

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

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If you wish your response to remain confidential you must provide a reason. Do you agree for your response to be published or disclosed if requested?

☐ Yes ☐ No

The closing date for this consultation is 3 April 2015

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	Trade union or staff association
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**Question 1:** Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as “Governing Principles”?

☒ Yes

☐ No

☐ Not sure

Comments: Overall, the recommended approach is sound and should have a positive impact. Although the principles are already part of the CAT governance process, “upgrading” their status from guidance to that of ‘Governing Principles’ reinforces their significance and relevance. This increased standing of the Governing Principles, covering key matters of case management, is a positive step towards achieving the overall aim of ensuring the CAT operates in a cost-effective way whilst ensuring the process is streamlined, speedy and efficient.

**Question 2:** Do you agree that the Governing Principles will help the CAT both in the task of (a) case management generally and (b) in the application of particular Rules?

a ☒ Yes

☐ No

☐ Not sure

b ☐ Yes

☐ No

☒ Not sure

Comments: The Governing Principles will assist the CAT in focussing on key aspects of case management, from the initial Case Management Conference (CMC) through to the oral Hearing and beyond. These principles will set the tone for the whole process and as such it is vital that the Governing Principles provide an enforceable structure. We believe these proposals provide that structure.

However, in terms of the application of particular rules, whilst the Principles provide an adequate framework and may help, the way that the rules are enforced by the Tribunal Chairperson is key. Matters such as restricting the number of witnesses and the length of oral Hearings go directly to the heart of the reforms being proposed; matters which the Principles as they stand can influence but not actually control.

**Question 3:** Do you agree with the recommended approach on setting target times and timetables for cases? Please explain your answer.

☒ Yes

☐ No

☐ Not sure

Comments: We totally agree with the approach recommended by Sir John; he is absolutely right not to incorporate automatic outcomes and fixed timetables in the rules. Appeals to the Tribunal are diverse and varied and cannot reasonably be considered within a single rigid framework. Although all stakeholders will wish for appeals to be dealt with efficiently and as quickly as possible, as this will constrain the cost of appeals, the over-riding requirement remains that appeals should be determined on the basis of robust, well-reasoned outcomes.

As such, the recommendation to incorporate the current principles in Rule 3 as 'Governing Principles' is a well-balanced solution, providing a structured timetable but not one that is dogmatic, rigid or inappropriate. The tribunal must be provided with sufficient freedom to conduct a case in the way that is most appropriate given the individual circumstances.

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

☒ Yes

☐ No

☐ Not sure

Comments: We totally agree. The Tribunal's focus should remain on reaching the correct, legal, judgment without any unnecessary constraints or pressure of a pre-conceived statutory time limit. Whilst of course the Tribunal should be mindful of conducting the case as efficiently and as timeously as possible, the Governing Principles as proposed provide sufficient emphasis on such matters. Anything more prescriptive in terms of fixed deadlines would have a significant detrimental impact on the overall judicial process.

**Question 5:** Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?

☐ Yes

☒ No

☐ Not sure

Comments: No. Whilst all parties clearly desire a swift resolution of the appeal, it is an inevitable feature of the appeals system that those cases which can be

appealed are often the most complex and therefore require time for due consideration of the specific grounds raised in the appeal. A fixed statutory deadline goes against the principle of a case being determined on all relevant facts and therefore against the inherent fairness on which the legal process is founded.

The proposed Governing Principles should lead to greater time efficiencies in areas which will not have a detrimental impact on the overall outcome of a case in terms of quality of decision; going further with the imposition of statutory deadlines would not be justified.

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

☒ Yes

☐ No

☐ Not sure

Comments: Yes. The proposal to include a new ground for striking out an appeal in situations where a party has failed to co-operate with the Tribunal to a significant extent is both fair and reasonable. Similarly, it is eminently sensible for the CAT to have the ability to address matters relating to its jurisdiction. Such issues need to be addressed swiftly to avoid undue cost to appellants and the Tribunal's time.

**Question 7:** Do you consider the Rules address unmeritorious appeals at an early stage, or are there other changes you consider might help to deal with such matters?

☒ Yes

☐ No

☐ Not sure

Comments: The Rules, incorporating the proposed Governing Principles, do provide the basis to address unmeritorious appeals at as early a stage as can reasonably be achieved, without unduly introducing barriers to the appeals process. It is clear that the Tribunal needs to have an understanding of the facts of a case before it can strike out an appeal and the Rules appear to ensure that this is the case, either on a reading of the grounds of appeal or after hearing the parties present their case.

**Question 8:** Do you agree that Sir John's recommendations regarding the introduction of new evidence on appeal is a sensible and proportionate way of addressing Government's concerns about the withholding of evidence? Please explain your answer.

☐ Yes

☒ No

☐ Not sure

Comments: We do not agree that time and cost considerations should be the prime determining factors in determining whether new evidence should be admitted. Ensuring the correct outcome ought to be the over-riding aim in all cases.

That said, generally we do agree with the principles proposed by Sir John for dealing with matters of new evidence or the withholding of evidence. It is agreed that where it is clear that evidence was available at the outset of the appeal and ought, in all the circumstances, to have been submitted at that stage then this should not be admissible since it would amount to a clear abuse of process. However, this should not unduly restrict the bringing of evidence to bear in Reply – it is often only at this point that the rub of the Respondent's case (and likely areas of importance for the Tribunal itself) become evident. Similarly, it is agreed that if new evidence comes to light later in the process then this should be accepted unless the defence has strong and valid grounds of objection. It is important that cases are determined taking into account all relevant, reasonably produced evidence.

