

**INDEPENDENT REPORT  
REVIEW OF THE RULES OF  
PROCEDURE OF THE  
COMPETITION APPEAL TRIBUNAL  
(CAT)**

**The Rt Honourable Sir John Mummery  
August 2014**

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## **Part I: The Review**

### **Appointment**

1. In March 2014 I accepted an appointment by the Secretary of State for Business, Innovation and Skills (BIS) to lead work on an independent review of the Rules of Procedure of the Competition Appeal Tribunal (CAT).
2. It was considered that the review should be independently led by a senior member of the judiciary and that, subject to certain considerations, the extent and scope of the review should be a matter for judicial determination.
3. The Government committed to undertaking a review of the Rules in its consultation on “Streamlining Regulatory and Competition Appeals” published in June 2013. The Review formed part of a package of measures to reform the appeals framework across regulatory and competition decisions.
4. The aim of the Review is to deliver improved Rules of Procedure as part of the Government’s policy objective of strengthening the appeal process. It aims to achieve this by minimising the length and cost of decision-making and by making the appeal process as streamlined and efficient as possible. This is to be done in a manner that is consistent across the United Kingdom.
5. The deadline set for submitting the revised Rules to Ministers is Friday 1 August 2014.
6. Once the draft Rules of Procedure are agreed by Ministers, consultation on them will follow.
7. It is envisaged that revised Rules of Procedure will be made and come into effect in the course of 2015.

## **Agreed Terms of Reference**

8. I was charged with undertaking the Review pursuant to the agreed Terms of Reference (at Annex A) to this report and with reporting back to Ministers with recommendations for revised Rules of Procedure.

## **Setting Up and Conduct of Review**

9. I was formally confirmed as Chair of a core Expert Working Group, which was assembled to support me in considering and drafting the new Rules of Procedure.

10. The Expert Working Group was invited to seek the views of a broader Expert User Group, on the substance and form of the proposed rules. The Expert Working Group had regard to those views when developing recommendations for revision.

11. With the assistance of officials at BIS the Expert Working Group was assembled to undertake the detailed review. The members were the President of the CAT (The Hon Mr Justice Roth), its Registrar (Mr Charles Dhanowa OBE QC) and the Hon Mrs Justice Rose, who also accepted my invitation to be a member of the Expert Working Group. We were supported by two CAT referendaires (Miss Jennifer Reeves and Mr George Lusty.)

12. I cannot praise too highly the excellent support and co-operation received from all members of the Group and from officials at BIS in arranging the meetings, providing information and materials, drafting and re-drafting revisions to the Rules of Procedure and making major contributions the Group discussions. It has been a pleasure to work with them.

13. Meetings were held with the CAT's User Group, which I considered suitable and convenient to serve as the Review's User Group, as its members are a wide mix of representative stakeholders, including leading solicitors and counsel (including one

from Scotland) experienced in competition law and litigation in the CAT, and representatives of the Competition and Markets Authority (CMA) and the Office of Communications (Ofcom). They were consulted for their views on the development of the substance and form of the proposed revisions to the rules.

14. The Expert Working Group met five times between 5 March and 28 July 2014. It also held two meetings with the CAT User Group. Some members of the User Group made valuable additional written submissions on the proposed revisions. I am grateful for their input.

15. All the above meetings were attended by BIS officials and were minuted by them.

16. I kept Ministers informed of progress.

17. At the date of this Report the Government has neither publicly announced this Review nor has it published a response to the consultation on “Streamlining Regulatory and Competition Appeals”.

18. On 7 July 2014 the Minister (Jo Swinson MP) wrote to me saying that she recognised that the delay in publicly announcing the Review had an impact on my ability to consult with a wide range of stakeholders before the drafting of the Rules (and this report) was finalised. I was, however, assured that there would be an opportunity for stakeholders to consider and comment on the Rules when they are publicly consulted on later in the year.

### **Purpose and Scope of Review**

19. This is the first review of the CAT Rules (SI 2003/1372, as amended) since the creation of the CAT in 2003. There have been many changes in the competition landscape in the last ten years. Changes have occurred in the appellate jurisdiction of the CAT and in the proposed expansion of its jurisdiction to determine private

actions for infringement. The Rules must therefore cover a wide variety of functions exercised by the CAT.

20. Further changes to the regime for infringements of competition law are proposed in Schedule 8 to the Consumer Rights Bill by way of amendment of the Competition Act 1998 and the Enterprise Act 2002. The Consumer Rights Bill is currently subject to Parliamentary scrutiny, and therefore rules relating to fast track procedure, injunctions, collective proceedings and settlement may change.

