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RESPONSE TO THE DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS' CONSULTATION ON COMPETITION APPEAL TRIBUNAL RULES OF PROCEDURE: REVIEW BY THE RT HONOURABLE SIR JOHN MUMMERY

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1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer LLP (***Freshfields***) welcomes the opportunity to comment on the Department for Business, Innovation and Skills' (***BIS***) consultation (the ***Consultation***) on the Competition Appeal Tribunal (the ***Tribunal*** or ***CAT***) Rules of Procedure (the ***Rules***). We refer to the review of the Rules conducted by the Rt Honourable Sir John Mummery in August 2014 (the ***Report***) and the accompanying Draft Competition Appeal Tribunal Rules 2015 (the ***Draft Rules***).

1.2 Our comments are based on our experience of representing clients in a wide range of Competition and Market Authority (***CMA***) (previously, the Office of Fair Trading) proceedings under the Competition Act 1998 (***CA98***), together with a significant number of analogous proceedings conducted by other competition authorities worldwide. We rely on this breadth of experience to provide these comments on BIS's proposed approach to revising the Rules. The comments in this response are those of Freshfields and do not necessarily represent the views of any of our clients.

1.3 We prioritise in this response our views on those proposed amendments to the Rules that we consider bear most directly on the effective operation of the Tribunal. In this regard, we are concerned, in particular, about the critical need to ensure clarity and legal certainty for those companies that may either bring or find themselves subject to proceedings before the Tribunal, whilst seeking to ensure the efficient and cost-effective operation of the CAT.

1.4 Our response is structured as follows:

(a) we set out at Section 2 below, our principal and overarching observations on the Draft Rules; and

(b) we set out in Section 3 responses to each of the Consultation questions, on a question-by-question basis.

1.5 We would be very happy to discuss any aspect of this response in more detail should that assist BIS.

2. PRINCIPAL OBSERVATIONS

2.1 Freshfields considers BIS's present Consultation exercise to be constructive and welcome. It is also timely in view of the anticipated increase in the

Tribunal's workload following the entry into force of the Consumer Rights Act 2015.[1]

2.2 We fully endorse BIS's position that it is appropriate to ensure that the Tribunal has in place robust case management powers that can be applied flexibly, effectively and (insofar as is practicable) consistently in individual cases. We also acknowledge, subject to ensuring the interests of justice are met in all cases, the validity of BIS's policy objectives to minimise the length and cost of decision making through the appeal process – which we agree is in the interests of the Tribunal and its users alike.

2.3 To this end, as more fully explained in the detailed comments provided on each of the Consultation questions at Section 3 below, we endorse many of the changes proposed in the Draft Rules. Specifically:

(a) we consider the codification of the Governing Principles (presently set out in the Guide to Proceedings) and enhanced case management powers (to be exercised with appropriate discretion) to be appropriate for ensuring the effectiveness and efficiency of the Tribunal;

(b) subject to specific comments made in Section 3, we are supportive of – or have no comment in relation to – the variety of procedural changes proposed in respect of matters such as strike out, pre-action disclosure, the addition or substitution of parties, the granting of injunctions and transfer of proceedings. In particular, to the extent that these amendments are consistent with provisions of the Civil Procedure Rules (***CPR***) (and are, therefore, familiar to both judges and users of the Tribunal), we consider they are likely to promote efficiency; and

(c) we welcome the introduction of a formal settlement offer process, reflecting the main elements of CPR Part 36. In our view, the possibility of cost-shifting in the context of settlement offers (which the Consultation envisages being placed on a clear basis for the purposes of proceedings before the Tribunal) is a powerful incentive for securing the negotiation and agreement of early settlements, thereby saving both the Tribunal and parties unnecessary costs.

2.4 We identify in Section 3 a small number of potential improvements that may be made to the more procedural elements of the contemplated Draft Rules. These include, *inter alia*, our strong preference that BIS considers the adoption of target dates for the delivery of judgments.

[1] We observe that further amendments to the Rules are likely to be necessary in the context of implementation of the EU Directive 2014/104/EU on antitrust damages actions (the ***EU Antitrust Damages Directive***).

2.5 There are, however, two key elements of the Draft Rules that bear closer scrutiny, and upon which our response is focused.

