UK COMPETITION LAW ASSOCIATION

Consultation Response

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

Wednesday 1st April, 2015

1. Introduction and overview

1.1 This document is submitted on behalf of the UK Competition Law Association ("CLA") in response to the consultation launched on 5 February 2015 by the Department for Business Innovation and Skills ("BIS") on "Competition Appeal Tribunal ("CAT") Rules of Procedure: Review by the RT Honourable Sir John Mummery".

1.2 The CLA is affiliated to the Ligue Internationale du Droit de la Concurrence. The members of the CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of the CLA is to promote the freedom of competition and to combat unfair competition.[1]

1.3 The CLA welcomes the opportunity to respond to this Consultation on the CAT Rules of Procedure.

1.4 The CLA's main concern relates to Draft Rule 21(2) (see responses to questions 8 and 9). The CLA believes that the proposed rules relating to the introduction of 'new' evidence are not appropriate and therefore should be withdrawn. The CLA also believes that Draft Rule 57, which governs the Fast Track procedure, could be clarified and made more workable (see response to question 12 below). The provisions regarding certification of 'opt-out' class actions are controversial; this paper sets out the varied views of its members (see response to question 19).

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[1] Further details on the CLA can be found on our website at http://www.competitionlawassociation.org.uk/.

2. Specific Points on "CAT Rules of Procedure: Review by the RT Honourable Sir John Mummery"

2.1 This part of the response provides specific responses to the questions raised by the Consultation on "CAT Rules of Procedure: Review by the RT Honourable Sir John Mummery". The chapter and question numbering below follows the references used in the Consultation paper.

RECOMMENDATIONS APPLYING TO THE CAT RULES

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 (a) case management generally and (b) in the application of particular Rules?

Response to questions 1 and 2

2.2 The CLA broadly agrees with the incorporation of the Governing Principles into Rule 3 and hopes that this will improve the CAT's case management generally and its application of particular rules.

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

2.3 The CLA broadly agrees with the recommended approach. In particular, the CLA welcomes the leeway which the draft Rules will provide to the CAT to set timetables. The CLA considers it appropriate to give the CAT discretion to deal with issues flexibly according to the relevant circumstances. The CAT should be permitted to look at each case upon its own merits and allocate the correct time and resources based upon this. In this regard, we note that the rules envisioned for time tabling 'fast track' cases are somewhat less flexible, which we consider inappropriate - we deal with this issue in our response to Q12 below.

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?

Response to questions 4 and 5

2.4 The CLA agrees with Sir John's recommendation that no time limits be imposed on the delivery of decisions. A 'one-size-fits-all' time limit is unlikely to help the CAT allocate its resources efficiently. In circumstances where there are particularly compelling reasons necessitating a swift decision, the parties can bring these reasons to the CAT's attention. The CAT can then allocate its resources in the light of those reasons. Whilst there has historically been a concern with the length of time for the CAT to hand down judgments, the CAT has become much speedier at writing judgments and this issue has therefore not arisen in recent years.

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

Draft Rule 11(1)(a) / Rule 41(1)(a)

2.5 The CLA agrees with introduction of the new powers for strike out in both regulatory appeals and private actions on the basis that the CAT has no jurisdiction to hear the dispute. As a general point of principle, the power to strike out should be narrowly defined. This proposed extension of the power to strike out is sufficiently precise.

Draft Rule 11(1)(d)

2.6 Draft Rule 11(1)(d) would permit strike out where: "the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly". Pursuant to Draft Rule 15(7) the rule applies by analogy also to the Regulator's defence. No equivalent provision applies in relation to private actions.

2.7 The CLA has doubts as to whether the introduction of Draft Rule 11(1)(d) is necessary. The CLA notes that Draft Rule 11(1)(f) provides for strike out where the

appellant or regulator *"fails to comply with any rule, direction, practice direction or order of the Tribunal"*. In the experience of the CLA's members, Draft Rule 11(1)(f) is likely to be adequate to address a party's failure to co-operate, rendering Draft Rule 11(1)(d) superfluous. The CLA also notes that the CAT has powers under Draft Rule 24 to take interim measures to protect a party's interests in the event of non-compliance by another party with a rule or direction and has powers under Draft Rule 23 to impose costs sanctions where a party fails to comply with directions.

