



## Department for Business, Innovation & Skills

### **Competition Appeal Tribunal (CAT) Rules of Procedure: Review by the Right Honourable Sir John Mummery - Consultation Response Form**

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

The closing date for this consultation is 3 April 2015

Name: Catriona Munro

Organisation (if applicable): Maclay Murray & Spens LLP

Address: 1 George Square, Glasgow, G2 1 AL

Please return completed forms to:

Sandra McNeish

Consumer and Competition Policy

3<sup>rd</sup> Floor, Victoria 1 Victoria Street

London SW1H 0ET

Tel: 020 7215 6439

Email: [catrules@bis.gsi.gov.uk](mailto:catrules@bis.gsi.gov.uk)

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)



## Department for Business, Innovation & Skills

	Trade union or staff association
	Other (please describe)

**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 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:

**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:

**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 provisions regarding the introduction of new evidence on appeal need to take account of the position of appellants in third party appeals brought under section 47 of the Competition Act 1998 ("Section 47 appeals"). Appellants in Section 47 appeals will not be aware of what information was available, or capable of being made available to the respondent before the disputed decision was made. We agree that there should be no presumption against the introduction of new evidence, and this is particularly important where third party appeals are concerned. Indeed, the first time that a third party appellant will see the evidence relied on by the respondent is likely to be when the respondent submits its defence. As such, even if a third party could have made available evidence to the respondent prior to the final decision being made, it may not be fair to have expected that the third party incur the cost of adducing such evidence to the respondent before the point at which it can know that its interests have been affected.

**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:

**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:

**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:

**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:

**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 are concerned by the proposal to introduce a presumption into the rules that special purpose vehicles should not be able to bring cases. This would prevent class members, who have a genuine interest in the case, establishing a limited liability vehicle which would enable them to share limited liability. For example, it would seem to be reasonable for class members to establish a non-profit making special purpose vehicle for the purposes of bringing a case and for this special purpose vehicle to obtain ATE insurance for the purposes of ensuring it would be able to pay the defendant's adverse costs if ordered to do so. This would ensure that it is not just one individual class member or trade association that is burdened with potentially substantial personal liability. Whilst we recognise that such a special purpose vehicle would have the option of rebutting the presumption proposed by Government, having to rebut the presumption in and of itself is likely to entail substantial cost and risk (and would need to be funded, which is likely to present difficulties). As a result, the numbers of cases brought under the new collective proceedings could very well be limited.

We have no material comments regarding the proposals to introduce a presumption into the rules that organisations that offer legal services and third party funders should not be able to bring cases.



**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:

**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



© Crown copyright 2015

You may re-use this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) This publication is also available on our website at [www.gov.uk/bis](http://www.gov.uk/bis)

**BIS/15/75RF**