



Department  
for Business  
Innovation & Skills

**Competition Appeal Tribunal (CAT)  
Rules of Procedure**

**Government Response**

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# Competition Appeal Tribunal (CAT) Rules of Procedure

## Foreword

The Competition Appeal Tribunal (CAT) is held in high regard as a specialist appeal body with expert knowledge and experience of reviewing economic regulation and competition decisions, and we believe the CAT's functions are an integral and essential element of the wider UK competition regime.

Firms and consumers need to have confidence that independent regulators and competition authorities are taking robust decisions in the interests of the wider economy and consumers. Appeals can provide a key route for holding regulators to account and giving parties a right of challenge.

We are delighted to publish the Government response to the consultation on revising the CAT Rules of Procedure, which sets out the Government's broad acceptance of Sir John Mummery's recommendations.

The Government is grateful to Sir John and the expert working group for reviewing the CAT Rules of Procedure. Sir John's recommendations will ensure that the CAT continues to operate in an effective and efficient manner with Rules that are accessible, easy to understand and reflect both the changes in the competition landscape and the Government's policy objectives.

The consultation also focused on practical implementation of the private actions reforms introduced under the Consumer Rights Act 2015. The revisions to the Rules ensure that consumers and businesses potentially harmed by a breach of competition law are able to seek redress.

We would like to extend our thanks to stakeholders who gave us well thought out contributions when considering the Rules. We have considered the points raised and amended the Rules where we think it is sensible to do so.

## Executive Summary

The CAT plays a key role in the competition regime, hearing appeals against competition decisions (under the Competition Act 1998 and the Enterprise Act 2002), and against regulatory decisions across regulated sectors (including, for example, under the Communications Act 2003).

The Right Honourable Sir John Mummery was asked to review the Rules of Procedure last year. The Government consulted on Sir John's recommendations from 5 February 2015 to 3 April 2015 and received 15 responses.

The aim set out in the Government's consultation document was to strike the appropriate balance between providing proper accountability for regulatory decisions, while at the same time minimising unnecessary costs and delays.

Effective case management formed the main part of Sir John's recommendations, and having considered the responses, the Government has decided to incorporate the five principles from the Guide to Proceedings 2005 into the Rules as Governing Principles. The principles expressly provide for early disclosure in writing, active case management, strict timetables, effective fact-finding procedures, and short and structured oral hearings.

A number of the other recommendations made by Sir John have also been incorporated into, or otherwise reflected in, the new revised Rules. These include:

- **Target times and timetables** for cases will be left at the discretion of the CAT.
- There will be **no statutory time limit for a decision**, as each case will be different and will vary greatly from case to case.
- A new provision allowing **strike out** where the CAT considers that the Tribunal has no jurisdiction to hear or determine an appeal has been incorporated into the Rules.
- New provisions will be inserted to require the **notice of appeal** and the defence to contain a brief statement by the respective party identifying any **new evidence**.
- Factors the CAT will consider when determining whether it would be just and proportionate to **admit or exclude new evidence** will be outlined in the Rules.
- The CAT will have wider discretion to permit **amendment to the Notice of Appeal**.
- The power to transfer **mixed/hybrid claims**.
- New rules on **settlement offers and cost consequences** will be introduced similar to Part 36 of the Civil Procedure Rules (CPR) to encourage and facilitate the settlement of cases.
- Details will be provided on the circumstances in which the Tribunal may exercise powers relating to **additional parties and additional claims**.

The consultation also included a section focused specifically on private actions in competition law. This follows on from the previous Government's response to the consultation on "Private actions in Competition Law" published in January 2013 - <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> One of the aims of the private actions reforms is to ensure that the CAT has the powers needed to process cases efficiently and ensure procedural fairness for both claimants and defendants.

The private actions section of this consultation considered the detail of how these reforms would work in practice and, specifically, be implemented through their incorporation into the rules. These include:

- Introduction of a **fast track procedure** to enable consumers and smaller business to obtain swift and cheap access to redress.
- **Power to grant injunction** - within the fast track, the CAT will have a discretionary power to grant an interim injunction without requiring the applicant to provide an undertaking as to damages; or to grant an interim injunction subject to a cap on the amount of the undertaking as to damages.

- **Disclosure in private actions** that will permit pre-action disclosure where the CAT determines that it is necessary in the interest of justice.
- The rules will allow only those who would fairly and adequately act in the interests of class members to **be authorised to act as the class representative for collective proceedings**.
- The rules will include '**the strength of the claims**' as part of the certification criteria for opt-out collective proceedings. When certifying claims the CAT will consider whether Alternative Dispute Resolution (ADR) is available, and as part of this **whether a voluntary redress scheme exists**.
- Parties will be able to **make 'Calderbank offers' in collective proceedings** in the CAT without prejudice save as to costs. The CAT may take the offer into account when deciding on the **costs at the end of proceedings**.

As this is a new approach to private actions, the Government will monitor the effectiveness of the regime to assess whether it is working as intended.

## 1. Introduction

### The Competition Appeal Tribunal

- 1.1 The Competition Appeal Tribunal (CAT) is a specialist appeal body with expertise in competition and regulatory decisions. It hears appeals against competition decisions (under the Competition Act 1998 and the Enterprise Act 2002), and against regulatory decisions across regulated sectors.
- 1.2 The appeals function is essential to ensure that decisions being appealed are taken properly and fairly and that there are effective markets across the UK economy. The Rules of Procedure (SI 2003/1372) (the 'Rules') by which the tribunal operates were introduced in 2003 when the CAT was created.
- 1.3 The Guide to Proceedings (the 'Guide'),<sup>1</sup> introduced in 2005, is intended to give practical guidance for parties and their legal representatives as to the procedures of the Tribunal in relation to case management.

### Revising the Rules of Procedure

- 1.4 In accordance with the normal Triennial Review process for public bodies, the Government is committed to review the governance arrangements, rules and operation of the CAT against the background of the wider reforms to the competition regime. Government published the Triennial Review report of the Competition Appeal Tribunal and Competition Service on 7 November 2014.<sup>2</sup>
- 1.5 In parallel with the Triennial Review, and as set out in the consultation on 'Streamlining Regulatory and Competition Appeals'<sup>3</sup>, the Government invited the Rt. Hon. Sir John Mummery to carry out a review of the Rules of Procedure. This review was in accordance with an agreed Terms of Reference which set out Government's objectives for the Rules and the revisions to them.
- 1.6 In carrying out his review, Sir John was supported by an expert working group that comprised the President of the CAT (the Hon. Mr Justice Roth), the Registrar of the CAT (Mr Charles Dhanowa OBE QC (*Hon*)), and the Hon. Mrs Justice Rose. The expert working group also sought the views of the CAT's User Group (which represents many of the CAT's stakeholders) on the substance and form of the proposed Rules.

### Government objectives of the consultation

- 1.7 The aim set out in the Government's consultation document was to strike the appropriate balance between providing proper accountability for regulatory decisions, while at the same time minimising unnecessary costs and delays. The Government set out its intention that appeals should focus on addressing material errors and that the overall decision-making and appeals process should be as streamlined as possible.

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<sup>1</sup> <http://www.catribunal.org.uk/240/Rules-and-Guidance.html>

<sup>2</sup> <https://www.gov.uk/government/publications/competition-appeal-tribunal-and-competition-service-triennial-review-2013-to-2014>

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf)

- 1.8** The Terms of Reference for Sir John’s review asked him to develop and recommend revisions to the Rules, with a view to ensuring that robust case management powers can be applied flexibly, effectively (so as to ensure cases are dealt with quickly) and (insofar as is practicable) consistently in individual cases. He was also asked to give attention to the over-arching policy considerations of minimising the length and cost of decision making through the appeal process.
- 1.9** In recommending changes, the Government invited him to have specific regard to the cost-effectiveness and proportionality of the system, both in relation to taxpayers and the parties themselves.
- 1.10** In making his recommendations, Sir John has drawn upon the Civil Procedure Rules (CPR)<sup>4</sup> but has made adaptations so as to suit the particular procedures used by the CAT.
- 1.11** The recommendations have at their root a regard for the efficiency, cost effectiveness and proportionality of the CAT procedures, and can all be linked to the Governing Principles for effective case management that will be incorporated in the Rules. The underlying principle of the approach to case management is that each case will be dealt with justly and at proportionate cost, expeditiously and fairly in accordance with the Rules.
- 1.12** The consultation also took account of the proposed expansion of the CAT’s jurisdiction to determine private actions for infringements of competition law (in accordance with the provisions of the Consumer Rights Act 2015). Although collective proceedings are not new, the revised regime is less prescriptive than the regime which was introduced by the Enterprise Act and is broader in scope with the introduction of opt-out collective proceedings and collective settlement. However, it is Government’s policy that only meritorious cases should be brought and that the rules which govern collective proceedings and collective settlement are as rigorous as they can be and the merits test is robust enough to strike the right balance in protecting the rights of all parties involved.
- 1.13** Sir John has recommended that, to accompany the Rules, the CAT should revise its Guide to Proceedings 2005 which is a source of practical guidance for both the parties and for their legal representatives on the conduct of proceedings in order to take account of the revised Rules. The Guide is an operational matter for the CAT, in contrast to the Rules of Procedure, which are an important document for Government to ensure policy objectives for the appeals system are met.
- 1.14** Nevertheless, in many circumstances a balance is struck between provisions, and the level of detail and clarity, in the Rules and in the Guide. The revisions to the Rules outlined in this document, in many instances, implicitly assume or rely on additional or revised content in the Guide (for example, where the Government seeks to provide greater clarity to appellants or claimants on a key policy objective but does not want to make binding provisions in the Rules). Consequently, this Response, in addition to outlining the revisions to the Rules, also highlights those areas where revisions are required to the Guide. The Government has worked closely with the CAT to ensure an effective balance to the benefit of both appellants and defendants.
- 1.15** Whilst making revisions to the Rules, much of the structure and layout of the 2003 Rules have been preserved in order to ensure that they remain in a format with which users are already familiar.