2.8 In the CLA's view, Draft Rule 11(1)(d) is unlikely to have any greater deterrent effect than an order pursuant to Draft Rule 11(1)(f). If the rule is considered worth introducing, then presumably an equivalent provision should also be introduced in relation to private actions. The CLA can see no reason why the rule is particularly apt for regulatory appeals but not private actions.

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?

2.9 The CLA considers that the draft Rules contain adequate provisions to address unmeritorious appeals at an early stage. The CLA does not have any further proposals 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.

2.10 The CLA disagrees with Sir John's proposal to introduce Draft Rule 9(4)(h) pursuant to which appellants would be required to identify at the time of filing an appeal *"the evidence (whether witness statements or documents annexed to the notice of appeal) the substance of which, so far as the appellant is aware, was not before the maker of the disputed decision"*. According to paragraph 6.39 of the Consultation Paper, the aim of the draft rule is to enable the CAT *"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".

2.11 The rule is unnecessary and disproportionate for the following reasons:

(a) The concerns leading to the proposal of the rule are not well founded. An appellant gains no advantage by withholding exculpatory evidence during a regulatory investigation. On the contrary, an appellant has a strong interest in convincing the regulator that a decision should not be made against it. The Government has not established any instances of the 'gaming' of the system in the way alleged actually taking place.

(b) There are a variety of legitimate reasons why an appellant may wish to rely on new evidence at the appeal stage, none of which derive from the desire to intentionally withhold evidence. In particular, document productions during regulatory proceedings are based upon search parameters specified by the regulator. The appellant may not fully understand the case being levelled against it when the document request is made. Thus, the appellant may not be able to identify all relevant exculpatory documents whilst the investigation proceeds (particular if the regulator's case evolves during the course of the investigation). A regulator may decide not to frame its document requests in a way which is liable to uncover exculpatory documents.

(c) The rule is unlikely to provide real assistance to the CAT in establishing instances of an appellant withholding evidence *"it could and should have"* produced to a regulator during the earlier investigation. The rule does not help establish the appellant's subjective intentions. In the event that a deliberate attempt to conceal evidence does take place, the CAT is likely to be able to identify such instances without the rule.

(d) The rule is liable to generate satellite litigation as to whether or not the *"substance"* of a witness statement was brought forward before the regulator.

(e) Most significantly, the rule is likely to be onerous and would generate considerable practical difficulties for appellants. Assessing whether the

"*substance*" of the evidence relied on is new is a burdensome box-ticking exercise which - if an investigation has spanned many years - could present practical difficulties. The timing of the requirement (*i.e.* at the outset of the appeal) creates unfairness to appellants which have only limited time to file their appeal.

2.12 In the CLA's view, the proposed Draft Rule is unnecessary and is unlikely to be of any practical use in the vast majority of appeals. Rather than applying a 'one-size-fits-all' approach, the CLA suggests that in instances where the regulator genuinely has difficulties assessing which materials before it on appeal are new, a requirement to prepare such a list be imposed on a case-by-case basis. The CAT has power to order such a list to be prepared by an appellant under Draft Rule 19(2)(e).

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?

Draft Rule 21(2)

2.13 Under Draft Rule 21(1) the CAT has power to restrict the volume of fact and expert evidence admitted in the proceedings and the issues on which such evidence is permitted, this provisions reflects the CAT's existing powers. Sir John proposes introducing a new Draft Rule 21(2) which sets out a non-exhaustive list of further criteria to be taken into account when exercising that power, including:

> *"(b) whether or not the evidence was available to the respondent [sic] before the disputed decision was taken;*
>
> *(c) whether or not the evidence was capable of being made available to the respondent [sic] before the disputed decision was taken;"*.

2.14 Paragraph 68 of Sir John's report explains that the aim of the new rule is to help identify issues regarding the admissibility of new evidence *"at an early stage"* to *"avoid unnecessary time and costs from being spent later on evidence which should never have been admitted on the appeal"*.

2.15 This was further elaborated upon in the Impact Assessment ('IA') carried out by the Department for Business Innovation and Skills ('BIS') in January. The IA implies that the CAT currently lacks sufficient powers to address the admissibility of new evidence. For example, at paragraph 16 the IA notes that the rules require amendment to deal with *"iv) volume of new evidence, v) statement of new evidence,"*. Paragraph 33 states *"[n]ew evidence can currently be submitted that is not directly relevant"*.

