

Title: The Competition Appeal Tribunal (CAT) Rules 2015 IA No: BISCCP005 Lead department or agency: Department for Business Innovation and Skills Other departments or agencies: N/A	Impact Assessment (IA)				
	Date: 15/01/2015				
	Stage: Consultation stage				
	Source of intervention: Domestic				
	Type of measure: Secondary legislation				
Contact for enquiries: Titi Sanyaolu, 020 7215 3964					
Summary: Intervention and Options				RPC Opinion: Awaiting Scrutiny	

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
N/A	N/A	N/A	Yes	Zero Net Cost

What is the problem under consideration? Rationale for government intervention?

The rules for processing and administering cases in the Competition Appeal Tribunal (CAT) have not been substantively reviewed since the CAT's creation in 2003. An independent review of the CAT Rules by Sir John Mummery (SJM) concluded that the current rules could be improved to make the appeal process quicker and less costly.

Government intervention to reform and update the Rules will ensure the framework operates in the most efficient and effective manner, protecting the right of those affected to challenge competition and regulatory decisions.

What are the policy objectives and the intended effects?

The main policy objective is to streamline procedures in the CAT and minimise the length and cost of CAT cases while ensuring access to recourse for affected parties.

Reducing the length and cost of CAT cases will:

- Provide overall savings to businesses appealing and defending cases in the CAT
- Enable beneficial market outcomes to be brought into force quicker, which will benefit consumers and, on the whole, businesses.
- Make the CAT's administrative proceedings more efficient.
- Promote greater confidence in the regulatory appeals process and scope for recourse for business.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

1. **Do nothing:** This option will leave the current rules for processing and administering CAT cases unchanged.
2. **Change CAT Rules to streamline procedures:** This option, based on the recommendations of SJM, will amend existing CAT Rules around i) case management, ii) striking out, iii) amendment of the notice of appeal, iv) volume of new evidence, v) statement of new evidence, and vi) settlement offers; - **Preferred option**

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 2018					
Does implementation go beyond minimum EU requirements?			NA		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro Yes	< 20 Yes	Small Yes	Medium Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded: NA		Non-traded: NA	

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: Date:

Summary: Analysis & Evidence

Policy Option 2

Description: Implement SJM's recommended changes to existing CAT Rules

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low	High:	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	N/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised costs by 'main affected groups'

N/A

Other key non-monetised costs by 'main affected groups'

The overall package will shorten the length of appeals. This may result in a small indirect cost to businesses that currently benefit from the suspensory effect of appeals on some regulatory decisions. This impact will be limited by the CAT's power to strikeout clearly unmeritorious appeals and those merely seeking to benefit from the suspensory effect. The reduction in length of appeals may result in lower fees to the legal industry.

There will be small one-off familiarisation costs, particularly for legal advisers, as a result of these rule changes.

The specific rule change on settlements may result in costs to parties that reject reasonable offers. This will be a transfer to the party who made the offer.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	N/A	N/A	N/A
High	N/A	N/A	N/A
Best Estimate	N/A	N/A	N/A

Description and scale of key monetised benefits by 'main affected groups'

N/A

Other key non-monetised benefits by 'main affected groups'

As a result of shorter appeals, the costs of both appealing and defending a case at the CAT will be reduced. This is the main goal of the rule changes. This will also benefit the CAT.

The new Rules will enable some regulatory decisions to be brought in quicker, which will allow firms and consumers to benefit from a more competitive market sooner.

The specific rule change on settlements may result in a transfer from parties that reject reasonable offers to those who made the offer.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

There is a risk that a faster appeals process may reduce the cost of an appeal, encourage a greater number of appeals and thus increase the total cost to business. The risk is minimal as the CAT has the power to strikeout clearly unmeritorious appeals.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	Yes	Zero Net Costs

Evidence Base (for summary sheets)

Background

Scope of this impact assessment

1. This impact assessment relates to amending the existing CAT Rules based on recommendations in an independent review carried out by Sir John Mummery (SJM).