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<sup>4</sup> <https://www.justice.gov.uk/courts/procedure-rules/civil/rules>

## The consultation process

- 1.16** The Department for Business, Innovation & Skills published a consultation on 5 February 2015 entitled '*Competition Appeal Tribunal (CAT) Rules of Procedure: Review by the Rt Honourable Sir John Mummery*' accompanied by Sir John's report and recommendations, an impact assessment, and draft Rules. The consultation period ran for 8 weeks, closing on 3 April 2015. The consultation document was sent to a range of relevant key stakeholder organisations and posted on the Gov.UK website.<sup>5</sup> A list of the questions asked can be viewed at Annex A.
- 1.17** Officials from the Department for Business, Innovation and Skills, led a stakeholder meeting with a range of interested parties about the proposals. The views from these stakeholders have been taken into account in reaching decisions in response to the consultation and are reflected in the summary of responses below.
- 1.18** Respondents welcomed the consultation in their responses and the Government would like to thank all those who contributed to the consultation.
- 1.19** This paper sets out the issues that were consulted on, a summary of respondents' views, the Government's analysis of responses, and its decisions. It is published alongside an updated Impact Assessment.
- 1.20** Since publishing the draft rules at consultation stage, the rules have been further revised to create the final version of the Rules. All references to the Rules in this document refer to the final version and rule numbering. Where consultation respondents have referred to previous rule numbers, these have been updated.

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<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/401678/bis-15-75-competiiton-appeal-tribunal-cat-rules-of-procedure-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401678/bis-15-75-competiiton-appeal-tribunal-cat-rules-of-procedure-consultation.pdf)



## 2. Responses to the Consultation

### Overview

- 2.1 The Government received 15 formal written responses largely from legal representatives, business and other interested organisations. A summary of key points made by respondents can be found in the “Summary of Responses” sections under each revision below. A list of those who provided written responses is at Annex B. We have published all of the responses, except those where respondents requested confidentiality. These can be found on the BIS website along with this document. The table below provides a breakdown of written responses by type of responding organisation.

### Breakdown of responses by type of organisation

Type of Organisation	Responses
Legal	7
Business	3
Consumer representative organisation	1
Trade Association	1
Business representative organisation	2
Other	1
<b>TOTAL</b>	<b>15</b>

- 2.2 The reforms relate to two overarching areas, which the consultation sought views on:
- i) Efficient case management, principally the recommendations made by Sir John Mummery; and
  - ii) Private actions, the practical implementation through the Rules of the policy and legislative changes brought about by the Consumer Rights Act 2015.

The consultation set out these recommendations and changes as options for change and invited views on these.

The sections below summarise responses to the consultation questions in these two areas.

## Case Management

### Summary of Government Decisions

- **The five principles from the Guide to Proceedings will be incorporated into Rule 4 as Governing Principles.**
- **The setting of target times and timetables for cases will be left at the discretion of the CAT.**
- **There will not be a statutory time limit for a decision, as the time needed to reach a decision and setting out the reasons, will vary from case to case.**
- **Rule 4(5)(c) (setting out the process through which the CAT will fix a target date for the main hearing as early as possible) will be amended to reflect the differing nature of proceedings, in particular the differing demands of competition enforcement and private damages proceedings.**
- **The revised Guide will provide that at the conclusion of a hearing the CAT will indicate the time period within which it expects to issue its judgement; and if there are any subsequent delays the parties will be kept informed.**

**2.3** This section summarises responses to the consultation questions on case management for regulatory and competition appeals, and sets out Government's response.

### The issue and proposals

- 2.4** Sir John recommended the introduction of a new section under Rule 3 (now re-numbered as Rule 4) incorporating the five main principles, as set out in the CAT's "Guide to Proceedings" (2005), into the Rules as governing principles.
- 2.5** Sir John was asked to explore the extent to which it is possible to set new time limits and fixed timetables for cases. He was also asked to consider reducing the length of time between the end of the hearing and the issuing of the Tribunal's decision, by introducing a statutory time limit if appropriate.
- 2.6** Sir John concluded that every case is different and the introduction of time limits for the proceedings of a case could prevent the decision maker from taking account of all the relevant considerations in each individual case. He also concluded that it was difficult to set a meaningful deadline for the delivery of a decision as the time needed to reach a decision and set out its reasoning will vary greatly from case to case.
- 2.7** This approach is akin to Part 1 of the Civil Procedure Rules (CPR) which sets out the overriding objectives for the Rules and provides a flexible but structured framework.

## Incorporation of the Governing Principles into the Rules

**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?**

### Summary of responses

- 2.8** All respondents agreed with the recommended approach to promote the five principles from the CAT’s Guide to Proceedings to be incorporated into Rule 4 as “Governing Principles.”
- 2.9** One respondent commented: *“The Governing Principles newly incorporated are to be welcomed as encapsulating a modern and common-sense approach to the active case management of proceedings.”*
- 2.10** Respondents agreed that incorporating the Principles into the Rules will help the CAT both in the task of case management generally and in the application of particular Rules. One respondent commented *“[R]obust case management is fundamental to ensuring the efficient use of the CAT’s and parties’ time and resource”*.
- 2.11** It was also noted that the CAT should retain its flexibility to adapt its case management to each case with one respondent commenting that *“the revised Guide will be instrumental to the CAT’s powers of effective case management in particular in achieving the objective of minimising the risk of satellite litigation relating to procedural issues”*.

### Government response

- 2.12** **The Government welcomes the comments made by respondents that the five principles from the Guide to Proceedings should be incorporated into Rule 4 as Governing Principles.**
- 2.13** **The new rule incorporating the principles will strengthen the current case management powers granted to the CAT, ensuring that each case will be dealt with justly and at a proportionate cost, expeditiously and fairly in accordance with the Rules.**

## ***Target times and timetables***

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

### **Summary of Responses**

- 2.14** The majority of respondents agreed the Rules should not provide for automatic outcomes and fixed timetables which preclude the decision-maker from taking account of all relevant considerations in each individual case. There was a clear view amongst respondents that setting target times and timetables should be left to the discretion of the CAT allowing it the flexibility to consider each case on its own merit and the ability to use its case management powers to set the most appropriate procedural timetable in each case. One respondent commented that *“cases can be vastly different in scope and complexity and it is important that the CAT can retain the flexibility to manage cases effectively.”*
- 2.15** Another respondent highlighted that the *“case management demands of appeals of competition enforcement decisions differ drastically from the demands of private damages actions brought under (section 47A of the CA 1998). The same cannot be said of damages cases where the issues for consideration and adjudication (in particular factual issues) will generally be broader.”* They made a suggestion that a small amendment to the draft Rule be reflected to take into account the nature of proceedings.

### **Government response**

- 2.16** **The Government agrees with the recommended approach on setting target times and timetables for cases, and that it should be left at the discretion of the CAT to use its case management powers when setting timetables, which will allow the CAT the flexibility to consider each case on its own merit.**
- 2.17** **Parties will be required to identify and concentrate on the main issues from the outset and the CAT will fix target dates for the hearing using structured timetables for proceedings up to the main hearing, ensuring that cases are dealt with expeditiously and fairly.**
- 2.18** **We recognise that cases will vary and have therefore amended Rule 4(5)(c) to take into account the nature of a case. Under the Rule the CAT will give consideration to the nature of proceedings, when setting timetables, which will also assist with effective case management.**

**Time Limit for delivery of a 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?**

**Summary of responses**

- 2.19** The majority of respondents were supportive of Sir John’s reasoning for not setting a fixed time limit for the delivery of a decision as cases are different and sometimes complex, requiring further deliberation and “*consideration of the specific grounds raised in the appeal.*”
- 2.20** A few respondents commented that the CAT has a good track record in delivering a decision in a timely manner, with one respondent commenting that “*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. Anything more prescriptive in terms of fixed deadlines would have a significant detrimental impact on the overall judicial process.*”
- 2.21** Although the majority of respondents expressed support that there should not be a set time limit for a delivery of a decision, a few respondents held the view that “*procedures should not be entirely ‘open-ended’*” with one respondent making a suggestion: “*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*” and said that “*this need not take the form of a formal statutory provision but should be included as an objective in the CAT procedural guidance.*” Another respondent considered that “*nine months from the conclusion of proceedings would be an appropriate timeframe.*”
- 2.22** There was also a suggestion that the “*CAT ought to be required to provide regular progress updates on the timetable for the delivery of a decision*” as this will likely promote greater efficiency of the CAT and would benefit the parties, particularly where parties need to report to their respective stakeholders.

