Telefonica UK Limited's response to:

Competition Appeal Tribunal: rules of procedure review

A consultation by the Department for Business, Innovation and Skills dated 5 February 2015

31 March 2015

Introduction

Telefónica UK Ltd ("**O2**") welcomes the opportunity to respond to the Government's consultation on the review of the Competition Appeal Tribunal ("**CAT**") rules of procedure (the "**Consultation**").

O2 is a communications provider in the UK with over 23 million customers. O2 runs 2G, 3G and 4G networks. O2 invests approximately £1.5m per day, on average, in its network infrastructure. O2 provides corporate customers with a broader range of communications, IT and consultancy services.

O2 employs approximately eight thousand people in the UK, has 450 retail stores and sponsors the O2, O2 Academy venues and the England rugby team. O2 is a subsidiary of Telefonica S.A.[1]

Overall, O2 has a number of concerns with the proposed amendments to the current Competition Appeal Tribunal's Rules (the "**Current Rules**"). Whilst certain of the new proposed Rules (the "**New Rules**") are straightforward a number have been conceived on the basis of flawed assumptions, for example, those provisions around strike out and evidence. In other cases, O2 does not consider that the Government has properly identified why there is a need to deviate from standard principles of litigation, for example, the proposals regarding the Fast Track and Collective Settlement. Finally, O2 considers that there are further potential reforms which could assist the CAT in delivering efficient case management.

In this response we have provided our comments by reference to the areas under consultation.

[1] Read more about O2 at www.o2.co.uk/news.

Robust case management and timetabling (Questions 1-5)

1. O2 agrees that robust case management is fundamental to ensuring the efficient use of the CAT's and parties' time and resources.

2. O2 therefore is supportive of the proposal to incorporate the five principles, which are currently set out in the CAT's Guide to Proceedings (the "**Guide**"), into the New Rules as "Governing Principles".

3. We note that the CAT already uses its discretion to apply these five principles to the cases that it hears. However, their inclusion in the New Rules as opposed to the Guide may provide extra focus by the parties on procedural efficiency which may assist the CAT with case management.

4. We also agree that there should be no target times and timetables for cases. Cases should be case managed on a case by case basis taking the Governing Principles into account.

5. We are content with the position that there is no timetable set for the delivery of a decision. Telefonica notes that the time between the full hearing and the decision is outside of the parties' control.

6. In addition, as noted below, we consider that there are further procedural reforms which may also assist the CAT improve procedural efficiency[2]. In particular O2 considers that the CAT may benefit from the stricter approach to statements of case, lists of issues and timetabling taken in the Commercial Court (and, where relevant, the Court of Appeal). Were such an approach adopted in appeals heard in the CAT, it may improve the efficiency of regulatory and competition appeals.

Statements of case

7. The Current Rules state that the grounds of appeal should include a "*concise statements of facts*" and a "*summary of the grounds for contesting the decision*".

8. The Commercial Court Guide[3] goes further: statements of case must be as "*brief and concise as possible*"[4] and, unless the court orders otherwise, "*limited to 25 pages in length*"[5]. Similarly, the Court of Appeal rules[6] state that the skeleton argument which accompanies the grounds of appeal must be "*concise*" and must both "*define and confine the areas of controversy*"[7].

9. We consider that the Commercial Court and Court of Appeal approaches instil a discipline in the parties' approach to their statements of case which could be replicated, to beneficial

[2] These were set out in our response to the Streamlining Regulatory and Competition Appeals Consultation but we set them out below again here for ease of reference.
[3] Admiralty and Commercial Courts guide, 2011, http://www.justice.gov.uk/downloads/courts/admiralitycomm/admiralty-commercial-courts-guide.pdf

[4] *Ibid*, C1.1.(a).
[5] *Ibid*, C1.1.(b).
[6] Civil Procedure Rules – Part 52 – Appeals: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52
[7] *Ibid*, Practice Direction 52, Part V, 5.1.(2).

effect, in the CAT by amending the Current Rules to reflect the relevant provisions in the Commercial Court Guide.

List of Issues

10. Neither the Current Rules nor the New Rules provide for a list of issues to be agreed between the parties whereas the Commercial Court requires the parties to agree such a list. The list of issues should set out succinctly and, in a structured form, the main issues of fact and law in the case. It should also list what is common ground between the parties[8]. This is intended to be a neutral document,[9]which acts a tool for case management purposes and is not intended to supersede the pleadings which remain the primary source for each party's case[10].

11. We consider that a list of issues could be a valuable resource for the CAT, for example at the case management conference, and that the proposed New Rules might usefully be amended to reflect similar provisions as those found in the Commercial Court Guide.

