ashurst

CONSULTATION ON THE DRAFT CAT RULES OF PROCEDURE

RESPONSE OF ASHURST LLP

Ashurst LLP welcomes the opportunity to respond to the consultation by the Department for Business, Innovation and Skills ("**BIS**") on the proposed new rules of procedure for the Competition Appeal Tribunal ("**CAT**") (the proposed new rules are referred to in this document as "**the draft CAT Rules**"). From the categories of respondent provided in the pro forma consultation response, Ashurst best corresponds to a "legal representative". This response, however, contains our own views, based on our experience in advising and representing clients on matters relating to the work of the CAT and before the general courts. This response is made in our own name and not on behalf of any client.

There is one sentence in this response which is confidential. It has been redacted in this non-confidential version.

We confirm also that we would be happy to be contacted by BIS in relation to research or other consultation documents.

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:

1.1 We agree that it would be sensible to promote the Guide's five principles to form Governing Principles embodied in the draft CAT Rules.

2. **Do you agree that the Governing Principles will help the CAT both in the task of**

(a) **case management generally and**

✓	Yes		No		Not sure

(b) **in the application of particular Rules?**

✓	Yes		No		Not sure

Comments:

2.2 We agree that the Governing Principles should help the work of the CAT. It is of course essential that the CAT remains able to adapt its case management to the requirements of each specific case. Whilst it is certainly in the general interest that the CAT's approach to case management should be reasonably predictable and consistent as between different cases, flexibility is also essential in ensuring that each individual matter is dealt with in the most efficient, just and appropriate manner.

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:

3.1 We agree that it is not desirable to have a target timetable for cases generally, given the provision in the General Principles for the CAT actively to manage each case by setting a target date for the main hearing as early as possible as well as providing for a structured timetable for the proceedings up to that point. We note that past cases have varied significantly in terms of the number of parties, the complexity of facts and law in question, the commercial urgency of the issues etc and we do not consider that a "one size fits all" approach is particularly useful or appropriate in that context.

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

	Yes	✓	No		Not sure

Comments:

4.1 We consider that there are arguments in favour of setting a sensible target deadline for the delivery of a decision, although we consider that it would be acceptable for this to take the form of an objective in CAT procedural guidance rather than a formal statutory deadline, as explained further in response to question 5 below.

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:

5.1 We consider that the requirement in Rule 3(2)(d) of the draft CAT Rules that the CAT should deal with a case expeditiously means that the CAT should be as diligent and efficient in delivering its rulings and decisions as it expects the parties to be in the production of evidence and submission of their case. It is in the interests of the parties and the efficient administration of justice that there should be no undue delay once the onus of effort in a matter has passed from the parties to the tribunal members.

5.2 Whilst we acknowledge the arguments that a fixed statutory deadline could be counterproductive because of the pressure put on the tribunal members, we consider that it would not be unreasonable to have an expectation that in 80 per cent of cases, judgments will be issued within six months of the final hearing or submission of evidence on a particular issue. This need not take the form of a formal statutory provision but should be included as a objective in CAT procedural guidance.

5.3 We consider that this commitment is appropriate and sufficiently flexible and note that:

(a) although a different process and supported by a large team of staff, the CMA is held to an 18 month deadline to conduct the entirety of a market investigation reference under Part 4 of the Enterprise Act 2002 ("**EA02**") (extendable once only by up to 6 months for special reasons). Market investigations can be incredibly involved proceedings involving many parties, complex markets and facts, with potentially broad terms of reference together with an obligation to identify

remedies to any competition problems identified, all within the 18 month deadline. The ongoing market investigations into Retail Banking, SME Lending and Energy exemplify the potential breadth of scope and size of the markets which a market investigation may need to consider; and

(b) CAT judgments tend to be long and detailed. However, as the Court of Appeal reminded it in **Argos v OFT and JJB v OFT** ([2006] EWCA Civ 1318) citing Griffiths LJ in **Eagil Trust Co Ltd v . Pigott-Brown** [1985] 3 All ER 119 at 122:

> "*a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties, and if need be, the Court of Appeal the basis on which he has acted*".

The Court of Appeal went on to confirm that the same principle applies equally to findings of fact and encouraged the CAT to express its findings of fact and its reasoning in more succinct form" (**Argos** at para 6). The fact that comprehensiveness should therefore not be an objective in writing judgments should facilitate prompt handing down of rulings.