21. In developing revised Rules of Procedure against that background of reforms to competition law and in recommending any further reform in the light of the proposed changes to the private actions regime I am asked to ensure that robust case management powers can be applied flexibly, effectively and consistently in individual cases. My attention is drawn to the over-arching policy considerations of minimising the length and cost of decision-making through the appeal process.

22. I have been asked to have specific regard to the cost-effectiveness and proportionality of the system, as regards both taxpayers and parties to proceedings, and to the ability of regulators to reach timely robust decisions.

23. While it is for me to determine the extent of the Review I am asked to give specific attention to the following matters to enable proceedings to be handled in a cost-effective way and to ensure that the process is as streamlined, speedy and efficient as possible:

(1) Focusing appeal regimes on identifying material errors in the decision under appeal.

(2) Constraining the volume of evidence and analysis introduced in appeals and considering whether the Rules should be amended to set out the factors that the CAT should take into account when

deciding to admit, in communications and anti-trust appeals, new evidence, which could have been adduced at the earlier investigation stage.

(3) Setting new target times and timetables for cases.

(4) Reducing the length of time between the end of the hearing and the issuing of the CAT's decision, by introducing, if appropriate, a statutory time limit.

(5) Considering the proposed introduction of a fast track procedure and other possible tracks.

(6) Avoidance of unmeritorious appeals and provisions for their dismissal at an early stage.

24. I am asked also to consider other possible reforms put forward in responses to the consultation. They include matters relating to extensions of time for filing defences in enforcement appeals, better case management tools and timetabling, procedures for the CAT to receive agreed summaries of essential issues, deadlines for applications for permission to appeal and for costs, requirements for permission to appeal for all appeal hearings and provisions for disclosure powers, including for third parties.

## **PART II: General Points on the CAT**

25. I make three general points about the CAT, which are relevant to the revision of the Rules.

### **Specialist Tribunal**

26. The CAT is a specialist tribunal held in high regard by stakeholders. It has ten years' experience of determining competition infringement appeals under the Competition Act 1998 and the Enterprise Act 2002 and regulatory appeals, such as under the Communications Act 2003, and reviews. The basis of the appeals and reviews is that the decision under appeal was wrong on grounds that must be identified in the Notice of Appeal.

27. The parties are usually represented by specialist solicitors and counsel, who are familiar with the law and with CAT procedure. This may not always be the case in a new jurisdiction over private actions for infringements of competition law. Claims may be brought in the CAT by unrepresented litigants seeking redress for breaches of competition law.

### **Case Management and Evidence**

28. The relevant primary legislation does not impose any requirement for permission to appeal to the CAT from a regulatory or infringement decision. In those circumstances the CAT's development of a system for case-managing appeals and reviews is of paramount importance.

29. Case management begins at the very outset of an appeal. In some cases the CAT can make an early preliminary assessment of the merits of the detailed grounds of appeal on law, fact or discretion and deal with the appeal, or some of its grounds, accordingly. In more complex or novel cases that may not be possible and the appeal will proceed to a full hearing on all grounds advanced.



30. In all cases the CAT makes directions laying down a timetable for what is to be done in preparation for a substantive hearing, so that it can be heard as soon as the parties have complied with directions allowing sufficient time to get ready for hearing. On average appeals under the Competition Act are heard within seven months of commencement, while reviews under the Enterprise Act are heard within two months in respect of merger decisions and three months in respect of market decisions. Communications Act appeals (excluding the very long Pay TV cases) have been heard within five months on average.

31. A docket system ensures that appeals are normally heard by the same constitution of CAT members throughout. The particular constitution of the CAT becomes familiar with the appeal at an early stage, the first Case Management Conference (CMC) being held within a few weeks of the commencement of the appeal and even before the service of a response to it.

32. Litigation experience shows that case management works best when the court or tribunal gets to grips with the case at an early stage and is in a position to ensure that the parties also get to grips with their own case and with the opposing case. It also makes sense for courts and tribunals to encourage the parties either to agree with each other about procedural matters or, failing that, to agree to directions proposed by the court or tribunal.

33. The procedure of CMC hearings conducted in accordance with a prepared agenda notified to the parties works well in practice. Nothing concentrates the minds of litigants and their legal representatives on the salient points more than having to explain, face to face at an oral hearing, a procedural objection that may be difficult to justify.

