeal-tribunal-rules-of-procedure-mummery-recommendations>

This consultation is a chance to provide your views on these recommendations and identify any practical issues that may arise from them.

A handwritten signature in blue ink, appearing to read 'Jo Swinson'.

Jo Swinson MP

Minister for Employment Relations and Consumer Affairs

1. Executive Summary

- 1.1 The CAT plays a key role in the appeals regime, particularly in hearing appeals against competition decisions (under the Competition Act 1998 and the Enterprise Act 2002), and against regulatory decisions in the communications sector (under the Communications Act 2003). It also hears a number of appeals in other regulated sectors.
- 1.2 In accordance with the normal Triennial Review process for public bodies, the Government is committed to review the governance arrangements, rules and operation of the CAT against the background of the wider reforms to competition.
- 1.3 Government published the Triennial Review report of the Competition Appeal Tribunal and Competition Service³ on 7 November 2014.
- 1.4 In parallel with the Triennial Review, and as set out in the consultation on “Streamlining Regulatory and Competition Appeals”,⁴ Government invited the Right Honourable Sir John Mummery to review the Rules, taking into account changes to the competition landscape since the Rules were first introduced in 2003, and having regard to the proposed changes being considered as part of the Consumer Rights Bill 2014, particularly those relating to the expansion of the private actions regime.
- 1.5 The Terms of Reference for Sir John’s review asked him to develop and recommend revisions to the Rules, with a view to ensuring that robust case management powers can be applied flexibly, effectively (so as to ensure cases are dealt with quickly) and (insofar as is practicable) consistently in individual cases. He was also asked to give attention to the over-arching policy considerations of minimising the length and cost of decision making through the appeal process.
- 1.6 In recommending changes, the Government invited him to have specific regard to the cost-effectiveness and proportionality of the system, both in relation to taxpayers and the parties themselves.

³ <https://www.gov.uk/government/publications/competition-appeal-tribunal-and-competition-service-triennial-review-2013-to-2014>

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf

Rules to be reviewed

- 1.7 The key objectives of reform included focusing the appeals regime on identifying material errors, avoiding unmeritorious appeals, and ensuring that the process of hearing appeals is as efficient and cost effective as possible.
- 1.8 Whilst making revisions to the Rules, much of the structure and layout of the 2003 Rules have been preserved in order to ensure that they remain in a format with which users are already familiar.

Government is seeking views on the new draft Rules and, in particular, on the issues summarised below:

- 1.9 **Effective Case Management** - This forms the main part of the recommendations, and includes introduction of new rules and redrafted rules on;
 - 1.9.1 **Governing Principles (Rule 3)** - the introduction of a new section under Rule 3 incorporating the five main principles as set out in the CAT's "Guide to Proceedings" (2005) into the Rules as governing principles.
 - 1.9.2 **Striking Out (Rule 11)** - the addition of two new grounds for striking out a case: (i) where the CAT has no jurisdiction; and (ii) where the party has failed to cooperate to such an extent that the CAT cannot deal with the case justly and fairly.
 - 1.9.3 **New Evidence: (Rules 9, 15, 21)** - strengthening of the CAT's powers to control the admission of new evidence and introducing a new procedure whereby evidence is identified in the Notice of Appeal, thereby assisting an early focus on the issues.
 - 1.9.4 **Amendment of the Notice of Appeal (Rule 12)** - the removal of restrictions which prohibited the CAT from granting permission to add new grounds.
 - 1.9.5 **Settlement Offers and Costs consequences (Rules 45- 48)** - the introduction of new rules to encourage and facilitate the settlement of private actions.
 - 1.9.6 **Additional Parties and additional Claims (Rules 38- 40)** – the introduction of new provisions allowing the CAT to remove, add or substitute a party to proceedings.
- 1.10 **Fast track procedure (Rule 57)** - the introduction of a procedure more suited to proceedings by individuals and SMEs who may wish to pursue private actions for redress of competition law.
- 1.11 **Disclosure in private actions (Rules 59- 64)** - the introduction of a new disclosure regime to facilitate the efficient and streamlined disclosure of documents in private actions and control the use of disclosed documents.
- 1.12 **Transfers of mixed/hybrid claims (Rules 70-71)** - the extension of the CAT's existing power to transfer suitable cases to the ordinary courts to situations where only part of a claim needs to be transferred.

- 1.13 **Injunctions (Rules 66- 69)** - the introduction of a new, discretionary, power to grant injunctions (other than in proceedings in Scotland) when it is considered just and convenient to do so, in line with the expansion of the CAT's jurisdiction by the Consumer Rights Bill.
- 1.14 Sir John was also asked to consider whether there should be set target time limits and fixed timetables for cases. His view was that rules which provide for automatic outcomes and fixed timetables should be avoided; every case is different and the introduction of time limits could prevent the decision maker from taking account of all the relevant considerations in each individual case.
- 1.15 In addition, Sir John has recommended that, to accompany the Rules, the CAT should revise its Guide to Proceedings which is a source of practical guidance for both the parties and for their legal representatives on the conduct of proceedings in order to take account of the revised Rules.
- 1.16 This consultation covers the procedural rules that govern the function of the CAT in the United Kingdom. Responses will be used to determine whether the Government will take forward some or all of Sir John Mummery's recommendations, and whether there are other changes that it may be appropriate to make to the Rules.
- 1.17 Alongside this paper we have published an Impact Assessment, which sets out the estimated impact these proposals to the revised rules would have if they were implemented.
- 1.18 A copy of the revised draft Rules can be found alongside this paper on the consultation page and the Terms of Reference for the review is attached at Annex B.

2. How to respond

The consultation will begin on 5 February 2015, and will run for eight weeks, closing on 3 April 2015.

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

The Consultation Response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review> (until the consultation closes) and at Annex C of this document. If you decide to respond the form can be submitted online, or by email or by letter to:

Sandra McNeish
Department for Business, Innovation and Skills
Consumer and Competition Policy
3rd Floor,
1 Victoria Street
London SW1H 0ET

Tel: 020 7215 6439

E-mail: catrules@bis.gsi.gov.uk

A list of those organisations and individuals consulted is in Annex D. We would welcome suggestions of others who may wish to be involved in this consultation process.

Versions of this document are available in other formats, for example Braille, other languages or audio-cassette on request.

BIS consultations are digital by default but if required, printed copies of the consultation document can be obtained from the contact above.

3. Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

4. Help with queries

If you have questions about the policy issues raised in this document, please contact:

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Consumer and Competition Policy
3rd Floor, 1 Victoria Street
London SW1H 0ET

Tel: 020 7215 6439

E-mail: catrules@bis.gsi.gov.uk

5. Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Tel: 020 7215 1661

Email: Angela.Rabess@bis.gsi.gov.uk

A copy of the Code of Practice on consultations is at Annex A

6. The Recommendations

- 6.1 Government set out its intention to undertake a review of the Rules in the consultation “Streamlining Regulatory and Competition Appeals”.
- 6.2 In March 2014, Government invited Sir John Mummery to carry out the review in accordance with the agreed Terms of Reference which set out Government’s objectives of minimising the length and cost of proceedings in the CAT and of streamlining the efficiency of the appeal process. They also take account of the proposed expansion of the CAT’s jurisdiction to determine private actions for infringements of competition law (in accordance with the provisions of the Consumer Rights Bill). In making his recommendations, Sir John has drawn upon the Civil Procedure Rules (CPRs) but has made adaptations so as to suit the particular procedures used by the CAT.
- 6.3 In carrying out his review, Sir John was supported by an expert working group that comprised of the President of the CAT (the Hon Mr Justice Roth), the Registrar of the CAT (Mr Charles Dhanowa OBE QC (*Hon*), and the Hon Mrs Justice Rose. The expert working group also sought the views of the CAT’s User Group (which represents many of the CAT’s stakeholders) on the substance and form of the proposed Rules.
- 6.4 Sir John has made improvements to the existing Rules and has made a number of recommendations designed to ensure that the CAT continues to operate in an effective and efficient manner. In addition he has looked at clarifying the Rules where necessary; maintaining maximum flexibility for the CAT; avoiding time-wasting satellite litigation; and tried to encourage a reasonable attitude to procedural matters.
- 6.5 In addition to the changes to the Rules recommended by Sir John as part of the Rules review, we have taken the opportunity to make a number of other changes to the Rules including our commitment to consult on collective actions in the Consumer Rights Bill. While respondents are welcome to comment on these, this consultation focuses on those changes that relate in particular to the objectives set out in the Terms of Reference.
- 6.6 The recommendations have at their root a regard for the efficiency, cost effectiveness and proportionality of the CAT procedures, and can all be linked to the Governing principles that will be incorporated in Rule 3.
- 6.7 Respondents should note that further changes to the regime for infringements of competition law are proposed in schedule 8 to the Consumer Rights Bill by way of amendments to the Competition Act 1998 and the Enterprise Act 2002.
- 6.8 The Consumer Rights Bill is currently subject to Parliamentary scrutiny, and therefore Rules relating to the fast track procedure, injunctions, collective proceedings and settlement may change.

Robust case management

- 6.9 Robust case management forms the main thrust of Sir John’s recommendations, with the underpinning principle that each case will be dealt with justly and at a proportionate cost, expeditiously and fairly in accordance with the Rules.

- 6.10 Sir John is very clear that case management, in particular the fixing of an early case management conference (CMC), should be at the heart of the Rules. This has always been a feature of the CAT's practice and procedure and Sir John's recommended changes reinforce that approach (Rules 19, 52, and 114).
- 6.11 To achieve this, Sir John has recommended that the five principles, currently set out in the Guide to Proceedings (which was published in 2005 to accompany the Rules of Procedure and gives practical guidance to parties on the conduct of proceedings), should be incorporated into the Rules. This approach is akin to Part 1 of the (CPR) which sets out the overriding objectives for the Rules and provides a flexible but structured framework to allow the CAT to process cases.
- 6.12 The principles expressly provide for:
- Early disclosure in writing – Each party's case must be fully set out in writing as early as possible, with supporting documents produced at the outset.
 - Active case management – The proceedings will be actively managed to identify and concentrate on the main issues at an early stage to avoid undue delay.
 - Strict timetables – A target date for the main hearing will be set to ensure that cases are dealt with expeditiously and fairly.
 - Effective fact-finding procedures - The Tribunal will pay particular attention to the essential evidential issues and where this cannot be satisfactorily resolved without cross examination, the Tribunal may permit the oral examination of witnesses. Parties are encouraged to concentrate on the main issues and reach agreement where possible.
 - Short and structured oral hearings – The structure of the main oral hearing will be planned in advance, in consultation with parties with a view to avoiding lengthy oral arguments. The main issues would have been identified where parties will have set out their written arguments in full prior to the main oral hearing.
- 6.13 Sir John believes that incorporating the Principles into the Rules will help the CAT both in the task of case management generally and in the application of particular Rules.
- 6.14 Each case will be actively case managed by the CAT by requiring each side to set out in writing as early as possible, by encouraging co-operation between the parties and by requiring their co-operation with the CAT. The parties will be required to identify and concentrate on the main issues at the outset. The CAT will fix target dates for the hearing and will use structured timetables for proceedings up to the hearing avoiding unnecessary oral evidence and argument.

Q1: Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as "Governing Principles"?

Q2: Do you agree that the Governing Principles will help the CAT both in the task of case management generally and in the application of particular Rules?

Setting new target times and timetables for cases

- 6.15 Under the current system the CAT's Guide to Proceedings states the Tribunal will aim to complete straightforward cases within 9 months.
- 6.16 The Rules also provide a power to set case specific timetables.
- 6.17 In the consultation "Streamlining Regulatory and Competition Appeals", Government proposed to work with the CAT to reduce its target timescale for all straightforward cases to 6 months, and encourage the CAT to introduce a target timescale for all other cases of 12 months.
- 6.18 Sir John was asked to explore the extent to which it is possible to set new time limits for cases, and how existing powers within the Rules can be used to set case-specific timetables for all appeals so that parties are clear about what is expected of them at each stage of the process.
- 6.19 Sir John did not consider that the Rules should provide for automatic outcomes and fixed timetables. He felt that Rules which preclude the decision-maker from taking account of all relevant considerations in each individual case would not be helpful.
- 6.20 He has instead recommended that the five main principles currently incorporated in the Guide to Proceedings should be incorporated in Rule 3 as "Governing Principles". This will give practical effect to the Governing Principles and, taken together with the other changes, will confer on the CAT all the powers it reasonably needs to achieve its objectives.
- 6.21 The fixing of a target date for the main hearing as early as possible, with a structured timetable, will ensure that proceedings are conducted as swiftly as is practicable, taking account of the particular circumstances of each case.

Q3: Do you agree with the recommended approach on setting target times and timetables for cases? Please explain your answer.

Reducing the length of time between the end of the hearing and the issuing of the CAT's decision

- 6.22 Currently the decisions of the CAT are delivered by handing them down in public on a date fixed for that purpose. The new rules will give the CAT the ability to hand down a decision by publication on the Tribunal's website, as well as provide for new methods for handing down decisions to be introduced by way of a practice direction.
- 6.23 The CAT can (and does) update parties on the progress of work on a decision if it thinks there will be a delay in a delivery of that decision.
- 6.24 Sir John was asked to consider reducing the length of time between the end of the hearing and the issuing of the Tribunal's decision, by introduction of a statutory time limit if appropriate.