Role of the Competition Appeal Tribunal

2. The CAT plays a key role in the appeals regime, particularly in hearing appeals against competition decisions (under the Competition Act 1998 and the Enterprise Act 2002), and against regulatory decisions in the communications sector (under the Communications Act 2003). It also hears a number of appeals in other regulated sectors. Since April 2003, 220 cases have been registered with the CAT with an average of 17 annually over the last three years and almost all of these are appeals.¹ An additional eight cases are expected annually as a result of the separate reforms to the private actions regime.²

Review by Sir John Mummery

3. Government invited the Right Honourable Sir John Mummery, a senior member of the judiciary, to review the Rules. The review took into account changes to the competition landscape since the Rules were first introduced in 2003 and had regard to the proposed changes being considered as part of the Consumer Rights Bill 2014, particularly those relating to the expansion of the private actions regime.
4. This is the first substantive review of the Rules since the creation of the CAT in April 2003,³ despite the many changes to the competition landscape during that time. This is now an opportunity to review the Rules, and identify ways of streamlining the procedures taking into account the lessons learnt from over a decade of experience operating the Rules.
5. The Terms of Reference for Sir John's review asked him to 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 <http://www.catribunal.org.uk/237/Cases.html> - retrieved January 12th 2015, latest case 1235/4/12/14

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69124/13-502-private-actions-in-competition-law-a-consultation-on-options-for-reform-final-impact.pdf

³ The exception is an amendment introduced in 2004 in relation to appeals under the Communications Act 2003 (SI 2004/2068).

Problem under consideration

6. The current Rules of the CAT could be improved to reduce the length and cost of decision-making in the appeals process for competition and economic regulatory issues.

Economic Rationale for intervention

7. The competition regime exists to ensure competition and markets works well for consumers and business. Independent regulators and competition authorities are an essential element of this regime. However, where decisions have been delegated to independent experts outside of direct ministerial control, firms need to have a mechanism for challenging regulatory decisions, in order to correct regulatory mistakes and ensure regulators are operating in a reasonable and consistent way. Appeals are thus central to ensuring proper accountability of these bodies and well-functioning markets.
8. The CAT plays a key role in this appeals process.⁴ Its rules impact on the cost-effectiveness and proportionality of the system, both in relation to taxpayers and the parties to any appeal or action themselves.

Policy Objectives

9. The Government's policy objective is to strengthen the appeal process by minimising the length and cost of decision-making and by making the appeal process as streamlined and efficient as possible. The Government is particularly concerned about the following matters:
 - Constraining the volume of evidence and analysis introduced in appeals – considering whether, and to what extent, the Rules should be amended to set out the factors that the CAT should take into account when deciding whether to admit new evidence (that is evidence which could previously have been adduced at the investigation stage) in either communications or antitrust appeals.
 - Whether the CAT's rules allow it to proper scope to dismiss unmeritorious appeals at an early stage.

⁴ More details on its functions are available here: <http://www.catribunal.org.uk/242/About-the-Tribunal.html>

Summary of Options

10. The options are:

1. **Do nothing:** Keeping the existing CAT Rules
2. **Amend the CAT Rules**

Option 1: Do Nothing/Baseline

11. This option will leave the existing Rules for governing CAT cases unchanged.
12. Over the years, there have been many changes to the competition landscape. However other than an amendment in 2004 in relation to appeals under the Communications Act 2003 (SI 2004/2068)⁵, the Rules have not been reviewed since the CAT's creation in 2003. This is now an opportunity to streamline CAT procedures taking into account the lessons learnt from over a decade of experience operating the Rules.
13. This option would not address the scope for improvements in efficiency and effectiveness identified in SJM's review.

