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

Organisation (if applicable): Hausfeld & Co. LLP
Address: 12 Gough Square, EC4A 3DW

Please return completed forms to:

Sandra McNeish
Consumer and Competition Policy
3rd Floor, Victoria 1 Victoria Street
London SW1H 0ET
Tel: 020 7215 6439
Email: 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 249 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)

	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:

We welcome the incorporation of the five principles from the Guide to Proceedings into the new rules and believe this is helpful in determining the approach to be taken in the application of the rules and case management. We would note only that:

a) the aim to deal with cases expeditiously and at proportionate cost may need also to take account of the encouragement of parties to use ADR and allow sufficient time in the timetable for this to take place at the appropriate stage in the proceedings, particularly in multiple party disputes; and

b) whilst we agree in principle with the idea that each party's case should be fully set out in writing as early as possible, this should not mean that parties are required to incur disproportionate and potentially wasted cost in obtaining and serving detailed expert analysis with their statement of case in circumstances where that analysis is likely to be impacted significantly by disclosure in due course.

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:

See response to Question 1 above.

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:

We agree with the proposed approach of setting a timetable and target trial date early in the proceedings to assist in dealing with the case as swiftly as practicable, but taking into account the individual circumstances of each case and number of parties involved, including in particular the likely scope and time required for disclosure, witness and expert evidence.

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:

We accept the reasoning in not setting a fixed time limit for delivery of a decision given this may vary from case to case. In order to assist in managing expectations for clients, we believe the Tribunal should provide an indication as to the likely timescale for its decision at the end of any hearing and provide any update if this changes significantly. It may also be worth considering adopting a longstop date, after which the Chair of the Tribunal has to provide an explanation for any delay.

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:

See above

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

☒ Yes ☐ No ☐ Not sure

Comments:

We do not comment on the strike out provisions as regards regulatory appeals under the 2002 Act, as this not an area in which we are typically involved.

We have no objection in principle to the equivalent power to strike out in Rule 41 in relation to private actions under section 47A, but note that:

a) the power to strike out under Section 41(1)(d) where the claimant fails to comply with any rule, direction, practice direction or order of the Tribunal should be subject to the case management discretion under section 52(2)(k) to extend time in appropriate circumstances and only exercised in the case of serious and/or non-remediable failures and/or which prevent a fair and effective hearing; and
b) there should be equivalent provisions under Rule 42 applicable to any defendant who fails to comply with any rule, direction, practice direction or order of the Tribunal.

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:

We have not commented on Questions 7 – 11 on the basis we are not typically involved in appeals under the 2002 Act, so confine our comments to the sections relevant to proceedings under section 47A of the 1998 Act and collective proceedings.

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

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:

We welcome the adoption of a fast track procedure to assist SMEs and small businesses who in our experience often do not have an effective right of redress and have typically only been able to take action to date where they have been able to bring claims alongside a group of claimants which typically include larger businesses. The use of costs caps will be important in making this a viable option. In relation to the draft Rule 57, we have the following comments:

a) We suggest that the time estimate for the final hearing to be taken into account in 57(3)(b) should be up to 5 days rather than 3. We anticipate that there may be claims that could be dealt with in up to 6 months but where the need for factual and expert evidence may mean that the hearing needs up to 5 days or alternatively more reliance on written submissions and evidence. We believe it sensible that the Tribunal therefore reserves the discretion on the hearing time estimate at this stage whilst the initial claims are considered and which does not of course prevent the Tribunal from exercising that discretion to a shorter timeframe should it consider it appropriate to do so;
b) We understand the reasoning in the Tribunal reserving discretion under Rule 57(2) to order that proceedings should cease to be subject to the fast track Procedure, but believe this

should take into account the impact on an SME of losing the benefit of a cost cap and any reliance that has been placed on that cost cap being effective; and

c) In relation to Rule 57 (3)(d), whilst the existence of additional claims may be a factor for consideration, we do not believe that this should prevent the claim itself being subject to the fast track procedure if it otherwise meets the relevant criteria and there is potential for the additional claims to be dealt with separately.