- 6.25 He concluded that it was difficult to set a meaningful deadline for the delivery of a decision as the time needed to reach a decision, and set out the reasons for it, will vary greatly from case to case. In some cases the time taken to finalise the text of the decision is consequential on submissions by the parties on the redaction of confidential information from the published decision.
- 6.26 Overall, he felt it would not increase the efficiency of the CAT to bind its members to the pressure of meeting a fixed statutory deadline for the delivery of a decision.

Q4: Do you agree with the rationale on not setting a time limit for the delivery of a decision?

Q5: Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?

Striking out (Rule 11)

- 6.27 In the current Rules this rule is called “The Power to Reject”. The Tribunal has the power, in certain, defined, circumstances and after hearing the parties, to strike out an appeal, in whole or in part at any stage of the proceedings.
- 6.28 Sir John was asked to consider whether the Rules allow the CAT proper scope to dismiss unmeritorious appeals at an early stage.
- 6.29 Sir John has recommended a new ground for striking out an appeal where a party has failed to cooperate to such an extent that the CAT cannot deal with the case justly and fairly.
- 6.30 He has also added a new provision to the Rules where the CAT considers that the Tribunal has no jurisdiction to hear or determine the appeal.
- 6.31 These add to the existing provisions at rule 11 which enable strike out where the notice of appeal discloses no valid grounds; where the appellant does not have sufficient interest in the decision being appealed; or where the appellant is deemed vexatious or has failed to comply with a rule, direction or order of the CAT.
- 6.32 The strike out provisions will allow the CAT to focus its attention and that of the parties on the points that have substance, thereby increasing its efficiency and effectiveness.
- 6.33 There is a similar power under Rule 41 to strike out private actions at any stage of the proceedings. Rule 42 introduces a power for the CAT to give default judgment in private actions. Both of these powers are only exercisable in defined circumstances.

Q6: Do you agree with the recommended new provisions for strike out?

Q7: Do you consider the Rules address unmeritorious appeals at an early stage, or are there other changes you consider might help to deal with such matters?

Evidence (Rules 9, 15, 21)

- 6.34 There is no criteria set out in the 2003 Rules for determining whether new evidence should be admitted on an appeal. Currently the CAT will decide what directions to give in relation to introducing new evidence.
- 6.35 Sir John Mummery's report notes that, in the ordinary courts the admission of new evidence on appeals is restricted by criteria confining its admission to just and equitable grounds. In practice this generally means that the new evidence is only admitted if it was not available, or could not, by the use of reasonable efforts, have been available, for use in the first instance.
- 6.36 Concerns have been expressed by some Regulators that parties were deliberately holding back evidence to "game" the system, and they have suggested that parties should not be permitted to introduce any new evidence at appeal. While Government recognises that introducing statutory provisions constraining the introduction of new evidence brings with it some risk, particularly in relation to satellite litigation, there may be benefits in terms of reducing the cost and time of cases for parties and the CAT.
- 6.37 Sir John was therefore asked to consider to what extent the Rules should be amended, and to set out the factors that the CAT should take into account when deciding whether to admit new evidence (that is evidence which could previously have been adduced at the investigation stage).
- 6.38 Sir John makes a distinction in his report between appeals from the ordinary courts and appeals to the CAT. In the ordinary courts appeals are usually brought from decisions made after, at a public hearing before a judicial body which has heard the evidence tested by cross examination and heard by rival submissions to the case. In the case of the CAT, the grounds of appeal will be set out in the notice of appeal, and will be the first independent judicial consideration of the case, including the factual matters in the case.
- 6.39 To address this gap Sir John has made the following recommendations to assist the CAT to exercise more control over the admission of new evidence on an appeal to enable it to deal firmly with cases where, for example, there are grounds for believing that an appellant has deliberately held back evidence that could and should have been produced to the regulator in the investigation leading to the decision under appeal.

Adducing New Evidence on Appeal

- 6.40 Sir John recommends inserting a new provision at rule 9(4)(h) to require the notice of appeal to contain a statement identifying any evidence, the substance of which, so far as the appellant is aware, was not before the initial decision maker. This will save the regulator time and cost in identifying the new evidence; currently, it is for the regulator to work through the papers submitted by the appellant to identify any evidence not previously submitted.
- 6.41 Sir John has also recommended a new provision at Rule 15(3) (c) which will require the defence to the appeal to set out in detail any objections to the admission of new evidence put forward by the appellant.

- 6.42 Rather than prevent the introduction of any new evidence on appeal, the recommended changes instead seek to strengthen the CAT's powers to control the admission of new evidence. The new procedure allows for new evidence to be identified and dealt with at an early stage in the proceedings, and will stop time wasting by appellants seeking to have evidence admitted late in the procedure.

Q8: Do you agree that Sir John's recommendations regarding the introduction of new evidence on appeal is a sensible and proportionate way of addressing Government's concerns about the withholding of evidence? Please explain your answer.

Admission of new Evidence

- 6.43 The CAT has a general power to admit or exclude evidence in rule 21(1) (b).
- 6.44 Sir John recommends a new provision in Rule 21(2) that lists the factors the CAT will consider when determining whether it would be just and proportionate to admit or exclude the evidence, including whether the evidence is necessary for it to determine the case. This more focussed early approach to new evidence will enable the CAT to make an informed decision about the admission of the evidence, thereby avoiding unnecessary time and costs from being spent later on dealing with evidence which should never have been admitted on the appeal.

Constraining the volume of evidence

- 6.45 Sir John Mummery was asked to consider constraining the volume of evidence and analysis introduced in appeals. The provisions in Rule 21 allow for a wide range of directions to be given by the CAT and, in particular, allow the Tribunal to place limits on the numbers of witnesses, reports and whether the parties are permitted to provide expert evidence.
- 6.46 The Government is aware that regulators have been criticised for not being sufficiently transparent, and for exhibiting confirmation bias – for example, not being willing to alter their initial views in the light of consultation responses. It is vital that regulators and competition authorities play their part in dis-incentivising appeals, by doing all they can to open up their reasoning and evidence to parties at the administrative stage.
- 6.47 Whilst it is important for appellants to have a proper chance to put forward evidence which supports their case, limiting the amount of witnesses, reports and expert evidence will assist the CAT as cases will be more manageable for the CAT and parties.
- 6.48 New Rule 27 "Expert Evidence" reflects the existing requirement established by the case law of the CAT that applicants for review under the Enterprise Act 2002 must apply for permission to adduce expert evidence where the evidence was not before the original decision maker.

