COMPETITION APPEAL TRIBUNAL (CAT) RULES OF PROCEDURE: REVIEW BY THE RT HONOURABLE SIR JOHN MUMMERY

RESPONSE OF HERBERT SMITH FREEHILLS LLP

INTRODUCTION

1. Herbert Smith Freehills LLP is grateful for the opportunity to respond to the Department for Business, Innovation & Skills ("**BIS**") in respect of its consultation document entitled *Competition Appeal Tribunal (CAT) Rules of Procedure: Review by the Rt Honourable Sir John Mummery* ("**Consultation Document**").

2. Herbert Smith Freehills has represented various clients in a wide range cases before the Competition Appeal Tribunal ("**CAT**") since its inception, including in cases under the Competition Act 1998, the Communications Act 2003, and the Enterprise Act 2002, and in a wide range of price control references (in various sectors) before the Competition Commission / Competition and Markets Authority. Herbert Smith Freehills has also represented various clients in the context of the administrative proceedings of the Office of Fair Trading, the Competition and Markets Authority and the various sectoral regulators. We also have substantial experience of cases in the High Court and appellate courts, including private damages actions and judicial reviews in the context of competition and regulatory cases. In addition, Herbert Smith Freehills has extensive experience of the appeals regime at the EU level, regularly acting for clients in the context of appeals of decisions of the European Commission.

3. The comments contained in this response are those of Herbert Smith Freehills and do not represent the views of our individual clients.

4. We would welcome the further opportunity to comment on any further or varied proposals in due course. Should you have any queries in relation to this response, please contact Stephen Wisking, Kim Dietzel or Andrew North of our offices.

5. Our responses to the questions in the Consultation Document are set out below.

HERBERT SMITH FREEHILLS

THE RECOMMENDATIONS (CONSULTATION DOCUMENT PART 6)

Robust case management

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 case management generally and in the application of particular Rules?

6. We do not disagree with the proposed approach.

Setting new target times and timetables for cases

Q3: Do you agree with the recommended approach on setting target times and timetables for cases?

7. We agree with the proposed approach, and in particular the need to retain flexibility for the CAT to set case-specific timetables. In our experience, cases can be vastly different in scope and complexity and it is important that the CAT can retain the flexibility to manage cases effectively. We also observe that cases overall, as well as specific case management issues, tend to be resolved efficiently, and this has a very real and positive impact on the smooth and expeditious running of cases before the CAT, many of which are large and complex. The time taken for cases in the CAT generally compares favourably in our experience with cases before other courts in the UK and at EU level.

8. Moreover, the time taken for cases in the CAT, including the time taken for a case to proceed to a hearing, is a product of a wide variety of factors, including requests by the parties themselves (both appellants/claimants and respondents including regulators) for extensions of time or for postponements in order to ensure that they have sufficient time to produce pleadings and evidence, and/or that their counsel or other advisors are available for hearing dates.

9. The imposition of short deadlines (and therefore a reduction in the flexibility of the CAT's procedures and timetabling) would in many cases be likely to lead to higher costs for all parties, including the regulators, facing timetables which do not allow them to, for example, utilise preferred counsel or organise internal resources effectively. Shorter deadlines may also have an impact on the quality of pleadings, which may undermine the efficiency and efficacy of the process for all concerned.

Reducing the length of time between the end of the hearing and the issuing of the CAT's decision

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?

10. We agree with the proposal not to set time limits for the delivery of decisions. The CAT should retain control to be able to allocate its resources effectively, which would include consideration of other cases before it and also the urgency and complexity of those cases as well as in relation to the case at hand.

A time limit would restrict this flexibility and could divert resources away from other cases which may need to be dealt with urgently, and may undermine the quality of judgments.