34. The admission of new evidence (including expert evidence) on an appeal is one of the important matters usually dealt with at the first CMC. Regulators entrusted with powers to investigate breaches of competition law and to impose penalties and obligations for breaches are particularly concerned with attempts by those appealing from their decisions to bring before the CAT new evidence of primary facts and expert evidence which was not before the regulator. In the ordinary courts the admission of new evidence on appeals is restricted by criteria confining the admission of new evidence on just and equitable grounds. In practice this generally means that the new evidence is only admitted if it was not available, or could not, by the use of reasonable efforts, have been available, for use at first instance. The appellate body also has to be satisfied that the new evidence is credible and is likely to influence the outcome of the case.

35. There is an important distinction between appeals from the ordinary courts and appeals to the CAT. In the ordinary courts appeals are usually brought from decisions made after adversarial argument at a public hearing before a judicial body which has heard the evidence tested by cross examination and has heard rival submissions on the case. In the case of the CAT the appeals, which are determined on the merits by reference to the grounds of appeal set out in the notice of appeal, are the first independent judicial consideration of the case, including the factual matters in dispute. A regulator's decision, which can be appealed on the merits, has been reached following a procedure which is more of an administrative than of a judicial character.

36. The position regarding the admission of new evidence on an appeal to the CAT was analysed by the Competition Commission Appeal Tribunals in *Napp Pharmaceutical Holdings Limited and subsidiaries v. The Director General of Fair Trading* (Case No 1001/1/01) (8 August 2001) at paragraph 65 et seq. It was held that the Competition Act 1998 and the Rules then in force implied that

the procedure on appeal should be “evidence--based, in the course of a determination ‘on the merits’ ” more akin to a court of first instance. The admission of evidence was a matter for the judicial discretion of the specialist tribunal. It was held that the analogy of the approach of the Court of Appeal to new evidence on an appeal was not directly in point. In the case of an appeal under the 1998 Act there had been no trial such as there would have been in civil proceedings: “there has merely been an administrative procedure” (paragraph 71). The tribunal hearing was the judicial stage and differed from the administrative procedure followed by the regulator leading to the decision under appeal.

37. The position regarding the admission of new evidence on appeal was more recently considered by the Court of Appeal in *British Telecommunications PLC v. Office of Communications & Anor* [2011] EWCA Civ 245. That was an appeal against a procedural decision of the CAT arising from a dispute referred to Ofcom under the Communications Act 2003. The case of *Napp* was cited. The Court of Appeal dismissed an appeal from an order of the CAT allowing the introduction of evidence on the appeal, which had not been presented to Ofcom. It held that the CAT had a discretion to admit the new evidence, which was not limited by the same considerations as affected a discretion to admit new evidence on an appeal in the ordinary courts. It was also held that the CAT had exercised that discretion lawfully.

38. Those are the circumstances in which the 2003 Rules do not place any express restriction on the admission of new evidence on an appeal or lay down any criteria for admission of evidence on appeal. Under the 2003 Rules, when issues of primary fact are contested on the appeal, witness statements and experts’ reports and other documents are normally served with the notice of appeal. They may relate to factual issues not raised in the course of the investigation leading to the decision under appeal. In the CAT oral evidence may be heard on an appeal and cross examination may take place. The

technical rules of evidence are not applied. The respondent regulator may object to the admission of new evidence. It is for the CAT to decide what directions to give in relation to the adducing of new evidence, but it does so without any guidance in the Rules on the criteria for admission. That gap needs to be expressly addressed in the revision of the Rules of Procedure.

### **CAT Guide to Proceedings**

39. It is now common for courts and tribunals to supplement Rules of Procedure by preparing and publishing, mainly for the benefit of users, a guide to proceedings explaining how the Rules of Procedure work in practice. The CAT issued an excellent Guide in October 2005.

40. I recommend, for use in conjunction with the revised Rules of Procedure, the preparation and publication of a new “Guide to Proceedings” in the CAT.

41. The present Guide was constituted a Practice Direction issued by the President of the CAT under Rules 68(2) of the 2003 Rules. In 64 pages it explains the conduct of proceedings in accordance with the 2003 Rules. It also contains general basic information, such as the CAT’s contact details and general matters, such as legal representation in the CAT. Having described the setting up of the CAT and its constitution the Guide proceeds chronologically step by step from commencement to conclusion explaining the requirements at the various stages of the procedure under each jurisdiction. It does so in the context of the general approach of the Rules.

42. A new Guide will be invaluable in giving practical guidance in a concise user-friendly way for both the parties and for their legal representatives on the conduct of proceedings under the revised Rules. Although the Rules and the procedural rulings of the CAT and the court on the interpretation and application of the Rules must take precedence over the Guide, the value of the Guide is that, whereas Rules are prescriptive, it can give guidance by explaining

how the Rules operate in practice, as well as providing important items of factual information for the users. Within the parameters allowed by the primary legislation and the Rules a Guide can also be updated more easily than the Rules can.