(a) **Approach to new evidence (Draft Rules 9, 15 and 21).** We support the envisaged notification process through which new evidence will be clearly identified at an early stage of proceedings for consideration as to admissibility by the CAT. However, we also consider it to be of paramount importance that the Tribunal retains a broad discretion, which is exercised favourably in relation to the admission of new evidence on appeal. As set out in CAT and Court of Appeal authority, and recognised by Sir John and BIS, an appeal before the CAT represents the first judicial consideration of a matter following an administrative process and the CAT is obliged to undertake a detailed merits assessment. A more flexible standard should therefore be applied than that which obtains in regular civil appeals or actions for judicial review. We are therefore concerned by the fact that the Draft Rules appear to apply (albeit non-exhaustively) civil appeal considerations where the Tribunal is contemplating the admissibility of new evidence.

Moreover, we do not recognise the reference in the Consultation to parties seeking to "game" the system and note that BIS has not provided any examples of such behaviour. BIS may have proceeded upon a misconception: in the (administrative) regulatory investigation context, a party to an investigation will generally not have full access to the authority's evidence or be able to cross-examine its witnesses. It should not, therefore, be surprising that a party under investigation may seek to preserve (as is its right) the possibility of having its own evidence assessed by an independent tribunal, where there will be an equality of arms.[2] In such circumstances, an appellant should not be unduly criticised for "gaming" the system: it is merely seeking to vindicate its rights.

A tightening of the rules on the admissibility of new evidence would, therefore, represent a departure from authority and further widen the imbalance between the appellant and the competition authority (particularly given that the Draft Rules do not contain any measures to promote transparency on the part of the regulator at the administrative stage). Accordingly, whilst we do not object to the enunciation of factors that the Tribunal may look to in the exercise of its discretion, we consider that primacy must be placed on the interests of justice and, in particular, the imperative to avoid prejudice to the parties to an appeal.

[2] We note, in any event, the CMA can now, pursuant to Section 26A of the Competition Act 1998, require any individual who has a connection with a business which is a party to the investigation to answer questions on any matter relevant to the investigation.

(b) **Availability of settlement offers in collective actions.** We consider cost shifting rules to be an essential mechanism for promoting the early settlement of disputes and for businesses to avoid being subjected to unmeritorious litigation. Given these clear benefits, it is our view that the cost shifting rules should apply in the usual way to collective settlement offers. This will safeguard against the risk that the new collective actions regime in the UK will repeat the US experience where unmeritorious class claims can and are brought regularly with limited cost or other consequences for claimants or their representatives. Moreover, we do not believe that claimant representatives will be in a substantially different position in assessing a collective settlement offer to any party in litigation where Part 36 or cost shifting rules apply: all parties are required to assess an offer on the basis of information available to them at the time the offer is made, and all parties face information asymmetries. We therefore consider that any adjustment to the cost shifting rules in the case of collective settlement offers would be regrettable and unnecessary.

We understand that certain adjustments to the normal cost shifting rules are being contemplated in light of concerns expressed in the Consultation and by stakeholders about the ability of claimant representatives to assess the reasonableness of collective settlement offers. Without prejudice to our strong view that the normal cost shifting rules should apply, in the event that BIS is minded to pursue an adaptation of the cost shifting rules in this context, we consider it vital that any such adaptation be limited so as to maintain the effectiveness of cost shifting as a mechanism for dis-incentivising unmeritorious litigation and promoting early settlement of disputes. The following <u>procedural</u> safeguards (as opposed to substantive variations to the rules) would be effective and apt to maintain the confidence of all stakeholders:

(i) the party making an offer must state that it believes, on the basis of what it presently knows, that the offer is reasonable in the circumstances;

(ii) the collective settlement offer must be supported by a report by an independent expert which sets out the basis for the settlement offer, including disclosure of the information and data used to prepare that report;

(iii) any party may apply to the Tribunal for a determination that it is satisfied that the report of the independent expert, and the information disclosed with that report, is sufficient for the offer to be capable of having cost shifting effect; and

(iv) the Tribunal will determine any such application in a manner which preserves the without prejudice status of the offer and independent report (for example, by ensuring the application is not heard by the Panel determining the substantive claim).

3. CONSULTATION QUESTIONS

QUESTIONS 1 & 2: Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as "Governing Principles"? 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?