11. Imposing a time limit on judgments would not in any event address the overall length of proceedings. For example, in more complex cases, the main judgment is not necessarily the end of the matter and it may take some time for the final orders to be made (which might involve further rulings/judgments accompanying those orders). In such cases, the form of final orders may well be subject to legitimate debate, and we have been involved in a number of recent cases where the issue of the final form of orders has required submissions by the parties including further oral hearings following the main decision, followed by careful further consideration by the CAT. It would therefore be impractical to impose time limits on the making of final orders: if the time limit applied to the final order then there may well be insufficient time for the case to be considered fully, as there would be additional pressure to release the result of the main decision ahead of the time limit in order to allow time for submissions and a further decision on the final form of orders; but if it applied instead to the judgment this might have unintended effects.[1] Again, we consider the current, flexible, approach is best retained so that the CAT can allocate resources on a case-by-case basis.

12. Finally, in the case of regulatory appeals, a limited time period in which to issue a decision could lead to a greater propensity for the CAT to remit substantive questions back to the regulator rather than determine such questions itself, which, contrary to the intended effect, would in fact increase the time to have issues finally determined.

Striking out (Rule 11)

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

13. We agree with the proposal to add a power to strike out on the basis that the CAT has no jurisdiction to hear the dispute in both rule 11(1)(a) (for appeals) and rule 41(1)(a) (for private actions).

14. We believe that rule 11(1)(d), which provides for a pleading to be struck out where the party has "*failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly*", is unnecessary, given the presence of rule 11(1)(f). Rule 11(1)(f) provides for strike-out where the party "*fails to comply with any rule, direction, practice direction or order of the Tribunal*" which would cover a party's failure to co-operate with the Tribunal, and this would be reinforced by the proposed new rule 3(7). We therefore do not see what proposed rule 11(1)(d) would add in practice. Indeed, for this reason the introduction of rule 11(1)(d) and its relationship to rule 11(1)(f) would

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[1] Moreover, quite often decisions of the CAT are the subject of applications for permission to appeal to the Court of Appeal. While the CAT deals with these applications quickly, if permission to appeal is granted the Court of Appeal can take 6-12 months to determine the appeal (and is subject to no time limit). If permission to appeal is not granted by the CAT, the application can be renewed in the Court of Appeal further in writing, and if refused again can be renewed orally – and this process can take up to 6 months even if permission to appeal is ultimately refused. The Court of Appeal is not subject to any time limit in dealing with applications for permission to appeal.

introduce uncertainty which could provoke satellite litigation and which would run counter to the expressed aims of the proposed amendments to increase efficiency and reduce the length and cost of cases.

15. If contrary to the above, it is decided that rule 11(1)(d) should nonetheless be introduced, a rule to the same effect should also be included in relation to private actions in rule 41, as there does not appear to be any reason to justify such a rule only for regulatory appeals and 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?

16. We do not believe there should be other provisions to address unmeritorious appeals at an early stage; the existing and proposed rules are adequate. In particular, for appeals in the CAT, appellants must set out their submissions and evidence fully at the start of the appeal (rather than, for example, merely filing a claim form and particulars), and it would therefore be unusual for a wholly unmeritorious appeal to be filed (and if it were it would relatively easy for the respondent to make an application since all the evidence supporting the ground of appeal would be before the CAT). We are not aware of a case where the respondent has sought the striking out of an appeal on the basis that it is wholly unmeritorious.

Evidence (Rules 9, 15, 21); Adducing new evidence on appeal

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.

17. It appears that the proposal to introduce rules 9(4)(h), 15(3)(c) and 21(2) is at least partly as a result of "*concerns … expressed by some Regulators that parties were deliberately holding back evidence to 'game' the system, and they have suggested that parties should not be permitted to introduce any new evidence at appeal*" (paragraph 6.36 of the Consultation Document). We do not agree with this premise and there is no basis for it. We are not aware of any cases where it has been apparent that parties have withheld evidence deliberately at the administrative stage to utilise this at the appeal stage to "game the system", and no evidence has been provided as to parties having "gamed" the system in this way. Bringing an appeal is cost, resource and time intensive for parties, and it is therefore highly unlikely that parties would deliberately hold back evidence at the administrative stage with the intention of using this on appeal following an infringement or other decision, rather than using this to demonstrate that no infringement had occurred or otherwise to support its position.