43. The Guide also sets the tone of the CAT for the conduct of proceedings and the parties and their representatives. It fosters a shared co-operative litigation culture by emphasising, for instance, that in all matters users are expected to act reasonably and courteously in accordance with the spirit of the both the Rules and the Guide. It is perfectly possible for the parties and their representatives to co-operate on procedural matters without weakening their respective positions on the legal or factual merits of their substantive cases.

44. Work on the new Guide cannot be completed before it is known what the Rules will ultimately provide. Consideration should be given to the re-arrangement of the Guide as well as to the re-writing necessary to update it. More prominence could be given to the governing principles of the procedures. All the basic factual information could be collected together in one place. Some of the procedures could be presented more concisely in, for example, tabular or diagram form for ease of reference.

## **PART III: Recommended Rules of Procedure**

45. I attach a copy of the revised Rules of Procedure, which I recommend as making improvements to the existing Rules. The revisions should secure, as far as practicable and subject to necessary updating, the Government's objective of minimising the length and cost of proceedings in the CAT and of streamlining the efficiency of the appeal and review process and of the new private action procedure.

### **Structure of the Rules of Procedure**

46. The revised Rules consist of 118 Rules which are at present arranged in Parts I to VII: Introduction (Part I); Appeals under the Competition Act 1998 (Part II); Proceedings under the Enterprise Act 2002 (Part III-penalties and reviews of decisions on merger and market investigations); Proceedings for damages under section 47A of the Competition Act 1998 (Part IV); Collective proceedings and Collective Settlements (Part V); and General and Supplementary (Part VI). The inclusion of (Part VI) to cover a Reference under the Communications Act 2003 of Price Control Matters to the CMA is dependent on the outcome of the "Streamlining Regulatory and Competition Appeals" consultation.

47. Many of the procedures for appeals under the 1998 Act apply equally to appeals in the other jurisdictions, though with some different approaches in the detail.

48. It is convenient to preserve, as far as possible, the basic structure and layout of the 2003 Rules. Both users and members of the CAT will be familiar with them. Within that structure it is possible to make revisions designed to achieve the policy objectives and to accommodate changes in the substantive law.

49. In addition to the points made in the Terms of Reference, such as reducing delays and cutting costs, I have looked at clarifying the

Rules where necessary; maintaining maximum flexibility for the CAT; avoiding time-wasting satellite litigation in which procedure becomes an end in itself when it is only a means to the end of orderly conduct of proceedings in a manner fair to both sides; and using influence and example to encourage, with a light, but firm, touch co-operative and reasonable attitudes to procedural matters.

50. I have avoided Rules which provide for automatic outcomes and fixed timetables. They are often a waste of time, as are most other rules which preclude the decision-maker from taking account of all relevant considerations in each individual case.

### **Particular Topics in Revised Rules of Procedure**

51. I will concentrate on those points of principle that are most relevant to the policy objectives and to the specific matters which I have been asked to address. Under each heading I will briefly explain the effect of the revised Rules, how they differ from the 2003 Rules and why I have concluded that the changes will improve efficiency in the processing of CAT appeals and reviews and secure efficiency in the operation of the new private action jurisdiction. In some instances I have concluded that a particular change suggested in the responses to consultation should not be made and I explain why.

### ***Governing principles***

52. The 2005 Guide sets out (see paragraph 3) the general approach of the Rules in the light of five main principles. It explains how they are based on the same general philosophy as the Civil Procedure Rules (CPR) and pursue the same overriding objective of enabling the CAT to deal with cases justly. A central feature of the CPR procedural regime is case management by the court or tribunal. That will be even more the case under the revised Rules.

53. My recommendation is that the “general approach” by reference to the five stated principles should be promoted from the

Guide to be “Governing principles” incorporated in Rule 3. It is expressly provided that the CAT will seek to ensure that each case is dealt with justly and at proportionate cost, and expeditiously and fairly in accordance with the Rules. Each case will be actively case managed by the CAT by requiring each side to set out its case in writing as early as possible, by encouraging co-operation between the parties and by requiring their co-operation with the CAT. The parties are required to identify and concentrate on the main issues from the outset. The CAT will fix target dates for the hearing. It will use structured timetables for proceedings up to the hearing at which it will avoid unnecessary oral evidence and argument.

54. The express incorporation of the governing principles in the Rules of Procedure should help the CAT both in the task of case management generally and in the application of particular Rules.

### ***Case management***

55. Case management, in particular the fixing of an early Case Management Conference (CMC), is at the heart of the Rules. It is the principle governing the exercise of case management powers by the CAT under Rules 19, 52 and 114.