Q9: Do you consider that the proposed changes to the Rules addresses Government concerns in relation to constraining the volume of new evidence by enhancing the CAT's powers?

Amendment of the Notice of Appeal – Rule 12

- 6.49 Currently, Rule 11(3) states that the CAT shall not grant permission to add new grounds to the original Notice of Appeal save in certain circumstances, such as matters of law or fact coming to light since the appeal was made, or if it was not practicable to include such grounds in the Notice of Appeal. This limitation on amendment has sometimes led to satellite litigation to determine whether an amendment should be permitted.
- 6.50 Sir John has recommended that the CAT should have a wider discretion to permit amendment to the Notice of Appeal. The revised Rule removes the restrictions contained in 11(3).
- 6.51 The CAT, in deciding whether to grant permission to amend, will take into account such circumstances as whether the amendment involves a substantial change or addition to the appellant's case, or whether the amendment is based on matters of fact or law which have come to light since the appeal was made; or whether it was not otherwise practicable to have included the matters in the Notice of Appeal.

Q10: Do you consider the rule as now drafted will give the CAT more flexibility when considering a variety of factors against permitting an amendment to an appeal? Please explain your answer.

Q11: Do you agree the rule will assist the CAT to minimise satellite litigation?

Fast Track Procedure (Rule 57)

- 6.52 The Government consulted on creating a 'fast track' mechanism in the CAT to facilitate access to justice for SMEs who currently find it too costly to seek remedies for competition matters through the courts.
- 6.53 In the Government Response to the consultation on "Private Actions in Competition Law"⁵, Government said "It would also a create a fast track for simpler cases in the CAT, delivering swift, cheap results, to empower SMEs to challenge anti-competitive behaviour that is restricting their ability to grow."

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf

- 6.54 Government asked Sir John to consider introducing provisions in the Rules to allow parties to jointly agree to pursue a “fast-track” procedure where there is agreement on evidence, witnesses and/or cost caps, and to consider whether there is merit in introducing other tracks.
- 6.55 Sir John Mummery supports the fast-track procedure as an effective way of dealing with private actions in a short timescale, at less cost and with a cap on costs. He has observed that the success of a type of fast track procedure in the Intellectual Property Enterprise Court (IPEC)⁶ reinforces the case for the CAT adopting its own fast track process.
- 6.56 Sir John considers the introduction of a fast track procedure for certain private actions are a significant revision to the Rules in conjunction with the proposed amendments to be made to paragraph 15A of Schedule 4 (Tribunal: procedure) to the Enterprise Act 2002 in accordance with the provisions in Schedule 8 to the Consumer Rights Bill.
- 6.57 Rule 57(1) defines the fast track procedure as proceedings where the trial takes place within six months and imposes a mandatory cap on recoverable costs. Rule 57(3) sets out the factors the CAT will take into account when deciding whether to make proceedings subject to the fast track procedure. These include: whether one or more of the parties is an individual, a micro enterprise or an SME; whether the time estimate for the final hearing is three days or less; the complexity and novelty of the issues; and the number of witnesses or documents involved.
- 6.58 These particular features will help to increase the access of individuals and SMEs to redress for damages caused to them by breaches of competition law.

Q12: Do you agree that a fast track procedure will benefit SMEs and micro businesses, providing them with access to redress? Please explain your answer.

Settlement offers and costs consequences (Rules 45 – 48)

- 6.59 The current Rules provide for defendants to make offers and payments to settle but do not set out a procedure for making such offers in the same way as Part 36 of the CPR. Nor do the Rules currently contain provisions for dealing with offers to settle in multi-defendant proceedings, such as in cartel damages claims, where one or more, but not all, of the parties make offers to settle.
- 6.60 Sir John has recommended that the CAT adopt Rules similar to Part 36 to encourage and facilitate the settlement of cases.

⁶ <http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-small-claims.pdf>

- 6.61 In particular, he has recommended the inclusion of special provisions for multi-defendant proceedings, as well as provisions regarding the cost consequences following judgment where a claimant fails to obtain a judgment more advantageous than a defendant's settlement offer, which was declined.
- 6.62 The recommended Rules also provide for clarification of a settlement offer at the request of the offeree. Taken together, the proposed changes will enhance the settlement regime, and encourage greater use of settlement offers as a means of resolving cases. This will improve the efficiency of the CAT, and save costs for all parties.

Q13: Do you agree with the new rules governing the procedure of settlement offers, particularly in relation to multi-defendant cases?

Disclosure in Private Actions (Rules 59 -64)

- 6.63 The current rules provide for the CAT to give directions for the disclosure between parties of documents, or classes of documents.
- 6.64 Sir John has recommended the introduction of new, detailed, provisions for the disclosure of documents by parties in private actions. In particular, parties will be able to make an application to the CAT for disclosure before proceedings have started. These applications must be supported by evidence but the Tribunal will be able to order disclosure where, amongst other things, doing so is desirable in order to dispose fairly of the anticipated proceedings; assist the dispute to be resolved without proceedings, or save costs.
- 6.65 The Rules will also allow the CAT to order disclosure of documents by a person who is not a party to the proceedings where the documents sought are likely to support the applicant's case, or adversely affect the case of one of the other parties to the proceedings, and disclosure is necessary in order to dispose fairly of the claim or to save costs. A person can apply to the CAT for permission to withhold disclosure of a document on the grounds that to do so would damage the public interest.
- 6.66 It should also be noted that Rule 101 introduces a new restriction on the subsequent use of documents provided in proceedings. This will limit how disclosed documents are used in a similar way to the equivalent rule in the CPR. It will also apply to pleadings or documents annexed to pleadings.

Q14: Do you have any views on the recommended provisions for disclosure in private actions, in particular on disclosure of documents before proceedings? Please explain your answer.

Transfers of mixed /hybrid claims (Rules 70-71)

- 6.67 The current Rules provide for the CAT to transfer claims for damages to the High Court or a county court in England and Wales or Northern Ireland, or the Court of Session or a sheriff court in Scotland. Claims for damages made in any of these courts will be able to be transferred to the Tribunal once section 16 of the Enterprise Act is brought into force.
- 6.68 In the private actions regime, there may be cases in which claims in a private action brought before the CAT include elements outside its jurisdiction, or a counterclaim may be made which is outside the CAT's jurisdiction. Sir John has recommended that the Rules should be amended to allow the CAT the ability to transfer a part of a case where that part concerns an issue that is outside the CAT's jurisdiction. For example, a contractual issue could be transferred to the ordinary courts, while the competition law points remained with the CAT for determination. Transferring part of proceedings between the Tribunal and these courts allows the case to be dealt with in the right court as efficiently as possible, saving parties and the judicial system time and cost.

