

**POST-IMPLEMENTATION REVIEW OF THE COMPETITION APPEAL TRIBUNAL  
RULES 2015: CALL FOR EVIDENCE**

**RESPONSE FROM FRESHFIELDS BRUCKHAUS DERINGER LLP**

**1. Introductory remarks**

- 1.1 This is the response of Freshfields Bruckhaus Deringer LLP (*Freshfields*) to the call for evidence<sup>1</sup> as part of the post-implementation review (the *Review*) of the Competition Appeal Tribunal Rules 2015 (the *CAT Rules*).<sup>2</sup> In preparing its response to this call for evidence, Freshfields has drawn upon its experience as a leading international law firm, with substantial experience of competition litigation matters before the Competition Appeal Tribunal (the *CAT*), in the High Court and appeal courts in the UK, as well as in courts in other jurisdictions. It is therefore able to provide practical insights from this perspective. However, and for the avoidance of doubt, the views provided herein – while informed by our experience and expertise – are those of Freshfields and not of any of its clients.
- 1.2 As an overarching comment, we consider that the objectives intended to be achieved by the regulatory system established by the CAT Rules have generally been achieved, and that those objectives broadly remain appropriate.
- 1.3 In particular, we consider that the CAT’s existing powers and jurisdiction are broadly fit for purpose, subject to certain specific areas where there are, or may be, gaps in the CAT’s existing powers and jurisdiction that we consider should be filled. We also consider that there are numerous aspects of the CAT Rules that require updating and may benefit from amendments, including to reflect issues arising in practice and from developments since their introduction.
- 1.4 A number of these amendments may be more appropriately addressed through updates and changes to the CAT Guide to Proceedings 2015 (the *Guide*)<sup>3</sup> than the CAT Rules themselves. We assume that the current review of the CAT Rules encompasses necessary consequential revisions to the Guide.
- 1.5 It is our clear view that the CAT’s existing powers of review in respect of decisions of the Competition and Markets Authority (*CMA*) and the sectoral regulators should be maintained, and not lessened. We consider this to be critical to the proper functioning of the UK’s competition enforcement landscape. This is especially the case in light of the increased powers granted (or expected to be granted) to the CMA and other UK regulators, including as part of the UK’s exit from the European Union (*EU*), as well as the significance of decisions of the CMA and sector regulators for UK and international businesses. We consider that calls in some quarters for the CAT’s powers, jurisdiction or standard of review to be diluted are misplaced and would, if pursued, be retrograde and diminish the standing of the UK competition regime in the eyes of UK and international stakeholders.

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<sup>1</sup> Department for Business, Energy & Industrial Strategy – Call for Evidence: Post-implementation review of the Competition Appeal Tribunal Rules 2015,

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/970089/pir-review-competition-appeal-tribunal-rules-2015-cfe.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970089/pir-review-competition-appeal-tribunal-rules-2015-cfe.pdf)

<sup>2</sup> Link to CAT Rules: [https://www.catribunal.org.uk/sites/default/files/2017-11/The\\_Competition\\_Appeal\\_Tribunal\\_Rules\\_2015.pdf](https://www.catribunal.org.uk/sites/default/files/2017-11/The_Competition_Appeal_Tribunal_Rules_2015.pdf)

<sup>3</sup> Link to CAT Guide to Proceedings 2015: [https://www.catribunal.org.uk/sites/default/files/2017-12/guide\\_to\\_proceedings\\_2015.pdf](https://www.catribunal.org.uk/sites/default/files/2017-12/guide_to_proceedings_2015.pdf)

1.6 The collective proceedings rules merit specific consideration in the light of the developments in collective proceedings cases (including an appeal on a certification decision having reached and been considered by the UK Supreme Court in *Merricks v Mastercard*<sup>4</sup> (*Merricks*)) in the time since the CAT Rules were adopted. Indeed, the collective proceedings regime is an area that may require ongoing review in the coming years to ensure that it continues to meet the objectives considered by this Review. While the recent judgment of the Supreme Court in *Merricks* acknowledged the important gate-keeper function of the CAT in screening proposed collective proceedings, we consider that other elements of that judgment risk constraining the CAT's ability properly to undertake that role, which would be contrary to Parliament's intention and may give rise to unwelcome consequences in the development of the collective proceedings regime. While it may be premature for this to be addressed as part of the present consultation process, we consider that the development of the law and practice in this area should be kept under ongoing review.