2.16 Further, the CLA's members find it concerning that the IA states that the "CAT must be satisfied that, if the evidence is new, it could not previously have been provided or obtained at the investigation stage" (paragraph 33). This statement suggests the new rules will fetter the CAT's discretion to admit new evidence and goes beyond the proposed rules, which in fact only require the CAT to "have regard to" whether evidence was capable of being made available previously (Draft Rule 21(2)(c)).

2.17 Over a year before the IA was published, Mr Justice Barling (then President of the CAT) addressed a similar concern raised in an earlier BIS consultation. See his speech of 10 September 2013 on "Reforming the UK Competition Regime - assessing the impact of new legislation and challenges ahead for the CMA"[2]:

> *"The same consultation paper raises the possibility of significantly restricting the introduction, on appeal, of what the paper calls "new evidence", by which is meant material which, for one reason or another, was not available to the regulator at the regulatory decision-making stage before it made the decision which is being appealed. The implication of the consultation seems to be that the CAT either lacks power to prevent this, or is unwilling to use its existing powers to full effect. Neither proposition is in fact correct. To the extent that evidence is produced at the appeal stage which could reasonably have been brought before the regulator in the course of the investigation, the CAT's current rules are perfectly adequate to enable it to admit, exclude or limit evidence to whatever extent the interests of justice require. The CAT can also*

[2] See paragraph titled "New" evidence on appeal on page 6 of Sir Gerald Barling's speech. Available at http://catribunal.org/8190-8158/Reforming-the-UK-Competition-Regime--assessing-the-impact-of-new-legislation-and-challenges-ahead-for-the-CMA.html.

"punish" culpably late production of evidence by means of its wide discretion to make costs orders." (Emphasis added).

2.18 The CLA supports the CAT's view that it currently has the power if needed to prevent new evidence being introduced at the appeal stage where that evidence could have been made available previously. Indeed, this power was recently exercised by the CAT in *BT v Ofcom*, where the CAT refused the admission of evidence that "*could have been made available to OFCOM and should have been done sooner*".[3] In coming to this conclusion, the CAT noted the draft Rules of Procedure but only considered them as expanding on the guidance given by the Court of Appeal.[4] Moreover, in certain circumstances, where an appellant adduces evidence late during an appeal which it ought properly have made available during an investigation, the CAT may even decide to revoke the reduction of a fine which the appellant received for co-operation during the investigation, as happened in *Allsports v OFT*.[5]

2.19 The CLA shares the concerns expressed by Mr Justice Barling and believes that the Government's concerns regarding the "*volume of new evidence*" introduced by appellants are exaggerated. As indicated in the response to Question 8, an appellant has an interest in making sure exculpatory evidence is provided to the regulator during the investigation. For very similar reasons to those identified at paragraph 2.11 it is unreasonable to expect an appellant to put forward all evidence it may later wish to rely on during the investigation.

2.20 If a concern exists, it applies equally to both regulators and appellants. Therefore, if Draft Rule 21(2) is to be introduced, it should be drafted in a party-neutral manner. The current drafting of the rule is ambiguous and confusing because it is unclear to which party (respondent or appellant) it relates. If the new rule is to be introduced, the CLA would suggest that it be reworded as follows:

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3 *British Telecommunications plc et al.* v *Ofcom* [2015] CAT 5, Ruling of 17 March 2015, paragraphs 69(2) and 78(2). Available at: http://www.catribunal.org.uk/238-8027/1211-3-3-13-British-Telecommunications-plc.html.

4 *Ibid*., paragraph 44, referring to *British Telecommunications plc v Ofcom* [2011] EWCA Civ 245.

5 [2005] CAT 22, Judgment on Penalty, paragraphs 208 to 235. Available at: http://www.catribunal.org.uk/files/Jdg1021Football190505.pdf.

*"(b) whether or not the evidence was available to the **party seeking to rely on it** before the disputed decision was taken;*

*(c) whether or not the evidence was capable of being made available to the **opposing party** before the disputed decision was taken;".*

2.21 The CLA also doubts that the Draft Rule would actually save costs, it might instead generate unnecessary satellite litigation. It is generally difficult to appreciate the importance of evidence at a very early stage, meaning that disputes might arise over admissibility issues over evidence which would not play an important role in the determination of the appeal. The CLA agrees with Mr Justice Barling that *"it should be left to the CAT's judicial discretion whether to admit or exclude the material in question* [...]*"*[6]

Draft Rule 27

2.22 Draft Rule 27 applies to proceedings under the Enterprise Act 2002 (the "2002 Act"). Under this rule an applicant must apply for permission if it wishes to adduce expert evidence which was not before the regulator which made the relevant decision. The CLA agrees with this approach in relation to proceedings under the 2002 Act which are determined using the judicial review standard.

