



**SKY'S RESPONSE TO THE GOVERNMENT'S CONSULTATION ON THE
COMPETITION APPEAL TRIBUNAL (CAT) RULES OF PROCEDURE: REVIEW BY
THE RT HONOURABLE SIR JOHN MUMMERY
DATED 5 FEBRUARY 2015**

1. Summary

- 1.1 This is the response of Sky UK Limited (**Sky**) to the Government's consultation on Competition Appeal Tribunal (**CAT**) Rules of Procedure: Review by the RT Honourable Sir John Mummery dated 5 February 2015 (the **Consultation**).
- 1.2 Sky welcomes the proposals suggested in the Consultation, especially to the extent these proposals facilitate robust case management and efficient conduct of hearings. Sky fully supports the key objectives of the proposed reforms to focus the appeals regime on: identifying material errors; ensuring the process of hearing appeals is as efficient and cost effective as possible; and avoiding unmeritorious appeals.
- 1.3 Sky also welcomes the fact that Government has proposed to adopt many of the proposals put forward by industry in the context of previous consultations such as:
- (a) direct referral of price control matters to the Competition and Markets Authority (**CMA**);
 - (b) aligning CAT case management procedures to the Commercial Court Guide or Civil Procedure Rules;
 - (c) promoting mediation or alternative dispute resolution early in the process, even at pre-appeal stage; and
 - (d) introducing a fast-track process for SMEs.
- 1.4 Sky considers these procedural reforms will enhance the appeals regime without jeopardising the integrity of the appeals process. The reforms will improve case management and efficiency without compromising the current "merits" standard of review of appeal. In relation to the standard of review, Sky considers it crucial that the existing level of examination and scrutiny of regulatory decisions be retained. This now well established level of review promotes legal certainty and will continue to ensure that affected parties have recourse to a robust appeals process.

2. Sky's response to the Government's consultation questions

- 2.1 Sky provides comments on some of the proposals outlined in the Consultation in response to a limited number of questions below.
- Q1: Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as "Governing Principles"?**
- Q2: Do you agree that the Governing Principles will help the CAT both in the task of case management generally and in the application of particular Rules?**
- 2.2 Sky supports the proposals intended to facilitate more efficient case management. The incorporation of the five principles from the Guide to Proceedings (**Guide**) into a new

"Governing Principles" rule, akin to the overriding objective in the Civil Procedure Rules, appears to Sky an appropriate way to help the CAT ensure robust and, where appropriate, early case management.

- 2.3 Sky also understands that Sir John Mummery has recommended that the CAT should revise its Guide to accompany the revised Rules of Procedure (**Rules**). Sky fully supports this suggestion. Sky believes the revised Guide will be instrumental to the CAT's powers of effective case management in particular in achieving the objective of minimising the risk of satellite litigation relating to procedural issues.
- 2.4 This is particularly the case with regard to the potential interpretation of the new Rule 3, which would introduce a new set of governing principles. These governing principles would merit further clarification for the benefit of stakeholders. For example, proposed Rule 3(3) requires that *"each party's case must be fully set out in writing as early as possible"*; and proposed Rule 3(5)(b) requires *"identification and concentration on the main issues as early as possible"*. It would be beneficial to understand what will be required as this has the potential to impact the preparation of the Notice of Appeal, where a summary is already required. Similarly, focusing on the "main" issues, whilst important, should not detract from full consideration of the issues raised in the appeal.
- 2.5 Overall, Sky considers that the proposed strengthened case management powers granted to the CAT will help the CAT promote effective case management. The new Governing Principles rule will provide an improved framework against which all cases should proceed.

Q3: Do you agree with the recommended approach on setting target times and timetables for cases?

- 2.6 Sky agrees with Sir John Mummery's conclusion that it is not appropriate for the revised Rules to provide for fixed case timetables. Sky considers each case is different and timetables for cases will inevitably vary depending upon, for example, the number of parties and complexity of the case. Therefore, flexibility is required.
- 2.7 Accordingly, Sky agrees with the recommended approach, which ensures that the CAT is able to take into account all relevant factors and considerations in each individual case when setting target times for the conduct of the case.
- 2.8 Sky also supports the proposals to set both a target date for the main hearing as early as possible and a structured timetable for the conduct of the case. Sky considers that this, coupled with the proposed Rule 3, should give the CAT the necessary powers to ensure effective case management, whilst retaining the requisite discretion to ensure the conduct of proceedings is adapted to accommodate each individual case.

