RESPONSE TO DEPARTMENT FOR BUSINESS INNOVATION & SKILLS CONSULTATION ON PROPOSED REFORMS TO COMPETITION APPEAL TRIBUNAL RULES OF PROCEDURE

Pinsent Masons LLP welcomes the opportunity to respond to the Consultation issued by the Department for Business, Innovation & Skills on 5 February 2015 regarding the proposed reforms to the Competition Appeal Tribunal ("CAT") Rules of Procedure.

Please note that our comments are limited to particular questions and do not necessarily represent the views of our clients, nor do they necessarily represent the views of all lawyers within Pinsent Masons LLP. For convenience, we adopt the numbering in the draft new Rules.

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"?

Question 2: 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?

1. Given that the proposed reforms generally align the CAT Rules more closely with the Civil Procedure Rules ("CPRs"), we agree that it makes sense to incorporate the five principles directly into the Rules and therefore mirror the approach of the overriding objective under CPR 1.

2. In that regard, we note that Rule 3(7) imposes an express obligation on the parties (and their representatives and experts) to co-operate with the CAT to give effect to the principles. The analogous duty that exists under CPR 1.3 is generally effective, and we would anticipate that Rule 3(7) would be equally effective in the context of proceedings before the CAT.

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

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

3. We agree that there is no need to impose fixed target times and timetables for cases. It is important that each case is considered on its own facts and that the CAT has discretion to use its case management powers to set the most appropriate procedural timetable in each instance.

4. Similarly, we would not be in favour of setting time limits for the delivery of decisions given that each case is different and some will require further deliberation than others. We would add that, in our experience, we have not encountered any issues with the speed at which the CAT delivers its decisions.

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

5. It is not immediately clear what the intention is behind Rule 11(1)(d). Given that the CAT already has the power to reject an appeal where an appellant fails to comply with any rule, direction, practice direction or order of the Tribunal (under Rule 11(1)(f)), it is difficult to understand what additional instances are envisaged that would constitute an appellant having *"failed to co-operate"* with the Tribunal *"to such an extent that the*

Tribunal cannot deal with the proceedings fairly and justly". In particular, we would be concerned that the language used in Rule 11(1)(d) is sufficiently vague and subjective that it could result in satellite litigation as parties try to understand the precise parameters. In the interests of certainty for all parties, therefore, it would be helpful if specific guidance were provided as to the type of scenario that the CAT anticipates will fall within the scope of Rule 11(1)(d).

6. We would also note that, in the context of the strike out provisions for private damages actions (Rule 41), there is now an additional ground where the CAT considers it *"has no jurisdiction to hear or determine the claim"*. The same ground does not appear in the equivalent strike out provisions in the CPRs and it is not immediately clear how this is meant to interact with Rule 34, which governs the ability of a defendant to challenge jurisdiction within 14 days of filing an acknowledgment of service. As currently drafted, it would appear that even if a defendant does not challenge the CAT's jurisdiction within 14 days and is therefore deemed to have accepted that the CAT does have jurisdiction (pursuant to Rule 34(5)(b)), it is nevertheless envisaged that the issue of jurisdiction can be revisited under Rule 41 (albeit not, presumably, at the request of the defendant) and can become a determinative factor.

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?

7. Whilst we note the comment in the Consultation that some Regulators are apparently concerned that parties have been 'gaming' the system in terms of withholding evidence, this does not reflect our own experience in practice. We also note that the Consultation does not refer to any concrete evidence underpinning those concerns.

Question 12: Do you agree that a Fast track procedure will benefit SMEs and micro businesses, providing them with access to redress?

8. Whilst we understand the reasons for the introduction of a Fast track procedure, we consider there are a number of practical concerns with Rule 57 which could potentially undermine its effectiveness in terms of providing SMEs and micro businesses with access to redress. Indeed, we think there is a real risk that the procedure could be largely redundant given that it may prove difficult in practice to satisfy the various criteria for Fast track classification.

9. In particular, given the inherently complex nature of competition claims (whether in relation to cartels or abuse of dominance), it is unrealistic to assume that there will be many cases which can proceed to a final hearing within six months. Similarly, it is likely to be rare that a case will only require a maximum of three days for a final hearing. It is also worth pointing out that there is no inherent correlation between the nature and complexity of a competition claim and whether or not the claimant happens to be a micro business or SME.

10. Further, the imposition of a costs cap will not necessarily mean that the work required on a case will no longer be undertaken; it will simply mean that parties will not be able to seek recovery of those costs which exceed the cap. On balance, it is likely that defendants will be most at risk in this regard. In addition, we would point out that even if a claim could be dealt with on such a tight timetable, it is often the case that expedited proceedings will result in increased costs as the intensive work required to complete a claim over a short period can be more expensive than that required over the course of a normal timetable. Consequently, there is an apparent disconnect between the underlying rationale behind the Fast track procedure which is to minimise costs, and the fact that the costs of proceeding so swiftly could ultimately end up higher than they would otherwise be.

11. More generally, it will be important for the CAT to ensure that when cases are conducted under the Fast track procedure defendants are not prejudiced. This will be

particularly relevant in the context of injunctive relief under Rule 67(5), discussed at Question 17 below. We note, for example, that it remains unclear how the CAT will determine whether or not to waive or cap the requirement for a cross-undertaking in damages in the context of an injunction in a Fast track claim (under Rule 67(5)).