3.1 The Governing Principles newly incorporated into Draft Rule 3 are to be welcomed as encapsulating a modern and common-sense approach to the active case management of proceedings. In particular (and subject to our response to question 3 below), we consider that the case management considerations listed at Draft Rule 3(5) strike an appropriate balance between the public interest in a cost-efficient and proportionate approach to dealing with cases and the interests of all parties in securing a just and fair outcome. The familiarity of these principles (currently contained in the Guide to Proceedings) to both the CAT and its users is also likely to enhance their utility.

QUESTION 3: Do you agree with the recommended approach on setting target times and timetables for cases?

3.2 We broadly agree with the new approach to setting times and timetables for cases. Subject to the views expressed at paragraphs 3.3 and 3.4 below, fixing a target date for the main hearing as early as possible in the proceedings, together with a structured timetable up to that hearing, as provided for by Draft Rule 3(5)(c), will undoubtedly be appropriate in all cases. We endorse, as a general proposition, the view expressed by Sir John that rules which provide for automatic outcomes and rigidly fixed timetables are best avoided in order to ensure that procedure does not become an end in itself.[3] Case management requirements inevitably differ from case to case, and we therefore acknowledge and accept that the retention of discretion on the part of the CAT – exercised reasonably and proportionately – will remain a necessary adjunct to the exercise of case management powers.

3.3 It should, however, also be recognised that dealing with a case justly and at proportionate cost will not always be synonymous with progressing that case as quickly as possible. In particular, the case management demands of appeals of competition enforcement decisions differ drastically from the demands of private damages actions brought under section 47A of the CA 1998. As Sir John explains appeals under the CA 1998, Enterprise Act 2002 and Communications Act 2003 are generally dealt with relatively swiftly (with the CAT's proceedings ranging from two to seven months in average length).[4] The same cannot be said of damages cases where the issues for consideration and adjudication (in particular factual issues) will generally be broader. In

[3] Report, paragraph 50.

[4] Report, paragraph 30.

damages cases, for example, questions relating to the effects of the infringing conduct, including the degree of over-charge and pass-through, may not have been considered at all by the competition authority during the course of its investigation, meaning that evidence on these issues will not yet have been collected. In such cases, an aggressive approach to the setting of deadlines, in particular for disclosure and the submission of expert evidence, may actually frustrate the effective and efficient resolution of the issues in dispute: in complex cases where the facts are disputed, parties will be unable to comply with unrealistic deadlines, or will at least be unable to do so in a methodical, comprehensive and cost-effective manner.

3.4 To this end, we would suggest a small addition to the Draft Rules to explicitly recognise that effective case management must reflect the nature of the proceedings. Our suggestion is that Draft Rule 3(5)(c) is amended to read: "*[Active case management includes: ...] fixing a target date for the main hearing as early as possible with a structured timetable for the proceedings up to the main hearing, taking into account the nature of the case and issues it presents;* (new wording underlined)".

QUESTIONS 4 & 5: Do you agree with the rationale on not setting a time limit for the delivery of a decision? Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?

3.5 We, of course, appreciate that the time it will take to reach a decision will vary from case to case and that finalising the text of a decision may be subject to external factors (e.g. submissions of the parties on confidential treatment).

3.6 Nevertheless, we are concerned that the CAT's procedures in this regard should not be entirely open-ended. Substantial delay in the delivery of a judgment can lead to commercial uncertainty for the parties before the Tribunal, and may, in a private action context, itself constitute a barrier to the resumption of normal commercial relationships between opposing parties. Just as we consider that it is appropriate to set target dates for the conduct of proceedings (to which parties should make every effort to adhere), we also consider that it would be appropriate to provide a recommended timeframe for the delivery of judgments by the CAT. We consider that nine months from the conclusion of proceedings would be an appropriate timeframe. We would therefore propose that wording to the following effect is added into the Draft Rules: "*The CAT should, where possible, seek to deliver its judgment on a case no later than nine months from the conclusion of proceedings before it.*"

QUESTIONS 6 & 7: Do you agree with the recommended new provisions for strike out? 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?

3.7 We have no specific comments to make in relation to the new strike out provisions. We are overall of the opinion that the Draft Rules make sufficient provision to address unmeritorious appeals at an early stage.

QUESTIONS 8 & 9: 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. 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?