6. **Do you agree with the recommended new provisions for strike out?**

☐	Yes	☑	No	☐	Not sure

Comments:

6.1 It is proposed to change Rule 11 to allow the CAT to strike out:

(a) where an appellant has failed to co-operate to such an extent that the case cannot be dealt with justly and fairly; and

(b) where the tribunal considers that it has no jurisdiction to hear the matter.

6.2 The second of these new grounds is sensible and in line with a desire for efficient case management.

6.3 However, it is not clear that the first new ground is needed. Rule 11(f) already entitles the CAT to strike out an action where the appellant "fails to comply with any rule, direction, practice direction or order". Presumably any on-going failure to co-operate would sooner or later involve a failure to comply with a practice management direction or order and if it did not, a direction or order could be made by the CAT making clear what is expected of the appellant and setting a deadline – and entitling the CAT to strike out in the event of non-compliance. If a broader power to strike out where the appellant "has failed to co-operate" is created, it is important that the meaning and scope of the provision should be clarified.

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:

7.1 We have no further suggestions.

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:

8.1 This question is referring to the discussion in the BIS consultation document of the apparent concerns of "*some Regulators that parties were deliberately holding back evidence to "game" the system*" prompting calls for a prohibition on the parties introducing any new evidence. We do not recognise this as a tactic and have not experienced any such approach by any party in any of the many CAT cases on which we have acted. We certainly would not support a prohibition on any new evidence being introduced before the CAT.

8.2 We consider that there are entirely valid reasons why new evidence is often introduced at the CAT appeal stage which was not made available to the competition authority during the administrative investigation:

(a) parties will typically be given 2 months to respond to a statement of objections. In many cases, this is a very long document, supported by a very extensive case file. […] **[Redacted – confidential]** It is typically a very intense process responding to the statement of objections and preparing for the oral hearing in the time available. It is simply not possible to marshal every possible piece of countervailing evidence before the deadline for responding. As a consequence, where parties expect an infringement decision to follow, they will typically continue to develop their case after their formal response to the statement of objections has been completed, in anticipation of an appeal. Inevitably new evidence emerges which is helpful to their case and which is therefore used in the appeal. The only way to avoid this reason for new evidence arising would be to extend the time for responding to a statement of objections to six months to give the parties longer to collate the best possible defence and supporting evidence;

(b) evidence at the administrative investigation stage is not necessarily submitted in the form of witness statements. Responses to requests for information, for example, are given as written answers from the business under investigation and not as evidence from individuals. By contrast, evidence before the CAT is given by named individuals in the form of written witness statements and the individuals may be cross-examined to test their evidence. Accordingly, new evidence in the form of witness statements is often necessary at the CAT stage. We do not consider that it would be appropriate to change this approach: if evidence at the administrative investigation stage was required to take the form of witness statements from named individuals, this would risk converting the investigation into a quasi-judicial process, which we do not consider would be appropriate, desirable or efficient;

(c) finally, it is not unusual for the competition authority's case to develop between the statement of objections and the final decision. This is inevitable given that the final decision needs to address the counterarguments raised by the parties in response to the statement of objections. If the essential case remains the same, no supplemental statement of objections will be required and the parties will not therefore see the reworked infringement case until the final decision is issued. Inevitably, this means that in appealing the final decision, evidence which was not on point as regards the statement of objections may become an important part of the parties' case before the CAT.

8.3 None of these situations involve "*gaming the system*" or "*deliberately holding back evidence*" and it would be wholly unjust to allow the CAT's approach to new evidence to be skewed by such a misconception. It is essential that parties remain able to develop their appeal fully before the CAT with all necessary supporting evidence and to do otherwise would risk serious prejudice to the parties' rights of defence.

8.4 We acknowledge that it is useful for all parties to know what new evidence has been submitted. We therefore consider that it is sensible to require an appellant to include a statement in its notice of appeal identifying any new evidence which was not before the initial decision-maker, as required in Rule 9(4)(h) of the draft CAT Rules. We consider that all new evidence should be deemed admissible unless there is a specific objection raised by the defending competition authority. Likewise, the defendant should be required to identify any new evidence in a statement included with the defence which will be admissible unless the appellant objects.