56. In the case of appeals a CMC may be held as soon as practicable after the filing of an appeal, which must be done within two months from the decision appealed. Six weeks is allowed for the response to the appeal. Both sides must set out arguments of fact and law. In the case of private actions the first CMC will normally be held after the service of the reply, or the expiration of the time for the service of the reply.

57. A very wide range of directions may be given by the CAT at a CMC held of its own initiative or at the request of a party. The purpose of the directions will be to secure the just, expeditious and economical conduct of the proceedings. The directions cover pleadings, the disclosure of documents, securing their



confidentiality, oral and documentary evidence, placing limits on the numbers of witnesses, reports of experts, the determination of submissions on the admission of evidence, skeleton arguments, filing a list of issues and provision of statements of agreed matters, directions for the hearing of preliminary issues, the setting and enforcement of time limits and the timetable to an oral hearing and fixing the date for it, directions of the costs management of proceedings, and directions for the filing and exchange of a costs budget.

58. I recommend the case management Rules as conferring on the CAT all the powers it could reasonably need to achieve the overriding objective and to give practical effect to the governing principles.

### ***Striking out***

59. The CAT may use powers under Rule 11 to strike out an appeal in whole or in part on a number of grounds: if, for instance, the grounds of appeal are invalid, or if the appellant does not have a sufficient interest in the decision under appeal, or for bringing vexatious proceedings and applications and for failure to comply with the CAT's orders and directions. A new ground for striking out an appeal is that 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 exercise of the power to strike out will enable the CAT to focus its attention and that of the parties on the points that have substance and to prevent parties wasting time and money by pursuing hopeless grounds of appeal or by seeking to delay the hearing by being obstructive and uncooperative.

60. There is a similar power under Rules 41 and 42 to strike out private actions at any stage.

### ***Failure to comply with directions***

61. There is a related power in the CAT under Rule 23 to make a range of orders where a party does not comply with a direction given by the CAT and to make consequential orders for costs. The exercise of that power is an effective way of dealing with parties who hold up the proceedings, increase the number of hearings and add unnecessarily to the costs by not doing what they were directed by the CAT to do.

### ***Summary disposal***

62. The CAT may of its own initiative or on the application of a party give summary judgment under Rule 43 in a private action either as against the claimant or as against the defendant. Judgment can be given in respect of the whole or part of a claim or particular issue and even before service of a defence. The power can be used in cases where an issue or a claim or a defence in a private action has no real prospect of success. It may make a consequential costs order. The advantages of the Rule are that there is no need to go to the time and expense of a full trial where the CAT is satisfied that a claim has no real basis or there is no real defence to a claim. In such cases the CAT can dispose of the matter summarily.

### ***Adducing new evidence on appeals***

63. The Rules of Procedure should include express provisions giving the CAT considerably more control over the admission of new evidence, including expert evidence, on appeals.

64. The 2005 Guide indicates that where primary facts found in the decision under appeal are contested in the notice of appeal they must be clearly identified along with grounds on which they are contested. New evidence relied upon must be clearly identified and furnished in the form of witness statements wherever possible with

the notice of appeal. Experts' reports and other documents must also be annexed to the notice of appeal.

65. However, as noted in paragraph 38 above, no criteria are spelt out in the 2003 Rules for determining whether new evidence should be admitted on an appeal. In the interests of more effective case management the CAT should be able to exercise more control over the admission of new evidence on an appeal to enable it to deal firmly with cases where, for example there are grounds for believing that an appellant has deliberately held back evidence that could and should have been produced to the regulator in the investigation leading to the decision under appeal.

66. I therefore recommend the new provision in Rule 9 (4) (h) which requires the notice of appeal to contain a statement identifying the evidence (whether witness statements or documents annexed to the notice of appeal) the substance of which, so far as the appellant was aware, was not before the maker of the disputed decision. Rule 15(3) (c) requires the defence to the appeal to set out details of any objection to the admission of the evidence put forward by the appellant. By that procedure the issue between the parties on new evidence is defined.

67. The power of the CAT to resolve the issue on the admission of new evidence is subject to the provisions in Rule 21 which I recommend as an effective way of dealing with fresh evidence on appeal. Rule 21 directs the CAT to have regard to whether it would be just and proportionate to admit or exclude the evidence by reference to the statutory provisions under which the appeal is brought and the standard of review to be applied by the CAT. Regard must also be had to other matters, such as whether the evidence is necessary for the CAT to determine the appeal, the availability of the evidence before the decision under appeal was taken and the prejudice that may be suffered if the evidence is admitted or excluded.