**Government response**

- 2.23** **The Government agrees there should not be a statutory limit for a decision, as each case will be different, given that the time needed to reach a decision and set out the reasoning will vary from case to case. We consider that it would not increase the efficiency of the CAT to bind it or parties to proceedings to a fixed statutory deadline.**
- 2.24** **However, we also agree with those respondents that suggested cases should not be entirely open ended and that there is an advantage in setting clear expectations for the time to deliver a decision. In light of this, and recognising the differences between cases, the CAT will inform parties at the end of each particular case when a judgement will be delivered.**
- 2.25** **The revised Guide will provide that at the conclusion of a hearing the CAT will indicate the time period within which it expects to issue its judgment; and that if there are any subsequent delays the parties will be kept informed.**

## Striking Out (Rule 11)

### Summary of Government Decisions

- A new provision will be included in Rule 11(1)(a) and 41(1)(a) allowing strike out where the CAT considers that the Tribunal has no jurisdiction to hear or determine an appeal.
- Draft Rule 11(1)(d) (allowing strike out if a party has failed to co-operate with the CAT to such an extent that the CAT cannot deal with the proceedings fairly and justly) will not be included in the final Rules

### The issue and proposals

- 2.26** The Tribunal has the power, in certain defined circumstances and after hearing the parties, to strike out an appeal in whole or in part at any stage of the proceedings. Sir John was asked to consider whether the Rules allow the CAT proper scope to dismiss unmeritorious appeals at an early stage.
- 2.27** Sir John recommended adding: (i) a new provision to the Rules to deal with cases where the CAT has no jurisdiction to hear or determine the appeal (Rule 11(1)(a)); and (ii) a new ground where the party has failed to cooperate to such an extent that the CAT cannot deal with the case justly and fairly (Rule 11(1)(d)).

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

**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?**

### Summary of responses

- 2.28** The majority of respondents indicated their agreement with the new provision in Rule 11 (1) (a) (and 41(1)(a) (for private actions)) allowing the CAT to strike out an appeal where “*it considers that the Tribunal has no jurisdiction to hear or determine the appeal;*” One respondent commented “[t]he new ground is sensible and in line with a desire for efficient case management. It is eminently sensible for the CAT to have the ability to address matters relating to its jurisdiction.”
- 2.29** A number of respondents had concerns with the proposed new draft Rule 11(1)(d), and considered it unnecessary, given the presence of rule 11(1)(f) which provides for strikeout where the party “fails to comply with any rule, direction, practice direction or order of the Tribunal”. They considered this current rule already covers a party’s failure to co-operate with the Tribunal.
- 2.30** Respondents also voiced their concern that more clarification was needed to avoid satellite litigation as Rule 11(1)(d) is “*sufficiently vague and subjective [that] parties [must] try to understand the precise parameters.*” Respondents were not aware of a case where the respondent has sought the striking out of an appeal on the basis that it is wholly unmeritorious.

- 2.31** Although a number of respondents did not agree with the new ground, some suggestions were put forward if the Government was still minded to proceed with the recommendation: for example, further clarification on the rule in the revised Guide and a rule to the same effect in relation to private actions (Rule 41).

### Government response

- 2.32** The strike out provisions recommended by Sir John would allow the CAT to focus its attention and that of the parties on the points that have substance, thereby increasing its efficiency and effectiveness.
- 2.33** The Government will take forward the recommendation for a new provision in Rule 11(1)(a) allowing strike out where the CAT considers that it has no jurisdiction to hear or determine an appeal and there will be equivalent provisions to that effect in Rule 41(1)(a).
- 2.34** We agree that the arguments put forward against the inclusion of draft Rule 11(1)(d) – being superfluous and too vague – are sensible and therefore we do not consider any further changes are required to address unmeritorious appeals. Consequently, draft Rule 11(1)(d) will not be included in the Rules.

## Evidence

### *Adducing New Evidence on Appeal (Rules 9 & 15)*

#### Summary of Government Decisions

- A new provision will be inserted at Rule 9(4)(h) to require the notice of appeal to contain a brief statement identifying any new substantive evidence, the substance of which, so far as the appellant is aware, was not before the decision maker. A new provision will be inserted requiring the defendant to also identify any new substantive evidence in a brief and succinct statement included with the defence. All parties will know at an early stage therefore, whether any new evidence is being adduced and will be able to assess whether they wish to make any objection to that new evidence.
- In this regard, a new provision at Rule 15(3)(c) will require the defence to the appeal to set out in detail any objections to the admission of new evidence put forward by the appellant.
- The revised rule will be accompanied by clear guidance in the Guide which will also cover what would happen if new evidence is not identified in the Notice of Appeal.

### The issue and proposals

- 2.35** Sir John Mummery's report notes that in the ordinary courts the admission of new evidence on appeals is restricted by criteria confining its admission to just and equitable grounds. In practice this generally means that the new evidence is only admitted if it was not available, or could not, by the use of reasonable efforts, have been available, for use in the first instance.

- 2.36** There are no criteria set out in the 2003 Rules for determining whether new evidence should be admitted on an appeal. Currently the CAT decides what directions to give in relation to introducing new evidence. The existing rules place the burden on the Regulator to identify new evidence not previously submitted.
- 2.37** In the consultation the Government was mindful of concerns expressed by some regulators that parties were deliberately holding back evidence to “game” the system and that, as a result of this assertion, parties should not be permitted to introduce any new evidence at appeal.
- 2.38** Sir John recommended inserting a new provision at rule 9(4)(h) to require the notice of appeal to contain a statement identifying any new evidence, the substance of which, so far as the appellant is aware, was not before the initial decision maker. He also recommended a new provision at Rule 15 (3)(c) which will require the defence to the appeal to set out in detail any objections to the admission of new evidence put forward by the appellant.

**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.**

### Summary of responses

- 2.39** All respondents who answered this question were concerned by the absence of evidence, from Government or regulators, to support the assertion that parties ‘game the system.’ One respondent commented that *“bringing an appeal is costly, 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.”*
- 2.40** Respondents explained in their responses, justifiable reasons as to why in some instances new evidence might be introduced at the appeal stage:
- The short period given to respond to a statement of objections.
  - Where parties expect an infringement decision, they will typically continue to develop their case after the 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.
  - Responses to requests for information at the investigation stage are typically given as written answers, rather than witness statements. By contrast, evidence before the CAT is given by named individuals in the form of witness statements and possible cross examination to test their evidence. Accordingly, new evidence in the form of witness statements is often necessary at the CAT stage.
  - Document productions during regulatory proceedings are based upon search parameters specified by the regulator.
  - It is not unusual for the competition authority’s case to develop between the statement of objections and the final decision so as to address the counterarguments raised by the parties in response to the statement of objections. Inevitably new evidence emerges which is helpful to the party’s case and which is therefore used in the appeal. It is essential that parties remain able to develop their appeal fully before the CAT with all necessary supporting evidence.



- 2.41** There was some support for the recommendation for a statement identifying new evidence with one respondent commenting *“that it is useful for all parties to know what new evidence has been submitted”* with another respondent commenting *“that it is sensible to require an appellant to include a statement in its Notice of Appeal”*.
- 2.42** However, respondents had concerns that the proposed amendments to the Rules could limit the CAT’s discretion to determine the admission or exclusion of evidence. Some referred to Sir John’s report which recognised that an appeal before the CAT will be the first judicial consideration of a matter following an administrative process, and therefore it was important the Tribunal retains discretion favourable to the admission of new evidence on appeal.
- 2.43** A significant number of respondents felt the existing Rules were adequate and under the current Rules the CAT is able to admit, exclude or limit evidence with one respondent commenting: *“In the event that a deliberate attempt to conceal evidence does take place, the CAT is likely to be able to identify such instances without the [proposed] rule.”*
- 2.44** Many respondents were also concerned the rule is liable to generate satellite litigation as to whether or not the substance of a witness statement was brought forward before the regulator, with one respondent commenting that rule 9(4)(h) as presently proposed refers to the “substance” rather than the form of “new” evidence.
- 2.45** Overall many respondents felt the Rule would be onerous on appellants, where they have only a limited period to file their appeal and could be deemed as unfair on the appellant. One respondent noted the draft rules do not contain any measures to promote transparency on the part of the regulator at the administrative stage, whilst another commented that Rule 15(3)(c) is asking the respondent to state whether they dispute its admission in their defence and creates an invitation to that defendant to dispute the evidence.
- 2.46** To address this point, some respondents suggested the provisions should be party-neutral with an equivalent rule providing for the defence to include a statement to the same effect as rule 9(4)(h) so that the appellants will be in a similar position to be able to consider whether they will challenge any new evidence provided in defence.
- 2.47** One respondent raised the point that the provisions regarding the introduction of new evidence on appeal need to take into account the position of appellants in third party appeals brought under section 47 of the Competition Act 1998 (“Section 47 appeals”). Appellants in Section 47 appeals will not be aware of what information was available, or capable of being made available to the respondent before the disputed decision was made.