18. We do, however, recognise that there is a separate issue as to the extent to which parties should be permitted to introduce evidence that was not before the regulator during the administrative proceedings. While, in our experience having been involved in a significant number of regulatory appeals, it is rare for objections to be pursued in relation to "new" evidence, we do not object in principle for there to be rules setting out a practical way of dealing with this issue. The CAT already has wide powers to control the

evidence before it (existing rule 22; mirrored in parts of proposed rule 21) and the substantive principles for the exercise of those powers have already been considered and developed in case law (including at the Court of Appeal level in *British Telecommunications v Office of Communications* [2011] EWCA Civ 245; [2012] Bus LR 113), but workable and practical rules to govern the procedure would be welcomed.

19. We consider the overall mechanism provided for in rules 9(4)(h) and 15(3)(c) would be a practicable way of dealing with the procedural issue, subject to the following observations:

    a) Rule 9(4)(h) should operate as a practical tool to allow for the identification of new evidence, while at the same time not being overly burdensome for appellants. We would suggest some minor changes to the drafting so as to strike an appropriate balance.

    b) In particular, it should be borne in mind that, unlike in some other courts and jurisdictions, appellants in the CAT have a very short time in which to prepare their appeal and all supporting documentation including factual/expert evidence (compare, for example, proceedings in the High Court where claims may be issued much later than in the CAT, and only a claim form and particulars of claim need be filed at the outset; witness statements and other documents can come months and, in some cases, years, later). The burden on appellants imposed by further requirements must therefore be carefully considered. Moreover, regard should be had to the potential for the new rule to create arguments as to whether the requirement has been complied with, thereby causing time-consuming and costly satellite litigation.

    c) Accordingly, we suggest that, in order to prevent undue burden on appellants, and to minimise the possibility of the sort of satellite litigation envisaged above, rule 9(4)(h) could be amended to align with the wording in rules 9(4)(a) or (e) (current rules 8(4)(a) and (c)); that is, rule 9(4)(h) should provide for a "concise" or "succinct" statement identifying the evidence.

    d) We consider that it is appropriate that rule 9(4)(h) as presently proposed refers to the substance rather than the form of "new" evidence. We consider this is essential, as often in practice the detail and form of evidence in appeals will be different: for example, submissions to regulators may be replaced by witness statements in appeals. Moreover, the reference to "substance" reinforces that the purpose of the rule is not to elicit a granular comparison between the precise text of submissions made to the regulator and a witness statement accompanying the appeal.

    e) Similarly, we consider that it is appropriate, and essential, that the rule as presently proposed refers to the appellant's awareness, as appellants may not be aware of all of the evidence that was before the regulator or the detail of it. For example, often some of the evidence before the regulator will have been submitted by others or gathered by the

regulator, and not shared with the appellant (and often material is claimed to be confidential), and even if evidence is referred to by the regulator for example in decision documents, appellants often are not aware of the detail of all the evidence. Given this, appellants will only be in a position to give a broad indication of the evidence on which they rely that they understand and consider to be "new". It will ultimately be for the respondent to take responsibility for identifying any "new" evidence to which they may wish to raise an objection, given the appellant would be unlikely to have full knowledge of what is on the regulator's file, and it will be a matter of opinion as to what constitutes "new" evidence and views may well differ. Accordingly, we suggest that the rule should refer to evidence which in the appellant's opinion was not before the decision-maker. This would align conceptually with the proposed rules concerning the mechanism in the pleadings for the CAT to determine which part of the United Kingdom the proceedings are to be treated as taking place, as set out in rules 9(4)(c) and 15(3)(a): those rules provide for the appellant and defendant, respectively, to provide their opinions as to this question (rather than a definitive statement as to what the position is), it ultimately being a matter for the CAT to determine.

f) In light of the above, we therefore suggest rule 9(4)(h) could be redrafted as follows (underlined text added):

"*(h) a concise [or succinct] statement identifying the evidence (whether witness statements or documents annexed to the notice of appeal) the substance of which in the appellant's opinion, and so far as the appellant is aware, was not before the maker of the disputed decision.*"

20. Rule 9(4)(h) should apply in a party-neutral manner and, accordingly, a similar rule should be introduced in relation to the defence: see, further, paragraph 29 below.