1.7 We respond below to the consultation questions by reference to the various parts of the CAT Rules, in the order in which they appear therein.

## 2. Part 1: Introduction (rules 1-8)

2.1 We have no comments relating to specific rules in this section, save to remark that this review provides an opportunity to amend outdated references, which no doubt the CAT Post-Implementation Review Team (*CAT PIR Team*) will be considering in any event, including but not limited to:

- (a) References to "Chairman": We would propose that this is amended to a more gender-neutral term, such as Chair or Chairperson. This change would also need to be reflected on the CAT's website and the Guide. We use "Chair" for the remainder of this response when referring to this position.
- (b) References to the CAT's former address at Victoria House, Bloomsbury Place, London WC1A 2EB (see rule 6) should be replaced with the CAT's present address at Salisbury Square House, 8 Salisbury Square, London EC4Y 8AP. We note that on 11 November 2019 the CAT issued a notice under rule 6 regarding its new address,<sup>5</sup> but consider that it would be sensible for the new address to be reflected/consolidated in the CAT Rules.
- (c) Amendment or removal of provisions that are redundant in light of the UK's exit from the EU, including but not limited to:
  - (i) Rule 50 (Intervention) – we suggest, for the avoidance of doubt, that rule 50 should be amended to clarify that the CMA may submit written observations to the CAT on issues relating to the application of Articles 101 or 102 of the Treaty on the Functioning of the European Union (the *TFEU*) only insofar as Articles 101 or 102 of the TFEU apply under the terms of the UK-EU Withdrawal Agreement 2019.

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<sup>4</sup> *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51

<sup>5</sup> Notice under rule 6 of the Competition Appeal Tribunal Rules 2015 – Change to Tribunal Address for Service (<https://www.catribunal.org.uk/sites/default/files/2019-11/Notice%20re%20change%20to%20Tribunal%20address%20for%20service%20.pdf>)

- (ii) Rule 109 (References to the European Court) – in light of the UK-EU Withdrawal Agreement 2019, rule 109 and the related cross-references to that rule at rule 110(1)(m)<sup>6</sup> should now be removed.

### 3. Part 2: Appeals (rules 9-24)

- 3.1 As a consequence of Brexit, the CMA anticipates a significant increase in the number and nature of decisions under its merger control and antitrust powers. Many major international merger transactions which formerly were subject to the exclusive jurisdiction of the European Commission under the EU Merger Regulation will now become subject to the jurisdiction of the CMA either instead of, or in addition to, the European Commission. Equally, the CMA anticipates that it will conduct major antitrust investigations in parallel with the European Commission. Against that background, the robustness of the UK competition regime is expected to assume greater significance in the future.
- 3.2 The CAT has contributed very substantially to the international reputation of the UK competition regime to date. The existence of rights of appeal to the CAT, and the speed and thoroughness of the CAT's evaluation of appeals, provide legitimacy for the decisions of the CMA which have potentially far-reaching consequences in monetary and business terms for the companies involved. The current arrangements for appeals to the CAT benefit the CMA, ensuring that its decisions are taken on the basis of robust evidence and sound analysis, as well as parties to CMA investigations. The CAT has rightly established a reputation as a specialist and influential judicial body and its jurisprudence contributes to the development of the fast-evolving area of competition law both in the UK and internationally. We are not aware of any compelling evidence that the current arrangements for appeals to the CAT do not function well. On the contrary, we consider that they are essential for the continued legitimacy of the UK competition regime. There is no basis to consider any reforms to the CAT's powers or rules which would water down existing rights of appeal and we would not support any such proposals.
- 3.3 In terms of specific rules within this section, we note that rule 18 (Forum) provides the CAT with significant discretion when deciding whether to accept the proposed transfer of proceedings to the CAT from other UK courts and, if transferred, the format in which those proceedings will be heard by the CAT. Notwithstanding this significant discretion, it is still possible that complex multi-jurisdictional proceedings could run in parallel across multiple UK courts. For example, proceedings in the *Trucks* litigation have been brought in the English High Court (and have subsequently been transferred to the CAT), the Scottish Outer Court of Session and the Northern Irish High Court. Such parallel proceedings could potentially undermine the CAT's case management of the proceedings before it, lead to inconsistent results, and generate additional costs and complexities. Notwithstanding the significant discretion afforded to the CAT under rule 18, it would therefore be beneficial to make clear in the Rules – for example, as an additional consideration in rule 18(3) – that the CAT will take into account the multi-jurisdictional nature of proceedings and the benefits that would result from those proceedings being heard before the CAT (as well as the risks, as outlined above, that would be avoided). This would also help achieve a consistent position with respect to the transfer to the CAT of proceedings from not only the English High Court,