## Government Response

- 2.48** **The Government has considered the responses and appreciates the arguments put forward by respondents in relation to appellants presenting new evidence at the appeal stage; their concerns regarding the new rule 9(4)(h), being onerous on appellants to identify new evidence in a limited period; and the new rule potentially leading to satellite litigation where parties have differing views on what is “new evidence.”**
- 2.49** **The Government acknowledges that no evidence has emerged to date that suggests parties deliberately hold back evidence to “game” the system.**

- 2.50 Clearly it is vital that regulators and competition authorities play their part in disincentivising appeals by being as transparent as possible, outlining their reasoning and evidence to parties as early as is practicable at the administrative stage.
- 2.51 The Government recognises the importance to appellants of being able to submit all relevant evidence and notes there are a number of justifiable reasons why such evidence may not have been submitted at the investigation stage. Consequently, it agrees entirely that there should be sufficient flexibility for appellants to raise points on appeal, particularly if the appellant was not reasonably able to realise the importance of a piece of evidence earlier in the administrative process or if new evidence emerges.
- 2.52 Nevertheless, despite the CAT already having powers to address the introduction of new evidence, we believe that a statement identifying new evidence which was not before the administrative decision maker will considerably assist defendants and the CAT, in more efficiently being able to ascertain new evidence and begin to address it at an early stage in the proceedings. We believe, in agreement with some respondents, that this must apply equally to appellant and defendant and explicitly address any imbalance by including a new provision requiring the defendant also to identify any new evidence in a statement to be included with the defence. Both parties will also be required to set out details of any objection to the admission of new evidence.
- 2.53 Some respondents commented that the rule will be onerous on appellants. However, it is important to emphasise that this new addition to the Notice of Appeal is not intended to be a burden. Instead, the statement is intended to be brief and succinct and only apply where new evidence is substantive and being relied on. The intention is to bring forward and make more transparent the evidence discovery process. The benefits to the efficiency of the overall process from this change are potentially significant. Furthermore, all parties ought to know the evidence that is being admitted directly in support of their key arguments, and full up-front disclosure will assist with overall transparency of the case and decision-making, thereby assisting all parties and the CAT.
- 2.54 The revised rule will also be accompanied by clear guidance in the Guide to include what would happen if new evidence is not identified in the Notice of Appeal.

### ***Constraining the volume of evidence (Rule 21)***

#### **Summary of Government Decisions**

- Rule 21(2) will list the factors the CAT will consider when determining whether it would be just and proportionate to admit or exclude the evidence. However, Rule 21(2)(c) will be amended to allow the CAT to take into account, in cases where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time.
- The revised Guide will set out in more detail how the CAT will interpret the rule and what factors it will take into account when considering matters relating to new evidence.
- The new Rule 27 'Expert evidence' will be included in the Rules.

## The issue and proposals

- 2.55** The CAT has a general power to admit or exclude evidence in the existing Rules. The provisions in proposed Rule 21 allow the CAT to give directions and, in particular, allow the Tribunal to place limits on the numbers of witnesses, reports and whether the parties are permitted to provide expert evidence. The CAT will also consider whether the evidence is necessary and the availability of the evidence before the decision under appeal was taken and the prejudice that may be suffered if the evidence is admitted or excluded.
- 2.56** Sir John Mummery was asked to consider constraining the volume of evidence and analysis introduced in appeals. He recommended a new provision (in proposed Rule 21 (2)) that lists the factors the CAT will consider when determining whether it would be just and proportionate to admit or exclude the evidence.
- 2.57** In addition, a new rule relating to expert evidence (Rule 27) has been inserted reflecting the existing requirement established by the case law of the CAT that applicants for review under the Enterprise Act 2002 must apply for permission to adduce expert evidence where the evidence was not before the original decision maker.

**Q9: 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?**

## Summary of responses

- 2.58** Although there was some support for the proposed changes to limit the amount of witnesses, reports and expert evidence to make cases more manageable, the majority of respondents disagreed with the proposals.
- 2.59** One respondent commented that *'[i]nstances where parties seek to put forward genuinely new evidence is relatively rare; generally all that occurs is that parties seek to elaborate on arguments made in earlier submissions and answer points in the decision, 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.'* Respondents argued that it is difficult to appreciate the importance of evidence at an early stage with one respondent commenting that in more complex cases *'limiting evidence, particularly expert evidence, may negatively impact the overall decision making process and could limit the CAT's discretion as it was too 'rigid and codified'.*
- 2.60** Respondents were concerned with the drafting and criteria in the proposed Rule 21(2). One respondent commented that *"[t]he inclusion of such criteria may, in practice, inappropriately limit the CAT's discretion, and Draft Rule 21(2) seems to track, in substance, the principles governing the admission of new evidence in ordinary civil appeals as set out in Ladd v Marshall (for example that: (i) the evidence could not have been obtained with reasonable diligence for use at the original trial; and (ii) that the evidence must be such that, if given, it would probably have an important influence on the result of the case")*. They also noted the judgments (including Court of Appeal authority) in Napp and British Telecommunications *"make it absolutely clear that the CAT should have a significantly broader discretion in relation to the admissibility of new evidence than the ordinary civil courts due to the different nature of the competition investigation and appeal process"*. Another respondent commented that *"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"*.

- 2.61 A few respondents also felt the current drafting of the rule is “*ambiguous and confusing because it is unclear to which party (respondent or appellant) it relates*”.

#### **Government response**

- 2.62 Whilst it is important for appellants to have a proper chance to put forward evidence which supports their case, the CAT should be able to exclude evidence on appeals when the party seeking to adduce that evidence could reasonably be expected to have made it available to the regulator before the disputed decision was taken. Rather than preventing the introduction of any new evidence on appeal, the new rules will give the CAT powers to control the admission of new evidence, allowing it to consider, in accordance with the criteria in proposed Rule 21(2), whether the new evidence was available to the regulator before the disputed decision was taken.
- 2.63 The criteria in draft Rule 21(2), lists the factors the CAT will consider when determining whether it would be just and proportionate to admit or exclude the evidence, including whether the evidence is necessary for it to determine the case. The criterion shows that the party seeking to adduce the evidence will be expected to explain why it was not made available to the decision maker.
- 2.64 In response to the concerns raised by respondents, Rule 21(2)(c) (which previously referred to the CAT considering whether evidence was capable of being made available earlier) will be amended to provide for the CAT to take into account, in cases where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time.
- 2.65 As pointed out in the responses to the consultation, there is a range of very different kinds of appeal to the CAT and the circumstances in which evidence was not made available at the administrative stage are varied. For example, the party seeking to adduce the evidence may be an intervener who was not directly involved prior to the appeal; the evidence may be directed to a particular point relied on in the decision that the party was not made aware of during the administrative proceedings; or the evidence may cover events since the time when the disputed decision was taken.
- 2.66 The revised Guide will set out in more detail how the criteria will be interpreted and what factors it will take into account when considering matters relating to new evidence. We believe this will meet some of the concerns expressed by respondents to the consultation (particularly in relation to limitations being placed on the CAT’s discretion).

## Amendment of the Notice of Appeal (Rule 12)

### Summary of Government Decisions

- Rule 11(3) be replaced with Rule 12(3)

### The issue and proposals

- 2.67** Currently, Rule 11(3) states that the *CAT shall not grant permission to add new grounds to the original Notice of Appeal save in certain circumstances, such as matters of law or fact coming to light since the appeal was made, or if it was not practicable to include such grounds in the Notice of Appeal*. This limitation on amendment has sometimes led to satellite litigation to determine whether an amendment should be permitted.
- 2.68** Sir John recommended that the CAT should have wider discretion to permit amendment to the Notice of Appeal. The revised Rule removes the restrictions contained in 11(3).

**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?**

### Summary of responses

- 2.69** All respondents agreed that removing the restrictions contained in the current Rule 11(3) and replacing it with Draft Rule 12(3) would give the CAT more flexibility by widening the discretion to permit amendment to the Notice of Appeal and “*should enable the CAT to take into account all relevant circumstances in reaching its decision.*”
- 2.70** One respondent commented that “*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 is generally positive, the Tribunal must ensure any relaxation of the rules does not lead to abuse.*”. Another respondent noted 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.*”
- 2.71** The majority of respondents agreed that giving the CAT broader discretion in deciding whether to allow amendments would assist it in minimising satellite litigation. The current rule is “*prone to generate disputes over technicalities.*” And the existing limitations on amendment have sometimes led to satellite litigation to determine whether an amendment should be permitted. One respondent commented that “[w]hether or not it does so [lead to further litigation] will, however, be largely dependent upon the way in which the CAT exercises its discretion in each case and therefore considers it may be of assistance for the CAT to address this in the revised Guide”.

- 2.72** However, one respondent did not agree, and commented that satellite litigation would be reduced “*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 Notice of Appeals; and in their experience, other factors tend to drive additional litigation, such as a decision to exclude evidence, a matter not addressed specifically by this rule change.

### Government response

- 2.73** The Government agrees that the current Rule 11(3) be replaced with Rule 12(3). The revised rule removes the restrictions contained in Rule 11(3) and will give the CAT more flexibility in deciding whether the amendment takes into account any substantial changes; or addition to the appellant’s case; or whether the amendment is based on matters of fact or law which have come to light since the appeal was made or could not otherwise have been practicably included in the notice of appeal.