The proposed rules and their rationale

3.8 The Draft Rules contemplate various new requirements in relation to the introduction of evidence upon appeal to the CAT that may not have been available to the original decision maker. In particular:

(a) Draft Rule 9(4)(h) requires an appellant to identify in its notice of appeal any evidence, the substance of which, so far as the appellant is aware, was not before the initial decision maker;

(b) Draft Rule 15(3)(c) requires the defendant to detail any objections it has to the admission of such new evidence in its defence;

(c) Draft Rule 21(1) empowers the CAT to give case management directions in relation to evidential matters, including (at 21(1)(b)) the admission or exclusion of evidence from the proceedings; and

(d) Draft Rule 21(2) introduces various criteria to which the CAT must have regard when deciding whether it would be just and proportionate to admit or exclude evidence, including:

(i) whether or not the evidence was available to the respondent before the disputed decision was taken (Draft Rule 21(2)(b));

(ii) whether or not the evidence was capable of being made available to the respondent before the disputed decision was taken (Draft Rule 21(2)(c)); and

(iii) the prejudice that may be suffered by one or more parties if the evidence in question is excluded or admitted (Draft Rule 21(2)(d)).

3.9 The Consultation explains that the above requirements are intended to assist the CAT in exercising more control over the admission of new evidence on an appeal and to enable it to firmly deal with cases where, for example, there are grounds to believe that an appellant has deliberately held back evidence that could and should have been produced to the competition authority in the course of the investigation leading to the decision under appeal (Consultation, at paragraph 6.37).

Our response to BIS's concerns

3.10 As Sir John correctly recognises, there is an important distinction between appeals from the ordinary courts and appeals to the CAT.[5] Appeals to the CAT represent the first independent judicial consideration of a case, including the factual matters in dispute, following an investigatory procedure that is of an administrative rather than judicial nature.

3.11 Given this distinction we consider that it is right as a matter of principle, and in the interests of justice, that the CAT should adopt a flexible approach to the submission of new evidence. This has been recognised in the current case law on the admissibility of fresh evidence before the CAT, which has consistently emphasised the importance of the CAT's discretion in this regard (see, for instance, *NAPP Pharmaceutical Holdings Ltd v The Director General of Fair Trading* [2001] CAT 3 and *British Telecommunications PLC v Office of Communications* [2011] EWCA Civ 245). The reasoning adopted in these cases takes due account of the need to ensure a fair hearing in the context of the unique procedure for competition investigations and competition appeals (in contrast to regular civil appeals). This reasoning remains fully applicable.

3.12 Against this backdrop of principle and authority, we consider that the concerns articulated, somewhat generically, by BIS in relation to the non-disclosure of evidence at the regulatory stage of proceedings are overstated. In particular, the description (at paragraph 6.36 of the Consultation) of parties "gaming" the system by deliberating withholding evidence is not consonant with our substantial experience of advising parties to competition authority investigations in the UK and elsewhere. Whilst a party to an investigation may seek to preserve (as is its right) the possibility of having its own evidence assessed by an independent tribunal, such behaviour cannot be criticised as gaming in circumstances where a regulator fails to make its own evidence fully available or produce its own witnesses for cross-examination at the administrative stage.

3.13 Indeed, in our view, the more compelling concern is that adverted to in the Consultation regarding the lack of transparency in administrative decision-making processes and the risks of confirmation bias.[6] Such concerns are real: BIS will be aware of various recent cases where a lack of transparency on the part of the regulator has led to substantive decisions being challenged or unwound (notably in the private healthcare market investigation).[7] This has entailed substantial cost for the parties, the authority and the Tribunal alike. The only concession made in this regard is BIS's suggestion that regulators

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[5] See paragraph 35 of the Report, reflected at paragraph 6.38 of the Consultation.

[6] Consultation, paragraph 6.46.

[7] We note, in particular, that in the private health care context it was the introduction of new evidence that caused the CMA to recognise certain mistakes in its analysis which subsequently led it to withdraw of certain parts of its decision. This is, in our view, indicative of the clear necessity to take a flexible approach to new evidence, even in the context of a review in accordance with judicial review principles, and certainly on a full merits appeal.