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<sup>6</sup> The UK-EU Withdrawal Agreement specifies limited circumstances in which from the end of the transition period UK courts may (or must) refer questions to the CJEU for a preliminary ruling on the interpretation of certain withdrawal agreement provisions or the EU law to which they refer. These questions, which relate to the citizens' rights provisions, certain financial provisions, and some of the Northern Ireland Protocol provisions, are unlikely to arise in the context of proceedings before the CAT.

but also the Scottish Outer Court of Session and the Northern Irish High Court, which we consider to be desirable.

#### **4. Part 4: Claims under section 47A of the 1998 Act (rules 29-72)**

- 4.1 **Fast-track procedure (rule 58):** We note that the fast-track procedure has been used in a number of CAT cases, in a manner that has broadly helped further the objectives of the 2015 Rules. A number of these cases have discussed best practice in fast-track proceedings. We consider that it would be helpful for the key practice points and guidance set out in the CAT's judgment in *Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited and Others*<sup>7</sup> (*Breasley Pillows*) and subsequent fast-track decisions to be reflected in the Guide. We consider that this should include general principles of best practice in fast-track cases; specific points such as the indication in *Breasley Pillows* (with which we agree) that follow-on damages claims typically will not be suitable for the fast-track procedure; and statements as to the appropriate length of a fast-track hearing, including making clear, as was held in *Breasley Pillows*, that although three days under rule 58(3)(b) is not an absolute limit, the three-day hearing guideline is not intended to apply per claimant, but rather for the hearing of the whole claim.
- 4.2 **Transfers (rule 72):** There is at present uncertainty regarding the making of applications in respect of High Court Orders in proceedings that have been transferred to the CAT from the High Court. More specifically, it is sometimes unclear whether applications to vary pre-transfer Orders of the High Court should be made to the High Court or the CAT and/or whether they should be made and assessed pursuant to the CPR or CAT Rules. This issue arises, in particular, in relation to the application of and amendments to disclosure orders and confidentiality ring orders. We consider that specific provision should be made in the CAT Rules (and Guide) to clarify that, from the point of transfer onwards, applications in relation to pre-transfer Orders should be made to the CAT and in accordance with the CAT Rules.

#### **5. Part 5: Collective proceedings and collective settlements (rules 73-98)**

- 5.1 We note that 11 collective proceedings applications have been filed since the introduction of the new collective proceedings regime in 2015, of which this firm is involved in a number, including the first to be considered by the Supreme Court.
- 5.2 The Supreme Court provided guidance in the *Merricks* proceedings on legal points surrounding certification, while restating the CAT's important screening and gatekeeping role over the pursuit of collective proceedings.<sup>8</sup> The Supreme Court's judgment considered in particular the criteria around the "suitability" requirement, as well as some practical aspects around the procedure surrounding a certification hearing.
- 5.3 We note that the Supreme Court's judgment focused on the "suitability" test for certification and therefore involved consideration of rule 79(2) in particular. In general, we consider that amendments to the Guide may be sufficient to address the issues arising from the Supreme Court's judgment. Specifically:
- (a) The Supreme Court acknowledged that the rule states that "*In determining whether the claims are suitable to be brought in collective proceedings (...), the Tribunal*