Q15: Do you have any comments on the proposed approach by allowing the CAT to make an order to transfer the whole or part of the proceedings from the CAT to the appropriate courts?

Additional Parties and Additional Claims (Rules 38 – 40)

- 6.69 The current Rules allow the CAT to grant permission for one or more parties to be joined in the proceedings, in addition or substitution to the existing parties.
- 6.70 Sir John has recommended that these Rules be amended to set out in more detail the circumstances in which the Tribunal may exercise this power. For example in the case of a new party, if there is an issue involving the new party and an existing party connected to the matters in dispute in the proceedings and it is desirable to add the new party in order to resolve that issue. The proposed new rules also allow the Tribunal to order any person to cease to be a party if it is not desirable for that person to be a party to proceedings.
- 6.71 Sir John has also recommended changes to the current rules on additional claims, to clarify what constitutes an additional claim and to specify how and when such claims may be made. Again, the new rules are aimed at procedural efficiency.

Q16: Do you have any views on the proposed changes in respect of additional parties and additional claims?

Injunctions (Rules 66 – 69)

- 6.72 These rules introduce a new discretionary power for the CAT to grant injunctions in relation to proceedings, other than in Scotland, when it is considered just and convenient to do so, in line with the expansion of the CAT's jurisdiction by the Consumer Rights Bill.
- 6.73 Injunctions can be interim or final and can be granted conditionally or unconditionally as the Tribunal thinks just. Interim injunctions granted in proceedings subject to the fast track procedure may be granted without requiring the applicant to provide an undertaking as to damages, or there may be a cap on the amount of the undertaking as to damages.
- 6.74 This expansion of the CAT's powers is intended to facilitate the use of injunctions which, in some cases, is a more suitable and effective remedy than an award of damages.

Q17: Do you have any views on the way that the proposed rule will implement the power to grant injunctions?

- 6.75 There are a number of other issues that affect the way in which the CAT operates that were noted as part of Sir John's work.

These include:

Failure to comply with directions

- 6.76 (Rule 23) – extends the range of orders the CAT can make where there has been a failure to comply with directions, and can include an order for costs.

Costs

- 6.77 (Rule 103) – The CAT already has the power to make orders for costs at any stage in the proceedings in respect of the whole or part of the proceedings. The changes are a list of factors that the CAT will take into account in making a costs order (e.g. conduct of the parties, costs schedules and whether the party was successful).

Permission to appeal a decision of the CAT

- 6.78 (Rules 106 - 107) – provides that applications for permission to appeal must be made in writing, rather than at an oral hearing; the CAT will decide the application on the papers, unless there are special circumstances which render a hearing desirable.

7. Private Actions (Clause 80) Consumer Rights Bill

- 7.1 The Government asked the CAT to convene a specialist working group to a draft set of rules on the collective actions and collective settlement as a means of assisting in the debate on the Consumer Rights Bill as the Bill made its passage through Parliament. These draft rules were published in March 2014.
- 7.2 The Consumer Rights Bill amends the regulatory framework for the private actions regime, and in particular provides a great deal of discretion for what further legislative requirements should be in Tribunal rules. This was the direct intention of government policy⁷: competition cases are often complex and therefore it is appropriate to provide the CAT with a broad set of powers when it comes to hearing cases.
- 7.3 Whilst collective proceedings are not new, the revised regime is less prescriptive than the regime which was introduced by the Enterprise Act and is broader in scope with the introduction of opt-out collective proceedings and collective settlement. However, it is also government policy that only meritorious cases should be brought. As part of this process, there should be a preliminary merits test to decide whether a case should proceed.
- 7.4 Therefore, it is imperative that the rules which govern collective proceedings and collective settlement are as rigorous as they can be and that the merits test is robust and the right balance is struck in protection of the rights of all parties involved. Of particular interest to Government are the merits test and whether formal settlement offers (often called Part 36 Offers and sometimes referred to as Caldebank Offers) should apply to collective settlement.

Merits test

- 7.5 Government believes that only those who have a genuine interest in the case, such as genuinely representative bodies (for example, trade associations or consumer organisations) or those who have themselves suffered loss should be allowed to bring cases.
- 7.6 Government policy is therefore that claims should not be brought by law firms, third party funders or special purpose vehicles. How to achieve this aim has been subject of debate in both Parliament and with stakeholders. In order to achieve a balance between claimants and defendants, Government is minded to introduce presumption into the rules that organisations, that offer legal services, special purpose vehicles and third party funders should not be able to bring cases.

⁷ *Private Actions in Competition Law: A consultation on options for Reform – Government Response* (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf) sets out in detail Government policy on collective proceedings and collective settlement.

- 7.7 It is intended that such a presumption would act to bar non-genuinely representative bodies from bringing cases, but would permit the CAT to decide that a consumer organisation or a trade body that offers legal advice would be suitable to bring a case. The same is also true of special purpose vehicles: an organisation created with the sole purpose of bringing a case. However, there may be cases with multiple claimants who decide to create a separate entity for bringing the case to make case management easier. Again, the CAT should therefore have the ability to override the presumption.

Q18: Should Government introduce a presumption into the rules that organisations that offer legal services, special purpose vehicles and third party funders should not be able to bring cases?

- 7.8 Secondly, Government is interested in wider views as to whether the certification test strikes the correct balance when assessing the strength of the claim.

Q19: What are your views on the proposed certification criteria, in particular the tests on: assessing the strength of the claim and the availability of alternative dispute resolution?

Collective settlement

- 7.9 Government policy is to encourage parties to use Alternative Dispute Resolution (ADR) as a means to settle disputes. The Consumer Rights Bill introduces collective settlement: a CAT based mechanism for parties to agree a redress settlement, on an opt-out basis, for underlying claimants. Under the revised Tribunal rules, the CAT is also likely to have the same formal settlement offer provisions as the High Court.
- 7.10 The use of formal settlement offers should be encouraged where appropriate, but Government has concerns about their use in collective actions cases due to the unique nature of collective proceedings. They may incentivise the defendant(s) to offer a low settlement offer early on in the proceedings. Once a formal settlement has been offered the claimant is liable for the costs of the proceedings if that settlement is rejected, and the level of damages awarded at the end of the case is less than the settlement offered.
- 7.11 Therefore, there is a risk that the defendant(s) submit a low offer per underlying class member, which multiplied across the class results in the defendant paying significantly less in damages. The claimant, however, may not necessarily be able to assess whether or not the settlement offer represents reasonable redress to the class members. This is because presently there is a limited role for the court in a formal settlement offer and therefore no disclosure powers for the claimant to be able to assess the offer.