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?

Response to questions 10 and 11

2.23 The CLA agrees with Sir John's proposal to permit the CAT wider discretion to permit amendment of a notice of appeal by removing existing Rule 11(3) and replacing it with Draft Rule 12(3). The CLA agrees with Sir John that such matters

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6 See paragraph titled "'*New' evidence on appeal*" at pages 6-7 of Sir Gerald Barling's speech. Available at http://catribunal.org/8190-8158/Reforming-the-UK-Competition-Regime--assessing-the-impact-of-new-legislation-and-challenges-ahead-for-the-CMA.html.

are left to the good sense of the CAT in all the circumstances of the particular case. Whilst inevitably some disputes may arise over amendments, we believe that permitting the CAT greater discretion in deciding whether to allow such amendments will reduce satellite litigation over such matters. The existing rule is prone to generate disputes over technicalities.

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.

Summary

2.24 The CLA welcomes the Government's intention to improve access to justice for smaller businesses. The proposed fast track will likely be perceived by smaller businesses as an improvement on the existing regime. However, the CLA fears that the proposed fast track will not be as attractive to smaller businesses as the Government may hope. In the experience of the CLA's members, there are two main obstacles hindering smaller companies from litigating competition disputes: (i) funding; (ii) the risks of adverse costs orders against the claimant. Whilst the proposed fast track does go some way towards addressing these issues, they remain a substantial hindrance to smaller companies bringing litigation because: (i) there is a lack of clarity at the outset as to whether a case will be deemed suitable for the fast track; (ii) a claimant could potentially incur substantial costs before it finds out whether the proceedings will be subject to the fast track; (iii) a case may cease to be subject to the fast track at any time. These issues could be addressed by amending Draft Rule 57(3) to improve predictability as to whether a case will be subject to the fast track.

The proposed fast track

2.25 Under Draft Rule 30(4)(c) a claimant wishing to have its claim heard subject to the fast track procedure should make an application for this when it issues its claim form. Pursuant to Draft Rule 57(1)(a) "*the final hearing will be fixed to commence as soon as practicable and in any event within six months of an order of the Tribunal stating that the particular proceedings are to be subject to the fast track procedure;*" and

pursuant to Draft Rule 57(1)(b) *"the amount of recoverable costs will be capped at a level to be determined by the Tribunal"*. Pursuant to Draft Rule 67(5) the CAT may grant interim injunctions without requiring a cross-undertaking as to damages or it may cap the cross-undertaking. Draft Rule 57(3) sets out a non-exhaustive list of eight factors to be taken into account by the CAT when deciding whether a case should be subject to the fast track, including factors: (a) whether the claimant is an SME; (b) *"whether the time estimate for the final hearing is three days or less;"*; and (c) *"the complexity and novelty of the issues involved"*.

2.26 In the experience of the CLA's members, there are two main obstacles hindering smaller companies from litigating competition disputes: (i) funding; (ii) the risks of adverse costs orders against the claimant. The above rules go some way towards addressing these issues as a case subject to the fast track will likely last no longer than a few days, meaning a substantially shorter trial than the existing procedures before the High Court (where trials often last several weeks) with consequent reduction in the likely costs in litigating a claim for both parties. The cap on recoverable costs and cap on cross-undertakings as to damages (once set) will also clarify claimants' adverse costs exposure. However, smaller companies which would likely benefit most from the fast track are still unlikely to be able to take advantage of it. The fast track is particularly important for injunction cases where a claimant may not yet have suffered substantial damages and will therefore find it difficult to obtain third party funding. Another problem for these smaller companies is the substantial uncertainty which surrounds whether or not a claim will be subject to the fast track. A claimant could potentially incur substantial upfront costs before finding out whether it will benefit from the short trial and cost-capping rules under the fast track.[7] It is therefore highly desirable that: (i) the track is determined very early in the proceedings; and (ii) to the extent possible there is predictability as to whether a case will be made subject to the fast track.