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

12. Yes, we think it is sensible to broadly align the settlement rules in the CAT with those under the CPRs.

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

13. The proposed provisions for disclosure essentially mirror those in the CPRs and we think this is a sensible way forward.

14. As regards pre-action disclosure, it will obviously be important for the CAT to ensure that this mechanism is not abused and that claimants are not permitted to pursue 'fishing expeditions' for evidence. In particular, the nature of the information that claimants might seek at the pre-action stage could well result in a disproportionate and costly burden on defendants in terms of information-gathering.

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

15. Our concern is not necessarily in respect of the way in which the CAT will determine whether or not to grant an injunction, given that the CAT is required to apply the same principles as the High Court would in reaching such a decision (namely, the *American Cyanamid* guidelines[1]). Rather, our concern is in respect of the CAT's ability to waive or cap the cross-undertaking in damages for injunctive relief for claims under the Fast track procedure.

16. Pursuant to Rule 67(5), the CAT may grant an interim injunction without requiring the applicant to provide an undertaking as to damages or subject to a cap. There is, however, no further guidance as to the precise basis on which such a decision will be taken. Given that a waiver or cap removes an important protection for defendants faced with an injunction, this will obviously be a highly contentious issue in practice. In particular, there is a real risk that if the CAT were to take a 'light touch' approach to this it could potentially encourage unmeritorious claims. We think that parties will require certainty on the point and that further guidance would therefore be helpful as to the criteria which the CAT will use to determine the question.

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?

17. Whilst we understand the rationale behind the restriction, we are not necessarily convinced that there is a need to introduce a presumption. We think that the protection that already exists under Rule 77 would allow the CAT sufficient flexibility to prevent inappropriate representatives from proceeding, yet still consider those instances where it might potentially be appropriate for such a non-aggrieved party to bring a collective action.

[1] *American Cyanamid Co (No.1) v Ethicon Ltd* [1975] UKHL 1

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?

18. In our view, the key difficulty for the CAT will be how to assess a prospective collective action that includes both direct and indirect purchasers. We understand that one of the drivers behind the new collective actions model is precisely to bypass the restrictive approach to Representative Actions under CPR 19.6 following *Emerald*[2], whereby each claimant must have the same interest. However, the practical difficulty with a collective competition claim that seeks to cover both direct and indirect purchasers is that their interests are inherently opposed and therefore from the outset there exists a direct conflict within the claimant group. Whilst we note that the intention appears to be that a claimant group will be able to consist of a number of sub-classes each with their own representatives (Rule 79(1)(a)), it is by no means clear how this will work in practice and how this will resolve the conflict of interest between direct and indirect purchasers (and, indeed, any other potential conflicts which might exist). Rule 78 refers to *"common issues"* but does not address the resolution of potential conflicts within the claimant group.

19. The conflict of interest between direct and indirect purchasers would also necessarily impact the CAT's ability to assess the strength of the claims on a collective basis (when determining whether proceedings should be opt-in or opt-out under Rule 78(3)(a)), given that if a direct purchaser claim is strong it will inevitably affect the merits of an indirect purchaser claim. It is not clear to us how the CAT will seek to deal with this tension in practice.

20. As regards the availability of ADR at Rule 78(2)(g), it is unclear whether the intention is that the CAT should be taking into account the existence of a CMA-approved voluntary redress scheme when deciding whether or not to allow a collective action to proceed.[3] If that is the case, this would appear to be at odds with the ostensibly voluntary nature of a CMA scheme - namely, that claimants are free to either participate in a scheme or pursue litigation. In other words, even if there were a CMA-approved scheme in place, it should not factor into the CAT's assessment of suitability under Rule 78(2)(g).

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

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?

21. In our view, the costs shifting rules on formal settlement offers should apply equally to both collective and non-collective actions. The reality is that defendants are more likely to make settlement offers if they know that they will be protected on costs as a result; consequently, without costs protection, collective claimants will likely miss out in terms of receiving offers. In short, if an offer is sensible and is rejected it is reasonable for those claimants who reject it and proceed with the litigation to be at risk on costs.

22. We recognise the concern that this could potentially result in defendants making early, low settlement offers to put claimants under pressure on costs, and that claimants would not necessarily be in a position to assess the reasonableness of an offer. However, on the assumption that settlement offers (in opt out collective actions at least) would in any event be subject to scrutiny by the CAT we think that claimants could be adequately protected against unreasonably low offers. To the extent that concerns remained regarding the information asymmetry between the parties and the

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2 *Emerald Supplies Ltd & Anor v British Airways Plc* [2010] EWCA Civ 1284

3 The proposed redress scheme is expressly described as *"a form of alternative dispute resolution"* at paragraph 1.3 of the CMA's Draft Guidance on the CMA's Approval of Voluntary Redress Schemes, March 2015.

potential vulnerability of collective claimants, it might be worth considering whether the CAT could be empowered to specify a point in the procedural timeframe when it would be appropriate and reasonable to accept an offer if one were made (for example, once certain evidence had been exchanged).

Pinsent Masons LLP