- 7.12 Due to the unique nature of collective proceedings, and that collective settlement is the appropriate mechanism for settling collective actions, Government is minded to exempt formal settlement offers from applying to collective actions.

Q20. Should formal settlement offers be excluded in collective actions?

Q21. If formal settlement offers are not excluded from collective actions, should there be special provision around the disclosure of information relating to the formal settlement offer, and how would they work?

Q22: Do you have any other comments on the proposed Rules; in particular do you consider there are other changes that could be made to achieve the objectives set out in the Terms of Reference?

8. Consultation questions

Q1: Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as “Governing Principles”?

Q2: Do you agree that the Governing Principles will help the CAT both in the task of case management generally and in the application of particular Rules?

Q3: Do you agree with the recommended approach on setting target times and timetables for cases?

Q4: Do you agree with the rationale on not setting a time limit for the delivery of a decision?

Q5: Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?

Q6: Do you agree with the recommended new provisions for strike out?

Q7: Do you consider the Rules address unmeritorious appeals at an early stage, or are there other changes you consider might help to deal with such matters?

Q8: Do you agree that Sir John’s recommendations regarding the introduction of new evidence on appeal is a sensible and proportionate way of addressing Government’s concerns about the withholding of evidence? Please explain your answer.

Q9: Do you consider that the proposed changes to the Rules address Government concerns in relation to constraining the volume of new evidence by enhancing the CAT’s powers?

Q10: Do you consider the rule as now drafted will give the CAT more flexibility when considering a variety of factors against permitting an amendment to an appeal? Please explain your answer?

Q11: Do you agree the rule will assist the CAT to minimise satellite litigation?

Q12: Do you agree that a Fast track procedure will benefit SMEs and micro businesses, providing them with access to redress? Please explain your answer

Q13: Do you agree with the new rules governing the procedure of settlement offers, particularly in relation to multi-defendant cases?

Q14: Do you have any views on the recommended provisions for disclosure in private actions, in particular on disclosure of documents before proceedings? Please explain your answer.

Q15: Do you have any comments on the proposed approach by allowing the CAT to make an order to transfer the whole or part of the proceedings from the CAT to the appropriate courts?

Q16: Do you have any views on the proposed changes in respect of additional parties and additional claims?

Q17: Do you have any views on the way the proposed rule will implement the power to grant injunctions?

Q18: Should Government introduce a presumption into the rules that organisations that offer legal services, special purpose vehicles and third party funders should not be able to bring cases?

Q19: What are your views on the proposed certification criteria, in particular the tests on: assessing the strength of the claim and the availability of alternative dispute resolution?

Q20: Should formal settlement offers be excluded in collective actions?

Q21: If formal settlement offers are not excluded from collective actions, should there be special provision around the disclosure of information relating to the formal settlement offer, and how would they work?

Q22: Do you have any other comments on the proposed Rules; in particular do you consider there are other changes that could be made to achieve the objectives set out in the Terms of Reference?

9. What happens next?

This consultation exercise will close on 3 April 2015. The Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).

The Government will, within four months of the close of the consultation, publish the consultation response. This response will take the form of decisions made in light of the consultation, a summary of the views expressed and the reasons given for the decisions finally taken. This document will be published on the Government's website

<https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review>

Annex A: Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Angela Rabess
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Angela on 020 7215 1661
or e-mail to: Angela.Rabess@bis.gsi.gov.uk

However if you wish to comment on the specific policy proposals you should contact the policy lead (see section 4).

Annex B: Terms of Reference

Streamlining Regulatory and Competition - Independent Review of CAT Rules of Procedure

Background Overview

The Government published its consultation on “Streamlining Regulatory and Competition Appeals”⁸ on 19 June 2013 in which it set out a package of measures to reform the appeals framework across regulatory and competition decisions. The key objectives of reform included focusing appeals regimes on identifying material errors, avoiding unmeritorious appeals, and ensuring that the process of hearing appeals is as efficient and cost effective as possible.

In particular, the consultation set out the Government’s concerns in relation to the way in which parties engaged with the regulator during the decision-making stage and whether and how the appeals process might affect a regulator’s ability to reach timely, robust decisions.

The Competition Appeal Tribunal (CAT) plays a key role in the appeals regime, particularly in hearing appeals of competition decisions (under the Competition Act 1998 and the Enterprise Act 2002), and of regulatory decisions in the communications sector (under the Communications Act 2003). It also hears a number of appeals in other regulated sectors.

Responses to the consultation demonstrated that the CAT is held in high regard by their stakeholders, and the Government agrees that the CAT’s expertise and experience in handling regulatory and competition appeals plays a very valuable role in ensuring robust decision making and ensuring that regulators are properly accountable for their decisions.

Having considered the responses to the consultation, the Government intends to proceed with a review of the CAT rules to explore ways of further strengthening and streamlining appeals processes. We consider that the review should be independently led by a senior member of the judiciary, and that the extent and scope of the review should be a matter for the Judge to determine, subject to certain considerations set out below.

⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf

1. Key Purpose

In accordance with the normal Triennial Review process for Arm's Length Bodies, the Government is committed to review the governance arrangements, Rules and operation of the CAT against the background of the wider reforms to competition.

This will be the first review of the Rules since the creation of the CAT in April 2003, despite the many changes to the competition landscape during that time. This is now an opportunity to review the Rules, and identify ways of streamlining the procedures taking into account the lessons learnt from 10 years of experience operating the rules.

2. Scope of Review

The Government invites the Rt. Hon Sir John Mummery to lead a review of the Competition Tribunal Rules⁹ and develop and recommend revised Rules of Procedure in line with the Terms of Reference set out here. The Rt Hon Sir John Mummery is also invited to recommend any further reform he may consider appropriate, particularly in light of the proposed reforms to the CAT in relation to changes to the private actions regime as set out in the Consumer Rights Bill.

The Rt Hon Sir John Mummery is asked to conduct his review, and develop recommended revised Rules, with a view to ensuring that robust case management powers can be applied flexibly, effectively (so as to ensure cases are dealt with quickly) and (insofar as is practicable) consistently in individual cases. The Rt Hon Sir John Mummery's attention is also drawn to an overarching policy consideration of Ministers, namely to minimise the length and cost of decision-making through making the appeal process as streamlined and efficient as possible.

In recommending changes, the Government invites the Rt Hon Sir John Mummery to have specific regard to the cost-effectiveness and proportionality of the system, both insofar as taxpayers are concerned and the parties themselves.