8.5 As regards the specific grounds in Rule 21(2) of the draft CAT Rules on which the CAT should rule on admissibility in the event of a dispute about new evidence, we consider that they are currently too inclined towards exclusion of new evidence. In particular, given the points made above regarding the various legitimate reasons for adducing new evidence which was or could have been available at the administrative investigation stage, draft Rules 21(2)(b) and (c) are not appropriate. The position should remain, as at present, that whether or not the evidence in question could have been made available at the stage of the administrative investigation should be irrelevant. The issues of potential prejudice and whether the new evidence is necessary to decide the matter are far more appropriate and neutral grounds on which the CAT should decide issues of admissibility.

8.6 Finally, we note that the CAT will also be able to control through its case management whether expert evidence can be submitted (Rule 21(1)(d)) and the number of witnesses which each party can put forward (Rule 21(1)(e)). This case management tool can also be used to control the extent of new evidence.

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:

9.1 See the response to question 8 above.

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:

10.1 We agree that it is sensible to enable the CAT to adopt a flexible approach to amendments to pleadings. We note that the grounds which the CAT must take into account are specified in Rule 12(3) as:

> "*… whether the proposed amendment:*
>
> *(a) involves a substantial change or addition to the appellant's case;*

(b) is based on matters of fact or law which have come to light since the appeal was made; or

(c) could not otherwise practicably have been included in the notice of appeal."

This Rule will apply both to amendments to a notice of appeal and amendments to a defence by virtue of Rule 15(7).

10.2 We have no objection to increasing the flexibility with which the CAT can manage amendments. We would note that if one side is permitted to change its case to too great a degree, it can be very difficult for the other side to know what it is arguing against. Significant amendments to pleadings can therefore create considerable additional costs, particularly where one side has to rework its arguments in light of the changes to the other side's pleadings.

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

✓	Yes		No		Not sure

Comments:

11.1 We agree that, by giving the CAT broader discretion, the extent of satellite litigation on the questions concerning the CAT's power to accept amendments should logically reduce.

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:

12.1 We consider that the proposed fast track procedure set out in Rule 57 of the draft CAT Rules will benefit SMEs and micro businesses (and other claimants)[1] in smaller or less complex cases, and in particular in applications for injunctions. We support the decision not to allocate every case that involves an SME automatically to the fast track procedure,[2] and we consider that the proposed new rule strikes an appropriate balance between facilitating access to redress and ensuring that larger and/or more complex cases are properly heard and dealt with by the CAT.

12.2 The list of matters to be taken into account by the CAT in deciding whether to make particular proceedings subject to the fast track procedure includes many of the elements we previously suggested in our June 2012 response to the original BIS consultation on options for reform and our September 2013 response to the Consumer Rights Bill consultation. We therefore welcome the approach adopted in Rule 57(3). Whilst restricting the fast track procedure to cases where the time estimate for the final hearing is three days or less will inevitably limit the number of cases where the fast track procedure can be used, we remain of the view that this is an appropriate restriction, which should ensure that the fast track procedure is only used for simpler cases.

---

[1] We note that the question of whether one or more of the parties is an individual or a micro, small or medium-sized enterprise is one of the factors to be taken into account by the CAT when deciding whether to make particular proceedings subject to the fast track procedure, but is not a pre-requisite for the procedure to be followed. We agree with this approach.

[2] As previously noted in our July 2012 response to the BIS consultation on options for reform in competition private actions, the fact that a case involves an SME will not necessarily mean that it is a less complex case which is suitable for fast track process.

12.3 We note that the list of factors in Rule 57(3) does not expressly refer to the fast track procedure being focussed primarily on applications for injunctions (in particular applications for interim relief), which we had previously advocated in our earlier consultation responses (and still consider to be desirable). However, we anticipate that an emphasis on injunctive relief will result from the combined effect of the list of factors in Rule 57(3).

12.4 We also welcome the express inclusion in Rule 57(2) of the possibility for either party to apply to the CAT for an order that proceedings should cease to be subject to the fast track procedure. In practice, what initially appears to be a relatively simple case with limited documentary evidence and witnesses can often develop into a much more complex matter, which would no longer be suitable for the fast track procedure.

