UK COMPETITION LAW ASSOCIATION

Consultation Response

Further response to Q8

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

20 July 2015

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.

1. Question 8 of BIS's consultation concerned Sir John's recommended introduction of a new rule to address the Government's concern that appellants may withhold evidence during the regulatory investigations which they later rely on during the appeal process. Pursuant to Draft Rule 9(4)(h) appellants would be required to identify at the time of filing an appeal "*the evidence* [...] *the substance of which, so far as the appellant is aware, was not before the maker of the disputed decision.*" Under Draft Rule 15(3)(c) the regulator would be required set out in its defence to the appeal any objection to the admission of the evidence put forward. In his review, Sir John explained that the purpose of this procedure is to "*identify the new evidence and the issue about its admission at an early stage and to enable the CAT to make an informed decision about the admission of the evidence*" (Paragraph 68).

2. The CLA opposed the new draft rule. At paragraph 2.11 of our response to the consultation, we pointed out:

   (a) there is no advantage for an appellant withholding exculpatory evidence during the investigation;

   (b) there are a number of legitimate reasons why an appellant may wish to rely on new evidence on appeal;

   (c) the rule was unlikely to assist the CAT in establishing whether appellants *"could and should have"* produced evidence to a regulator during the earlier investigation.

   (d) 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.

   (e) The rule is likely to be onerous and would generate considerable practical difficulties for appellants. Assessing whether the 'substance' of the evidence relied on is new is a burdensome box-ticking exercise which – if an investigation has spanned many years – could present practical difficulties. The timing of the requirement (*i.e.* at the outset of the appeal) creates unfairness to appellants which have only limited time to file their appeal.

3. We have been asked to provide further detail regarding our concerns at (d) and (e) that the draft rule, if enacted, would lead to satellite litigation and additional burdens for appellants.

Further detail

4. The CLA considers that a procedural rule is likely to give rise to satellite litigation and burden where the rule is: (i) ambiguous; and (ii) potentially able to influence the outcome of the substantive trial. Both of these conditions are fulfilled in relation to Draft Rule 9(4)(h).

   <u>Ambiguity of Draft Rule 9(4)(h)</u>

5. The proposed rule requires appellants to identify "*the evidence (whether witness statements or documents annexed to the notice of appeal)* ***the substance of which****, so*

far as the appellant is aware, was not before the maker of the disputed decision" (emphasis added). Whether the 'substance' of the evidence has been relied upon already is a matter which will frequently be open to interpretation. It will only be beyond dispute that the substance of the evidence on appeal has not changed when it is word for word the same as submitted in the original investigation, *e.g.*, if the same document is served again. However, if the material differs in some way, then the potential for dispute arises. Even changes of just a few words between a submission during an investigation and a witness statement submitted on appeal might potentially be argued to constitute a material change. The same might be the case for expert economic evidence. As Lord Justice Toulson observed in the *BT (Termination Charges: 080 Calls) v Ofcom*[1] litigation, it might be the case that much of the case turns on economic theory supported by algebraic and mathematical calculations. An appellant might revise its algebraic and mathematical calculations in the light of the final decision of the authority. Whether such revisions amount to a change 'in substance' could easily give rise to disagreement.

6. In *BT (Termination Charges: 080 Calls) v Ofcom* the Court of Appeal challenged counsel for Ofcom to set a test for "*drawing a line between acceptable and unacceptable fresh evidence*". Counsel for Ofcom was unable to do provide an adequate test and the Court of Appeal ultimately decided against stipulating such a guidance on the basis that any attempt to do this would be "*counterproductive, in that it would be more likely to lead to further procedural arguments*". In the same way, we consider that it is unlikely that the Courts will be able to set a bright line test between changes of substance and changes not of substance.

Potential for Draft Rule 9(4)(h) to influence the substantive appeal

7. If an appellant fails to comply with Draft Rule 9(4)(h) then, pursuant to Draft Rule 10(1), the CAT may give "*such directions as may be necessary to ensure that those defects are remedies*".

8. Where an item of evidence is submitted on appeal which is non-identical to the evidence submitted during the investigatory procedure, and the appellant has not identified it pursuant to Draft Rule 9(4)(h), then the regulator may argue that:

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1 [2011] EWCA Civ 245, paragraph 74.

(a) the substance of the evidence was not before it during the investigation.

(b) the evidence should be excluded Draft Rule 21(2);

(c) the appellant failed to comply with Draft Rule 9(4)(h) and that failure ought to be sanctioned (*e.g.* by strike out of a portion of the appeal pursuant to Draft Rules 23(1)(c) and 11(1)(f)). Moreover, the sanction for non-compliance should apply irrespective of whether the evidence would have been admissible under Draft Rule 21(2), if it had been identified as 'new evidence' under Draft Rule 9(4)(h).

9. Whilst arguments (a) and (b) are arguments which can be raised under the existing rules, argument (c) is a new and potentially attractive argument for a regulator because it may enable the regulator to exclude evidence which could have a substantive impact on trial – even if argument '(b)' fails.

10. Of course, the appellant would no doubt oppose the regulator and argue that a sanction under (c) would be inappropriate. However, this would be amount to procedural 'satellite' litigation, over the application of a rule which was intended to smoothen the appeal procedure.

11. Given the uncertain treatment of a failure to comply with Draft Rule 9(4)(h), appellants and their advisers may devote significant resources to deciding whether to classify an item of evidence as in substance new or not new. It is impossible to say in the abstract how much resources would be expended, but given many investigations span a number of years, the volume of evidence may be considerable. The CLA notes that it was obviously considered overly burdensome to require an appellant to identify every single item of new evidence, however minor, hence the requirement was limited to only changes 'in substance'. However, this delimitation does not significantly reduce the burden imposed on the appellant since the appellant must review all the evidence to decide whether any of it is 'in substance' new.