Pre-trial Timetabling

12. Neither the Current Rules nor the New Rules set out detailed guidance on the approach to the management of the pre-trial timetable.

13. In contrast, the Commercial Court Guide provides detailed guidance on the management of the pre-trial timetable[11]. So for example, only minor variations to the timetable can be agreed between the parties[12] and, if material variations are required, the parties have to get the court involved by reconvening the case management conference[13].

14. We consider that the proposed New Rules could be amended to reflect similar provisions.

Alternative Dispute Resolution

15. Following the 4G liberalisation decision key stakeholders agreed a standstill period to enter discussions to see if threatened litigation could be avoided. In that instance, litigation was avoided as clearance of spectrum following the proposed auction was brought forward by several months. Whilst these discussions did not take the form of a formal mediation, we consider that the context of these discussions (i.e. an agreed standstill) provided the parties with an impetus to work together to reach some form of solution which was agreeable to all parties and that ultimately benefitted consumers.

16. It is with this in mind that we consider that thought should be given to parties to appeals being encouraged to consider mediating their disputes. One way of doing so would be by providing in the New Rules that the parties be required to consider mediation either prior to the commencement of proceedings and/or again at the first case management conference,

[8] Admiralty and Commercial Courts guide, 2011, D6.1.
[9] *Ibid*, D6.2(a).
[10] *Ibid*, D6.4.
[11] *Ibid*, D8.10.
[12] *Ibid,* D8.11
[13] *Ibid,* D8.12

at which point the CAT can order a standstill of proceedings to allow for mediation to take place.

Strike Out (Questions 6 and 7)

17. We note that Sir John Mummery as part of his independent review of the Current Rules was asked to consider "whether the Rules allow the CAT proper scope to dismiss unmeritorious appeals at an early stage"[14]. Sir John has subsequently recommended a new ground for striking out an appeal where a party has failed to co-operate to such an extent that the CAT cannot deal with the case justly and fairly. He has also added a new provision which enables the CAT to strike out an appeal where the CAT considers that it does not have jurisdiction to hear or determine the appeal.

18. O2's view is that the starting position for these recommendations is flawed. The Government has never provided evidence to support its assertion that there are unmeritorious appeals. The reality is, on the contrary, that parties will only, in light of the legal, business and reputational risks associated with appealing, bring appeals where they consider they have a meritorious appeal.

19. It is not therefore clear to O2 what ill the first new strike out provision, where an appellant fails to co-operate[15], seeks to cure.

20. O2 has concerns with this new provision because it is broad and unparticularised. A failure to co-operate could cover a multitude of alleged sins. There is therefore a real risk of satellite litigation arising to determine what the parameters of a failure to cooperate are.

21. Furthermore, it is not clear why the CAT requires this extra power to strike out. The CAT already has the power to strike out an appeal where an appellant has not complied with any rule, direction, practice direction or order of the Tribunal or is vexatious and these powers remain in the New Rules[16][17]. The Consultation does not explain what other behaviour would give rise to a failure to co-operate with the Tribunal and hence why this provision is necessary.

22. O2's view is that this New Rule 11(d) should therefore be deleted from the New Rules. If the CAT requires the power to deal with a specific circumstance, e.g. contempt of court, a new provision should be drafted (or an existing one amended) to cover this explicit requirement.

Evidence (Questions 8-9)

23. Again, O2 has concerns that the background to this recommendation is flawed. In particular, O2 notes that Sir John was asked to consider this issue against a backdrop of concerns that "have been expressed by some Regulators that parties were deliberately holding back evidence to "game the system" and they have suggested parties should not be permitted to

[14] The Consultation, p.14
[15] The New Rules, Rule 11 (d)
[16] The New Rules, Rule 11 (f)
[17] The New Rules, Rule 11 (e)

introduce any new evidence at appeal"[18]. To date, the Government and/or the relevant Regulators have not provided any evidence to support their assertion that parties "game the system". Neither have they recognised that an appeal to the CAT is the first time that any evidence has been subject to judicial scrutiny.

24. O2 therefore welcomes Sir John's distinction between appeals brought from the ordinary courts and appeals to the CAT, in particular the recognition that "[i]n the case of the CAT, the grounds of appeal will be set out in the notice of appeal, and will be the first independent judicial consideration of the case, including the factual matters in the case"[19].

25. The Consultation states that, as such, the intention of these new provisions is "[r]ather than prevent the introduction of any new evidence on appeal, the recommended changes instead seek to strengthen the CAT's power to control the admission of new evidence".