Admission of new evidence; constraining the volume of evidence

Q9: Do you consider that the proposed changes to the Rules address Government concerns in relation to constraining the volume of new evidence by enhancing the CAT's powers?

21. We do not agree with the premise that the volume of new evidence is in general somehow excessive. This has generally not been our experience in our involvement in cases before the CAT (and we note that we have acted both for appellants as well as interveners in support of respondent regulators). While the volume of evidence and argument may in some cases be extensive, in our experience this tends to reflect the complex nature of the decision under appeal (such decisions often run to many hundreds of pages). This should not be seen as problematic in and of itself, if it is necessary to enable the parties to hold the regulator effectively to account and exercise their rights of defence. We also note that instances where parties seek to put forward genuinely new evidence are relatively rare; generally all that occurs is that parties seek to elaborate on arguments made in earlier submissions, answer points in the decision which respond to those submissions but which were not previously put to the

parties, provide background and context for the CAT, and/or to "repackage" evidence or present this in a way which can be more conveniently provided to the CAT and understood in relation to the grounds of appeal. This clearly should not be prevented. Additionally, as noted above at paragraph 18, the introduction of evidence on appeal is rarely challenged, despite the clear ability for the regulator or other parties to do so under the current CAT rules. Accordingly, we do not see that there is any evidence to suggest that the volume of new evidence introduced in appeals tends to be excessive or would need to be constrained, and the fact that such evidence is rarely challenged (in circumstances where the rules and case law clearly provide a basis to do so; see paragraph 18 above) reinforces this.

22. We therefore also disagree with the premise in the impact assessment in relation to this consultation dated 15 January 2015 (**"Impact Assessment"**) that the rules require amendment to deal with the volume of new evidence (see, e.g., paragraphs 16 and 33 of the Impact Assessment).

23. That said, the mechanism of rule 21(2) in reflecting the existing discretion the CAT has to control the admission of evidence, aims broadly to articulate the principles on which that discretion is to be exercised. On that basis, and subject to the further comments on the drafting of the rule in paragraphs 24-28 below, we have no objection in principle to the mechanism proposed. However, we would have significant concerns if the proposed rule were to be amended such that the CAT's existing flexibility and discretion in controlling new evidence would be curtailed. In that connection, we note that the Impact Assessment could appear to be suggesting that the Government may be considering the curtailment of that discretion: paragraph 33 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*"; whereas rules 21(2)(b) and (c) provide for the CAT to have regard to whether the evidence was made available or capable of being made available to the respondent, as well as other factors which contribute to the overall assessment of whether it would be just and proportionate to admit or exclude the new evidence.

24. As to the drafting of rule 21(2)(b), we would suggest that there be some amendments to clarify: (1) that it is party-neutral; and (2) the situation where evidence may not have been before a regulator for reasons outside the control of the party seeking to have the new evidence admitted.

25. Specifically, we would suggest that the rules should provide for the CAT to take into account the fact that an appellant (or respondent) might have taken steps to obtain and/or introduce the contested evidence prior to the decision being taken but failed to do so.

26. The need to be clear on this point reflects the need to take account not just of the scenario where an appellant could have made the evidence available (i.e. the evidential "ambush" which appears to be one of the concerns expressed in the Consultation Document), but also the serious issue where regulators have themselves declined or failed to exercise their powers (and obligations) to take decisions with regard to obtaining material evidence (or go further and take positive steps to limit the evidential record).

27. An example of the latter scenario where a regulator takes steps to limit the evidential record includes settlement agreements which, as a condition of settlement, require settling parties not to contest evidence on the case file (whether through the introduction of new witness evidence or otherwise – save for the correction of material factual inaccuracies) as a condition of settlement. Similar issues arise through the obligation upon leniency candidates not to contest evidence. This means the CAT necessarily faces an incomplete evidential record when such appeals fall to be determined. The situation is made more complex by the fact that the party which has the first-hand knowledge of the content and detail of that evidential record (i.e. the settling party or leniency applicant) will be prohibited by the terms of the agreement from contesting the proceedings (i.e. they will not be there). This presents a serious risk of injustice.