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<sup>7</sup> [2016] CAT 8, Case No: 1250/5/7/16 at paragraphs 18-19, 31-34

<sup>8</sup> *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, at paragraph 4, per Lord Briggs

*shall take into account all matters it thinks fit, including (...)*” (emphasis added),<sup>9</sup> and elaborated on how the CAT should conduct its value judgment given that wording and the listing of various relevant factors in rule 79(2) (including, for example, the costs and benefits of the collective proceedings under rule 79(2)(b)). In particular, it noted that a tribunal charged with a multi-factorial balancing exercise may properly regard one factor among many as sufficient to compel a particular outcome, but if a tribunal does so, it needs to make that clear in express terms.<sup>10</sup> We consider that this ought to be reflected in changes to the Guide.

- (b) The CAT PIR Team may also consider clarifying whether and, if so, how the concept of “relative suitability”, which was introduced by the majority of the Supreme Court in *Merricks*<sup>11</sup> and was a key part of its reasoning, should be reflected in rule 79(2) and/or the Guide, given that it does not presently find expression in either the Rules or the Guide.

- 5.4 As regards issues of “commonality” and the related certification threshold in rule 79(1)(b), in addition to updating the Guide to reflect the *Merricks* proceedings and any other intervening judgments by the CAT regarding commonality issues, we consider that there would be some benefit to the Guide further clarifying the role of individual issues in collective proceedings under the existing CAT Rules. In particular, we consider that it would be beneficial for the Guide to state more clearly that, where the criteria for certification are otherwise met (including the commonality requirement), any individual issues could either be excluded from collective proceedings (rule 74(6) and Guide paragraph 6.4 (third bullet)), or included within the collective proceedings but addressed by way of case management of those proceedings (rules 88(2)(c) and 98(1)(b), and Guide paragraphs 6.37 and 6.80). We consider that clarification of those mechanisms would assist parties in preparing their cases before the CAT and help to highlight the potential material and practical differences between the two routes (including, for example, as regards the formal parties to the determination of those individual issues, related disclosure and funding points, and associated issues regarding the drafting of CPO Applications and Draft Orders at the certification stage). It would also assist the parties’ understanding of the need for consideration and/or determination of common and individual issues by the CAT at the certification stage of collective proceedings, even if the overall commonality threshold in rule 79(1)(b) is or may be met.

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<sup>9</sup> *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, at paragraph 61, per Lord Briggs: “the listing of a number of factors potentially relevant to the question whether the claims are suitable to be brought in collective proceedings in rule 79(2), within the general rubric “all matters it thinks fit” shows that the CAT is expected to conduct a value judgment about suitability in which the listed and other factors are weighed in the balance. The listed factors are not separate suitability hurdles, each of which the applicant for a CPO must surmount. The hurdles (ie preconditions to eligibility under section 47B(5)(b) and (6)) are only that the claims are brought on behalf of an identifiable class, that they raise common issues and that they are suitable to be brought in collective proceedings: see also rule 79(1). In particular it is not a condition that the claims are suitable for an award of aggregate damages. That is only one of many relevant factors in the suitability assessment under rule 79(2).”

<sup>10</sup> *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, at paragraph 68, per Lord Briggs: “a tribunal charged with a multi-factorial balancing exercise may perfectly properly regard one factor among many as sufficient to compel a particular outcome. But in such a case, and in particular where some factors are statutory hurdles and others are not, I consider it incumbent upon a tribunal which regards a factor which is not a statutory hurdle but is nonetheless decisive to make that clear in express terms. Suitability of a case for aggregate damages is plainly not a hurdle. It is just one of many factors relevant to suitability of the claims for collective proceedings under rule 79(2).”