3 Rules to be reviewed

While it is for the Rt Hon Sir John Mummery to determine the extent of the review of the rules, the Government asks that he give specific attention to the following matters to enable proceedings to be handled and as quickly and efficiently as possible:

- Constraining the volume of evidence and analysis introduced in appeals – considering whether, and to what extent, the rules should be amended to set out the factors that the CAT should take into account when deciding whether to admit new evidence (that is evidence which could previously have been adduced at the investigation stage) in either communications or antitrust appeals.

⁹ SI 2003/1372 and SI 2004/2068

- Exploring the extent to which it is possible to set new target time limits for cases, and how existing powers within the Rules can be used to set case-specific timetables for all appeals so that parties are clear about what is expected of them at each stage of the process.
- Reducing the length of time between the end of the hearing and the issuing of the Tribunal's decision, by introduction of a statutory time limit if appropriate.
- Considering introducing provisions in the rules to allow parties to jointly agree to pursue a "fast-track" procedure where there is agreement on evidence, witnesses and/or cost caps, and to consider whether there is merit in introducing other tracks.
- Whether the CAT's rules allow it to proper scope to dismiss unmeritorious appeals at an early stage.

3.1 In considering whether and what other reforms might be appropriate, the Rt Hon Sir John Mummery may wish to consider suggestions put forward by respondents to the consultations, in particular:

- The granting of extensions for filing of defences in enforcement appeals;
- Indicative timetables and better case management tools "such as those available to the CC in context of energy regulatory appeals";
- Requiring the tribunal members to receive an agreed summary of the essential issues and "to decide on the most efficient way of using the time table available to resolve the points at issue";
- deadlines for making applications for permission to appeal and costs;
- Introducing a permission stage for all appeal hearings at the CAT;
- granting the CAT disclosure powers, including for third parties.

3.2 The rules must be exercised, and orders are made, in a manner that is consistent across United Kingdom.

3.3 It is envisaged the new rules will come into effect in April 2015, save that some rules may not come into force until winter 2015 when we expect the Bill has become an Act and the relevant provisions commenced.

4 Reporting and Accountability

The review will be chaired by the Rt Hon Sir John Mummery. Ministers will be kept informed of progress.

Ministers invite the Rt Hon Sir John Mummery to recommend revised rules for the CAT by 1 August 2014.

5 Communications

A short consultation will follow, once the Rules have been agreed in autumn 2014.

Annex C: Response Form - Competition Appeal Tribunal (CAT) Rules of Procedure, Review by the Right Honourable Sir John Mummery

A copy of this consultation can be found at:

<https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review>

You can complete your response online through

<https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review>

Alternatively, you can e-mail or post the completed response form to:

Sandra McNeish
Consumer and Competition Policy
3rd Floor, 1 Victoria Street
London SW1H 0ET

Tel: 020 7215 6439

Email: catrules@bis.gsi.gov.uk

The closing date for this consultation is 3 April 2015

Confidentiality and disclosure of responses

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses. If you wish your response to remain confidential you must provide a reason. Do you agree for your response to be published or disclosed if requested?



Yes



No

Your details

Name:	Ben Hawkins
Organisation (if applicable):	Litigation Management Limited (LML)
Job title (if applicable):	Director
Address:	Tarrant Place, 65 Tarrant Street, Arundel, West Sussex, BN18,9DJ
Telephone number:	020 3051 8645

Please tick the box from the list that best describes you, your company or your organisation.

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
✓	Other (please describe) Litigation manager. We work with solicitors firms to provide expert support in group litigation.

Question 1: Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as “Governing Principles”?

☒ Yes

☐ No

☐ Not sure

Comments:

Question 2: Do you agree that the Governing Principles will help the CAT both in the task of (a) case management generally and (b) in the application of particular Rules?

a ☒ Yes

☐ No

☐ Not sure

b ☒ Yes

☐ No

☐ Not sure

Comments:

Question 3: Do you agree with the recommended approach on setting target times and timetables for cases? Please explain your answer.

☒ Yes

☐ No

☐ Not sure

Comments:

Please see response to Q5 below.

Question 4: Do you agree with the rationale on not setting a time limit for the delivery of a decision?

☒ Yes

☐ No

☐ Not sure

Comments:

Question 5: Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?

☐ Yes

☐ No

☒ Not sure

Comments:

Guideline timings are helpful, but we agree that the weight of a statutory time limit is too much.

Question 6: Do you agree with the recommended new provisions for strike out?

☒ Yes

☐ No

☐ Not sure

Comments:

Question 7: Do you consider the Rules address unmeritorious appeals at an early stage, or are there other changes you consider might help to deal with such matters?

☒ Yes

☐ No

☐ Not sure

Comments:

Question 8: Do you agree that Sir John's recommendations regarding the introduction of new evidence on appeal is a sensible and proportionate way of addressing Government's concerns about the withholding of evidence? Please explain your answer.

☒ Yes

☐ No

☐ Not sure

Comments

The advent of collective actions and the extension of private enforcement actions broadens the range of matters dealt with by the CAT. A measure of discretion will preserve the ability to make a decision which is in the best interests of the case.

Question 9: Do you consider that the proposed changes to the Rules addresses Government concerns in relation to constraining the volume of new evidence by enhancing the CAT's powers?

☐ Yes

☐ No

☒ Not sure

Comments:

This is not an area directly within our experience.

Question 10: Do you consider the rule as now drafted will give the CAT more flexibility when considering a variety of factors against permitting an amendment to an appeal? Please explain your answer.

☒ Yes

☐ No

☐ Not sure

Comments:

Question 11: Do you agree the rule will assist the CAT to minimise satellite litigation?

☒ Yes

☐ No

☐ Not sure

Comments:

Question 12: Do you agree that a fast track procedure will benefit SMEs and micro businesses, providing them with access to redress? Please explain your answer

☒ Yes

☐ No

☐ Not sure

Comments:

We agree that a fast track mechanism is helpful, but it should not be considered as the sole solution for SMEs and micro businesses. Concerns that can prevent them seeking access to justice are not just about capping cost exposure but also about reluctance to commit management time and costs to an uncertain process. The availability of practical guidance about how to take action, together with availability of funding for costs can overcome these hurdles.

Question 13: Do you agree with the new rules governing the procedure of settlement offers, particularly in relation to multi-defendant cases?

☒ Yes

☐ No

☐ Not sure

Comments:

Question 14: Do you have any views on the recommended provisions for disclosure in private actions, in particular on disclosure of documents before proceedings? Please explain your answer.