26. However, it is not clear why the CAT requires further powers to admit or exclude evidence. Under the Current Rules the CAT is able to admit, exclude or limit evidence where it is in the interests of justice to do so. Furthermore requiring Appellants to identify so called "new" evidence (i.e. evidence that was not before the Regulator at the administrative stage) at the early stage of the appeal and asking the Respondent to state whether they dispute its admission in their defence creates an invitation to that Respondent to dispute the evidence. This will thereby increase the likelihood of time consuming procedural disputes and the potential for satellite litigation which is the opposite of the Government's stated objectives.

27. However, and without prejudice to O2's primary position outlined above, if the Government does intend to go ahead with the proposals, O2 has the following comments on the New Rules:

    a) If an Appellant has to confirm whether it intends to rely on "new" evidence to assist the CAT and the Respondent in managing and responding to the appeal, O2 considers that the same onus should be placed on the Respondent to ensure at an early stage that all parties and the CAT knows what evidence will be tested in the appeal. This could be achieved by an addition to rule 15 requiring a Respondent to not only confirm if they object to new evidence but also to confirm what evidence they intend to rely on over and above the evidence that was used at the administrative stage.

    b) We consider that it is unnecessary and unhelpful to list the criteria set out at rule 21(2) of the New Rules. Incorporating these criteria into the New Rules creates a real risk of satellite litigation as the parties seek to test the CAT's application of these factors. This is contrary to the Government's stated objectives. Instead, we recommend, if it is deemed necessary to list these criteria somewhere, that they are set out in the new version of the Guide. This is a more natural home for provisions such as these which detail how the CAT will interpret a rule. Further, their inclusion in the Guide will give the CAT greater

[18] The Consultation, p.15
19 *Ibid*

discretion regarding what factors to consider when considering matters relating to evidence.

c) Finally, all issues of evidence in respect of appeals made pursuant to the Framework Directive must be determined in the context of the appeal being an appeal on the merits.

Amendment of the Notice of Appeal (Questions 10 and 11)

28. The New Rules around making amendments to Notices of Appeal may provide the Tribunal with greater flexibility to allow amendments. On balance we agree with the proposed changes.

Fast Track Procedure (Question 12)

29. We do not see any need for reform here. The key aim of an appeals mechanism should be to ensure good decisions stand and bad ones are weeded out, where speed and efficiency should be secondary to substance.

30. In addition, we note that we are not clear on why this process is necessary as the same outcomes could be achieved by the CAT simply using its case management powers either of its own volition or following applications by parties in respect of the same.

Settlement Offers and cost consequences (Question 13)

31. O2 does not have any substantive comments on these proposals save to note that, if the New Rules are intended to reflect Part 36, any amendments to Part 36 (e.g. those being introduced in April 2015) should be considered as and when they arise to determine whether or not the New Rules should be updated to reflect the same or similar amendments.

Disclosure in Private Actions (Question 14)

32. O2 has no comment on this provision.

Transfers of mixed/hybrid claims (Question 15)

33. O2 has no comment on this provision.

Additional parties and Additional Claims (Question 16)

34. O2 has no comment on this provision.

Injunctions (Question 17)

35. O2 has no comment on this provision save for to note that it refers to its comments regarding the fast track above. On this basis it does not consider that it is appropriate to carve out cross undertakings in damages for fast track claims.

36. Even where the new provisions regarding the fast track are incorporated into the New Rules we would advise against the inclusion of this provision. Instead O2 suggests that the New Rules are amended to reflect Practice Direction 25A 5.1(1) in the Civil Procedure Rules. This provides that any order for an injunction, unless the court orders otherwise, must contain a cross undertaking in damages. This leaves it open to a party to argue that it would not be appropriate to provide a cross undertaking in damages and for the CAT to make an order to this effect rather than creating a de facto position which may encourage vexatious litigation.

Merits test (Questions 18-19)

37. O2 agrees that only parties who have a genuine interest in a case should be entitled to bring a case and that accordingly there should be a presumption against organisations that offer legal services, special purpose vehicles and third party funders bringing claims (unless they can prove they have a genuine interest in the case).

38. O2 considers that the certification procedure as set out at rule 79 of the new Rules, if adopted, should be kept under review as collective actions proceed.

Collective Settlement (Questions 20-21)

39. O2 considers that settlement offers should not be excluded from collective actions. Settlement offers serve a public policy objective of facilitating dispute resolution between the parties and saving valuable court time. The cost consequences associated with settlement offers focus parties' minds on what they are seeking and what is reasonable to achieve from the dispute. Without settlement offers disputes are much more likely to progress to trial and take up valuable court time.

40. To the extent there are settlement offers these should be disclosed at the end of proceedings once costs are being determined as is the norm in civil litigation.

Telefonica UK Limited
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