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[7] The CLA notes that the Government has decided not to implement the suggestion it made in its Response Paper under which a claimant would not be liable for adverse costs if it felt unable to pursue a claim due to the level at which the cost cap had been set. See paragraph 4.25 of the BIS Response Paper. Available at: 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.

2.27 Under the present draft rules, the only hard criterion for determining suitability for fast-tracking is that under Draft Rule 57(1)(a) that a case must be heard "*in any event within six months*" of an order that it be subject to the fast track (emphasis added). Whilst an aspiration to hear a fast track case swiftly is certainly admirable, it is difficult to see why such a rigid cut-off should be implemented. It would seem perverse that a case otherwise suitable for the fast track might have to be tried under the standard procedures if it would take six months and a day to come to trial. The CLA considers that it would be more appropriate to use the length of trial as the main criterion for determining suitability for the fast track. This would more closely resemble the approach adopted by the IPEC, which endeavours to ensure that the trial in all cases lasts no more than 2 days.[8] The CAT should ask whether it can do justice within the timeframe allowed in the fast track (three days is proposed under the existing draft rules). If the CAT cannot hear a case fairly within the timeframe permitted then the case should not be subject to the fast track. In fact, the CLA suggests that a trial length of up to five sitting days (ideally consecutive days) would be a more appropriate cut-off for the application of the fast track procedure. This would mean trials capable of being heard fairly within one week would be considered suitable for the fast track.

2.28 Draft Rule 57(3) could also be improved to increase the predictability of its application. The CLA recommends the deletion of paragraph (c) which lists "*the complexity and novelty of the issues involved*" as a factor to be used to determine the suitability of cases for the fast track. The CLA does not believe this somewhat abstract criterion is useful. In its submissions to the BIS Committee in the House of Lords on the Draft Consumer Rights Bill the CAT itself noted: [9]

> "*It will not necessarily be straightforward to identify what constitutes a "simple" case, and considerable thought will need to be given to this question: in the competition law field, simplicity is not often encountered. One*

8 See the Intellectual Property Enterprise Court Guide (April 2014), section 2.11. Available at: https://www.justice.gov.uk/downloads/courts/patents-court/intellectual-property-enterprise-court-guide.pdf.

9 See paragraph 4.3.1 of the CAT's submission. Available at: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/697/697vw17.htm.

cannot assume, for example, that because the parties are of a relatively small size, the issues raised by the claim will be simple, any more than the opposite is true where larger parties are involved. Very complex issues can arise in relation to claims brought by small companies: 2 Travel and Albion Water are cases in point."

2.29 On this basis, the CAT suggested to the Committee that fast track cases should be capable of being heard by a panel with ordinary members (and not by just the Chairman sitting alone, as had originally been proposed in the draft Bill). The Committee accepted these submissions and recommended that the Draft Consumer Rights Bill be amended.[10] This amendment was later accepted by the Government. It would be perverse to amend the legislation such that the CAT can sit as a panel to hear more complex cases in the fast track, but then implement procedural rules which mean that more complex cases are unlikely to be subject to the fast track. A more appropriate approach is to use trial length to determine suitability. If three days (the length of trial specified in the existing proposal) is sufficient to try a legally complex and/or novel case, then there is no good reason why such a case should not be heard using the fast track procedure. Using trial length as the primary criterion for suitability will also encourage claimants to streamline their claims.

2.30 The CLA also recommends that Draft Rule 57 explicitly cross-refer to the Governing Principles under Draft Rule 3 since whether or not the fast track is appropriate will in many cases boil down to a question of access to justice for the claimant (which might not otherwise be able to bring a claim at all) versus the rights of defence of the defendant (which might find its ability to defend its interests hindered by the abbreviated trial envisaged under the fast track).

Recommendations

2.31 For the reasons above the CLA recommends that:

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10 See paragraphs 257 to 260 of the BIS Committee report on the Draft Consumer Rights Bill. Available at http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/697/697.pdf.