Q4: Do you agree with the rationale on not setting a time limit for the delivery of a decision?

Q5: Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?

- 2.9 Sky agrees with Sir John Mummery's view that it is difficult to set a meaningful deadline for the delivery of a decision (or judgment), given that this will vary from case to case. To do so risks setting arbitrary deadlines that cannot be met.
- 2.10 Sky recognises that the CAT can (and does) update parties on the progress of a decision if there is likely to be a delay in handing down of that decision. Sky considers, however, that the CAT ought to be required to provide regular progress updates on the timetable for the

delivery of a decision in any event. This will likely promote greater efficiency of the CAT and would benefit the parties, particularly where parties need to report to their respective stakeholders.

- 2.11 Sky does not object to the proposal to enable the CAT to hand down a decision by publication on the CAT website.

Q6: Do you agree with the recommended new provisions for strike out?

- 2.12 Sky does not have any particular objections to the recommended new provisions for strike out. However, we consider that some clarification on the anticipated interpretation of the proposed new ground for striking out an appeal in whole or in part where *“the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly”* (Rule 11(1)(d)), would be beneficial.
- 2.13 Sky considers it would reduce the risk of satellite litigation if the CAT includes in the revised Guide an explanation as to what is meant by failure to co-operate *“to such an extent that the Tribunal cannot deal with the proceedings fairly and justly”* and how this differs from the existing Rule 40(1)(b), *“the claimant fails to comply with any rule, direction, practice direction, or order of the Tribunal”*.

Q7: Do you consider the Rules address unmeritorious appeals at an early stage, or are there other changes you consider might help to deal with such matters?

- 2.14 Sky would expect that a proper examination of the record of appeals of regulators’ decisions brought to date would show that few, if any, could reasonably be described, either at the outset or with the benefit of hindsight, as having been without merit¹ and the CAT already has sufficient power to address vexatious litigation. Sky therefore does not believe there is an issue to be resolved by the inclusion of further changes.

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.

Q9: Do you consider that the proposed changes to the Rules address Government concerns in relation to constraining the volume of new evidence by enhancing the CAT’s powers?

- 2.15 The Consultation identifies two concerns with the current rules of evidence: (i) that regulators incur time and cost identifying new evidence referred to in the notice of appeal (paragraph 6.40 of the Consultation) and (ii) that some regulators were concerned that parties deliberately held back evidence to “game” the system (paragraph 6.36 of the Consultation).
- 2.16 The first concern is purportedly addressed through the proposed amendments to Rules 9 and 15. These rules introduce a new procedure that requires appellants to identify

¹ Appellants face significant costs when bringing an appeal and appeal bodies have powers to strike out plainly unmeritorious appeals at an early stage. Sky notes that the Government has not identified in either the Consultation or BIS’s Consultation on *Streamlining Regulatory and Competition Appeals* (June 2013) (the **2013 Consultation**) any specific cases that were without merit.

evidence that (i) so far as the appellant is aware, was not before the maker of the disputed decision, and (ii) enables the respondent to object to the admission of such evidence.