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:

We welcome the addition of the new rules governing settlement offers in a similar way to Part 36 CPR, and the additional provisions clarifying the position in relation to multi-defendant proceedings. Under Rule 45(10), where a claimant accepts an offer in satisfaction of claims against all defendants and the Tribunal directs that the claim against any remaining defendants be discontinued, we believe this should be on the basis of no order as to costs save as agreed between the settling parties.

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

☒ Yes ☐ No ☐ Not sure

Comments:

We welcome the more detailed provisions on disclosure, and in particular the clarification regarding pre-action disclosure and third party disclosure.

The use of pre-action disclosure in private actions may in certain cases be curtailed in practice due to perceived risk of "torpedo" actions but may be very helpful in those cases where this is not viewed to be a risk. Given experience in a number of cases where there have been corporate re-organisations during the course of regulatory investigations and/or after the infringement finding with documents no longer remaining with a potential defendant, we believe the rules should leave open the potential to obtain documents from third parties prior to proceedings if the criteria under Rule 61 are otherwise met.

We support the approach of leaving to the discretion of the Tribunal the appropriate scope of disclosure to that which is necessary to deal with the case justly and proportionately, following submissions by the parties.

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:

We agree in principle with the Tribunal retaining the ability to transfer proceedings to other courts in appropriate cases. By way of example, we could foresee this being relevant where there may be similar proceedings in the High Court which it would be sensible to case manage together, or where certain aspects of the proceedings more appropriately fall within the expertise of another court. We believe this option should be exercised in consultation with, and following submission by, the parties.

We have some concerns, however, regarding the practicality of transferring part of the proceedings and believe this would need to be carefully considered on a case by case basis as to whether this was practical and proportionate where e.g. disclosure and evidence may overlap to ensure this would not create significant additional cost. It should be considered whether this could be avoided (e.g. if competition issues could be dealt with in the Chancery Division by Judges who sit in both the High Court and the Tribunal if a transfer was considered sensible for other aspects of the claim); and only used where necessary.

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

☒ Yes ☐ No ☐ Not sure

Comments:

We believe the amendments to the rules are helpful in clarifying an area which has, to date, been the subject of some uncertainty and created additional complications.

We welcome the provision in Rule 40(1)(c) which allows the Tribunal to consider whether an additional claim should be dealt with separately from the claim by the claimant against the defendant. We believe this is an important consideration, particularly in cartel damages actions where there may be a very large number of contribution parties. We believe an additional reference should be added to the criteria which the Tribunal should consider in reaching a decision on this point in Rule 40(2) to include the proportionality of the costs of dealing with additional parties alongside the main claim, in accordance with the governing principles. This is, in particular, a potentially significant issue where a claimant might exercise its right to bring a claim against one defendant on a joint and several basis, but the defendant chooses to bring additional claims against all other addressees of an infringement decision which could very substantially increase the costs and slow down the timetable in some cases if the contributions claims are dealt with alongside the main claim.

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:

We welcome the expansion of the Tribunal's jurisdiction to grant injunctions in appropriate cases. The discretion granted to the Tribunal to dispose of the need for an undertaking as to damages or to cap the amount of an undertaking in fast track cases is welcomed and we believe important in providing effective access to redress for SMEs. Some guidance on how this discretion will be exercised would be useful in circumstances where it may be necessary to apply for an injunction in advance of proceedings being started and so before any consideration of the suitability of the claim for the fast-track has been considered. We believe that Rule 67(5) should also be revised to apply to any proceedings which fall within the fast track criteria, to allow the suitability of the proceedings for fast track and the potential waiver or capping of any undertaking as to damages to be considered at this stage.