12.5 However, we have concerns that the requirement set out in Rule 57(1)(a) that the final hearing must be fixed to commence no later than six months from the date of allocation of a case to the fast track procedure could, in practice, have an adverse effect on access to redress in some cases. As previously noted in our July 2012 response to the BIS consultation on options for reform, an insistence on scheduling the substantive hearing within six months of the case being lodged could actually lead to an increase in costs due to the intense work which may be required to be in a position to go to trial within six months (in particular collation of evidence and expert reports). We therefore remain of the view that it would be preferable to give the CAT greater discretion to vary the timeframe for hearing cases allocated to the fast track, whilst retaining an expectation that the CAT would, where possible, aim to hear a fast track case within six months.[3] This would be in line with the rejection of strict timetables for cases generally (see Question 3 above).

12.6 We also consider that it would be helpful to publish clear and accessible guidance setting out the process for applying to have a case allocated to the fast track procedure and the implications of doing so, to ensure that parties can make an informed judgment about whether to request the use of the fast track procedure (or indeed to argue against its use) in a particular case.

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:

13.1 The Mummery Review recommended that the CAT adopt rules similar to CPR 36 to encourage and facilitate the settlement of cases. We support this recommendation, and indeed made the same suggestion in our response to the original BIS consultation on options for reform of competition private actions.

13.2 However, we note that Rules 45-48 as currently drafted do not reflect CPR 36 as amended from 6 April 2015. We understand that CPR 36 was revised to clarify how it is to be used and to deal with points raised in the case law since its last major review in 2007. With that in mind, it seems to us to make sense that the CAT Rules should be amended to reflect the new CPR 36. For example:

(a) new CPR 36.9(4)(b) permits Settlement Offers to be made which are time-limited;

---

[3] See paragraph 5.11 of our July 2012 response to the BIS consultation on options for reform in competition private actions.

(b) new CPR 36.10 amends the rules on withdrawal offers, such that permission of the court is only required in circumstances where the offeree wishes to accept the offer within the relevant period;

(c) new CPR 36.9(5) clarifies the status of offers where the terms of the offer are amended to make it more advantageous to the offeree;

(d) new CPR 36.12 clarifies the position in relation to acceptance of offers in the context of a split trial. This point is not dealt with in the draft CAT Rules, which simply refer to "the substantive hearing" (see for example Rule 45(8)). We would suggest that this issue should be addressed in the final version of the Rules; and

(e) new CPR 36.13(2) provides that where a defendant's offer relates to only part of the claim and, at the time of serving notice of acceptance within the relevant Period, the claimant abandons the balance of the claim, the claimant will normally only be entitled to the cost of the relevant part of the proceedings up to the date of serving notice of acceptance, rather than the cost of the entire proceedings.

13.3 We are also concerned that a number of important issues are not dealt with in the proposed CAT Rules. It is unclear whether it is intended that CPR 36 should be relied upon to "fill in the gaps" where necessary. This would be one possible approach, but if this is the intention it should be made clear. For example:

(a) there is no clear statement in the draft CAT Rules regarding when a Settlement Offer is deemed to be made. CPR 36.7(2) (references are to CPR 36 as it applies from 6 April 2015) expressly provides that a Settlement Offer is deemed to be made when it is served on the offeree in accordance with the service rules set out in the CPR. We consider that it would be helpful to clarify this point in the CAT Rules;

(b) the draft CAT Rules do not address how counterclaims will be dealt with. CPR 36.5 requires a Settlement Offer to state whether it takes into account any counterclaim, and we consider that the same approach should be adopted by the CAT;

(c) the draft CAT Rules do not make clear whether Settlement Offers made in the context may be non-monetary. This possibility is provided for in Part 36 CPR, and we consider that the position should be clarified in the context of competition claims before the CAT; and

(d) given that the costs consequences on acceptance of any Settlement Offer within the relevant period are automatic, we consider it sensible to clarify, in the definition of relevant costs, that the claimant's costs entitlement is on the standard basis. This would be in line with the approach adopted in CPR 36.

13.4 With regard to the circumstances to be taken into account by the CAT when considering whether it would be unjust to make a costs order under draft CAT Rule 48, we consider that an additional factor should be added to the list set out in draft Rule 48(2), namely:

"*(e) whether the offer was a genuine attempt to settle the proceedings.*"

13.5 This would reflect the requirements under the revised CPR 36. We consider that this is an important factor to take into account in competition claims, and we can see no reason for taking a different approach to CPR 36 in this regard.