☒ Yes

☐ No

☐ Not sure

Comments:

We support the use of pre-action disclosure as an efficient method of disposing of disputes.

Questions 15: Do you have any comments on the proposed approach by allowing the CAT to make an order to transfer the whole or part of the proceedings from the CAT to the appropriate courts?

☒ Yes

☐ No

☐ Not sure

Comments:

Delay and procedural confusion will inevitably follow if the CAT transfers part of any proceedings. Much better to extend the jurisdiction of the CAT to enable it to deal with the whole dispute.

Question 16: Do you have any views on the proposed changes in respect of additional parties and additional claims?

☐ Yes

☒ No

☐ Not sure

Comments:

Questions 17: Do you have any views on the way the proposed rule will implement the power to grant injunctions?

☐ Yes

☒ No

☐ Not sure

Comments:

Question 18: Should Government introduce a presumption into the rules that organisations that offer legal services, special purpose vehicles and third party funders should not be able to bring cases?

☒ Yes

☐ No

☐ Not sure

Comments:

We agree the Government's caution, but promote the view that potential claimants require expert support and practical guidance when initiating collective actions. In the current opt in regime, lead claimants or early adopters need to be reassured that their exposure to costs is contained and our role as a litigation manager has emerged from the gap left between solicitors, funders and insurers in addressing these challenges. Without this, cases simply don't get off the ground and access to justice is not provided. We believe that the presumption against law firms, SPVs and funders should remain but that role of independent litigation managers should be promoted to fulfill the representative role.

Question 19: What are your views on the proposed certification criteria, in particular the tests on: assessing the strength of the claim and the availability of alternative dispute resolution?

Comments:

We agree but repeat that expert guidance is required to provide effective access to justice to multiple claimants. Law firms and funders play an important part in this, but risk using the system to prioritise their own commercial interests in the absence of any restraint. However, the practical hurdles of initiating mass claims should not be overlooked and any idea that a claimant representative will come forward unsupported and with costs exposure, is misconceived.

Question 20: Should formal settlement offers be excluded from collective actions?

☐ Yes

☒ No

☐ Not sure

Comments:

Question 21: If formal settlement offers are not excluded from collective actions, should there be special provision around the disclosure of information relating to the formal settlement offer, and how would they work?

☐ Yes

☐ No

☐ Not sure

Comments:

Question 22: Do you have any other comments on the proposed Rules; in particular do you consider there are other changes that could be made to achieve the objectives set out in the Terms of Reference.

☐ Yes

☒ No

☐ Not sure

Comments:

Do you have any other comments that might aid the consultation process as a whole?

☐ Yes

☒ No

Comments:

Thank you for taking the time to let us have your views on this consultation. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes

☐ No

Annex D: List of Individuals/Organisations consulted

Attach a list of all those who are being consulted and ask individuals/organisations for names of others who should also receive the consultation.

39 Essex Street Chambers
Addleshaw Goddard LLP
Allen & Overy LLP
Anglian Water
Arnold & Porter
Arriva
Ashurst
Association of Convenience Stores
Association of General Counsel & Company Secretaries
BAA
Baker & McKenzie LLP
Bar Council
Barclays Bank Plc
Barry Rodger (University of Strathclyde)
Berwin Leighton Paisner LLP
Bill Wood QC
Bird & Bird LLP
Black Stone Chambers
Brick Court Chambers
Bristows
British Chambers of Commerce
British Institute of International and Comparative Law
BSkyB
BT
Burgess Salmon LLP
CBI
CEDR
Chancellor of the High Court
Charles Rivers Associates
Charles Russell Associates
Citizens Advice
Citizens Advice Scotland
City of London Law Society
Civil Aviation Authority
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
CMS Cameron McKenna LLP
Compass Lexecon
Competition and Markets Authority
Competition Law Association
Consumer Council for Northern Ireland
Consumer Council for Water
Consumer Focus
Consumer Focus, Scotland
Consumer Focus, Wales
Corker Binning

Crowell & Moring LLP
Decker, Chris Dr
DLA Piper
Dundas & Wilson LLP
Ernst & Young
ESRC Centre for Competition Policy (Professor Bruce Lyons, University of East Anglia)
European Commission
European Justice Foundation
Eversheds
Everything Everywhere
Faculty of Advocates
Federation of Small Businesses
Field Fisher Waterhouse LLP
Financial Services Authority
Financial Services Consumer Panel
Forum for Private Business
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Harding, Prof. Christopher (Aberystwyth University)
Harker, Michael
Hausfeld LLP
Herbert Smith LLP
Hogan Lovells
Hutchinson 3
In-house Competition Lawyers Association
Institute for Legal Reform
Institute of Directors
International Bar Association
International Chamber of Commerce UK
International Chambers of Commerce
Joint Working Party of the Bars and the Law Societies of the United Kingdom Keyworth, Tim
Kirkland & Ellis LLP
KPMG
Law Society
Law Society of Northern Ireland
Law Society of Scotland
Lever, Sir Jeremy QC
Linklaters LLP
Local Government Association
London School of Economics
MacCulloch, Angus (Lancaster University Law School)
Macfarlanes LLP
Maclay Murray and Spens LLP
Matrix Chambers
Mayer Brown International LLP
Merger Streamlining Group (Neil Campbell of McMillan LLP and J. William Rowley QC)
Monckton Chambers
Monitor
Nabarro LLP
National Audit Office
Northern Ireland Assembly

Northern Ireland Executive
Northern Ireland Utility Regulator
Norton Rose LLP
O2/Telefonica
Ofcom
Office of Rail Regulation
Ofgem
Ofwat
One Essex Court
ORR
Orrick, Herrington & Sutcliffe LLP
Osborne, Iain
Oxera
Oxford Law
Pinsent Masons LLP
Purnell, Nicholas QC
Rachael Mulheron
RBB Economics
Reed Smith LLP
Regulatory Policy Institute
Scottish Assembly
Scottish Competition Law Forum
Sharpe, Tom QC
Shearman & Sterling LLP
Shepherd and Wedderburn LLP
Simmons & Simmons
SJ Berwin LLP
Sky
Slaughter and May
Speechly Bircham LLP
Squire Saunders Dempsey LLP
Talk Talk
Taylor Wessing LLP
Tesco
Three
Towerhouse Consulting
Travers Smith LLP
Turner, Jon QC
UK Competitive Telecommunications Association
UK Competition Law Assoc (David Went of Sidley Austin)
University College London
University of East Anglia
University of Exeter
Virgin Media
Vodafone
Waddams, Catherine
Welsh Assembly
Whelan, Dr Peter (of University of East Anglia Law School)
Which?
Whish, Prof Richard (Kings College London)
White & Case LLP



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