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 see no inherent need for a presumption on the basis that anyone applying to act as class representative will need to fulfil the relevant criteria in Rule 77. We have, however, no strong objection to a presumption against law firms or funders provided it could be overridden in appropriate circumstances e.g. if they were a claimant under a proposed class and had a genuine interest fulfilling the criteria in Rule 77 (albeit which we anticipate will only apply in exceptional circumstances). It should, however, be made clear that this does not prevent a class representative using third party funding to bring a claim.

In the case of special purpose vehicles, the consultation document itself recognises that this might be appropriate in particular cases where an entity is formed specifically to bring a case to simplify case management. This is also important to ensure that the provisions relating to collective proceedings are not unduly restricted to a very limited number of organisations which could hinder the effective use where there is otherwise a meritorious claim. Similarly, we believe the reference under Rule 77(3)(b) in the criteria which the Tribunal will consider in determining whether the class representative would act fairly and adequately in the interests of class members to "*whether an applicant is a pre-existing body*" should not prevent a newly formed body from being able to demonstrate that it otherwise fulfils the qualifying criteria. In light of the above, we believe a presumption against special purpose vehicles is not necessary or appropriate, but if maintained it

should be made clear that the CAT has the discretion to override the presumption where the criteria under Rule 70 are otherwise met.

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

Comments:

We agree with the criteria set out under Rule 78(2), subject to the following comments:

a) the relevance of separate proceedings already having been commenced by members of the class (under Rule 78(2)(c)) should not be taken to suggest a collective proceedings order is not necessary, but rather may be an indication that this is a fair and efficient approach to avoid need for multiple claims;
b) whilst we fully endorse the use of ADR, we anticipate that this will not typically provide a viable alternative for multiple class members unless a defendant has set up a voluntary redress scheme or otherwise agrees to enter into a dialogue with a potential class representative with a view to considering a collective settlement offer; and
c) we are not convinced on the rationale in making the strength of the claim a relevant factor in determining between opt-out and opt-in proceedings under Rule 78(3)(a), particularly given that the Tribunal will retain its powers to strike out cases which are not meritorious in the usual way under Rule 41 in either event. Rather the second criteria in Rule 78(3)(b) is, we believe, the key to determining between the appropriateness of opt-out and opt-in proceedings. We of course accept that the Tribunal will consider, as it may in all cases, whether there are reasonable grounds for bringing the claim and whether it has reasonable prospects of success. We believe this needs to be applied in a way which: (i) recognises the asymmetry of information which may exist between claimants and defendants at an early stage in the proceedings in e.g. cartel damages actions; and (ii) should not unnecessarily front load the costs of proceedings, in particular detailed expert analysis, prior to class certification but strike the appropriate balance in allowing the Tribunal to consider whether there are reasonable prospects of success without making the costs of class certification disproportionate and a deterrent to meritorious claims.

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

☐ Yes ☐ No ☐ Not sure

Comments:

Whilst we ordinarily find formal settlement offer a useful mechanism which assist in promoting settlement, we share the concerns expressed in the Consultation Paper regarding the potential for defendants to offer low settlement offers and apply costs pressure on claimants to settle early without having the relevant information at their disposal to assess the reasonableness of the offer.

If the rules were to be applied to collective proceedings, this should be subject to additional conditions as to disclosure of information in order for the costs consequences to become effective as set out below.

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:

We suggest that the cost consequences of a formal settlement offer by a defendant should only become effective where the claimant has sufficient information to judge the reasonableness of that offer, and, in particular, has been provided with sufficient disclosure or information by the Defendant of the factual and/or expert evidence on which the offer has been based.

We believe this should usefully follow the information which the Tribunal would expect to see under Rule 96(c) in considering whether to approve a collective settlement approval order as to why the terms are just and reasonable, in particular any independent expert evidence on which the defendant relies with a signed statement of truth. The Tribunal would then, in the normal way, have the discretion under Rule 51(2) to consider whether it would be unjust to apply the costs consequences of a formal settlement offer including the information available to the parties at the time when the Settlement Offer was made, the conduct of the parties in providing supporting information for the purposes of evaluating the offer and any change in the offering party's evidence since the date of the offer.