68. The effect of the new procedure will be to identify the new evidence and the issue about its admission at an early stage and to enable the CAT to make an informed decision about the admission of the evidence. This more focussed early approach to new evidence should avoid unnecessary time and costs from being spent later on evidence which should never have been admitted on the appeal.

### ***Interim orders and measures***

69. It is appropriate for the CAT to have the wide power in Rule 24 to make interim orders and to take other interim measures. They include suspending, in whole or in part, the effect of any decision which is the subject of proceedings before it and granting a remedy which the CAT would have power to grant in its final decision. In cases of urgency the CAT may, having taken account of the relevant circumstances, including the existence or otherwise of a cross-undertaking in damages, give directions to prevent significant damage to a particular person or category of person, or to protect the public interest.

### ***Amendment***

70. I recommend the provisions in Rule 12 for the CAT to have a wider discretion to permit amendment of the notice of appeal. The revised Rule removes restrictions contained in Rule 11(3) of the 2003 Rules, which prohibited the CAT from granting permission to add new grounds save in certain circumstances, such as matters of law or fact coming to light since the appeal was made, or if it was not practicable to include such a ground in the notice of appeal. Those limits on amendments could waste time and money by fostering satellite litigation about whether the conditions for amendment were satisfied. Such matters are best left to the good sense of the CAT in all the circumstances of the particular case. In the revised Rule 12 (3) the prohibition against permitting amendment is removed, but the CAT can, in deciding whether to grant permission to amend, take into account such circumstances as whether the amendment

involves a substantial change or addition to the appellant's case, or whether the amendment is based on matters of fact or law which have come to light since the appeal was made; or whether it was not otherwise practicable to have included the matters in the notice of appeal.

### ***Additional parties and additional claims (Rules 38-40)***

71. I recommend the provisions made for allowing the joinder of additional parties and the making of additional claims, subject to limitation considerations. Similar considerations of procedural efficiency apply as in the case of other kinds of amendment. It is important to get the right parties to the claims before the CAT.

### ***Offers to settle and costs consequences***

72. The 2003 Rules do not contain provisions equivalent to Part 36 of the CPR setting out a procedure for making offer to settle. Subject to possible modification in the light of recent submissions from the User Group, I recommend new Rules 45 to 48 governing the procedure for 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 (such as in a cartel damages claim), and the costs consequences following judgment where a claimant fails to obtain a judgment more advantageous than a defendant's settlement offer, which has not been accepted. The CAT may order that the defendant, who made the settlement offer, either alone or jointly with any other defendant, is entitled to costs from the date on which relevant period for acceptance of the offer expires. The Rules also provide for clarification of a settlement offer at the request of the offeree. The innovations made in these rules, which incorporate the main elements of CPR Part 36, are framed in terms that will encourage and facilitate the settlement of cases by providing that adverse costs consequences may ultimately follow for those who do not accept reasonable offers to settle. Settlements improve procedural efficiency by saving costs that would otherwise

be incurred by continuing with a case and also save the time that the parties and the CAT would otherwise spend on cases that could have been settled.

### ***Fast track procedure***

73. The provisions in Rule 57 for the introduction of a fast track procedure for certain private actions are a significant revision to the Rules in conjunction with the proposed amendments to be made to paragraph 15A of Schedule 4 (Tribunal: procedure) to the Enterprise Act 2002 in accordance with the provisions in Schedule 8 to the Consumer Rights Bill.

74. I support the importance of this innovation as an effective way of dealing with private actions in a shorter timescale, at less cost and with a cap on costs. These particular features will help to make the CAT more suited to proceedings by individuals and small to medium sized enterprises, who might wish to pursue private actions for redress for breaches of competition law. The success of the fast track procedure in the Intellectual Property Enterprise Court (IPEC) has re-enforced that it be adopted in the CAT.

75. A trial within six months from a Fast Track order will be available in cases where the hearing will last three days or less and there are not many witnesses or documents. A cap will be placed on the costs recoverable. These provisions are designed to secure the same degree of efficiency and cost and time saving as has been achieved in IPEC's use of similar procedures.

76. I would also point out in this connection the power of the CAT in Rule 67(5) to dispense with the cross undertaking in damages as the price for granting interim injunctions for breaches of competition law and to place a cap on the amount of the undertaking as to damages. An individual or small to medium sized company might be deterred from seeking an injunction in a suitable case, if it always

had to give such an undertaking to cover the possibility that it might turn out that the injunction ought not to have been granted.