28. The present formulation for existing rule 22(2), as well as the proposed formulation in rule 22(2), would obviously permit such matters to be taken into account. However, we would suggest that the formulation set out below is clearer and, in particular, removes some of the ambiguity contained in the word "*available*" in the proposed wording (for example: Is material "*available*" if the respondent does not know about it? Is it "*available*" if the respondent knows about it, but would have to issue a new section 26 notice to obtain it?). It also aligns with rule 9(4)(h) as presently proposed by recognising that (as noted at paragraph 19(d)above) that whether evidence is "new" depends on whether the substance of that evidence was in the possession of the decision-maker before making the decision.

> "*(2) In deciding whether to admit or exclude evidence, the Tribunal will have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following criteria:*
>
> *(a) the statutory provision pursuant to which the appeal is brought and the applicable standard of review being applied by the Tribunal;*
>
> *(b) whether or not the substance of the evidence was ~~available to~~ in the possession of the respondent (or the respondent was otherwise aware of it) before the disputed decision was taken;*
>
> *(c) whether or not the party seeking to admit the evidence was in a position to have ~~capable of being~~ made the substance of the evidence available to the respondent before the disputed decision was taken;*
>
> *(d) whether the respondent or any other party was in a position to have obtained the substance of the evidence before the disputed decision was taken;*
>
> *(~~d~~e) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded; and*
>
> *(~~e~~f) whether the evidence is necessary for the Tribunal to determine the case.*"

29. In order to ensure the provisions are party-neutral, there should also be a rule providing for the defence to include a statement to the same effect as proposed rule 9(4)(h) (subject to the comments above at paragraph 19), so that appellants will be put in a similar position to be able to consider whether they will challenge any new evidence provided in the defence. This could be inserted as new rule 15(3)(f).

Amendment of the Notice of Appeal (Rule 12)

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?

30. We agree with both of the above in relation to rule 12.

Fast track procedure (Rule 57)

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

31. We agree that the proposed fast track procedure may improve access to redress for SMEs and micro businesses. It will be of crucial importance for the CAT to retain a discretion as to the application and management of a fast track procedure, as this should be applied on a case-by-case basis with regard to the particular circumstances of each case. The procedure should not operate in an overly prescriptive way or against both claimants' interests as well as defendants' legitimate rights of defence. We believe the proposed rule 57 would achieve this.

32. In particular, cases vary considerably in the level of complexity and novelty involved and this is not necessarily linked to the size of the parties: a number of complex and detailed cases have been heard in the CAT which have involved small companies and which would not have been suitable for a fast track procedure as a result, such as *Albion Water v Dŵr Cymru*, *2 Travel v Cardiff City Transport Services*, *Rapture Television*, and *VIP Communications*. Accordingly, we agree that the factors listed in rules 57(3)(a) to (h) are appropriate, and in particular the explicit recognition of the complexity and novelty of the issues involved in rule 57(3)(c).

Settlement offers and costs consequences (Rules 45-48)

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

33. We agree in principle with the introduction of new rules governing the procedure of settlement offers. To the extent that the proposed rules reflect CPR Part 36, we would suggest that the drafting could be updated to reflect some of the recent changes to CPR Part 36 which came into force on 6 April 2015 pursuant to the Civil Procedure (Amendment No.8) Rules 2014 (SI 2014/3299).

Disclosure in private actions (Rules 59-64)

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.

34. We agree with the proposals, which would align the rules with rules in the High Court, given that the CAT will now have jurisdiction to hear stand-alone private actions.

Transfers of mixed / hybrid claims (Rules 70-71)

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?

35. We agree with the proposed approach.

Additional parties and additional claims (Rules 38-40)

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

36. We agree with the proposed approach.

Injunctions

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

37. We agree with the proposed approach.

PRIVATE ACTIONS (CLAUSE 80) CONSUMER RIGHTS BILL (CONSULTATION DOCUMENT PART 7)

Merits test

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?

