POST-IMPLEMENTATION REVIEW OF THE COMPETITION APPEAL TRIBUNAL RULES 2015

RESPONSE TO BEIS FROM THE COMPETITION AND MARKETS AUTHORITY

Introduction

1. On 16 March 2021, the Department for Business, Energy and Industrial Strategy (BEIS) published a consultation document calling for evidence to inform its post-implementation review of the Competition Appeal Tribunal (CAT) Rules 2015. The questions posed in the document are as follows:

    - *To what extent have the objectives intended to be achieved by the regulatory system established by the 2015 Rules been achieved? and*
    - *Do those objectives remain appropriate and, if so, to what extent could they be achieved with a system that imposes less regulation?*

2. The objectives of the 2015 Rules are as follows:

    - *To minimise unnecessary costs and delays while balancing proper accountability for decisions*
    - *To ensure effective case management*
    - *To provide a framework for the CAT's extended jurisdiction in private actions related to infringements of competition law, as set out in the Consumer Rights Act 2015.*

3. The CMA welcomes the opportunity to respond to this call for evidence. By way of introduction, the CMA considers it axiomatic that there should be a robust system for appeals of the CMA's decisions. Checks and balances are an essential part of the administrative system for the enforcement of competition law. The CMA should have to account for its decisions before an impartial tribunal and the rights of defence of parties need to be maintained.

4. The CMA faces many of the same challenges as the CAT in terms of managing its increased workload and has a shared interest in ensuring that the end-to-end process is as effective and efficient as possible. Delay in the final resolution of cases allows any underlying consumer detriment to persist for longer and weakens deterrence.

5. This response focuses on the first question in the BEIS call for evidence i.e. whether the objectives of the 2015 Rules have been achieved. Given that the CMA's experience before the CAT is primarily in relation to appeals against the CMA's decisions, our response focuses on this aspect of the CAT's work, although we also note the pressures on the CAT as a result of the increased volume of private litigation.

6. Overall, the CMA considers that the 2015 reforms have led to improvements in the efficiency of the CAT's processes; and it believes some further targeted reforms are desirable in order to manage the increased pressures facing the regime in a way which is consistent with and supports the Rules' objectives.

Background

7. When the Competition Act 1998 (CA98) was adopted, it was recognised that:

> "*If the new regime is to work effectively and to command the confidence of business and consumers, it is essential that it is fair and transparent, and that there are effective rights of appeal.*"[1]

8. A new specialist tribunal was established to hear appeals under CA98. The CAT's remit was later expanded to cover challenges to other decisions, including in markets and mergers cases.

9. One of the CAT's key objectives when it was first established was to be a "*tightly controlled procedural regime in which cases are actively managed*". This was confirmed in evidence given to the House of Lords Select Committee on Constitution in 2003, in which the Registrar of the CAT explained that this was intended to "*minimise the traditional difficulties presented by competition cases – those of byzantine complexity of issues, hypertrophic growth of documentation and evidence and inordinate duration of proceedings*".[2] The CAT Rules were made under the Enterprise Act 2002 to reflect this intention and to guide the CAT and parties before it in the conduct of proceedings.

10. In June 2013, the Government published a consultation document titled "Streamlining Regulatory and Competition Appeals" in which it committed to undertake a review of the CAT Rules. The Government stated that some CA98 appeals were taking a long time to resolve, and that "*appeals should be as quick as possible, while remaining robust, to increase regulatory certainty and so as to not act as a drag on the regulatory system*".[3] The key aim of the review was to deliver improved procedural rules which would strengthen the appeal process by minimising the length and cost of decision-making. The Rt Hon Sir John Mummery was appointed to lead work on the review.

11. In August 2014, Sir John completed his independent review of the CAT's procedures.[4] Following his report, the CAT Rules and the CAT Guide to Proceedings were both amended in 2015, and the current objectives introduced.