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:

We have set out below some additional comments on the draft Rules which are not otherwise covered by the above questions:

22.1 Case administration - We welcome the reference in the guiding principles to use of technology to manage cases, and would support a move to allow correspondence with the Tribunal by email rather than fax, and to reduce the number of hard copies required from 10 where practicable. It would also be useful where issuing claims if there was a process by which they were stamped as issued on receipt (similar to the High Court) so there is more certainty for a claimant, particularly if dealing with limitation deadlines.

22.2 Period for Service- We would welcome consideration being given to allowing a period in which service can be effected following issue as is the case with the High Court, rather than service having to be carried out immediately. We say this due to the well known risk in competition cases of "torpedo" proceedings being issued by defendants in alternate jurisdictions if there is any correspondence prior to issue. Where it is necessary to issue proceedings immediately to avoid this risk, there is then no opportunity presently in the Tribunal procedure to engage with the defendant prior to service and without the proceedings immediately becoming publicised on the Tribunal website, which can be unhelpful to any settlement dialogue. Alternatively, the Tribunal could consider a request by all parties to delay publicising the proceedings pending any initial agreed dialogue.

22.3 Requests for Further Information – We note that the new draft rules do not adopt equivalent provisions to Part 18 of the Civil Procedure Rules, which we think would be a useful addition, and consistent with the guiding principle that a party's case should be fully set out in writing as early as possible.

22.4 Limitation:

a) Transitional provisions - As there are claims which cannot currently be brought in the Tribunal without permission pending conclusion of appeals, but for which limitation might have expired in the High Court, transitional provisions on limitation will be critical to avoid claimants losing their rights on adoption of the new rules and we would therefore welcome early sight of these.

b) Limitation for collective proceedings: We note that the provisions under Section 47E will only apply to claims arising after commencement. It would be helpful if there was some clarification regarding the interpretation of this term to avoid this triggering any later satellite litigation.

22.5 Jurisdiction – it would be helpful to clarify under what circumstances the Tribunal would consider not exercising its jurisdiction under Rule 34(1)(b).

22.6 Defence – Rule 35 should be amended so that a Defendant is required to annex any documents to which it refers to its Defence in the same way that a Claimant is required to do with its Claim Form under Rule 30(4)(c).

22.7 Withdrawal of a Claim – Under Rule 44 where a claim is withdrawn, the discretion of the Tribunal to make any consequential cost order as it thinks fit should not apply where costs have been agreed between the parties.

22.8 Directions – We suggest a reference is added into Rule 52(1) that the Tribunal should also have regard to any submissions by the parties.

22.9 CMC – Under Rule 53(1) and 53(4), we suggest a reference is added to the Tribunal having regard to the need for a hearing, the just and proportionate costs of proceeding and any submissions of the parties.

22.10 Collective proceedings:

a) Under Rule 75(6) we do not see the logic of a Defendant being able to raise applications at certificate stage for strike out, but not to have to put forward any jurisdiction argument, which we believe should also be raised at this stage.

b) Under Rule 77(3)(b) – we do not believe the fact that a body is an existing body should be determinative (see Comments in relation to Question 18 above)

c) Under Rule 92(4) – we suggest that "*the costs, fees or disbursements incurred*" should be clarified to include any funding and/or ATE costs, which we believe will be key to ensuring the viability of many potential actions given the costs burden and risk which is placed on the class representative.

22.11 Funding Arrangements

a) Where an uplift under a conditional fee agreement is no longer recoverable, we see no reason why this should still need to be notified to the Tribunal under Rule 112 (2), save in the case of any requirement for collective proceedings under Rule 77(3)(iii); and

b) Where a proposed class representative is required to provide information regarding its costs, fees or disbursements under Rule 77(3)(iii) the Tribunal should have the discretion to receive some of that information on a confidential basis where, for example, a conditional fee agreement might be relevant to a risk assessment of the case.

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

BIS/15/75RF