38. We agree with introducing the proposed presumption, for the reasons set out in paragraphs 7.5 to 7.7 of the Consultation Document. In particular, we consider the existence of a presumption that claims should not be brought by law firms, third party funders or special purpose vehicles strikes an appropriate balance and will assist with encouraging Government's aim (set out in paragraph 7.5 of the Consultation Document) that cases are only brought by those with a genuine interest in the case.

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?

39. We agree with the scope of the certification criteria and the mechanism for certification in rule 78, subject to the drafting comment at paragraph 42 below.

40. In particular, we consider that it is essential that the criteria include consideration of whether collective proceedings are an appropriate means for the fair and efficient resolution of common issues (rule 78(2)(a)); costs and benefits (rule 78(2)(b)); the availability of alternative dispute resolution (rule 78(2)(g) – see also suggested drafting amendment below). We also agree that the factors to be considered in determining whether collective proceedings should be opt-in or opt-out should include considerations of the strength of the claims and practicability (rule 78(3)).

41. We would also point out that an initial assessment of the strength of the claims as a condition of launching an opt-out action (rule 78(3)(a) is of particular importance given that this would involve the court allowing a claim to be brought on behalf of a party without that party's consent. It is only right that before being certified the claim should meet a preliminary merits threshold. It is, moreover, not unusual for courts to have to undertake some form of initial assessment of the strength of a claim at a preliminary stage before making a final decision after hearing the evidence and submissions; similar assessments are routinely made by courts, for example, in the context of injunction / interim relief applications, strike-out and summary judgment applications, and applications for permission to appeal.

42. We would suggest that rule 78(2)(g) (availability of alternative dispute resolution) should include an explicit reference to the proposed voluntary redress scheme which is currently under consideration by the Competition and Markets Authority, as it would be helpful to make clear that voluntary redress is a form of alternative dispute resolution which would be relevant. The words "*including the availability of redress through voluntary schemes whether approved by the CMA under section 49C of the Competition Act 1998 or otherwise*" could be added at the end of rule 78(2)(g).

Collective settlement

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

43. We do not agree that formal settlement offers should be excluded from collective actions.

44. Paragraphs 7.10-7.11 of the Consultation Document suggest that, due to the "*unique*" nature of collective actions, the claimant may "*not necessarily be able to assess whether or not the settlement offer represents reasonable redress to the class members … because presently there is a limited role for the court in a formal settlement offer and therefore no disclosure powers for the claimant to be able to assess the offer*". But any action, including a collective action, should be properly based and it is fundamental that claimants must be able to particularise their claimed losses, let alone understand their position in order to assess any offer which may be made to them. If the fact that an action is sought to be brought collectively is what is somehow preventing claimants from being able to understand the nature of their losses, then this would call into question the suitability of that particular claim to be brought collectively as opposed to individually. In any event, claimants will need to have a reasonably good understanding of their claim in order to have a collective action certified pursuant to rule 78, including providing sufficient detail to allow the CAT to consider the questions of appropriateness; costs and benefits; and the size of the class. (We would also assume that the suggestion would only apply to

opt-out actions, since opt-in actions would be just like normal claims given the set of claimants within the class is known; members of the opt-in class would be in the same position as claimants in individual actions in terms of their ability to consider their claimed losses.) Accordingly, the premise does not appear to be well-founded, and restricting the availability of settlement offers would merely operate to discourage parties from attempting to settle and avoid costly and time-consuming litigation.

45. The Government also appears to view the possibility of a defendant offering a "*low settlement offer early on in the proceedings*" as undesirable (paragraph 7.10 of the Consultation Document), but this is always just one of the incentives in play in such a regime; claimants can always reject such an offer if they consider they are likely to achieve a better outcome after litigation. In the event that a claimant decides to reject an offer but is ultimately awarded a lower level of damages, the settlement regime provides for potentially adverse costs consequences on the claimant. Attempting to remove the prospect of those costs consequences would remove an essential incentive for early settlement in all collective actions (but not individual actions). It thereby would undermine a key tenet of the Government's overarching policy to "*minimise the length and cost of decision-making through making the appeal process as streamlined and efficient as possible*" (see section 2 of the terms of reference for the Rt Hon Sir John Mummery's review, set out in Annex B of the Consultation Document (page 30) and Government's policy "*to encourage parties to use Alternative Dispute Resolution (ADR) as a means to settle disputes*" (Consultation Document paragraph 7.9): removing this incentive for early settlement will increase the likelihood that costly and time-consuming litigation is pursued rather than settling at an early stage.