Option 2: Amend the existing Rules for governing CAT cases

14. This option implements the rule changes recommended by SJM. The rule changes will be implemented together as a package. These changes all aim to streamline procedures in the CAT and reduce the length and cost of CAT cases. Some specific rules will also have discrete impacts.
15. Below, we first set out the costs and benefits of the package as a whole and then lay out each rule change, and specify any additional costs and benefits.

Package of Rule changes

16. The package of rule changes consists of:

- i) case management
- ii) striking out
- iii) amendment of the notice of appeal
- iv) volume of new evidence
- v) statement of new evidence
- vi) settlement offers

Costs

Costs to business: reduced benefits from appealing unmeritorious cases

17. An appeal to the CAT can suspend the effect of regulatory decisions (e.g. a price review) whilst it is being heard. This can give firms an incentive to appeal regulatory decisions that make them worse off.
18. The package of rule changes could have two different impacts on this type of appeal. Lower costs may incentivise more appeals, while shorter appeals reduce the incentive. The overall impact on the incentive is unlikely to be large as the CAT has the power to strikeout clearly unmeritorious appeals and the proposed changes widen these powers.

⁵ <http://www.catribunal.org.uk/240/Rules-and-Guidance.html>

19. The impact of delaying a regulatory decision will be reduced because the duration of the suspension will be reduced by shorter appeals. This will be a cost to any business that uses appeals in this way. It will be a gain to firms and consumers that are likely to benefit from the regulatory decision. Where the appeal has merit, there will be no cost to business, the appellant will potentially benefit from the decision faster.
20. These impacts are not a direct result of the rule changes, but a subsequent effect of the rules impact on the length of appeals. The changed Rules will lead to shorter appeals changing the incentives of potential appellants and so will indirectly result in a behavioural change.
21. This cost is not quantified; however, the overall impact is unlikely to be large due to the mixed effect on incentives and offsetting benefits.

Costs to business: familiarisation costs

22. There will be one-off familiarisation costs as a result of these rules changes. These will be minimised by preserving, as far as possible, the basic structure and layout of the 2003 Rules. Both users and members of the CAT are familiar with these. Furthermore, familiarisation will only be necessary for the specialist solicitors and counsel that represent parties at the CAT. As such, these costs are likely to be small. This cost is not quantified.

Benefits

Benefits to business: Reduced cost of appealing/defending a case at the CAT

23. As a result of shorter appeals, the costs of both appealing and defending a case at the CAT will be reduced for businesses through lower legal fees and time saved. There is a risk that a faster appeals process may encourage a greater number of appeals and thus increase the total cost to business. However, the changes are designed not just to improve the speed but also the efficiency of the process, and so should not result in an increase in appeals (for example, by giving the CAT greater flexibility to reduce the time burdens imposed by nuisance appeals or irrelevant evidence).
24. This benefit is not quantified as we are not able to estimate how much the new Rules would reduce the length of CAT cases. An earlier wider ranging policy was estimated to reduce cost to business in this area by £3.31 million,⁶ based on reforms beyond changing the CAT Rules, such as changes to regulators processes and where appeals would be heard. The benefits of this policy are likely to be substantially less.

Benefits to businesses and consumers: introducing regulatory decisions quicker

25. The new Rules will enable some regulatory decisions to be brought in quicker, which will allow firms and consumers to benefit from a more competitive market sooner. Reducing the duration of appeals and thus the potential suspension of regulatory decisions, as discussed in paragraphs 17-21, will benefit those firms and consumers that are the beneficiaries of such decision. As discussed above this impact is not likely to be large and is not quantified.

Benefits to government: savings to the CAT

26. The CAT is funded by central government. Streamlining the appeals process will reduce the workload of the CAT. This will allow the CAT to better meet its anticipated increase in workload following other changes in the competition regime.

