



## **Competition Appeal Tribunal (CAT) Rules of Procedure: Review by the Rt Hon. Sir John Mummery**

Department for Business, Innovation and Skills consultation

### *Response from Vodafone UK*

In addition to its competition function, the CAT hears appeals on certain decisions by Ofcom. As a company which is both regulated and in commercial relationships with other entities regulated by Ofcom we welcome the opportunity to submit a response to this consultation.

The ability to effectively appeal decisions made by a regulator is a fundamental part of a well-functioning, competitive market. Vodafone is a major UK business providing fixed and mobile connectivity and services to millions of customers from individual consumers to global companies and major government departments. We respect and welcome the key role that our regulator plays in our market place but it is crucial that, when necessary, we have the right to effectively appeal the decisions it makes.

We understand and support the need for greater efficiency across all public services, including the Competition Appeal Tribunal and are broadly supportive of initiatives aimed at achieving this end. However, efficiency improvements must necessarily be balanced against the impact on stakeholders. With regard to the proposals relating to the introduction of new evidence and the manner for bringing this evidence to the attention of parties to proceedings, Vodafone does not believe that the proposals would result in greater efficiency and, indeed, may adversely impact on parties' rights and the efficacy of the appeal process more broadly.

We make the following points on this issue:

First, we do not consider that the present manner of dealing with new evidence is particularly disadvantageous for parties to proceedings or for the Tribunal in terms of its ability to hear cases expeditiously.

Second, the consultation refers to evidence from some regulators to the effect that some parties deliberately hold back evidence whilst a matter is before the regulator in order to "game" the system. We are not aware that such a practice is common and, in any event, Vodafone considers that the present powers of the Tribunal for dealing with such a situation are entirely adequate.

Third, there are no doubt many cases in which it is appropriate to adduce new evidence on appeal given that (a) the decision the subject of the appeal proceedings is usually the first final-form document which sets out the basis for the regulator's decision and (b) it is sometimes the case that only once that reasoning has been digested the question of what is 'relevant' must necessarily change because of that reasoning. We would therefore be concerned with a move towards prescriptive rules or considerations which would limit a party's ability to properly challenge a regulatory decision.



Finally, it is not clear that the goal of a more efficient appeals process would be achieved by introducing such a rule. Instead, it is foreseeable that such a rule could result in the proliferation of preliminary hearings on the question of admissibility.

Vodafone considers that the proposal that appealing parties be required to clearly identify the 'new' evidence on which they rely has the potential to create very significant burdens for appealing parties. First, there will no doubt be disputes about what is 'new' and what is not depending on subjective assessments of evidence. Second, the focus of the appealing party's efforts in the relatively short period of time between decision and appeal should be on constructing the best case possible rather than conducting an administrative task which will only result in further preliminary argument. In short, the identification of new evidence seems to be a time consuming exercise which will inevitably result in preliminary debate as to what is "in" or "out" and thus gives rise at best to a false economy.

Further, the consultation states "*whilst it is important for appellants to have a proper chance to put forward evidence which supports their case, limiting the amount of witnesses, reports and expert evidence will assist the CAT as cases will be more manageable for the CAT and parties*". If the primary goal of this change is to make caseloads more manageable, we would suggest that there are other ways of achieving this without potentially reducing the ability of businesses to effectively appeal decisions made by their regulator.

We have no further comments on the consultation document at this stage.

**For further information:**

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