## Fast Track Procedure (Rule 58) – (Previously Rule 57)

### Summary of Government Decisions

- To introduce a fast track procedure to enable consumers and smaller businesses to challenge anti-competitive behaviour and obtain swift and cheap access to redress.
- To continue with the criterion that a final hearing will be fixed within six months of a case being subject to the fast track procedure. The CAT however has sufficient flexibility under its case management powers subsequently to extend the period to trial in exceptional circumstances where it determines that it is in the interests of justice.
- An estimated trial length of no more than three days is only a factor to which the CAT will have regard in deciding whether a case should be subject to the fast track procedure. In appropriate circumstances, a case with a trial estimate in excess of three days may still be made subject to that procedure.
- The Guide should set out the criteria that will be considered by the CAT when determining whether a case is eligible for the Fast Track. It will also provide guidance as to what is expected from parties under the Fast Track procedure so parties have a clear understanding of the demands of an expedited timetable.

### The issue and proposals

- 2.74** In the Government response to the consultation on Private Actions, we confirmed our intention to create a ‘fast track’ mechanism for simpler cases in the CAT, delivering swift, cheap results to challenge anti-competitive behaviour. The purpose of introducing a ‘fast track’ mechanism within the CAT is to facilitate access to justice for Small and Medium Sized Enterprises (SMEs) who currently find it too costly to seek remedies for competition matters through the courts.

- 2.75** Within the Competition Appeal Tribunal (CAT) Rules of Procedure consultation, we sought views specifically on whether a ‘fast track’ procedure will benefit SMEs and micro businesses, providing them with access to redress.

**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.**

## Summary of responses

### *Likely use of Fast Track*

- 2.76** A number of respondents welcomed the ‘fast track’ procedure and were in favour of being able to resolve cases speedily and efficiently. There was scepticism from some respondents, however, over whether the proposed ‘fast track’ procedure was likely to benefit SME and micro businesses. Concerns raised included whether the procedure would be used and the likely demand for the procedure; that an expedited case may prevent the full and proper exploration of the details of a case; and a lack of clarity over whether a case would satisfy the criteria for ‘fast track’ classification.
- 2.77** On the latter point, several respondents expressed concerns that it may prove difficult to satisfy the various criteria (pointing out that the nature and complexity of a claim is not correlated with whether the claimant is an SME or not). Similarly, one respondent raised concern over the potential costs borne by a claimant before they find out if proceedings will be subject to the ‘fast track’, and highlighted the risk that a case may cease to be subject to the ‘fast track’ at any time.
- 2.78** Some respondents made recommendations to address these concerns, including early determination that a case is ‘fast track’ and greater predictability over whether a case would be subject to, or qualify, for the ‘fast track’. Specifically on this latter point, it was suggested that clear guidance was required on the process for applying for the ‘fast track’ and the implications of doing so to ensure parties can make informed judgements about eligibility and whether they wish to request use of the ‘fast track’ procedure.

### *Timescales for Fast Track Proceedings*

- 2.79** While there was some support for restricting the timescale for ‘fast track’ proceedings, acknowledging that this would ensure it is used only for similar cases, concerns were also raised relating to the feasibility of adhering to the proposed timescales for ‘fast track’ proceedings. A number of respondents suggested that the six month timescale for reaching a final hearing, as well as the three day timescale for completing the final hearing itself, were both too short. One respondent, for example, stated that expedited proceedings often will result in increased costs due to the increased intensity of work relative to a normal timetable. Others were either against a fixed time for the hearing or suggested this could be up to five days at the discretion of the Tribunal.

## The Government response

- 2.80** **The Government will introduce a ‘fast track’ procedure for simpler cases in the CAT to facilitate access to justice for SMEs who currently find it too costly to seek remedies for competition matters through the courts. The Government recognises the concerns raised around predictability and the importance of clarity in the eligibility criteria. The Guide to Proceedings will set out the criteria that will be considered by the CAT when determining**

whether a case is eligible for the ‘fast track’. It will also outline the demands of a more expedited process so parties have clear expectations of what is required.

- 2.81 ‘Fast track’ cases will be required to proceed to final hearing within six months of entering the procedure. The CAT however has sufficient flexibility under its case management powers to extend this period in exceptional circumstances where it determines that it is in the interests of justice. We believe this ensures that cases requiring a slightly longer timescale to proceed to final hearing are not excluded from ‘fast track’ where they otherwise meet the criteria.
- 2.82 An estimated trial length of no more than three days is only a factor to which the CAT will have regard in deciding whether a case should be subject to the ‘fast track’ procedure. In appropriate circumstances, a case with a trial estimate in excess of three days may still be made subject to that procedure and the CAT may use its discretion to extend this in exceptional circumstances in the interest of justice. We recognise that, even with this potential flexibility, these timescales may be too restrictive for some complex cases. However, we believe it is important to maintain a tighter timescale to ensure the delivery of expedited results *where possible* so there must be a clear distinction between ‘fast track’ and non-fast track cases. Parties using the ‘fast track’ procedure must also consider the number of witnesses and scale and nature of any evidence that is to be submitted to ensure that the process is as streamlined and efficient as possible.
- 2.83 The same eligibility criteria used to determine if a case is suitable for ‘fast track’ will be used by the CAT when deciding whether or not a case remains suitable for such proceedings. Where the CAT judges that a case may no longer be suitable (such as it involving too many witnesses), the CAT will consult parties and advise them of the changes required to ensure their case remains suitable. Parties would not, therefore be ejected from the ‘fast track’ procedure without warning, or without having had the opportunity to adapt their approach to ensure that their case remains eligible for ‘fast track’. This process will be set out in the Guide to Proceedings.

## Settlement offers and costs consequences (Rules 45 – 49) - (previously 45 -48)

### Summary of Government Decisions

- Government will take forward the recommendation regarding the procedure for settlement offers and the CAT will adopt Rules similar to Part 36 (CPR) of the Civil Procedure Rules to encourage and facilitate the settlement of cases (excluding collective actions).

### The issue and proposals

- 2.84 The current Rules provide for defendants to make offers and payments to settle but do not set out a procedure for making such offers in the same way as Part 36 of the Civil Procedure Rules (CPR). Nor do the Rules currently contain provisions for dealing with offers to settle in multi-defendant proceedings, such as in cartel damages claims, where one or more, but not all, of the parties make offers to settle.
- 2.85 Sir John has recommended that the CAT adopt Rules similar to Part 36 to encourage and facilitate the settlement of cases.



- 2.86** In particular, he has recommended the inclusion of special provisions for multi-defendant proceedings, as well as provisions, regarding the cost consequences following judgment where a claimant fails to obtain a judgment more advantageous than a defendant's settlement offer, which was declined.

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

### Summary of responses

- 2.87** Respondents welcomed the addition of new rules governing the procedure for settlement offers similar to those in Part 36 CPR and the additional provisions clarifying the position in relation to multi defendant proceedings.
- 2.88** Although supportive, one respondent commented that a number of "*important issues have not been dealt with in the proposed rules*". They were unclear whether it is intended that CPR 36 should be relied upon to "*fill in the gaps*" and made the points that there was: "*(i) no clear statement in the draft rules regarding when a settlement is deemed to be made (CPR 36 (7) (ii) the draft rules do not address how counterclaims will be dealt with (CPR 36.5) (iii). Non-monetary settlements and (iv) clarification in the definition of relevant costs that the claimant's costs entitlement is on the standard basis*"
- 2.89** A number of respondents flagged up that Rules 45-48 as currently drafted do not reflect amendments made to CPR 36 with effect from 6 April 2015.

### Government response

- 2.90** The 2003 Rules do not contain provisions equivalent to Part 36 of the CPR setting out a procedure for making an offer to settle.
- 2.91** Part 36 aims to encourage parties to settle their disputes. Offers to settle can be made by both a claimant and a defendant, at any stage of a dispute before or after proceedings have commenced. The Rules also set out costs and other consequences if a party refuses a reasonable offer to settle.
- 2.92** The Government will incorporate new rules similar to those in Part 36 of the CPR. The new Rules 45-49 will allow for a settlement offer to be made at any time, including before the commencement of proceedings. The Rules also provide for clarification of a settlement offer at the request of the offeree and provisions regarding the cost consequences following judgment where a claimant fails to obtain a judgment more advantageous than a defendant's settlement offer, which was declined.
- 2.93** The Government will take forward the new rules governing the procedure for settlement offers, and in relation to multi-defendant cases. Rules 45 – 49 will be updated to take into account the amendments made to CPR Part 36 with effect from 6 April 2015.
- 2.94** The proposed changes will enhance the settlement regime, and encourage greater use of settlement offers as a means of resolving cases. This will improve the efficiency of the CAT, and save costs for all parties.
- 2.95** These provisions will not apply to private actions, which will be subject to a separate settlement regime.

## Disclosure in Private Actions (Rules 60 - 65) - (Previously 59 - 64)

### Summary of Government Decisions

- To permit pre-action disclosure where the CAT determines that it is proportionate and necessary in the interests of justice.
- The CAT will have flexibility to determine the scope of disclosure necessary for each case to ensure it is proportionate and necessary so as to avoid unreasonable burden on either party.
- Applicants will be required to provide evidence supporting their application for disclosure, which will prevent them from being able to request pre-action disclosure where it is not necessary or desirable.

### The issue and proposals

- 2.96** As part of Sir John Mummery's review, he recommended the introduction of new, detailed provisions for the disclosure of documents by parties in private actions – and in particular, whether parties should be able to make an application to the CAT for disclosure before proceedings have started.
- 2.97** The revised rules will also allow the CAT to order disclosure of documents by a person who is not a party to the proceedings where the documents sought are likely to support the applicant's case or adversely affect the case of one of the other parties to the proceedings, and where disclosure is necessary in order to dispose fairly of the claim or to save costs.

