



## Competition Law Association

British Group of the  
Ligue Internationale du Droit de la Concurrence  
(International League for Competition Law)

### UK COMPETITION LAW ASSOCIATION

#### Consultation Response

#### Providing copy of claim form to the Competition Markets Authority (CMA)

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

**20 July 2015**

#### **BIS's additional question of 14 May 2015 and the CLA's response of 22 May 2015**

**What are the potential costs and / or difficulties that could be created if it was necessary to provide a copy of the claim form to the CMA at the same time that it was submitted to the CAT?**

*“We have canvassed the opinions of the working group which prepared the CLA's response to the consultation. In the membership's view, the additional costs imposed by requiring claimants to provide a copy of the claim form to the CMA would be relatively minor compared to the cost of preparing the claim itself. This would involve photocopying costs, delivery costs and some costs in terms of lawyers' time spent preparing covering letters and ensuring 'compliance' with the rule. It is difficult to estimate these costs precisely, but they are likely in any event to exceed £80 and may be much higher in larger disputes. Obviously, these costs would be incurred for every claim and so over the course of a year the total costs would be significant.*

*We also note that in some instances the claimant may be under contractual confidentiality obligations to one or more third party. In these instances, the claimant may have difficulty complying with an obligation to supply the claim to the CMA before a confidentiality regime is established. For example, the claim may refer to or annex third party confidential material (e.g. commercially sensitive supply contracts). In the event that a claim has to be redacted, so that a non-confidential version could be*

*provided to the CMA, this would substantially raise the costs of fulfilling this requirement. We would estimate that the costs would be at least several hundred pounds and possibly several thousands of pounds in complex cases.*

*In our view, it would ease the ‘compliance’ burden imposed on claimants for the requirement to provide a copy to the CMA at “the same time” to be relaxed. For example, the rule could provide for the claimant to provide a copy of the claim to the CMA within a week of lodging the claim with the CAT. It should also be made clear that the timing of the provision of the copy to the CMA has no relevance to question of when the claim is deemed to have been received by the CAT. It would be unfair and disproportionate if a claim were deemed to be lodged ‘out of time’ owing to a failure to supply the CMA with a courtesy copy of the claim.”*

### **BIS’s further follow-up questions of 29 May 2015**

**A. In terms of establishing a confidentiality regime, does this mean seeking agreement from potential third parties that they do not have concerns with you sharing the confidential version of the claims form with the CMA?**

1. If the claimant has agreed a contractual confidentiality obligation towards a third party then it may potentially breach that contractual duty by sharing the material with the CMA unless it either: (i) obtains consent of that third party (or complies with notice provisions to enable the third party to object to the disclosure); or (ii) obtains an order of the CAT relieving it from complying with the obligation.
2. Precisely what the claimant would need to do to comply with its contractual duties towards the third parties would depend on the scope of those contractual duties. A well drafted confidentiality obligation may include an explicit carve-out for disclosing material to competition authorities, but not all agreements will do so. We note that the claimant may owe duties to a number of third parties, so giving notice to those third parties could take considerable time (even if the third parties do not object to the material being shared with the CMA).
3. As a practical matter, circumstances may arise where the difficulty of obtaining consent from third parties may mean it is easier for the claimant simply to create a redacted version of the annexed document(s) to provide to the CMA. As noted above, the alternative (i.e. to provide unredacted copies to the CMA without obtaining consent) would be to apply to the CAT for directions permitting it to share the materials with the CMA.

**B. In regards to the proposal that claimant should be able to submit the claim form to the CMA within a week of lodging the case with the CAT, can I please clarify what this interim period would be used for? For instance, would the party use this week**

**period, to satisfy themselves that they were comfortable providing a confidential version of the documents to the CMA, or to produce non-confidential documents for the CMA, or either depending on the circumstances?**

4. Filing a claim is a potentially hectic process and the culmination of a significant amount of work. Arranging delivery of an additional copy of the claim to separate address on the same day as the filing the materials at the CAT is an additional burden. The additional week relieves that burden.
  5. The additional week could potentially also be used by the claimant to identify confidentiality issues, should it be required to provide a copy of the claim to the CMA.
- C. Ideally the CMA would see the same version of the documents that are served on the court and parties, as this is consistent with the High Court Practice Direction regime. Any material the CMA received would be specified information within [part 9](#) of the Enterprise Act 2002 since it would facilitate relevant CMA functions under the CA98 and EA02. As such, there would be clear restrictions on disclosure, which should provide reassurance to parties as to the CMA's treatment of such material. The concern with alternatively redacting material might be that parties could potentially redact so much material that it renders the CMA unable to assess it usefully so the provision of the same documentation would be the preference in most, if not all circumstances.**
6. The fact that the material would be subject to the protections under Part 9 of the Enterprise Act would not relieve the claimant from any contractual duty owed to the relevant third party(ies). Technically, the claimant would be in breach if it shared the information with the CMA contrary to the contractual obligation it had agreed.
  7. In our view the claimant is unlikely to over-redact materials it provides to the CMA since this would appear suspicious and would draw attention to the dispute. We also doubt that it is necessary for the CMA to view confidential details to gain a sufficient grasp of the dispute to decide whether or not it wishes to take further action.