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207702/bis-13-924-regulatory-and-competition-appeals-impact_assessment.pdf

Specific provisions

Case management

27. During the course of a case management conference (CMC) the Tribunal discusses the main issues of the case. Under the new Rules, the CMC shall be held as soon as practicable after the filing of an appeal. Active case management will also include “encouraging parties to co-operate with each other in the conduct of proceedings”. As a result of these Rules, parties will be able to identify and concentrate on the main issues at the outset allowing cases to be dealt with more effectively. This will contribute to shorter cases and lower costs for both appellants and defendants and result in no extra costs.

Striking out

28. There are a number of grounds for which the CAT can strike out an appeal, in whole or in part. The new Rules will introduce a new ground for strike out where the appellant has failed to co-operate with the CAT to such an extent that the CAT cannot deal with the proceedings fairly and justly. The new grounds will discourage parties from seeking to delay the hearing by being obstructive and uncooperative.
29. Businesses will have a greater incentive to cooperate with the CAT. This may lead to fewer cases in the first place, discouraging those where the appellant’s main intention is to delay decisions being finalised. It may also lead to shorter cases as delays due to uncooperative appellants are prevented or reduced.
30. The number and proportion of cases that this applies to is uncertain but each scenario, and thus the change overall, will result in lower costs, principally through lower legal fees and saved time (for defendants and particularly those facing nuisance appellants).

Notice of Appeal

31. A party appealing a case drafts a Notice of Appeal setting out the grounds of appeal. Changes to the initial grounds of appeal can be done by amending the Notice of Appeal. The CAT then grants the amendment at their discretion. The new Rules grant wider discretion to the CAT, to permit amendment of the Notice of Appeal.
32. Giving the CAT wider discretion to permit amendment of the Notice of Appeal will reduce the amount of satellite litigation necessary to demonstrate that the new grounds fall within the specified conditions, thereby saving business – both appellants seeking to change or add grounds of appeal and defendants seeking to resist this – legal costs. There will be no additional costs as a result of this provision.

Evidence – volume of new evidence

33. New evidence can currently be submitted that is not directly relevant. The new provisions proposed constrain the volume of new evidence that can be submitted during appeal. In particular, the CAT must be satisfied that, if the evidence is new, it could not previously have been provided or obtained at the investigation stage. The CAT will determine if the new evidence is relevant.
34. Shorter cases and lower costs for defendants will follow from the admission of irrelevant new evidence being refused by the CAT.
35. There will be no additional costs as a result of this provision. While reducing the appellant’s ability to introduce new evidence, the CAT will ensure new evidence that is relevant can still be considered.

Evidence - statement of new evidence

36. There are no criteria set out for determining whether new evidence should be admitted on an appeal. This means the CAT must rule on a case by case basis as to whether to admit new evidence. As part of the new Rules, the Notice of Appeal must contain a statement identifying the new evidence. Respondents will be required to set out, in their defence, details of any objection to the admission of new evidence.
37. The revised Rules will stop time being wasted as a result of evidence being admitted late in the procedure, thus leading to shorter CAT cases.
38. This new addition to the Notice of Appeal is very minor – just a statement setting out the new evidence – and will only apply where new evidence is being relied on. Appellants will know what new evidence they are relying on and so this cost is just brought forward. The process for setting out new evidence and responding to it in the defence should be more efficient for both appellant and defendant
39. To give an idea of the scale of this impact the CAT has had an average of 17 cases per year over the last three years; almost all of these are appeals.⁷ This means it is unlikely there will be more than about twenty statements of new evidence required in notices of appeals. This assumes one per case, but there could be fewer if no one wishes to introduce evidence or more if multiple parties wish to introduce evidence.
40. We do not expect extra costs to business from sourcing the evidence, as Appellants will know what new evidence they are relying on. The additional new evidence statements may result in legal fees in producing the statement, which, given the same process is currently undertaken in a less coherent way, are likely to be minimal.
41. While this gives an idea of the scale of the change, these costs are not included in this assessment of the policies costs, because they are not additional. The same work is undertaken in the current system but in a more disparate and time consuming way. This means the overall cost in legal fees is currently greater. Furthermore, for meritorious appeals businesses may be able to recover some of the costs.