46. We recognise that claimants may require information from the defendant in order to assess an offer and their prospects in the litigation, whether in the context of collective or individual actions. But this presumes there is an asymmetry of information in favour of the respondents which is not always the case, and in any event there are already incentives in the proposed rules for such information to be provided.

47. As to the assumption that there is information asymmetry in favour of the respondents in collective actions, this often not the case: defendants and claimants alike may not have access to relevant documents or witnesses due, for example, to the passage of time, and quantification may therefore have to proceed on the basis of assumptions. In some circumstances, the information asymmetry may well go in the other direction: for example, claimants may be better-placed to assess their own loss; and in cases involving indirect purchasers a respondent may have little or no information about purchases which by definition would not have been made from the respondents.

48. As to incentives for information to be provided in any event:

    a) It is in the interests of the party making the offer to have their offer accepted, so in the case of a defendant, it is incentivised to make disclosures where appropriate to help the claimants understand the offer. A claimant can also ask for clarification of the offer pursuant to rule 46,

which could involve disclosing relevant information. The Tribunal is also empowered to order clarification.

b) Furthermore, as noted in paragraph 45 above, the adverse costs consequences of rejecting an offer are not automatic. Proposed rule 48(1)(a) provides that such costs consequences will not apply if the CAT considers it "*unjust to do so*" and, in determining whether it would be unjust, the CAT must consider (rule 48(2)) "*all the circumstances of the case*" including "*the information available to the parties at the time when the Settlement Offer was made; and (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the Settlement Offer to be made or evaluated*" (emphasis added). Accordingly, there are very clear incentives on the party making the offer to give disclosure of underlying information.

c) Finally, rule 93 provides a detailed and comprehensive mechanism for the CAT to approve any collective settlement that is reached, and this provides a final check to prevent settlement at too low a figure (see rule 93(7)(c): the CAT must take into account "*the likelihood of judgment being obtained in the collective proceedings for an amount significantly in excess of the amount of the settlement*"), and includes a power on the part of the CAT to obtain further evidence (see rule 93(4)(c): the CAT may give directions "*for further evidence to be filed on the merits of the proposed collective settlement*"). Not only does this provide an incentive for defendants to provide adequate information to enable claimants to assess offers made to them and to obtain the approval of the CAT, but it also directly involves the CAT's intervention to assess the terms of any offer which a claimant may be minded to accept.

49. Finally, in the case of opt-out actions, if a claimant does not wish to accept a settlement offer, they would be able to opt out of the group claim.

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?

50. We consider there is already sufficient provision for the disclosure of such information – see paragraph 46 above.

OTHER COMMENTS

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?

51. We have the following comments concerning specific proposed rules.

Appeals – completeness of defence (rule 15(5))

52. Proposed rule 15(5) modifies the current rule 14(5) by providing that the specified documents to be annexed to the defence must be annexed "[*a*]*s far as practicable*" (under the current rule there is a strict requirement, except in so far as expert witness statements which does have a practicability qualification). This would therefore align with the requirement in current rule 8(6)(b) (proposed rule 9(6)(b)) which has a practicability qualification for documents to be annexed to the notice of appeal. While it would make sense to align the requirements for notices of appeal and defences as proposed, we assume the qualifications as to completeness of the defence will, in practice, only apply in cases where the defence is filed within the 6 week time frame provided for in rule 15(1). In practice, respondents often seek a longer time in which to file and serve their defence and it would generally be unsatisfactory if the time for filing and serving a defence were extended but was then not complete. (This is to be contrasted with the situation for notices of appeal, where the time limit in which to file an appeal must not be extended except where "*the circumstances are exceptional*" (rule 9(2)) (in practice a very high threshold, as confirmed in the CAT's case law); for a defence, "*such further time as the Tribunal may allow*" is permissible (rule 15(1).) This could perhaps be addressed in the updated Guide to Proceedings.

