



COMPETITION APPEAL TRIBUNAL

**PRACTICE DIRECTION RELATING TO
DISCLOSURE AND INSPECTION OF EVIDENCE
IN CLAIMS MADE PURSUANT TO PARTS 4 AND 5 OF THE
COMPETITION APPEAL TRIBUNAL RULES 2015**

**14 March
2017**

PRACTICE DIRECTION

Introduction

This Practice Direction is issued pursuant to Rule 115 (3) of the Competition Appeal Tribunal Rules 2015¹ (the “Rules”) in relation to the procedures provided for by the Rules.

The Rules (notably Rules 60 to 65 and 89) provide for disclosure and inspection of evidence in proceedings under Parts 4 and 5 of the Rules. As mentioned in paragraph 5.86 of the Tribunal’s Guide to Proceedings (2015), disclosure in such proceedings is not automatic and will only proceed on the order or direction of the Tribunal. Generally in making an order for disclosure or inspection, the Tribunal will have regard not only to the specific requirements of the Rules concerning disclosure but also to the governing principles contained in Rule 4 to ensure that disclosure or inspection is limited to that which is proportionate in the circumstances to deal with the case justly and to minimise costs. Where appropriate to do so (for example where evidence is disclosed by third parties), the Tribunal will exercise its powers under the Rules to preserve the confidentiality of information disclosed in the proceedings.

The purpose of this Practice Direction is to ensure that the practice and procedure of the Tribunal with regard to the disclosure or inspection of evidence is aligned with the relevant requirements of the Damages Directive (defined in paragraph 1 of the Practice Direction) as transposed by Schedule 8A of the Competition Act 1998 (inserted by The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017²).

The Hon. Mr Justice Roth
President

14 March 2017

¹ 2015 No. 1648

² 2017 No. 385

1. Interpretation

In this Practice Direction—

“the 1998 Act” means the Competition Act 1998;

“cartel leniency statement” has the same meaning as in paragraph 4(4) of Schedule 8A to the 1998 Act;

“competition authority” has the same meaning as in paragraph 3(1) of Schedule 8A to the 1998 Act;

“competition authority evidence” means evidence in the file of a competition authority;

“Damages Directive” means Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union;

“investigation materials” has the same meaning as in paragraph 3(3) of Schedule 8A to the 1998 Act;

“reasoned justification” means a statement containing reasonably available facts and evidence to support the plausibility of the claim for damages to which the relevant evidence relates;

“relevant evidence” means evidence that a person is seeking to have disclosed or is seeking to inspect that relates to a claim made pursuant to parts 4 and 5 of the Rules;

“the Rules” means the Competition Appeal Tribunal Rules 2015 (2015 No. 1648);

“settlement submission” has the same meaning as in paragraph 5(1) of Schedule 8A to the 1998 Act.

2. General approach of the Tribunal with regard to disclosure or inspection of evidence

- 2.1. This Practice Direction applies in addition to other requirements of the Rules (and other practice directions issued pursuant to Rule 115(3) of the Rules) relating to applications for disclosure or inspection of evidence.
- 2.2. The application must include a description of the evidence that is sought that is as precise and narrow as possible on the basis of a reasoned justification.
- 2.3. The Tribunal will limit disclosure or inspection of evidence to that which is proportionate.

2.4. In determining whether any application for disclosure or inspection of evidence is proportionate, the Tribunal will consider the legitimate interests of all parties and third parties concerned and will, in particular, consider the factors set out in article 5(3) of the Damages Directive³.

3. Making an application for disclosure or inspection of competition authority evidence

3.1. Where an application is made for an order requiring the competition authority to disclose or allow inspection of competition authority evidence, the application must be supported by evidence that no other person is reasonably able to provide that evidence.

3.2. Where an application for disclosure or inspection of competition authority evidence includes investigation materials, the application must be supported by evidence that the competition authority has closed the investigation to which those materials relate⁴.

3.3. Where relevant, the application must specify that the applicant is applying for the Tribunal to determine whether any document is a cartel leniency statement or a settlement submission⁵ in accordance with paragraphs 4(7) or 5(3) of Schedule 8A of the 1998 Act.

4. Informing the competition authority and other interested persons of the application for disclosure or inspection of competition authority evidence

4.1. Where the applicant is applying for the Tribunal to determine whether a document is a cartel leniency statement or settlement submission, the applicant must serve a copy of the application on—

- (a) the competition authority; and
- (b) the author of the document;

at the same time as the application is filed with the Tribunal.

³ Those factors are: (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

⁴ Paragraph 29 of Schedule 8A to the 1998 Act provides that the Tribunal must not make a disclosure order in respect of a competition authority's investigation materials before the day on which the competition authority closes the investigation to which those materials relate.

⁵ Paragraph 28 of Schedule 8A to the 1998 Act provides that the Tribunal must not make a disclosure order in respect of—

- (a) A settlement submission which has not been withdrawn, or
- (b) A cartel leniency statement (whether or not it has been withdrawn).

4.2. In determining whether a document is a cartel leniency statement or settlement submission, the Tribunal may take evidence from the author of the document and obtain assistance from the competition authority⁶.

4.3. Copies of alleged cartel leniency statements or settlement submissions and information concerning the content of the alleged statements or submissions must not be served on any parties other than the competition authority and the author of any such alleged statement or submission.

5. Determining an application for disclosure or inspection of competition authority evidence

5.1. The Tribunal may give such directions in accordance with the Rules as it considers appropriate for hearing and determining an application for disclosure or inspection of competition authority evidence.

5.2. In determining the application the Tribunal will have regard to:

(a) the Rules (including but not limited to Rules 60 (disclosure by parties to the proceedings, 61 (documents referred to in statements of case etc.), 62 (disclosure before proceedings start), and 63 (Orders for disclosure against a person not a party));

(b) the factors set out in Article 6(4) of the Damages Directive⁷; and

(c) any observations of the competition authority (made on its own initiative or at the request of the Tribunal) in respect of the proportionality of the application.

⁶ Paragraphs 4(8) and 5(4) of Schedule 8A to the 1998 Act stipulate that the Tribunal may not obtain assistance from anyone else when making such a determination.

⁷ Those matters are: (a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority; (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and (c)...the need to safeguard the effectiveness of the public enforcement of competition law.

6. Entry into force

- 6.1. This Practice Direction comes into force on the same day as the coming into force of The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.

7. Transitional Provision

- 7.1. This Practice Direction applies to applications for disclosure or inspection of evidence made in relation to a claim where the first proceedings in relation to that claim were brought before the Tribunal on or after the date on which the Practice Direction came into force.

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