We do not, however, agree with the proposal to require the notice of appeal to contain a statement identifying any evidence that was not before the initial decision maker. By definition, Appellants are appealing a decision document, which they have not previously had the chance to comment on, and this means that there will always be new evidence. We strongly suspect the outcome would be of limited practical use to the Tribunal.

This is also not a task which Appellants are well equipped to carry out. In many cases, the full extent of evidence relied on by the decision maker is not available publicly for confidentiality or other reasons. Often decision makers will obtain information in meetings or other informal contact which is not published. The decision maker, on the other hand, is by definition aware of what evidence it relied on and is best placed to inform the Tribunal in a targeted manner if there is new evidence to which it wishes to take exception.

**Question 9:** Do you consider that the proposed changes to the Rules addresses Government concerns in relation to constraining the volume of new evidence by enhancing the CAT's powers?

☒ Yes

☐ No

☐ Not sure

Comments: The proposed changes to the Rules go a long way to addressing Government concerns in relation to constraining the volume of new evidence; however the proposals are not without risk. Limiting the number of witnesses and placing constraints on expert evidence, is, in principle, a reasonable proposition, as long as there remains some right to submit such evidence. However, the danger is that, in more complex cases, limiting evidence, particularly expert evidence, may

negatively impact the overall decision making process. So whilst in principle the proposals have merit, there needs to be safeguards incorporated to ensure a degree of equity is maintained given the potential disparity between the parties of any given appeal.

**Question 10:** Do you consider the rule as now drafted will give the CAT more flexibility when considering a variety of factors against permitting an amendment to an appeal? Please explain your answer.

☒ Yes

☐ No

☐ Not sure

Comments: Yes, although with more discretion to allow amendments to the notice of appeal, there is an increased risk that appellants and/or defendants will attempt to change the basis of their case to suit new developments as the case proceeds. So whilst the removal of the restrictions on amending the notice of appeal are generally positive, the Tribunal must ensure any relaxation of the rules does not lead to abuse.

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

☐ Yes

☒ No

☐ Not sure

Comments: Probably not; perhaps only in a small number of cases. This is due to the fact that the rule change in question (Rule 12) addresses a narrow point on amendments to NoAs; in our experience, other factors tend to drive additional litigation, such as a decision to exclude evidence, a matter not addressed specifically by this rule change.

**Question 12:** Do you agree that a fast track procedure will benefit SMEs and micro businesses, providing them with access to redress? Please explain your answer.

☐ Yes

☐ No

☐ Not sure

Comments: The proposals sound reasonable but no UKCTA members are SMEs or micro businesses so we are not well placed to comment and so we do not offer a detailed response to this question.

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

☐ Yes

☐ No

☐ Not sure

Comments: We have no views to offer in response to this question.

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

☐ Yes

☐ No

☐ Not sure

Comments: Private actions are not something of which UKCTA has any experience so we cannot offer a detailed response to this question.

**Questions 15:** Do you have any comments on the proposed approach by allowing the CAT to make an order to transfer the whole or part of the proceedings from the CAT to the appropriate courts?

☐ Yes

☒ No

☐ Not sure

Comments: Private actions are not something of which UKCTA has any experience so we cannot offer a detailed response to this question.

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

☒ Yes

☐ No

☐ Not sure

Comments: The proposed changes appear reasonable and should result in greater procedural efficiency. Anything which increases procedural certainty and clarifies the approach to be adopted for adding a party to an ongoing appeal where the issues of that new party are essentially the same as the initial appellant can only be beneficial in achieving greater overall efficiency.

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

☐ Yes ☐ No ☐ Not sure

Comments: The only comment offered relates to interim injunctions. It is noted that interim injunctions can be ordered by the Tribunal before proceedings commence. Such an action may be appropriate for proceedings brought under the Consumer Rights Bill but not for cases brought under the Enterprise or Communications Act, which are the cases of concern to UKCTA members; as such we cannot offer a detailed response to this 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?

☐ Yes ☐ No ☐ Not sure

Comments: We would not have an issue if the Government introduced such a presumption. However, we would support providing the CAT with the authority to over-ride such a presumption, particularly in relation to the involvement of consumer organisations and trade bodies. The involvement of such bodies could prove beneficial in certain circumstances and reduce the overall administrative burden of the CAT.

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

Comments: This question relates to collective actions, something of which UKCTA does not have any experience so we cannot offer a response to this question.

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

☐ Yes ☐ No ☐ Not sure

Comments: Collective actions are not something of which UKCTA has any experience so we cannot offer a response to this question.



**Question 21:** If formal settlement offers are not excluded from collective actions, should there be special provision around the disclosure of information relating to the formal settlement offer, and how would they work?

☐ Yes

☐ No

☐ Not sure

Comments: No response is offered to this question.

**Question 22:** Do you have any other comments on the proposed Rules; in particular do you consider there are other changes that could be made to achieve the objectives set out in the Terms of Reference?

☐ Yes

☒ No

☐ Not sure

Comments: Nothing further to add.

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

☒ Yes

☐ No

Comments: Overall the proposals are reasonable and should achieve the desired outcome in terms of enabling proceedings to be conducted in a cost-effective manner, in line with a streamlined, speedy and efficient process. Such aims are laudable and welcome as long as they do not result inadvertently in the introduction of prescriptive barriers, whose effect is to restrict unduly the number of legitimate appeals brought before the CAT.

Just to be clear, we do not consider that the measures outlined in the proposals will introduce such barriers and so we broadly support them.

Thank you for taking the time to let us have your views on this consultation. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☐ Yes

☐ No



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