- Draft Rule 57(1)(a) be amended to remove the rigid six month deadline for fast track cases to come to trial, in its place there should be a requirement capping the length of the fast track trial at up to five days. Draft Rule 57(3)(b), which currently states that the length of trial should be a factor to be taken into account, should be deleted. Draft Rule 57(1)(a) could be reworded as follows:

> *"(1) In this rule "Fast Track Procedure" means proceedings in which—*
>
> *(a) the final hearing will have a duration of no longer than five sitting days and will be fixed to commence as soon as practicable and, if practicable, within 6 months of an order of the Tribunal stating that the particular proceedings are to be subject to the Fast Track Procedure; and*
>
> *(b) the amount of recoverable costs will be capped at a level to be determined by the Tribunal."*

- Draft Rule 57(3) be amended to improve the predictability of whether cases will be considered suitable for the fast track. In particular, Draft Rule 57(3)(c) should be deleted.

- Draft Rule 57(3) be amended to cross-refer explicitly to the Governing Principles under Draft Rule 3.

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

2.32 The CLA welcomes the introduction of Draft Rules 45 to 48, which broadly reflect the rules in place in the High Court under CPR Part 36. In general, it makes sense for parties bringing private actions to be in an equivalent position (in terms of early

settlement negotiations) whether they decide to litigate in the High Court or in the CAT.

2.33 To help parties distinguish between settlement offers made under Draft Rule 45 and settlement offers made outside the scope of the rule, the CLA would suggest that an offer made under the rule be described as a "Rule 45 Offer". Draft Rule 45(1), which currently defines such an offer as a "Settlement Offer" is potentially confusing and should therefore be amended accordingly.

2.34 Draft Rule 45(10)(c) corresponds with CPR Part 36(12)(3), Draft Rule 45(10)(d) corresponds with CPR Part 36(12)(2). Draft Rules 45(10)(a) and (b) are new. These new proposed rules apply where the defendants are alleged to have joint and severally liability. In these circumstances a defendant may make an offer which is in satisfaction of the claim against all the defendants (per Draft Rule 45(10)(a)) or in satisfaction of the claim against only those defendants making it (per Draft Rule 45(10)(b)), the claimant can accept either type of offer by notifying the defendants making the offer. In the case of an offer made on behalf of only some defendants, the claimant could continue its claim against the remaining defendants. By contrast, under CPR Part 36(12)(4) in an equivalent situation, the claimant would need to apply to Court for an order permitting him to accept the offer and the remaining defendants could seek to persuade the Court that it should not be permitted to accept the offer.

2.35 CLA members agree with the proposed draft rules, as a means of simplifying settlement.

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.

2.36 The CLA agrees with Sir John's proposals with regards to disclosure in private actions (Draft Rules 59 - 64 and 100 and 101). Now that the CAT will be empowered to hear standalone private actions, the CLA believes that it makes sense for its powers in relation to disclosure to be brought into line with those of the High Court.

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?

2.37 The CLA agrees with the proposed Draft Rules 70 to 71 which provide powers for transfer of the whole or part of a case from the CAT to other courts. The CLA notes that the transfer of cases is a 'two-way street' and in appropriate circumstances cases initiated before other courts should be transferred to the CAT, where its expertise would assist in the swift determination of the matters in question.

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

2.38 The CLA agrees with the proposed Draft Rules 38 to 40 which relate to the joinder of additional parties and the making of additional claims.

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

2.39 The CLA agrees with the proposed Draft Rules 66 to 69 regarding the power of the CAT to grant injunctions. The CLA notes that Draft Rule 67(5) permits the CAT to grant an interim injunction without requiring a cross-undertaking as to damages or, alternatively, it may cap the amount of the cross-undertaking. The CLA recommends that Draft Rule 67(5) should explicitly cross-refer to the Governing Principles under Draft Rule 3 which will help ensure that an appropriate decision under this power is taken.

PRIVATE ACTIONS (CLAUSE 80) CONSUMER RIGHTS BILL

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?

2.40 Draft Rule 77 concerns the authorisation of a class representative. Draft Rule 77(1)(b) provides that the CAT may authorise a person to act as a class representative *"only if the Tribunal considers that it is just and reasonable for that person to act as*

a class representative in the collective proceedings". Draft Rule 77(2) contains a non-exhaustive list of factors to be taken into account when determining this issue, including whether the person: *"(a) would fairly and adequately act in the interests of the class members; (b) does not have* [...] *a material interest that is in conflict with the interests of class members"*.