<sup>11</sup> *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, at paragraph 56, per Lord Briggs

- 5.5 Similarly, it would be beneficial for the Guide to be amended to reflect other points from the Supreme Court judgment in *Merricks* relating to the practicalities of the certification stage, including the acknowledgment by the Supreme Court that:
- (a) the CAT can cross-examine the collective proceedings applicant’s expert when appropriate;<sup>12</sup> and
  - (b) it is not inevitably premature for the CAT to have regard to a proposed distribution method at the certification stage.<sup>13</sup>
- 5.6 We also consider that the availability of appeals to challenge decisions relating to an application for a CPO could be clarified. The *Merricks* proceedings, at the Court of Appeal level,<sup>14</sup> considered whether a decision of the CAT on an application for a CPO can be challenged by way of appeal (rather than by way of judicial review, as contemplated by the Guide at paragraph 6.92)<sup>15</sup>. The Court of Appeal allowed an appeal (rather than a judicial review). We note also the CAT and Court of Appeal permission to appeal judgments relating to the funding issue in the *Trucks* collective proceedings,<sup>16</sup> which addressed the availability of appeal as a way to challenge decisions regarding the authorisation of the proposed class representative. We consider that it would be beneficial for the Guide to provide clarification in this regard.
- 5.7 There are, in addition, other areas of the Guide that may benefit from clarification to ensure clearer case management as well as clarity of the powers of the CAT in collective proceedings:
- (a) Paragraph 6.7 of the Guide says that “*if the proceedings are certified as opt-out collective proceedings, the panel conducting the case management (the “case management tribunal”) will at an appropriate stage prior to the trial determine that the proceedings should thereafter be heard by a separate panel (the “trial tribunal”)*” (emphasis added). No guidance is provided on the meaning of “an appropriate stage”. Parties would, in our view, benefit from additional guidance on the point, for case management purposes.
  - (b) A number of the collective proceedings to date have considered the assurances that could be provided by third party litigation funders, depending on circumstances. The CAT has, for instance, considered the use of undertakings from third party funders to the CAT in at least two proposed collective proceedings. Parties may benefit from additional clarification in the Guide on practices that may be encouraged or obligations that may be imposed on third party litigation funders where appropriate.

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<sup>12</sup> *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, at paragraphs 78-79, per Lord Briggs

<sup>13</sup> *Mastercard Incorporated and others v Walter Hugh Merricks CBE* [2020] UKSC 51, at paragraph 64(g), per Lord Briggs

<sup>14</sup> *Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2018] EWCA Civ 2527

<sup>15</sup> The Guide, paragraph 6.92: “(...) there is no statutory provision for appeals against the Tribunal’s decision on an application for a CPO. Therefore, any challenge to such decisions can only be brought by way of judicial review.”

<sup>16</sup> Case No. 1282/7/7/18 and 1289/7/7/18 *Road Haulage Association Limited v Man SE and Others* [2019] CAT 28; and *PACCAR Inc. and others v Road Haulage Association Ltd and another (Association of Litigation Funders of England and Wales intervening)* [2021] EWCA Civ 299

## **6. Part 6: General and Supplementary (rules 99-115)**

### **6.1 Conduct of proceedings (rule 99 – Hearing to be in public and rule 111 – Documents etc)**

#### ***Use of technology***

- 6.2 The CAT may wish to consider consolidating in the CAT Rules certain aspects of Practice Direction 1/2020, which it issued in response to the Covid-19 pandemic. More specifically, it might be more appropriate and efficient for parties to file documents, or at least certain categories of documents, solely electronically with the CAT, rather than to file a signed original and a specified number of hard copy versions, as was previously the case under rules 9(7), 15(6), 30(6), 35(4) and 75(5).
- 6.3 More broadly, the CAT may wish to reflect in the CAT Rules the use of certain remote hearing technology that has been utilised effectively during the pandemic. While it will be most appropriate to hear the majority of hearings before the CAT in person, there may be (i) certain circumstances in which remote hearings are more appropriate than an in-person hearing (for example, in extreme and unforeseen circumstances), and (ii) certain categories of hearings which can be effectively dealt with solely by way of videoconference (for example, relatively straightforward procedural hearings on limited issues). Accordingly, it may be sensible to include in the CAT Rules an express power to enable the CAT to determine, at its discretion and in light of the relevant circumstances, that hearings take place solely via videoconference (or, at least, to provide guidance on the issue in the Guide).
- 6.4 Relatedly, the CAT may wish to live-stream certain in-person hearings going forwards – and we consider that there should be an express power in its Rules to this effect (or, at least, relevant provisions in the Guide). The live-streaming of certain hearings would be in the interests of open justice and, moreover, would be a more efficient use of the resources of both the CAT and the attending parties. For example, the large number of attendees at in-person *Trucks* hearings in recent years has led to the CAT live-streaming the hearing to an adjacent court room.