**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.**

### Summary of responses

- 2.98** The majority of respondents agreed that it is sensible for the CAT to have equivalent powers to those available under the Civil Procedure Rules. Differing views were however expressed on the safeguards needed around disclosure of documents before proceedings, in order to avoid abuse of the system. Many respondents suggested that the CAT had a role to play in dealing with such requests in a fair and proportionate manner. Specifically, respondents pointed to giving the CAT discretion to determine the appropriate scope of disclosure, to ensure the mechanism is not abused (e.g. if claimants were to attempt 'fishing expeditions' for evidence), or that such disclosure should be regarded as exceptional by the CAT.
- 2.99** Wider issues were also raised in relation to pre-action disclosure "*where a party inadvertently discloses a privileged document, they 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)*".

### Government response

- 2.100** The Government has decided that disclosure, including pre-action disclosure will be permitted where the CAT determines that it is proportionate and in the interests of justice.

This will include situations where the CAT judges that disclosure could facilitate the fair disposal of proceedings; potentially assist the dispute to be resolved without proceedings; or save costs. Parties who have seen a privileged document that was inadvertently disclosed by another party will require the permission of the Tribunal before they can use a document or its contents.

- 2.101** The CAT will also have flexibility to determine the scope of disclosure necessary for each case to ensure that pre-action disclosure does not place an unreasonable burden and/or cost on either party. Claimants will also be required to provide evidence supporting their application for disclosure to act as a further safeguard against unnecessary and expensive disclosure. The Guide will provide clear guidance on how the safeguards will be applied.

## Transfers of mixed /hybrid claims (Rules 71-72) - (previously 70-71)

### Summary of Government Decisions

- Government recommends the transfer of mixed/hybrid claims to the appropriate courts. This will give the CAT the power to transfer a case to the right court or tribunal at an early stage and is an efficient way of resolving the problem of mixed claims and counterclaims, whilst saving parties and the judicial system time and cost.

### The issue and proposals

- 2.102** The current Rules provide for the CAT to transfer claims for damages to the High Court or a County Court in England and Wales or Northern Ireland, or the Court of Session or a sheriff Court in Scotland. Claims for damages made in any of these courts will be transferable to the CAT (once appropriate rules of court and regulations are made, relating to section 16 of the Enterprise Act 2002).
- 2.103** Sir John has recommended that the Rules should be amended to allow the CAT the ability to transfer a part of a case where that part concerns an issue that is outside the CAT's jurisdiction. For example, a contractual issue could be transferred to the ordinary courts, while the competition law points remained with the CAT for determination.

**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?**

### Summary of responses

- 2.104** Respondents that answered this question were generally supportive of the proposed approach to allow the CAT to make an order to transfer the whole or part of the proceedings from the CAT to the appropriate courts. However, three respondents had concerns about part of a case being transferred and held the view that 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 to deal with any non-competition law elements of the case.

Hearing different elements of the case in separate proceedings, under different procedural rules was suggested to be unnecessarily cumbersome and costly.

## Government response

- 2.105** The Government will take forward the recommendations for the transfer of mixed /hybrid claims.
- 2.106** We acknowledge the concerns put forward by respondents. However, we believe Sir John's proposal regarding the transfer of mixed/hybrid claims to the appropriate courts will give the CAT the power to transfer a case to the right court or tribunal at an early stage and is an efficient way of resolving the problem of mixed claims and counterclaims, which are outside the CAT's jurisdiction. There will also be provision for the transfer of claims to the CAT if they are within its jurisdiction. The CAT will also have the discretion to hear a case and appoint a Chancery judge as the Chair to hear any non-competition law elements of the case.

## Additional Parties and Additional Claims (Rules 38 – 40)

### Summary of Government Decisions

- The current Rules on additional parties and additional claims will be amended and set out in more detail the circumstances in which the Tribunal may exercise its powers in respect of these matters. The new rules will assist with procedural efficiency.

### The issue and proposals

- 2.107** The current Rules allow the CAT to grant permission for one or more parties to be joined in the proceedings, in addition or substitution to the existing parties. Sir John has recommended that the Rules be amended to set out in more detail the circumstances in which the Tribunal may exercise this power. For example the power could be used to join a new party, if there is an issue involving the new party and an existing party connected to the matters in dispute in the proceedings and it is desirable to add the new party in order to resolve that issue. The proposed new rules also allow the Tribunal to order any person to cease to be a party if it is not desirable for that person to be a party to proceedings.
- 2.108** Sir John has also recommended changes to the current rules on additional claims, to clarify what constitutes an additional claim and to specify how and when such claims may be made.

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

## Summary of responses

- 2.109** All respondents who answered this question welcomed the proposed rules, highlighting that the new rules will be helpful, and increase with procedural certainty, and clarify an area which has previously created additional complications. The rules will also be beneficial in achieving greater overall efficiency.
- 2.110** Although supportive of the proposals there were some comments for consideration, including:
- (i) the CAT should apply a high threshold when determining the addition or substitution of a new party after the expiry of a limitation period to substitute parties (the inclusion of ‘necessary’ in draft Rules 38(5) and (6) and discretion should be restricted to genuine mistakes; and
  - (ii) draft rule 40(1)(c) which allows the Tribunal to consider whether an additional claim should be dealt with separately from the claim by the claimant against the defendant. One respondent commented “[t]his is an important consideration, particularly in cartel damages actions where there may be a very large number of contribution parties.” They also believe an additional reference should be added to the criteria which the Tribunal should consider in reaching a decision on this point in Rule 40(2) to include the proportionality of the costs of dealing with additional parties alongside the main claim, in accordance with the governing principles.

## Government response

- 2.111** The Government agrees with Sir John’s recommendations that it is important to get the right parties to the claims before the CAT and that the current Rules on additional claims are amended to set out in more detail the circumstances in which the Tribunal may exercise its powers.
- 2.112** The Government has considered the comments on the proportionality of costs and considers it is not necessary to have a specific reference to costs as a factor to be taken into account when deciding whether to add a claim. The CAT will consider costs under the Governing Principle Rule 4(2) and will seek to ensure that each case is dealt with justly and at proportionate cost, so far as is practicable. The new rules will also assist with procedural efficiency.

## Power to grant injunctions (Rule 67-68) – (previously 66-69)

### Summary of Government Decisions

- Within the ‘fast track’ procedure, the CAT will have a discretionary power to grant an interim injunction without requiring the applicant to provide an undertaking as to damages; or to grant the interim injunction subject to a cap on the amount of the undertaking as to damages, in circumstances where it determines that it is in the interests of justice.
- The Guide will set out the factors that will be considered by the CAT when determining whether it is in the interests of justice to waive or cap the undertaking as to damages in order to provide clarity for both parties.

## The issue and proposals

- 2.113** These rules introduce a new discretionary power for the CAT to grant injunctions in relation to proceedings, other than in Scotland, when it is considered just and convenient to do so, in line with the expansion of the CAT's jurisdiction by the Consumer Rights Act 2015.
- 2.114** Injunctions can be interim or final and can be granted conditionally or unconditionally as the Tribunal thinks just. Interim injunctions granted in proceedings subject to the 'fast track' procedure may be granted without requiring the applicant to provide an undertaking as to damages, or there may be a cap on the amount of the undertaking as to damages.

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

## Summary of responses

- 2.115** The proposed rule to implement the power to grant injunctions has proven divisive with several respondents supporting this power, while others expressed concerns that it could have a detrimental impact on defendants. In particular, opposing views were received on permitting the CAT to grant an interim injunction 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. Some welcomed the proposal but others argued that it could leave defendants vulnerable to unmeritorious claims.

## Government Response

- 2.116** The Government recognises that a balance must be struck between not exposing defendants to potentially vexatious or unmeritorious claims while also ensuring that small businesses that have potentially suffered a breach of competition law are provided with sufficient interim relief. Without this protection, we believe that many SMEs would be unlikely to bring forward claims due to the financial risks involved. Frequently redress and damages are less important to the claimant than getting the anti-competitive activity to stop – a view that was echoed by many respondents to the initial consultation on Private Actions.
- 2.117** In light of this, the new Rules will ensure the CAT has the flexibility to grant an interim injunction within the 'fast track' procedure without requiring the applicant to provide an undertaking as to damages; or to cap the amount of the undertaking as to damages where it determines that it is in the interests of justice. This approach will therefore ensure that the CAT can make a balanced judgement, which takes into account the financial limitations of the applicant and protects them from potentially becoming liable for an unlimited sum from a potentially much better funded defendant.
- 2.118** However, recognising the risk of burdensome unmeritorious claims being brought forward, the Guide will set out the factors that will be considered by the CAT when deciding whether or not to require an undertaking from the applicant or whether to cap the amount of the undertaking. The waiver or cap will only be applied in situations where the CAT deems it is necessary in the interests of justice and appropriate to ensure that businesses with limited financial funds can still seek redress. This will be reflected in the Guide.