"*open up their reasoning and evidence to parties at the administrative stage*".[8] Whilst we fully endorse this sentiment, we note that the Consultation contemplates no positive steps to ensure improved standards of regulatory conduct. Absent such steps, we consider that an appellant should not be unduly penalised through the exercise of stricter case management powers for seeking to preserve its ability (indeed, its right) to have relevant evidence assessed by an independent, judicial body – taking such a course of action will only widen the inequality of arms between the appellant and the regulator.

Our response to the Draft Rules

3.14 As noted above, we consider it appropriate for the CAT to retain a broad discretion as to the admissibility of new evidence, to be exercised consistently with the interests of justice. We have no objection in principle to the provision of non-exhaustive guidance in the Rules regarding the exercise of such discretion. Nor do we object to the new procedural requirements at Draft Rule 9(4)(h) and 15(3)(c), which we agree will help to ensure that new evidence is identified and any concerns in relation to its admissibility are considered and addressed at an early stage of the proceedings.

3.15 However, in view of our concern identified above that the admissibility of new evidence should not be unduly curtailed, we have certain reservations in relation to the criteria introduced by Draft Rule 21(2) that the CAT must consider when deciding whether it would be just and proportionate to admit or exclude new evidence. The inclusion of such criteria may, in practice, inappropriately limit the CAT's discretion.

3.16 In particular, we note that the criteria at Draft Rule 21(2) seem to track, in substance, the principles governing the admission of new evidence in ordinary civil appeals as set out in *Ladd v Marshall*[9] (for example that: (i) the evidence could not have been obtained with reasonable diligence for use at the original trial; and (ii) that the evidence must be such that, if given, it would probably have an important influence on the result of the case (which appear to have effectively been transposed to Draft Rules 21(2)(b), (c) and (d) respectively)). However, as noted above, the judgments (including Court of Appeal authority) in *Napp* and *British Telecommunications* make it absolutely clear that the CAT should have a significantly broader discretion in relation to the admissibility of new evidence than the ordinary civil courts due to the different nature of the competition investigation and appeal process. Accordingly a more expansive approach than that articulated in *Ladd v Marshall* is necessary in the CAT context.[10]

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[8] Consultation, paragraph 6.46.

[9] *Ladd v Marhsall* [1954] 1 WLR 1489 at 1491.

[10] See *NAPP Pharmaceutical Holdings Ltd v The Director General of Fair Trading [2001] CAT 3* at [71] and *British Telecommunications PLC v Office of Communications* [2011] EWCA Civ 245 at [68-74].

3.17 This is not to say that the various criteria specified at Draft Rule 21(2) are not factors that the CAT may legitimately take into account when considering whether or not to admit new evidence; however, we consider that such criteria should not be rigidly codified. [11] To that end we would advocate altering the balance of the criteria proposed in Draft Rule 21(2). In particular, we consider that it should be made clear that the criteria proposed are non-exhaustive, and that particular emphasis should be placed on the criterion of prejudice at Draft Rule 21(2)(d) as the overriding principle in deciding whether or not to admit new evidence.

QUESTIONS 10 & 11: 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. Do you agree the rule will assist the CAT to minimise satellite litigation?

3.18 We have no specific comments to make in relation to Draft Rule 12.

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.

3.19 The Fast Track procedure set out in the Draft Rules (implementing Schedule 8 of the Consumer Rights Act) is highly innovative. The extent to which it will ultimately benefit SMEs and micro businesses is not likely to be immediately apparent. However, due regard should also be had to the potential impact of the Fast Track procedure on putative defendant companies. In particular, the Tribunal must safeguard against the Fast Track procedure being used (conceivably as a weapon in commercial negotiations) to subject companies to numerous fast-track cases brought on unmeritorious grounds. To that end, we would merely caution that the success of the proposed Fast Track system will likewise owe much to the supplementary use of case management powers (for example, enhanced strike out powers) by the CAT more broadly.

3.20 In this regard, the parallel that the Consultation seeks to draw with the Intellectual Property Enterprise Court (***IPEC***) is apposite: our experience indicates that some of the success of IPEC (and its predecessor, the Patents County Court) is attributable to active case management on the part of its presiding judge.

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

3.21 We endorse the incorporation of the main elements of CPR Part 36 in the Draft Rules. In our view, the possibility of cost-shifting strongly incentivises the consideration of early settlements by the parties, which may lead to the

[11] We note in this regard the Court of Appeal's remarks in *British Telecommunications* that it would be inappropriate and unnecessary to lay down a comprehensive list of factors relevant to the exercise of that discretion (at [72]).

avoidance of litigation entirely. The provision of greater clarity as to the Tribunal's approach through the Draft Rules is to be welcomed.