2.41 The CLA does not consider that introducing a presumption debarring certain classes of person from acting as class representatives would be helpful. It appears to the CLA that the Government's concern that *"only those who have a genuine interest in the case, such as genuine representative bodies (for example, trade associations or consumer organisations)* [...] *should be allowed to bring* cases*"* is already adequately addressed by the existing factors listed in Draft Rule 77(2). Rather than introducing a presumption (which would be rebutted in appropriate circumstances) it would instead make more sense simply to include as an additional factor under Draft Rule 77(2) that the CAT should consider whether the class representative is a law firm, third party funder or special purpose vehicle. The CAT can then apply its discretion appropriately.

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?

2.42 Draft Rule 78(1) provides that the CAT may certify claims as eligible for inclusion in collective proceedings where they are: (a) brought on behalf of an identifiable class of persons; (b) raise common issues; (c) are suitable to be brought in collective proceedings. Draft Rule 78(2) contains a non-exhaustive list of factors to be taken into account when determining whether the conditions under Draft Rule 78(1) are met, the factors include: *"(g) the availability of alternative dispute resolution and any other means for resolving the dispute"*. Draft Rule 78(3) provides that in determining whether collective proceedings should be opt-in or opt-out the CAT will take into account *"all matters it thinks fit"* including *"(a) the strength of the claims; and (b) whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all the circumstances* [...]*"*.

2.43 The CLA's members are divided in their viewpoints on the proposed certification criteria. The CLA notes that the European Commission in its Recommendation on common principles for collective redress[11] states that "[t]*he Member States should ensure that the parties to a dispute in a mass harm situation are encouraged to settle the dispute about compensation consensually or out-of-court, both at the pre-trial stage and during civil trial* [...]". Some of its members would agree that Draft Rule, 78(2)(g) is suitable to encourage such settlement, other members would consider that it is inappropriate to take into account the availability of ADR when determining whether a route to court determination should be available and that other means should be used to encourage ADR.

2.44 The proposal that *"the strength of the claims"* be taken into account under Draft Rule 78(3)(a) is particularly controversial within the CLA's membership. Some members see it as legitimate question to be asked to prevent misuse of the opt-out procedures. Other members consider that the criterion is unworkable, since the CAT cannot know the strength of the claim at a pre-trial stage. These members are also concerned that Draft Rule 78(3)(a) risks being unduly burdensome for claimants. The Government has recognised that information asymmetry can lead to problems for claimants, these problems are likely to be even more pronounced at the certification stage, before disclosure has taken place. If *"the strength of the claims"* is to be included as a certification criterion, then further guidance could be incorporated into the Draft Rules to direct that the CAT take into account potential information asymmetries between the claimant and defendant. For example, the Draft Rules could refer to whether the claim is a follow-on or stand-alone action and whether the claim relates to an alleged (secret) horizontal cartel or another type of infringement.

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

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11 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU) [2013] OJ L 201, paragraph 25. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN.

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?

Response to Questions 20 and 21

2.45 As stated in response to question 13, the CLA believes that the procedure for settlement offers available in the CAT should reflect those available in the High Court. The CLA therefore welcomes Draft Rules 45-48.

2.46 The CLA notes that Draft Rule 46 provides for the person who receives a Rule 45 Offer (the "offeree") to seek clarification of the offer. However, as noted by Government at paragraph 7.11 of the consultation paper there are no formal *"disclosure powers for the claimant to be able to assess the offer"*. The Government identifies a concern that this might lead to the application of cost consequence rules under Draft Rule 47 in situation where the claimant *"may not necessarily be able to assess whether or not the settlement offer represents reasonable redress to the class members."*

2.47 The CLA notes that the cost consequence rules which potentially apply where an offeree fails to beat a Rule 45 Offer will not apply where the CAT considers it *"unjust to do so"* (Draft Rule 48(1)(a)). In determining whether it would be unjust, Rule 48(2) provides that the CAT must consider "*all the circumstances of the case*" including *"(c) the information available to the parties at the time when the* [Rule 45] *Settlement Offer was made; and (d) the conduct of the parties with regards to the giving or refusing to give information for the purposes of enabling the* [Rule 45] *Settlement Offer to be made or evaluated"*. In other words, there already exists an incentive for an offeror to give disclosure of underlying information where it is able to do so. In the CLA's view, the existing rules are adequate to address the concern identified by the Government and no further formal procedure is required.

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?

2.48 No.

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

2.49 No.

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The CLA would be happy to discuss any of the comments provided above in more detail if it would be of assistance to BIS.