### ***Disclosure in private actions***

77. I recommend the detailed provisions in Rules 59 to 64 for the disclosure of documents by parties in private actions. They will increase the efficiency and effectiveness of the CAT by being available before proceedings start and by extending to disclosure by non-parties. The Rules enable the CAT to act in a way that also ensures that there is appropriate protection for the public interest and for the interests of the parties in preserving confidentiality.

### ***Injunctions***

78. A broad discretionary jurisdiction is conferred by Rules 66 to 69 on the CAT to grant interim and final injunctions in private actions when it is considered just and convenient to do so. They may be granted conditionally or unconditionally and, in the case of interim injunctions, subject to a cross undertaking in damages, which can be capped. In some cases an injunction is a more suitable and effective remedy than an award of damages.

### ***Costs***

79. A very wide discretion on costs is conferred on the CAT by Rule 103. It enables it to make orders for costs at any stage in the proceedings in respect of the whole or part of the proceedings. The CAT may take into account a range of factors, including the conduct of the parties in the proceedings, a schedule of incurred or estimated costs filed by the parties, the outcome of the proceedings and the making of a settlement offer. The CAT may consider whether the costs were proportionate and reasonable. A costs order may be made immediately following delivery of the decision.

### ***Collective proceedings and collective settlement***

80. These comprehensive provisions in Part V (Rules 72 to 97) for private actions were drafted in connection with a separately constituted working party before I was appointed to lead this Review. The provisions were published separately to aid understanding of the Consumer Rights Bill as it passes through Parliament. There is only limited scope for amendment at this stage. They will be subject to consultation later.

### ***Transfers of mixed/hybrid claims***

81. There may be cases in which claims in a private action brought in the CAT include claims outside its jurisdiction or a counterclaim may be made which is outside the CAT's jurisdiction. I recommend Rules 70 and 71 as laying down a satisfactory and efficient procedure for dealing with this jurisdictional complication by simply making an order for transfer of the whole or part of the proceedings from the CAT to the High Court or to the county court, or the appropriate court in Scotland i.e. the Court of Session or the Sheriff's Court. The power to transfer gets the case in the right court or tribunal at an early stage. Transfer is the correct and efficient way of resolving the problem of mixed claims and counterclaims.

82. There are corresponding provisions for the transfer of claims to the CAT if they are within its jurisdiction.

### ***Delivery of decision of the CAT***

83. Under Rule 102 the decisions of the CAT are delivered by handing them down in public and by publication on the CAT's website.

84. I do not recommend inclusion in the Rules of a set time limit for the delivery of a decision. It is difficult to set a meaningful deadline, as the time needed to reach agreement on the decision and on the



reasons for it and to write it up will greatly vary from case to case. Some decisions may be quite short. Other decisions, such as those made after a hearing at which there was substantial contested evidence, may take longer to produce. In some cases the time taken to finalise the text of the decision is consequential on submissions by the parties on the redaction of confidential information from the published decision. Overall it would not increase the efficiency of the CAT to subject its members to the undue pressure of meeting a fixed statutory deadline for the delivery of a decision in every case.

85. The CAT can (and do) update parties on the progress of work on decisions. That courtesy is a reasonable way of addressing the concerns of the parties about perceived delays in the delivery of decisions.

### ***Permission to appeal from the CAT***

86. The provisions in Rules 106 and 107 enable the CAT to process applications for permission to appeal more efficiently by dealing with them on paper rather than at an oral hearing.

87. The decision of the CAT is handed down by the chairman alone. A party is then allowed three weeks in which to make a written application for permission to appeal from the decision of the CAT. The application will normally be decided by the CAT without the need for an oral hearing. Fixing a date for and holding an oral hearing, which has to be attended by the other members of the CAT who sat on the appeal and the parties' legal representatives, usually means a delay in the decision that could be avoided, the unnecessary incurring of additional legal costs and the inefficient use of CAT time.

## **Part IV: Next Steps**

88. I understand that the next step will be for Ministers to consider the recommended revised Rules of Procedure before embarking on consultation.

89. After responses to consultation have been received and considered a decision can be made by Ministers on the final form of the Rules of Procedure.

90. Once the Rules of Procedure are promulgated work on the re-writing of the Guide can proceed to completion. I would recommend consultation with the CAT Users Group in connection with the revision of the Guide.

The Rt Honourable Sir John Mummery  
August 2014

## **Annex A – Terms of Reference**

### **Streamlining Regulatory and Competition - Independent Review of CAT Rules of Procedure**

#### **Background Overview**

The Government published its consultation on “Streamlining Regulatory and Competition Appeals”<sup>1</sup> on 19 June 2013 in which it set out a package of measures to reform the appeals framework across regulatory and competition decisions. The key objectives of reform included focusing appeals regimes on identifying material errors, avoiding unmeritorious appeals, and ensuring that the process of hearing appeals is as efficient and cost effective as possible.