#### ***Hearing of expert evidence***

- 6.5 There are currently no express references to the provision of concurrent expert evidence, commonly referred to as ‘hot-tubbing’, in the CAT Rules, the Guide or the Practice Directions issued by the CAT. We consider that, in addition to the CAT’s general case management powers regarding the hearing of evidence (see rules 55(1)(f) and 55(6)), it would be desirable for there to be an express provision in the CAT Rules (or, at least, further guidance on this issue in the Guide) similar to that set out in CPR PD35 11 to permit the evidence from experts from like disciplines to be given concurrently in the interest of expediency and efficiency.

#### ***Power of the President, Chair and Registrar to exercise powers of the CAT (rule 110)***

- 6.6 We note that, while certain case management issues can be dealt with by only one judge (the President or the Chair), there are a number of limits to this. This can cause delays in proceedings, in particular when certain issues are raised before only the President or Chair acting alone. It may assist in ensuring the achievement of the objectives contemplated by the Review (in particular to ensure that case management powers can be applied flexibly and having regard to cost effectiveness and proportionality), to review some of the exceptions to when the President or the Chair can act alone, and/or grant additional express powers to allow for the President or Chair to take appropriate decisions acting alone.

6.7 In addition, we note that at present the CAT has no power to grant declaratory relief. We consider that this should be addressed by way of amendment to the CAT Rules, to grant the CAT express power to do so.

**7. Part 7: Reference of price control matters to the CMA under the Communications Act 2003 (rules 116-117)**

7.1 The current rules on the reference of certain price control matters to the CMA set out a complex jurisdictional and procedural framework. We note, in this context, that the rules relevant to price control appeals in the communications sector are significantly different to those applicable in other sectors. While we are not aware of any specific difficulties arising from the current rules in the communications sector, we note that the CAT is reconsidering its rules against a backdrop of calls for reconsideration of the arrangements for price control appeals generally. For example, in his recent report for the government, John Penrose MP states: “[the] CMA has proposed the system should be simplified so that any appeals which they currently consider should instead be dealt with by CAT. This is a pragmatic step and should go ahead promptly.”<sup>17</sup>

7.2 Should this proposal be taken forwards, detailed consideration would need to be given to the appropriate rules of procedure relevant to such appeals. Price control and other licence modification appeals give rise to a number of features which are distinct from other proceedings in the CAT. In particular, although expert economic evidence is a common feature of nearly all cases before the CAT, the nature and extent of the economic issues considered in such appeals has a number of distinct features. In the light of these proposals, the CAT may wish to consider now what adjustments to its current rules may be necessary or desirable in the event that these functions are transferred to it, including whether it may be helpful to make additional resources available to the CAT such as additional panel members and/or staff with expertise on economic issues such as the cost of capital for UK regulated industries.

**8. Part 9: Review (rule 120)**

8.1 Rule 120 provides for the Secretary of State to, from time to time, carry out a review of the CAT Rules. As explained above, we consider that it is important to consider the CAT Rules and the Guide holistically and to maintain consistency between both. We would therefore recommend that the CAT Rules be amended to give the CAT the express power to update and reissue the Guide from time to time as it considers appropriate, including in light of any amendments to the CAT Rules following a review by the Secretary of State.

**10 May 2021**

**Freshfields Bruckhaus Deringer LLP**

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<sup>17</sup> “Power to the People”, An Independent Report Presented to Her Majesty’s Government by John Penrose MP, February 2021, section 2.6. This follows proposals made by then Chairman of the CMA, Lord Tyrie, in a letter to the Secretary of State for Business, Energy and Industrial Strategy dated 21 February 2019 that the CMA’s current functions in regulatory appeals be transferred to the courts (page 40).