COMPETITION APPEAL TRIBUNAL

PRACTICE DIRECTION 1/2022: HANDLING OF SUPER-CONFIDENTIAL OR SUPER-SENSITIVE MATERIAL

1. General

1.1 This Practice Direction concerns the treatment of super-confidential or super-sensitive material in proceedings before the Competition Appeal Tribunal (the "Tribunal"). An example of the type of material which might fall into this category is that involving public interest issues of national security which may be relevant to the determination of merger cases in sectors such as defence and technology.

1.2 The Tribunal has established and well-tried processes for the handling of confidential or sensitive material, both prior to hearings (through the use of confidentiality rings and redactions) and at hearings (through the avoidance of reference of sensitive material in public and the limited use of hearings in private). Nothing in this Practice Direction is intended to alter the approach of the Tribunal so far as such tools for the protection of confidential or sensitive material is concerned and the current practice (including the use of confidentiality rings) for dealing with such material should be continued. The importance of ensuring that, so far as possible, proceedings before the Tribunal are in public is, however, to be stressed and should inform the conduct of all parties at all stages of the Tribunal's proceedings: see, in particular, *BGL (Holdings) Limited v. Competition and Markets Authority*, [2021] CAT 33.

2. Use of "new" processes for the handling of super-confidential or super-sensitive material

2.1 The Tribunal is conscious that a small number of proceedings – including by way of appeal – may come before it in the future which concern materials that are so confidential or so sensitive that they may require a level of protection that has not hitherto been accorded to confidential or sensitive materials by the Tribunal. For example, Developed Vetting security clearance may be required in order to review such material. The purpose of this Practice Direction is to make clear how – in the event of proceedings involving this super-confidential or super-sensitive material – the Tribunal will approach the procedural aspects of ensuring appropriate protection of sensitive material whilst maintaining confidence in public justice and due process.

2.2 In the event that proceedings are anticipated to come before the Tribunal involving materials that cannot sufficiently be protected by the current practice relating to confidentiality or sensitivity described in paragraph 1 above, the Tribunal will expect the party or parties seeking to protect such material to raise the issue at the earliest practicable opportunity, so that the issue can be addressed in a timely manner. That may include contacting the Tribunal Registry to discuss the appropriate procedure before any document is filed. The Tribunal recognises that proceedings involving such material may also involve a degree of urgency, and will do its best to accommodate the parties. The Tribunal also recognises that the manner in which such procedures operate will likely raise issues of "open justice"

and be contentious. The resolution of contentious questions, if they were to arise, would have to be accommodated in any appropriate procedure.

2.3 Without in any way anticipating the sort of enhanced protection that may be sought in respect of such material or permitted by the Tribunal, the following guidance is offered:

(1) The Tribunal can ensure that the proceedings are heard either by the President or by a Justice of the High Court who is also a Chair in the Tribunal. Judges of the High Court do not require any further form of security clearance or "vetting" in order to see even the most sensitive material. However, the parties will need to consider:

(a) The extent to which other members of the Tribunal will require security clearance.

(b) The extent to which limited support staff within the Tribunal will require security clearance.

If and to the extent that security clearance is required, the Tribunal will expect the parties to address this at an early stage.

(2) The Tribunal considers that – in an appropriate case – it can operate a "closed-material" process. The basis for this statement is the decision of the Supreme Court in *R (Haralambous) v. Crown Court at St Albans and another*, [2018] UKSC 1 together with the legislative framework which applies to matters which are brought before the Tribunal. Of course, the extent to which a "closed-material" process is permissible and/or appropriate will depend on all of the circumstances, and the Tribunal would not wish to anticipate, in this Practice Direction, precisely how super-confidential or super-sensitive material should be dealt with in any individual case. But the Tribunal will expect specific and concrete proposals to be advanced by the parties at an early stage if such a case were to arise. Part 82 of the Civil Procedure Rules may be a useful resource for parties formulating such proposals, although it is stressed that the Tribunal is not bound to follow Part 82 and will determine its procedure in accordance with its own rules.

Sir Marcus Smith
President

28 February 2022