12. Notably, Sir John recommended in his report that the CAT have the power to make a very wide range of directions at a case management conference, and that the purpose of the directions be to "*secure the just, expeditious and economical conduct of the proceedings*".[5] These amendments represented a significant development towards a streamlined framework, by recognising the need to balance proper accountability for decisions with minimising costs and lengthy proceedings. In light of the overall intention for the CAT to be a "*tightly controlled procedural regime*", as well

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[1] Hansard HL 30 October 1997, volume 582, columns 1148-1149, Minister of State, DTI, Lord Simon of Highbury

[2] Memorandum by the Competition Appeal Tribunal, 26 June 2003, submitted in evidence to the Lords Select Committee on Constitution, paragraph 23

[3] *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform*, page 68

[4] *Independent Report: Review of the Rules of Procedure of the Competition Appeal Tribunal (CAT)*, The Rt Honourable Sir John Mummery, August 2014, page 3

[5] Ibid, page 16

as evolving challenges for the overall competition regulatory system, the CMA considers that there is scope for further reform.

Context

13. Since the 2015 reforms, the competition landscape in the UK has evolved in a way which has placed increased pressure on the CAT. The CAT, like many other adjudicative bodies, must balance the competing demands of finite resources and high-quality decision-making, even where its caseload increases. This task has been made particularly challenging by a number of developments, the impact of which is likely to be ongoing.

Increase in volume of challenges to the CMA's decisions and impact of EU Exit

14. In the last few years, the CMA has experienced an increase in the number of appeals and challenges to its decisions before the CAT. Many of these cases are lengthy and complex.

15. This trend is only likely to continue as a result of the UK's exit from the EU, as a result of which the CMA has taken on an expanded role to investigate mergers and launch cartel and antitrust cases with a global dimension that would have previously been reserved to the European Commission. As decisions made by the CMA in these areas are frequently appealed, this is likely, over time, to lead to a corresponding increase in the number and scale of cases before the CAT, thereby having a considerable direct impact on the case load of the CAT.

Private actions

16. In parallel to these developments, the CAT has also experienced a significant growth in private damages litigation. The 2015 reforms included new rules governing the conduct of private law actions in the CAT. This was necessary due to the enactment of the Consumer Rights Act 2015, which enlarged the CAT's jurisdiction in respect of private actions. In the consultation document for the present review, it is made clear that the number of claims under sections 47A (monetary claims) and 47B (collective proceedings) of the CA98 have markedly increased since 2015. This increase in the number of private damages claims in the CAT, in particular standalone claims and collective actions, represents a particularly onerous challenge in terms of predicting and managing a growing overall caseload.

Reforms in other judicial contexts

17. The pressures faced by the CAT are not unique and are faced by other parts of the judicial system. It is therefore instructive to look at some of the changes being introduced in other courts and tribunals in order to enhance efficiency.

18. For example, there have been recent changes to the rules on witness evidence in the Business and Property Courts. On 6 April 2021, Practice Direction 57AC on Witness Evidence at Trial became effective, with an appended Statement of Best Practice. The Practice Direction sets out prescriptive rules as to the content of witness statements at trials in the Business and Property Courts, and as to the way statements are compiled. The use of an exhaustive list of matters which can be contained in a witness statement creates certainty for parties and limits the potential for costly disputes over the admissibility of evidence. It introduces a new requirement to include a Certificate of Compliance with a witness statement as well as sanctions for non-compliance, including the power to refuse a party the right to rely on the witness evidence, or to order a

witness to give their evidence-in-chief orally and to be cross-examined. The likely effect of the new Practice Direction is briefer and more focused witness evidence.

19. Consistent with the approach taken in other areas of the judicial system, the CMA considers that there is scope for targeted reform to the CAT's procedures in order to achieve greater efficiency and better equip the CAT to deal with the increased pressures it is facing. The CMA has set out some initial suggestions below on areas that might merit further consideration. We would be very happy to engage further with the CAT and BEIS to explore these areas further.