3.22 The Draft Rules governing the procedural consequences of an offer being made by a number, but not all, of the defendants in a multi-defendant case and accepted by the claimant(s) (Draft Rule 45(10)) appear sensible: we agree that a settlement offer made by a limited number of defendants should not, without more, bind non-settling defendants. Moreover, it is clearly appropriate that any cost-shifting effect be limited to those parties that are actually engaged in any settlement. We therefore also endorse Draft Rule 47(1)(c) which makes clear that the relevant cost base for determining the costs impact of the acceptance of a settlement offer should generally be that of the defendant(s) making the offer. We similarly agree that any entitlement to costs following judgment where a settlement offer is not accepted must be limited to those defendants that made the offer (Draft Rule 48(1)(a)).

3.23 Consistent with CPR Part 36, the Draft Rules propose that the Tribunal will retain a discretion to vary the cost-shifting impact of a settlement offer if it is just to do so (Draft Rule 48(2)), including by reference to the conduct of the parties. We consider the retention of such discretion to be appropriate. However, consistent with our observations above, we consider that in a multi-defendant case, it is the conduct of the parties actually engaged in the settlement offer process that is of primary relevance. A defendant seeking to settle in good faith should not be denied the benefit of cost-shifting due to the conduct of non-settling defendants outside its control. To that end, we would suggest that Draft Rule 48(2)(d) is amended to refer to the "*conduct of the parties <u>to the Settlement Offer</u>*".

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.

3.24 We have no objection to the recommended provisions for disclosure in private actions, including the provisions on pre-action disclosure at Draft Rule 61 which (sensibly, in our view) largely track the approach taken under CPR r.31.16. We would, however, seek to emphasise that pre-action disclosure should be regarded as exceptional and treated as such by the CAT in order to avoid abuse of the system. In particular, we would emphasise that, while there is no jurisdictional "arguability threshold" pursuant to CPR r.31.16, the CAT should nevertheless consider, in deciding whether to grant an application for pre-action disclosure, the likelihood of the applicant being able to establish in due course a viable claim as part of a flexible exercise of its discretion.[12]

[12] Per the approach endorsed by the Court of Appeal in relation to pre-action disclosure pursuant to the Civil Procedure Rules, in *Smith v Secretary of State for Energy and Climate Change* [2013] EWCA Civ 1585.

3.25 We make two specific observations in relation to disclosure and early access to evidence more broadly. First, we strongly consider that an even-handed approach must be taken to pre-action and early disclosure. In particular, where pre-action disclosure has been given in favour of a claimant to a private damages action (for example, in relation to the degree of any overcharge), the CAT should also be sympathetic to a subsequent request for early, specific disclosure from the defendant(s) (particularly in relation to the issue of pass-through, which may be of fundamental importance in a damages claim).

3.26 Second, in addition to pre-action disclosure, we also believe that there may be circumstances in which parties would benefit from the early deposition of key witnesses. In particular, this could facilitate the early resolution of disputes if there are central factual issues in dispute between the parties. We have in mind, in particular, information in relation to pass-through which may bear fundamentally on the basis and merits of any claim, or as to the operation and effect of relevant infringing conduct. We would encourage the CAT (and BIS) to consider how it might exercise the increased flexibility afforded by the Draft Rules to pursue such a course of action in the future.

QUESTION 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?

3.27 We have no particular comments in relation to the proposed procedure for transferring cases and proceedings out of the CAT.

3.28 We note that in relation to the transfer of cases into the CAT, BIS in its 2013 response to the Government's consultation on private actions in competition law endorsed the transfer of standalone and follow-on cases to the Tribunal.[13] We reiterate the need in practice for relevant courts to exercise broad powers to enable the consolidation of proceedings or transfer of cases into the CAT. This is particularly important given the possibility of multiple proceedings against a single defendant at different levels of the supply chain, and the EU law obligation imposed upon the UK, pursuant to the EU Antitrust Damages Directive, to ensure overcompensation is avoided.[14] The effective consolidation of proceedings will, in our view, be essential to ensure that this obligation is observed, and that multiple claims can be disposed of in a cost-efficient and timely manner.