- 2.17 Sky does not agree that the introduction of this new procedure is necessary and considers the current rules are sufficient. Any material concerns would be better addressed through amendments to the Guide. Sky is concerned that there is a real risk that this new process could result in satellite litigation, without delivering any quantifiable benefit.
- 2.18 The introduction of this process is described as “*very minor*” in the Impact Assessment as there are unlikely to be more than twenty statements of new evidences required in notices of appeal per year (paragraph 38 of the Impact Assessment). This cursory statement does not engage in the potential costs and benefits of introducing the new procedure. The potential costs are significant: the rules are not clear about what would happen if new evidence is not identified in the notice of appeal and could give rise to satellite litigation. Similarly, the benefit is not articulated: there is no evidence of the time and cost incurred by regulators in reviewing evidence submitted with a notice of appeal and the Impact Assessment suggests that this is an infrequent occurrence.
- 2.19 As regards the second concern – that some regulators were concerned that parties deliberately held back evidence – the Government proposed introducing factors that the CAT must have regard to when deciding whether to admit or exclude evidence. New factors to be considered by the CAT are: whether the evidence was capable of being made available to the respondent (as well as whether it was made available); whether any of the parties would suffer prejudice; and whether the evidence is necessary for the CAT to determine the case.
- 2.20 Sky considers that these amendments to the Rules are unnecessary. Neither the Consultation nor the Impact Assessment substantiates any purported harm and, in any event, the existing Rules provide the CAT with sufficient flexibility to exclude evidence where appropriate.
- 2.21 Sky notes that in the 2013 Consultation, the Government noted that “*it has seen no evidence that parties are purposely holding back evidence until the appeal stage*” (paragraph 3.23). It is not clear to Sky what has changed between the 2013 Consultation and this Consultation. The foundations of the Government’s purported concerns in the Consultation are unclear and, furthermore, Sky considers that the CAT already possesses adequate powers for managing the admission of new evidence.
- 2.22 At the time of the 2013 Consultation, the former President of the CAT, Sir Gerald Barling, expressed his view on the admission of new evidence quite clearly:
- “To the extent that evidence is produced at the appeal stage which could reasonably have been brought before the regulator in the course of the investigation, the CAT’s current rules are perfectly adequate to enable it to admit, exclude or limit evidence to whatever extent the interests of justice require. The CAT can also “punish” culpably late production of evidence by means of its wide discretion to make costs orders”.*²
- 2.23 Indeed, in the Ethernet appeals, the CAT took a pragmatic approach to new evidence, acknowledging that the issues were complex and a significant amount of new evidence was put before the CAT. The President recommended that evidence was admitted to the extent that it was relevant to the determination of “threshold questions” and “consequential matters” would be considered subsequently [Case 1205-1207/3/3/13, CMC, 18 March 2013].

² Sir Gerald Barling, “*Reforming the UK Competition Regime – assessing the impact of new legislation and challenges ahead for the CMA*”, 10 September 2013.

- 2.24 The CAT currently has adequate powers, which it can exercise flexibly and proportionately, to address the introduction of new evidence. Sky is concerned that the proposed amendments to the Rules could limit the CAT's discretion to determine the admission or exclusion of evidence. Indeed, the Impact Assessment indicates that the Rules are intended to be restrictive. It states that "*the CAT must be satisfied that, if the evidence is new, it could not previously have been provided or obtained at the investigation stage*" (paragraph 33). This goes significantly beyond the draft Rules which require the CAT to have regard to whether the information could have been made available at the investigation stage but still allows the CAT discretion to admit evidence where its exclusion would result in prejudice to one or more parties and the evidence is necessary for the CAT to determine the issues at hand.

Q10: Do you consider the rule as now drafted will give the CAT more flexibility when considering a variety of factors against permitting an amendment to an appeal? Please explain your answer.

Q11: Do you agree the rule will assist the CAT to minimise satellite litigation?

- 2.25 Sky agrees with the proposal to afford the CAT greater flexibility when considering whether or not to permit an amendment to an appeal. This provision should enable the CAT to take into account all relevant circumstances in reaching its decision.
- 2.26 In principle, given that proposed Rule 12(3) requires exercise of the CAT's discretion, this ought to help the CAT minimise the risk of satellite litigation. Whether or not it does so will, however, be largely dependent upon the way in which the CAT exercises its discretion in each case. Sky therefore considers it may be of assistance for the CAT to address this in the revised Guide.

Q12: Do you agree that a Fast track procedure will benefit SMEs and micro businesses, providing them with access to redress? Please explain your answer

- 2.27 Sky supports the proposal to introduce a fast track procedure, as suggested by industry in the context of previous consultations.
- 2.28 Making the appeals process more readily accessible should result in lower costs of access to justice for SMEs and a quicker handling of appeals in these cases. This should in turn facilitate access to redress for SMEs and micro businesses.

Sky

1 April 2015