Disclosure – applicability (rule 60)

53. Proposed rule 60 is currently intended to apply to private damages claims. There may be merit in making rule 60 of general application to all proceedings in the CAT.

Disclosure – costs for pre-action and non-party disclosure applications (rules 61-62 and 103)

54. We would suggest that, for applications for disclosure before proceedings start pursuant to rule 61, and for orders for disclosure against a person not a party pursuant to rule 61, the default position should be that the applicant pays the costs, subject to a discretion to be exercised by reference to all the circumstances to make a different order. This would align with the CPR 46.1 which applies to equivalent actions.

55. The operation of the costs rule (rule 103) could be clarified in the context of applications against non-parties pursuant to rule 62. Rule 103(4) refers to the conduct of parties to the proceedings being relevant factors in the discretion to award costs, whereas the targets of the applications under rule 62 are described as non-parties. This could be addressed by adding a provision to rule 102 to the effect

that, for the purposes of an award of costs in relation to an application under rule 62, the applicant and respondent to that application are to be considered as parties to those proceedings.

Subsequent use of documents provided in proceedings (rule 101(4))

56. Proposed rule 101(4) provides for an exception to the restriction on documents being used only for the purposes of the relevant proceedings (rule 101(1)), such that it "*will not apply to the CMA or any statutory body which is the maker of a disputed decision that is remitted to it by order of the Tribunal in the proceedings*".

57. It is not clear that this rule is necessary, as this can be provided for in the remittal order itself. However, if some form of this rule is retained, we consider that two amendments would be required.

58. First, the rule should be party-neutral, as the parties other than the regulator involved in the remittal would also need to be able to use relevant material in the course of the remittal.

59. Secondly, as presently proposed, this provides a complete exception to the rule in circumstances of remittals, and would allow such documents to be used in any context, whether or not related to the regulator's consideration of the issue remitted to it. Given it appears that the purpose of the exception in rule 101(4) is to allow regulators (and, presumably, other parties – see above) dealing with remitted issues to use documents disclosed in the proceedings which led to the remittal, the words "*but only to the extent that such documents may be used for the purposes of the remittal*" should be added at the end of rule 101(4) to clarify that the exception from rule 101(1) is a limited one. Obviously this would not preclude the statutory body, like any other party, seeking consent from the CAT under rule 101(3) for wider use.

60. Taking the above suggestions together, we would therefore suggest that proposed rule 101(4) be drafted as follows:

> "*(4) The restriction in paragraph (1) will not apply (i) to the CMA or any statutory body which is the maker of a disputed decision that is remitted to it by order of the Tribunal in the proceedings nor to any party to the proceedings in such a case, but only to the extent that such documents may be used for the purposes of the remittal.*"

Delivery of decisions of the Tribunal (rule 102)

61. The proposed new rules 102(1)(b) and (c) provide for the decision of the CAT to be delivered by publishing the decision on the Tribunal's website or in such other manner as may be specified by practice direction. (See also paragraph 6.22 of the Consultation Document.)

62. We have no objection to there being means for decisions to be delivered other than, as is currently the case, by way of handing down at a formal public hearing.

63. As a practical matter, we would note that it is important for parties to have certainty of the date and precise time of handing down in advance, as well as the means to obtain a copy of the decision at (or before, on an embargoed basis, if appropriate) the precise time it is made public. Parties need to be aware of decisions at least as soon as they become public in order to field inquiries both from the press and internally, and often the Tribunal's decisions will contain market-sensitive information which further requires them to be prepared to respond. Accordingly, they need to have certainty about the timing of public release. The CAT's current procedures, which involve handing down of decisions at a public hearing on a date and at a time notified in advance do provide sufficient certainty. In the case of decisions to be delivered, instead, by publication on the Tribunal's website, appropriate technical measures would need to be taken to achieve certainty in advance of the timing of publication.

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