### 3. COLLECTIVE PROCEEDINGS

*Who should be able to bring collective proceedings cases to the CAT?*

#### Summary of Government Decision

- **Only those who will act fairly and adequately in the interests of the class members will be authorised to act as the class representative in accordance with Rule 77 (Authorisation of the class representative).**
- **The Guide will clarify the criteria that the CAT will consider when determining whether a potential class representative would fairly and adequately act in the interests of the class members. This will include factors such as the financial interests of the proposed class representative to ensure that it does not have an interest that is in conflict to the class members.**

#### The issue and proposals

- 3.1** As part of the Government response to the consultation on Private Actions, the previous Government set out an objective that claims should only be brought by those with a genuine interest in a case, such as representative bodies, or those who have themselves suffered loss. This issue was also then the subject of considerable debate during the passage of the Consumer Rights Act 2015.
- 3.2** As part of the subsequent consultation on the CAT Rules of Procedure, the former Government indicated that it was minded to 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. The purpose of this is to prevent bodies that do not represent the genuine interests of class members from bringing cases, whilst still granting the CAT sufficient flexibility to over-ride this presumption in cases where it judges that the proposed class representative can be trusted to act in the genuine interests of the class members.

**Q.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?**

#### Summary of responses

- 3.3** This question has proven to be particularly divisive amongst respondents. Many considered this draft rule unnecessary as the CAT has sufficient flexibility to prevent inappropriate class representatives under draft Rule 77. Despite this, a number of these had no strong objection to the presumption so long as it could be overridden at the CAT's discretion in appropriate circumstances. These circumstances may include, for example, consumer or trade bodies, where the body was a victim or target of the anti-competitive behaviour, or where an entity is formed specifically to bring a case and simplify case management or limit liability. One respondent went further and expressed concerns that the very process of having to rebut such a presumption can entail substantial cost and risk.

## Government Response

- 3.4** The Government has decided that only those who would fairly and adequately act in the interests of the class members will be authorised to act as the class representative.
- 3.5** No presumption will be included in the Rules to exclude certain organisations bringing cases. We believe that this flexibility is necessary as a presumption against legal firms, special purpose vehicles and third party funders is too prohibitive and could prevent for instance, a special purpose vehicle that has been established to genuinely represent the class from being able to bring forward a case.
- 3.6** The Rules however have a number of factors the CAT must consider before approving a class representative in collective proceedings in order to ensure that unsuitable individuals or bodies are not permitted to act as the class representative.
- 3.7** The Government's policy intention on this issue has been made very clear. , The Guide will therefore set out the criteria the CAT will consider when determining whether a potential class representative would fairly and adequately act in the interests of the class members to assist claimants and (prospective) representative organisations. This would include factors such as the financial interests of the proposed class representative to ensure that it does not have an interest that is in conflict to the class members. This will enable the CAT to consider whether a class representative should be authorised on a case by case basis and take into account their individual circumstances.

## Criteria for certifying claims

### Summary of Government Decision

- To include draft Rule 78 (3) (a) – ‘the strength of the claims’ as part of the certification criteria for opt-out collective proceedings.
- To extend the remit of the rules on Strike Out to cover all claims, including collective actions to ensure that cases do not progress if the CAT considers that there are no reasonable grounds for making the claim.
- As part of the CAT rules, the CAT will consider the existence of a voluntary redress scheme as part of its certification criteria for collective proceedings. In circumstances where a redress scheme already exists, the CAT may stay proceedings until it can assess how the scheme is working in terms of uptake.
- More broadly, the CAT will also consider whether ADR is available but will take into consideration whether it is a feasible option for parties on a case by case basis.

## The issue and proposals

- 3.8** As part of the Government response to the consultation on Private Actions, the previous Government decided to introduce a limited opt-out collective actions regime. This will allow consumers and businesses to collectively bring a case to obtain redress for their losses. Recognising concerns that the introduction of an opt-out regime could lead to unmeritorious



litigation, the Government is also introducing a number of safeguards. These include: no treble damages; no contingency fees for lawyers and that the CAT will certify whether a claim is suitable for collective action and whether it should proceed under an opt-in or opt-out basis.

- 3.9** As part of the subsequent consultation on the CAT Rules of Procedure, views were therefore sought on whether the certification test for collective proceedings strikes the correct balance. Respondents were asked to comment particularly on the tests on assessing the strength of the claim and the availability of alternative dispute resolution.

**Q.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?**

### Summary of responses

- 3.10** There was general agreement that certification of collective actions acts as a legitimate safeguard to unmeritorious claims. There were, however, very differing views as to what the criteria should include.

### Strength of claims

- 3.11** There was some general support among respondents for inclusion of a merits test. Illustrative of this, one respondent argued that *“an initial assessment of the strength of the claims as a condition of launching an opt-out action is of particular importance given that this would involve 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.”* Another respondent, also supportive of an initial determination of the strength of claim by the CAT as a condition of launching an opt-out action, suggested that the test ought to be whether the claimant’s case has a *‘reasonable prospect of success’*, while another suggested such an approach was *“analogous to the courts determining whether to refuse a summary judgement application on the basis that the defendant has a real prospect of success.”*
- 3.12** Respondents were not all supportive, however, with one trade association noting that its members were divided: some believe the strength of the claims is a *“legitimate question to be asked to prevent misuse of the opt-out procedures;”* other members however consider that *“the criterion is unworkable, since the CAT cannot know the strength of the claim at a pre-trial stage”*.
- 3.13** Another respondent was categorically opposed stating that: *“experience shows that a merits test at the interlocutory stage of a collective action can generate considerable cost and delay. This approach has the effect of turning what should be an interlocutory stage into a mini-hearing of the substantive case, muddying and prolonging the certification process and increasing costs for all parties”*. The respondent also questioned the evidence for why a merits test is necessary noting that *“in follow on cases (i) liability will already have been established (via the infringement decision) and (ii) it can be presumed that the represented group suffered a loss. This should be more than sufficient to demonstrate that a collective action has merit on its face”*.

### Availability of ADR

- 3.14** On the availability of ADR, respondents were divided. Some did not believe that ADR should be mandatory stating, for example, *“if [the existence of a CMA-approved voluntary redress scheme is taken into account] when deciding whether or not to allow collective action to proceed... this would appear at odds with the ostensibly voluntary nature of a CMA scheme.”* Another respondent

also noted that ADR does not “typically provide a viable alternative for multiple class members unless a defendant has set up a voluntary redress scheme or otherwise agrees to enter into a dialogue with a potential class representative with a view to considering a collective settlement offer”.

- 3.15** However, other respondents believed 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.” One respondent suggested that rule 78(2) (g) “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”.

### Government response

- 3.16** The Government believes the ‘the strength of the claims’ criteria (draft Rule 79 (3) (a)) is particularly important for opt-out proceedings, as cases can be brought without class members’ knowledge or consent, as they do not need to actively participate in the claim. As a result, we have decided to incorporate this into the Rules. This will not however amount to a full ‘merits test’ and the approach of the CAT will be clarified in the Guide.
- 3.17** The remit of Strike Out will also be extended to cover all claims, including collective actions to ensure that cases do not progress if the CAT considers that there are no reasonable grounds for making the claim or that it is unlikely to succeed. In addition to the ‘strength of the claims’, this will act as a further safeguard against unmeritorious or vexatious claims being brought via opt out collective proceedings.
- 3.18** On the availability of ADR, the Government recognises the concerns raised by respondents, particularly in terms of the voluntary nature of any redress scheme. Nevertheless, we believe that without this safeguard, compensating businesses may lack sufficient incentives to offer redress schemes. Both parties would therefore lose out on the benefits of voluntary redress in enabling the speedy resolution of disputes without the need for costly litigation. This is why we are also promoting the role of ADR and introducing voluntary redress schemes to make it easier for businesses and consumers to gain compensation for harm caused by infringements of competition law.
- 3.19** As a result the Rules will reflect that the CAT will take into account the existence of a voluntary redress scheme when considering whether to certify a claim for opt-out collective proceedings.
- 3.20** However, if a claimant decides to reject a voluntary redress scheme offer in pursuit of litigation, the CAT may stay the case to allow both parties to try and resolve the matter out of court, or direct the claimant to pursue their case on an individual basis rather than via a collective action. We believe that this strikes an appropriate balance in promoting the benefits of voluntary redress schemes and encouraging claimants to carefully consider rejecting such compensation, while not however preventing claimants from pursuing litigation if they believe this is the most appropriate means to seek redress.
- 3.21** The CAT will therefore be required to consider the availability of ADR as part of its certification criteria for collective proceedings if it judges that this could potentially be a positive solution for both parties.

## Formal Settlement offers

### Summary of Government Decisions

- **That formal settlement offers in collective proceedings should not attract the same cost protections as those which apply to such offers in non-collective proceedings.**
- **Parties will nonetheless be able to make Calderbank offers in collective actions in the CAT, i.e. offers "without prejudice" save as to costs. This will ensure that if a party rejects an offer in favour of litigation, the Calderbank offer could then be considered at the end of the case when the CAT decides what order to make as to costs.**

### The issue and proposals

- 3.22** Government policy is to encourage parties to use ADR as a means to settle disputes. The Consumer Rights Act 2015 therefore introduced collective settlement, a CAT based mechanism for parties to agree a redress settlement on an opt-out basis for underlying claimants.
- 3.23** The Government however had reservations about the use of such settlement offers in collective proceedings given the unique nature of collective actions. The concern was that they could incentivise defendants to provide a low settlement offer early on in the proceedings because if the offer was then rejected, the claimant would become liable for the defendant's costs if the claimant then achieved a lower offer after pursuing litigation. In particular, the Government sought views on whether the disclosure of information should accompany such settlement offers to assist claimants in assessing whether the offer is just and reasonable.