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

3.29 We broadly consider the proposed Draft Rule 38 to be appropriate in the interests of ensuring procedural efficiency.

[13] Section 16, Enterprise Act 2002; CPR Part 30 PD8.3.

[14] Article 12(2).

3.30 We note that Draft Rules 38(5) and (6) will enable the addition or substitution of a new party where "necessary" after the expiry of a relevant limitation period for the purpose of where, *inter alia*, the new party is to be substituted for a party who was named in the claim form by mistake. We observe that the Tribunal should apply a high threshold in this regard (as is implied by the use of the term "necessary"): this discretion should not be exercised so as to allow the rules on limitation to be freely circumvented and the correction of "mistakes" should be contained to genuine "slips." It should not be available, for example, where a properly advised claimant has in a private actions context instituted proceedings against, for example, the wrong subsidiary of a defendant (which was not an addressee to a relevant decision), and seeks to take advantage of this rule to bring into the proceedings an entirely different corporate entity after the expiry of the relevant limitation period.

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

3.31 The Draft Rules appear to provide an adequate procedural basis for the Tribunal's forthcoming powers to order injunctive relief, as contemplated by the Consumer Rights Act 2015 (the ***CRA 2015***). It is clearly correct that – consistent with civil procedure –such powers be exercised upon application (generally on notice) which must be supported by evidence.

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?

3.32 Yes, we consider that there should be a presumption that such organisations will not ordinarily be the lead claimant in a collective action, for the reasons enunciated by BIS in the Consultation.[15] The CAT should, however, have discretion to depart from this presumption in exceptional cases, where it would be unjust or unfair to preclude such an organisation from bringing a claim. This could, for instance, be the case where the organisation was itself one of the principal victims or targets of the anti-competitive conduct.

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?

3.33 We consider the proposed, non-exhaustive certification criteria to be appropriate. Importantly, they leave a wide margin of discretion for the CAT, which we believe is necessary in order to make the system practicable and effective.

3.34 The CRA 2015 makes no provision for appeals of certification decisions to the Tribunal. As such, we understand that certification decisions shall be amenable to challenge solely by way of judicial review before the

[15] At paragraphs 7.5 - 7.7 of the Consultation.

Administrative Court. In our view, this strikes the right balance between ensuring the workability of the collective actions regime – in particular that early cases are able to proceed promptly and efficiently without the risk of satellite litigation – and safeguarding procedural rights.

3.35 If necessary, the operation of the certification criteria may be reviewed after an appropriate introductory phase (i.e. within three to five years).

QUESTIONS 20 & 21: Should formal settlement offers be excluded in collective actions? 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?

The advantages of cost shifting rules

3.36 We understand the reference to "formal settlement offers" in these questions to be a reference to offers which may have cost shifting consequences (per CPR 36 and Draft Rule 48). As set out above, we endorse the incorporation of the main elements of CPR 36 in the Draft Rules, as the possibility of cost-shifting strongly incentivises early settlements by the parties and is an effective mechanism for businesses to avoid being subjected to unmeritorious litigation.

3.37 We do not agree that the concerns expressed in the Consultation justify changes to the normal costs rules in the case of collective settlements. We consider these rules will play a vital role in minimising the risk that the UK class action regime is hijacked by unmeritorious class claims that can be pursued with limited regard to cost or other consequences for claimants or their representatives (as has been the experience in the United States).

3.38 In addition, we do not believe that the claimant representative will be in a substantially different position in assessing a collective settlement offer to any party in litigation where Part 36 or cost shifting rules apply, in that all parties are required to assess an offer on the basis of information available to them at the time the offer is made, and all parties face information asymmetries. In our view the claimant representative would not be at such significant information disadvantage to warrant departure from an established and effective principle of English civil procedure for incentivising the efficient settlement of disputes.

3.39 Further, as discussed below, the Tribunal (as a civil court would applying the Part 36 rules) will retain a discretion to vary the cost shifting effect of a collective settlement offer should the circumstances (including the conduct of the parties) so demand. We therefore consider that it would be an entirely disproportionate response to exclude all collective settlement offers from those rules altogether given the importance of those rules to the efficient settlement of disputes and dis-incentivising of unmeritorious claims.