13.6 Finally, we note that the reference to CPR 36.14(3)(d) in draft CAT Rule 48(1)(b)(iv) should be changed to CPR 36.17(4)(d) in light of the April 2015 revision to CPR 36.

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:

14.1 We welcome the inclusion of detailed provisions relating to disclosure of documents by parties in private actions, including disclosure before proceedings have started. We agree that such disclosure may be desirable in some cases in order to assist in resolving the dispute without commencing proceedings or to dispose fairly of the proceedings, whilst also seeking to minimise costs. However, we consider it important that any such application should be supported by sufficient evidence, and that the CAT should consider carefully whether disclosure at such an early stage is appropriate in a particular case, in accordance with draft Rule 61(3).

14.2 With regard to disclosure of documents by a person who is not a party to proceedings, we agree that any such disclosure order should only be made where the conditions set out in draft Rule 62(2) and 62(3) are met.

14.3 Where a party inadvertently discloses a privileged document, we do not agree that the party who has seen the document may use it or its contents with the permission of the CAT (draft Rule 64). We do not consider that the party who has seen such a document should be permitted to use it or its contents in the proceedings where it is clearly established that disclosure of the document was not intended. We consider that the CAT should follow the approach under the CPR, where the recipient of the privileged document must apply for permission to use it, which will not be granted if the mistake in disclosing the document was obvious to a reasonable solicitor.

14.4 In relation to the Electronic Documents Questionnaire (defined as being the questionnaire in the Schedule to Practice Direction 31B of the CPR), we note that under the CPR disclosure of this document would occur prior to the first case management conference. By contrast, Rule 59(2) of the draft CAT Rules indicates that the CAT will usually decide whether and when the (disclosure report and) Electronic Documents Questionnaire should be filed at the first case management conference.

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:

15.1 We support the transfer of cases from the CAT to the appropriate courts (and, once section 16 of the EA02 is brought into force, the transfer of cases from the courts to the CAT). However, as a general rule, we do not agree that it would be necessary, or indeed desirable, to transfer *part* of a case from the CAT to the courts (or indeed vice versa), leaving the competition elements to be dealt with by the CAT and any other elements to be dealt with by the courts.

15.2 As previously noted in our July 2012 response to the BIS consultation on options for reform, such bifurcation of cases involving competition law elements would give rise to considerable practical difficulties, both in terms of timetabling and case management issue, as well as debate regarding which collective actions regime should apply (assuming

that the proposed opt-out regime for collective actions before the CAT is implemented as expected).

15.3 It would also be unnecessary, at least in respect of transfer of cases to/from the High Court, bearing in mind that all Chancery judges are Chairmen of the CAT and have expertise in both competition and non-competition issues. Where a case is *predominantly* concerned with a *competition law* issue, it would seem sensible for it to be heard by the CAT in its entirety, with a Chancery judge acting as Chairman (who would be very capable of dealing with any non-competition law elements of the case). Where a case is *predominantly* concerned with *non-competition law* issues, but there are competition law elements to it, it would seem sensible for the whole case to be heard by the appropriate court, provided the judge had the requisite experience to deal with the competition law elements as well (as would certainly be the case in the Chancery division of the High Court). Hearing different elements of the case in separate proceedings, under different procedural rules, appears to us to be unnecessarily cumbersome and costly.

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

☐	Yes	☑	No	☐	Not sure

Comments:

16.1 We have no comments.

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

☑	Yes	☐	No	☐	Not sure

Comments:

17.1 We welcome the discretion given to the CAT in Rule 66 to grant an injunction (whether interim or final) in all cases in which it appears to the CAT to be "*just and convenient*" to do so, and on such terms and conditions (if any) as the CAT thinks just. We note that this largely mirrors the provisions of section 37(1) and (2) of the Senior Courts Act 1981, relating to the grant of injunctions by the High Court.

17.2 We also welcome the provisions of Rule 67(5), which permits the CAT to grant an interim inunction without requiring the applicant to provide a cross undertaking in damages or subject to a cap on the amount of the undertaking as to damages, in proceedings subject to the fact track procedure in Rule 57. We would also suggest adding the word "or" at the end of Rule 67(5)(a), in the interests of clarity of drafting.