In particular, the consultation set out the Government’s concerns in relation to the way in which parties engaged with the regulator during the decision-making stage and whether and how the appeals process might affect a regulator’s ability to reach timely, robust decisions.

The Competition Appeal Tribunal (CAT) plays a key role in the appeals regime, particularly in hearing appeals of competition decisions (under the Competition Act 1998 and the Enterprise Act 2002), and of regulatory decisions in the communications sector (under the Communications Act 2003). It also hears a number of appeals in other regulated sectors.

Responses to the consultation demonstrated that the CAT is held in high regard by their stakeholders, and the Government agrees that the CAT’s expertise and experience in handling regulatory and competition appeals

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf)

plays a very valuable role in ensuring robust decision making and ensuring that regulators are properly accountable for their decisions.

Having considered the responses to the consultation, the Government intends to proceed with a review of the CAT rules to explore ways of further strengthening and streamlining appeals processes. We consider that the review should be independently led by a senior member of the judiciary, and that the extent and scope of the review should be a matter for the Judge to determine, subject to certain considerations set out below.

## **1. Key Purpose**

In accordance with the normal Triennial Review process for Arm's Length Bodies, the Government is committed to review the governance arrangements, Rules and operation of the CAT against the background of the wider reforms to competition.

This will be the first review of the Rules since the creation of the CAT in April 2003, 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 10 years of experience operating the rules.

## **2. Scope of Review**

The Government invites the Rt. Hon Sir John Mummery to lead a review of the Competition Tribunal Rules<sup>2</sup> and develop and recommend revised Rules of Procedure in line with the Terms of Reference set out here. The Rt Hon Sir John Mummery is also invited to recommend any further reform he may consider appropriate, particularly in light of the proposed reforms to the CAT in relation to changes to the private actions regime as set out in the Consumer Rights Bill.

The Rt Hon Sir John Mummery is asked to conduct his review, and develop recommended revised 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. The Rt Hon Sir John Mummery's

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<sup>2</sup> SI 2003/1372 and SI 2004/2068

attention is also drawn to an overarching policy consideration of Ministers, namely to minimise the length and cost of decision-making through making the appeal process as streamlined and efficient as possible.

In recommending changes, the Government invites the Rt Hon Sir John Mummery to have specific regard to the cost-effectiveness and proportionality of the system, both insofar as taxpayers are concerned and the parties themselves.

### **3. Rules to be reviewed**

While it is for the Rt Hon Sir John Mummery to determine the extent of the review of the rules, the Government asks that he give specific attention to the following matters to enable proceedings to be handled and as quickly and efficiently as possible:

- 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.
- Exploring the extent to which it is possible to set new target time limits for cases, and how existing powers within the Rules can be used to set case-specific timetables for all appeals so that parties are clear about what is expected of them at each stage of the process
- Reducing the length of time between the end of the hearing and the issuing of the Tribunal's decision, by introduction of a statutory time limit if appropriate.
- Considering introducing provisions in the rules to allow parties to jointly agree to pursue a “fast-track” procedure where there is

agreement on evidence, witnesses and/or cost caps, and to consider whether there is merit in introducing other tracks.

- Whether the CAT's rules allow it to proper scope to dismiss unmeritorious appeals at an early stage.

**3.1 In considering whether and what other reforms might be appropriate,** the Rt Hon Sir John Mummery may wish to consider suggestions put forward by respondents to the consultations, in particular:

- The granting of extensions for filing of defences in enforcement appeals;
- Indicative timetables and better case management tools “such as those available to the CC in context of energy regulatory appeals”;
- Requiring the tribunal members to receive an agreed summary of the essential issues and “to decide on the most efficient way of using the time table available to resolve the points at issue”;
- deadlines for making applications for permission to appeal and costs;
- Introducing a permission stage for all appeal hearings at the CAT;
- granting the CAT disclosure powers, including for third parties.

**3.2** The rules must be exercised, and orders are made, in a manner that is consistent across United Kingdom.

**3.3** It is envisaged the new rules will come into effect in April 2015, save that some rules may not come into force until winter 2015 when we expect the Bill has become an Act and the relevant provisions commenced.

#### **4. Reporting and Accountability**

The review will be chaired by the Rt Hon Sir John Mummery. Ministers will be kept informed of progress.

Ministers invite the Rt Hon Sir John Mummery to recommend revised rules for the CAT by 1 August 2014.

## **5. Communications**

A short consultation will follow, once the Rules have been agreed in autumn 2014.