Alternative options

3.40 We note the concerns expressed in the Consultation that the application of cost shifting rules may incentivise defendants to make, and claimant representatives to accept, unreasonably low offers, including because 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. We do not consider, in light of the advantages described above, such concerns justify exclusion the entire collective settlement regime from the application of the normal cost shifting rules.

3.41 We understand that BIS is exploring intermediate options regarding the application of the cost shifting rules in the collective settlement context. Whilst this is to be preferred to a blanket exclusion, we nevertheless would caution against the adoption of any stakeholder proposal for the CAT to determine the potential cost shifting consequences of an offer through adoption or adaptation of its supervisory jurisdiction to certify agreed settlements as just and reasonable in Draft Rules 93 and 96. Those rules are designed to determine consensual applications and to dispose of proceedings rather than to determine potential cost shifting consequences. Their use to determine the potential cost-shifting consequences of an offer which has not been accepted by the class representative would be apt to result in a mini-trial of the merits on quantum, with potentially a number of mini-trials as offers are adjusted. The purpose of the cost shifting rules (to provide an incentive for low-cost settlement and settlement offers) would not, in our view, be achieved.

3.42 Should, contrary to our primary position, BIS be persuaded to adopt an alternative approach, we consider the following package of procedural safeguards would command the confidence of all stakeholders while maintaining the effectiveness of cost shifting as a mechanism for dis-incentivising unmeritorious litigation and promoting early settlement of disputes:

(a) the party making an offer must state that it believes, on the basis of what it presently knows, that the offer is reasonable in the circumstances;

(b) the collective settlement offer must be supported by a report by an independent expert which sets out the basis for the settlement offer, including disclosure of the information and data used to prepare that report;

(c) any party may apply to the Tribunal for a determination that it is satisfied that the report of the independent expert, and the information disclosed with that report, is sufficient for the offer to be capable of having cost shifting effect. If the Tribunal is not so satisfied, it may order the disclosure of such further documents or information as it sees fit in order for it to be satisfied;

(d) the Tribunal will determine any such application in a manner which preserves the without prejudice status of the offer and independent report (taking advantage, as required, of the flexible case management

powers granted under the Draft Rules to ensure the application is not heard by the Panel determining the substantive claim); and

(e) if no such application is made by any party, the Tribunal will assess the compliance of a collective settlement offer with the relevant procedural requirements at the same time as making its costs award in the proceedings (that is, at the same time as assessing whether it would be unjust to make an award of shifted costs in the circumstances - see below).

3.43 In addition to the above, other procedural safeguards in the Draft Rules will continue to apply in the case of collective settlement offers. These include that:

(a) an offer which is accepted by the claimant representative will be submitted to the Tribunal for final approval as just and reasonable (see Draft Rules 93 and 96). If not approved as just and reasonable, there will be no recourse to Part 36 considerations (as the relevant offer will not have been rejected by the claimant representative); and

(b) the Tribunal will retain a discretion, following judgment, not to award shifted costs if it would be unjust to do so (see Draft Rule 48(2)). In considering whether to exercise that discretion, the Tribunal will take into account all the circumstances of the case, including the terms of the settlement offer and the information available (and made available) to the parties at the time the settlement offer was made. The Tribunal will therefore be able to account for any concealment or bad faith by the offeror, or procedural defect, at the time of making its costs award in the proceedings.

3.44 We consider that the package of safeguards outlined above provides sufficient comfort to all relevant stakeholders, including claimant representatives.

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?

3.45 We have identified in the course of our responses to the Consultation questions above additional steps that we consider would assist in achieving the objectives set out in the Terms of Reference. In particular, we consider active consideration should be had, where relevant, to the use of case management powers and relevant discretions to:

(a) secure the early disclosure of pass-through evidence and the early deposition of key witnesses where this might facilitate the resolution of central factual issues in dispute between the parties (see our response to question 14 above);

(b) ensure, going forward, that transfer powers are exercised to ensure claims at different levels of the supply chain can be consolidated (before the CAT, where appropriate), so that claims can be effectively

and promptly handled, and to prevent overcompensation in accordance with the EU Antitrust Damages Directive (see our response to question 15 above); and

(c) maintain the flexible application of the certification criteria (insulated from challenge otherwise than on judicial review grounds), to promote the prompt and efficient handling of early collective settlement cases (see our response to question 19 above).

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