17.3 We consider that it would be helpful to provide further guidance regarding how the CAT will apply the "*just and convenient*" test in practice. In respect of interim injunctions, we would suggest that the CAT should follow a similar approach to the High Court, applying the principles set out in the **American Cyanamid** case,[4] namely:

(f) whether there is a serious question to be tried;

(g) whether damages would be an adequate remedy;

[4] **American Cyanamid Co v Ethicon Ltd** [1975] AC 396

(h) what would be the balance of convenience of each of the parties should an order be granted; and

(i) whether there are any special factors.

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:

18.1 Whilst we acknowledge the Government's desire to ensure that only those who have a genuine interest in the case or those who have themselves suffered loss should be allowed to bring collective actions, we are concerned that there are limited incentives for individuals or private bodies to act as representatives in collective actions, particularly in light of the proposed approach to costs in draft Rule 97(1).

18.2 We therefore consider that introduction of a presumption in relation to the identity of a class representative which can be overridden at the CAT's discretion is preferable to the introduction of an automatic prohibition on collective actions being brought by law firms, third party funders or special purpose vehicles.

18.3 We also note that organisations that offer legal services and third party funders will continue to be involved in collective actions as providers of essential legal advice or funding, and this should not be discouraged.

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:

19.1 We generally support the proposed certification criteria, and we welcome the wide discretion left to the CAT to take into account all matters which it considers to be relevant in determining whether claims are suitable to be brought in collective proceedings.

19.2 We agree that the availability of alternative dispute resolution and any other means of resolving the dispute is an appropriate factor to be taken into account by the CAT in this regard. We consider that this should expressly include taking into account the extent of any voluntary redress scheme already proposed by the defendant(s) (whether or not such redress scheme has been formally approved by the Competition and Markets Authority pursuant to the procedure under new section 49E to be inserted into the Competition Act 1998 by the Consumer Rights Act 2015).

19.3 With regard to the CAT's assessment of the strength of the claims at the certification stage:

(a) we consider that the strength of the claims should be a factor to be taken into account by the CAT in initially determining whether the claims are suitable to be brought in collective proceedings for the purposes of draft Rule 78(1), rather than only being taken into account when determining whether the collective proceedings should be opt-in or opt-out proceedings (as is currently proposed in draft Rules 78(2) and (3)); and

(b) the relevant test for assessing the strength of the claims should be specified more clearly in the final CAT Rules. As indicated in our June 2012 response to the

original BIS consultation on options for reform, we consider that the test should be whether the claimants' case has a "reasonable prospect of success". We remain of the view that the CAT should follow this approach, and that this should be stated more clearly in the final version of the CAT Rules.

20. **Should formal settlement offers be excluded from collective actions?**

☐	Yes	✓	No	☐	Not sure

Comments:

20.1 We see no reason for excluding formal settlement offers from collective actions given that the CAT has discretion under Rule 48 of the draft CAT Rules to disapply the formal settlement cost consequences, where just to do so.

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:

21.1 If it is decided that the rules on formal settlement offers should apply in this context, we consider that the disclosure rules set out in draft Rule 45(9) should apply equally in the context of collective actions.

21.2 If a formal Settlement Offer is accepted, the terms of the Settlement Offer should then be subject to the approval process set out in draft Rules 93-96, but this process should take place before a different judge/CAT Chairman to the person hearing the main proceedings. This is important to ensure that, if the proposed collective settlement is *not* approved by the CAT, the fact that a Settlement Offer was made (and indeed accepted) has not communicated to the members of the CAT who are then still required to decide the case.

21.3 We consider that this proposed approach to disclosure should apply to any type of settlement offer made in the context of collective actions, whether a formal settlement offer akin to a CPR 36 offer under draft Rules 45-48 or any other settlement offer made without prejudice save as to costs.

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:

22.1 We note that it is proposed in Rule 102 of the draft CAT Rules that the CAT should be able to issue a judgment on the internet rather than by formally handing it down at a hearing. We accept that in some cases this will increase efficiency where there are perhaps timetabling difficulties in scheduling the handing down. However, we consider that the parties should be given an opportunity, before the decision is taken to issue the judgment on the internet, to confirm that they were not intending to make any form of oral application at the handing down hearing.

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

☐	Yes	☑	No

Comments:

23.1 We have no further comments.

Ashurst LLP
15 April 2015