Settlement offers

42. The current Rules provide for parties to make offers to settle, but they do not set out a procedure for making an offer. New Rules have been introduced to govern the procedure of settlement offers, including special provisions in the case of settlement offers made by one or more, but not all, of the defendants in multi-defendant proceedings. Following an offer, if a claimant fails to subsequently obtain a more advantageous outcome, they may be liable to pay the defendant's costs from the date of that offer.
43. A settlement procedure offers cost and time savings to business, as it means that cases could be resolved without having to proceed to hearing. There is a new incentive on businesses to accept settlement offers where these are reasonable, distinguishing between parties burdening the appeals system for reasons other than a genuine challenge to a decision (for example, to benefit from a suspensory effect) and genuine appeals.
44. Businesses may face claims for costs where settlement offers are rejected. This will only affect cases where defendants make offers less advantageous than the final judgments. This will exclude all cases where financial settlements are not possible, for example regulatory decisions.
45. Not all the costs of a case will be affected - only those incurred after a rejected settlement is made are in scope of the change and only those of one party. An appellant may face claims for costs where they have rejected an earlier settlement offer.

⁷ <http://www.catribunal.org.uk/237/Cases.html>

46. For costs awarded as a result of a more advantageous settlement being rejected, a useful extreme upper bound is the £11m *total* cost to business of appeals to the CAT estimated in an earlier IA.⁸ However, these are avoidable through accepting the offer (which the outcome has implied to be *ex-ante* reasonable) for the reasons set out below the affected costs will be a tiny fraction of this figure.
- Not all cases are amenable to financial settlements, for example where regulatory decisions are being appealed
 - Settlement offers will not be made in every case where financial settlements are possible
 - Accepted settlements will not be affected
 - Rejected settlements will not always result in costs being awarded (for example, the CAT will still determine whether cost recovery is justified)
 - Only the costs of one side can be claimed
 - Only the costs after the rejection of an offer can be claimed
47. These costs will not be an additional overall cost as they are a transfer from one party to another.
48. In terms of the impact on the “One-In Two-Out” cost to business, some of the costs are likely to be out of scope as they will be incurred by non-businesses, such as regulators, or non-compliant businesses, i.e. those who have broken competition law.

Key assumptions and risks

49. There is a risk that a faster appeals process may reduce the cost of an appeal, encourage a greater number of appeals and thus increase the total cost to business. The risk is minimal as the CAT has the power, widened by the SJM reforms, to strikeout clearly unmeritorious appeals.

One-In-Two-Out status

50. The proposed rule changes that impose costs to business are insignificant and will be more than offset by the savings to business as a result of shorter CAT cases. As these benefits are not monetised the policy counts as zero-net-cost for OITO purposes. There may also be an indirect impact to business as a result of shorter and lower cost cases. This impact will be out of scope of OITO, otherwise the costs are in scope of OITO.

Small and Micro-business Assessment

51. Small and Micro-businesses are in scope of the proposed changes, but will rarely be affected as they have a minor record of appealing at the CAT.⁹ Moreover, the revision of the Rules is intended to minimise the length and cost of proceedings in the CAT, resulting in a cost saving to all businesses. Since small and micro-businesses are in scope, if they were to appeal regulatory and competition decisions, they would benefit from these cost savings.

⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207702/bis-13-924-regulatory-and-competition-appeals-impact_assessment.pdf

⁹ There have been few appeals from small and micro-businesses. One example is case 11191/6/1/12, Association of Convenience Stores and (2) National Federation of Retail Newsagents v Office of Fair Trading, <http://www.catribunal.org.uk/237-7599/1191-6-1-12-1-Association-of-Convenience-Stores-and-2-National-Federation-of-Retail-Newsagents.html>