**Q.20: Should formal settlement offers be excluded in collective actions?**

**Q.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?**

### Summary of responses

- 3.24** The majority of respondents stated that they did not believe that the cost consequences of formal settlement offers should be excluded from collective actions. Many respondents believe that settlement offers have benefits and that cost shifting consequences incentivises early settlement. For example:
- 3.25** “[We] endorse the incorporation of the main elements of CPR 36 in the draft rules, as the possibility of cost-shifting strongly incentivises early settlement by the parties and is an effective mechanism for businesses to avoid being subjected to unmeritorious litigation”.

- 3.26** There were however differing views regarding the special provision around the disclosure of information relating to the settlement offer. Some respondents argued that claimants might not be in a position to assess whether a settlement offer was just and reasonable when, for example, “[t]hey will not be privy to the data needed to assess the true loss to victims of an infringement [as] this information lies exclusively in the hands of the defendant.
- 3.27** The cost consequences mean that rejecting an offer carries a huge financial risk and, as a result, there is significant “*potential for defendants to offer low settlement offers and apply costs pressure on claimants to settle early without having the relevant information at their disposal to assess the reasonableness of the offer.*” Suggestions for addressing this concern included that “*the party who **makes an offer** must demonstrate to the CAT that the resulting collective settlement is just and reasonable*” and “*if the CAT is not satisfied no cost consequences will apply to that offer; if the rules were to be applied to collective proceedings, this should be subject to additional conditions as to disclosure of information in order for the costs consequences to become effective*”.
- 3.28** However, others argued that there was no incentive for defendants to make intentionally low offers and supported a necessary burden on claimants to understand their position and estimate their claimed losses. One respondent’s views were illustrative of this position, stating that “[d]efendants 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”.
- 3.29** Even among these respondents, the concern around putting claimants under pressure on costs and the difficulty they face when trying to assess the reasonableness of an offer was acknowledged. However, it was believed that sufficient protections would remain in place. One argument was “*that the settlement offers would in any event be subject to scrutiny by the CAT [means] that claimants could be adequately protected against unreasonably low offers*”. Another argument was that the respondent did not “*believe that the claimant representative will be in a substantially different position in assessing a collective settlement offer to any party in litigation where Part 36 or cost shifting rules apply,*” arguing, in effect, that all parties face information asymmetries as they are required to assess an offer on the basis of the information available to them at the time the offer is made.
- 3.30** One suggestion to assist claimants in making such an assessment was for the collective settlement offer to be supported by a report by an independent expert, which sets out the basis for the settlement offer, including disclosure of the information and data used to prepare that report.

### Government response

- 3.31** **We agree with respondents that cost-shifting in regards to settlement offers plays an important role in incentivising parties to settle outside of court where appropriate, as it enables matters to be dealt with more speedily, and provides both parties with financial certainty not possible if they pursue a private action.**
- 3.32** **We have however; decided not to apply Rules 45-49 to opt-out collective proceedings, as there are a number of substantial practical difficulties.**

#### These include:

- **The class representative cannot take instruction from class members in the same way as for other types of proceedings;**
- **If class members are unhappy with the offer, they could opt out of the class – this could then leave the defendant vulnerable to a number of individual claims, which is what the defendant would be trying to avoid;**
- **This could encourage funders to put pressure on class representatives to accept/reject a particular offer;**

- It might be difficult for the CAT to assess whether an offer is just and reasonable – particularly if they are just given an explanation of the offer from one party (i.e. the defendant);
  - In collective proceedings, it is rare to reach quantified damages, as cases can split into smaller claims and are therefore no longer comparable to the initial settlement offer;
  - There is added complexity if you then consider groups, for example direct and indirect purchasers, within a class.
- 3.33 We do however agree with the views put forward by a number of respondents that cost-shifting protections serve an important purpose in encouraging parties to settle out of court where possible.
- 3.34 We recognise that it is important to protect defendants from claimants rejecting reasonable offers in favour of unnecessary and costly litigation. However we also recognise the importance of ensuring that claimants are able to properly assess whether a settlement offer is just and reasonable, so that they can make an informed decision about whether or not to accept it. We agree with the concerns raised in response to the consultation that claimants should not feel compelled to accept a settlement offer that they are uncomfortable with for fear that they would automatically be required to pay the defendant’s costs if they pursued litigation and then received a lower award of damages.
- 3.35 We therefore intend that parties will be able to make Calderbank offers in collective actions in the CAT, i.e. offers ‘without prejudice’ save as to costs. This will ensure that if a party rejects an offer in favour of litigation, the Calderbank offer could then be considered at the end of the case when the CAT decides what order to make as to costs.
- 3.36 We believe that this strikes a balance in protecting both parties by providing for cost-shifting protections where appropriate, *but not making such protections automatic*. The Government has decided not to make these cost-shifting protections automatic in recognition that a claimant might not always be able to assess whether an offer is just and reasonable at the time that it was made. This approach will therefore allow the CAT to take the original offer into account when deciding on costs after the case has concluded, and to make its assessment based on how the case developed, and whether it believes the claimant should have accepted the original offer. The CAT can then use its discretion to decide how to distribute costs.

## 4 Other issues raised and considered

### Summary of Government Decisions

- Amending the CAT rules to provide that claimants are required to provide a copy of the claim form to the CMA when private actions cases are initiated.
- Amending the CAT Rules to allow the CMA to make written and (with the permission of the tribunal) oral observations to the CAT, where appropriate, in private actions cases.
- Ensuring the CAT has the power to stay cases being investigated by a competition authority.
- Undistributed damages will not be returned to the defendant.

## Issues and proposals

- 4.1 As part of the consultation we were asked to include a requirement in the CAT rules that claimants copy their claims form to the CMA when private cases are initiated in the CAT. The Government was also asked to ensure that the Competition and Markets Authority could make observations to the Tribunal, where appropriate, in private actions cases and that the CAT was able to stay cases being investigated by a competition authority.

### Summary of responses

- 4.2 As part of this consultation, another respondent also requested that “*undistributed damages should be returned to defendants after a reasonable period*”. One of their key concerns was that “*the goal of collective redress must be to provide compensation to claimants who have actually been injured by the defendant*” and expressed concerns that the current approach was essentially punitive, as defendants are unable to recoup undistributed damages.
- 4.3 They also raised concerns with regard to the CAT’s power to award undistributed damages to the class representative where it determines that it is appropriate to do so, commenting that “*where a class representative itself stands to gain a “bonus” if class members do not come forward, the class representative loses all incentive to locate class members, and indeed has incentives which are directly contrary to those class members*”.

## Government Response

- 4.4 **The Government believes there should be a requirement added to the CAT rules that claimants should have to copy their statement of case to the CMA when initiating a case in the CAT. This will ensure consistency with similar provisions that already exists for action in the High Court. We also believe this will ensure a more effective private actions regime and will compliment public enforcement, as the CMA will have oversight of competition cases before the CAT.**
- 4.5 **The CAT Rules will be amended to allow the CMA to make written and (with the permission of the tribunal) oral observations to the Tribunal, where appropriate, in private actions cases; and**
- 4.6 **The CAT will be able to use its power to stay a case being investigated by a competition authority.**
- 4.7 **The Government does not intend to award undistributed damages to defendants after a certain period of time. Whilst the objective is not to punish defendants, we equally do not believe that it is appropriate to reward them by enabling them to recoup damages they were responsible for, as a result of a breach of competition law. We also believe that the decision not to allow defendants to recoup undistributed damages will play a significant role in the deterrence effect of the reformed private actions regime. We do not believe that the existence of unclaimed damages will incentivise class representatives not to represent their class appropriately because class representatives will not necessarily be awarded some, or all of the undistributed damages. Undistributed damages can also be awarded to the Access to Justice Foundation and the decision of who to award the damages to will ultimately be decided by the CAT on a case by case basis. Rule 77 also requires the CAT to authorise the class representative and consider that they “would fairly and adequately act in the interests of the class members”, which would act as a further safeguard in protecting claimants from representatives who might not act on behalf of their interests. Rule 80 (1) also sets out that “the class representative must give notice of the collective proceedings order to class members in a form and manner approved by the Tribunal”,**

**which will prevent class representatives from deliberately trying not to identify class members.**

## Annex A

### Consultation questions

Q1: Do you agree with the recommended approach to promote the five principles from the Guide to Proceedings be incorporated into Rule 3 (re-numbered to Rule 4) 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?

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

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?

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

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?

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.

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?

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?

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.

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

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.

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?

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

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



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?

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?

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

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?

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?

## **Annex: B**

### **List of consultation respondents**

**Ashurst LLP**

**Brick Court Chambers**

**Competition Law Association (UKCLA)**

**Freshfields Bruckhaus Deringer LLP**

**Hausfeld & Co LLP**

**Herbert Smith Freehills LLP**

**Litigation Management Ltd**

**Maclay Murray & Spens LLP**

**Pinsent Masons LLP**

**SKY UK Limited**

**Telefonica UK Limited**

**UKCTA**

**US Chamber – Institute for Legal Reform**

**Vodafone UK**

**Which?**



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