Potential procedural reforms

Continuation of certain changes made during the Covid 19 pandemic

20. During the recent Covid-19 pandemic, the CAT has made various temporary changes to its procedures in order to continue to operate effectively. These were set out in Practice Direction 1/2020 issued in March 2020. In the CMA's view, many of these changes have increased the efficiency of the CAT process and would benefit from being retained. In particular, the introduction of electronic filing has brought the CAT into line with the approach taken in other courts and the possibility of online hearings is also a welcome development (in particular for case management conferences and pre-trial reviews).

Witness evidence

21. The CMA's experience of litigation before the CAT is that the length and cost of proceedings is often linked to the amount of evidence from factual and expert witnesses. As things stand in the CAT, although it is open to a party to challenge the admissibility of evidence after it has already been adduced, there is limited control over what evidence is strictly necessary to decide the issues in the case.

22. Our view is that Practice Direction 57AC in the Business and Property Courts could provide a useful blueprint for the kind of procedural changes which could have a significant impact on the overall functioning of the CAT. While the 2015 reforms provided some guidance on the CAT's powers to make directions, the introduction of provisions which set out a list of matters which may be included in witness evidence would provide more predictability not only to parties before the CAT, but for the CAT itself in managing its caseload.

23. Alternatively, or in addition to amendments in the nature of Practice Direction 57AC, a requirement could be introduced for party wishing to adduce witness evidence (whether from factual witnesses or experts) to apply to the CAT for permission to do so. In the CMA's view, this change would make it more likely that evidence before the Tribunal is limited to what is reasonably required in order to resolve the proceedings fairly.

New evidence on appeal

24. The 2015 reforms included changes intended to address the introduction of new evidence. The focus of Rule 21(2) is on whether it would be "*just and proportionate*" to admit new evidence.[6] As well as the criteria provided for under Rule 21, Rule 9(4)(h) was introduced to require a notice of appeal to contain a statement identifying evidence 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 a

[6] Rule 21(2)

respondent to set out any objections to the admission of new evidence put forward by the appellant. In his report, Sir John stated that this "*focussed early approach*" to new evidence "*should avoid unnecessary time and costs*" where evidence should never have been admitted on the appeal.[7]

25. However, in the CMA's experience, these amendments have not sufficiently limited the scope for appellants to adduce new evidence, even where the appellant could have provided the evidence to the CMA during its investigation. In particular, in *Ping*[8], new evidence was held to be admissible, despite the CMA having requested such evidence during the administrative phase and the appellant having refused to provide it. This meant that the CMA was required to respond to such evidence for the first time on appeal, effectively converting the CMA's decision into a provisional decision and the CAT into the first instance decision-maker. In light of the approach taken in *Ping*, it is difficult to envisage circumstances where new evidence would be ruled inadmissible.

26. It is not clear yet what impact the CAT's ruling in *Ping* will have in practice, as a number of subsequent cases are still working their way through the administrative system, but the CMA's concern is that the current regime does not sufficiently incentivise the production of such evidence at the investigation stage. This increases the likelihood of appeals and that any appeals will have a broader scope, and therefore be lengthier and more costly.

27. The CMA considers that the starting point when an appellant seeks to rely on new evidence should be that, absent any good reason why such evidence was not made available to the CMA, the evidence should not be admissible. This is in keeping with the wider trends in the judicial system towards streamlining processes in order to maximise efficiency whilst ensuring a high quality of decision-making.

Introduction of equivalent to s.312A of the Senior Courts Act

28. Section 31(2A) of the Senior Courts Act 1981 was introduced in 2015 to limit the circumstances in which the High Court can grant relief in judicial review cases. This provision states that the High Court must refuse to grant relief on application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

29. In the CMA's view, there is merit in considering whether an equivalent provision should be inserted in the CAT Rules in respect of judicial review challenges under sections 120 and 179 of the Enterprise Act. This will bring judicial review challenges in the CAT into line with judicial review challenges in the High Court.

Introduction of a fast track procedure for certain appeals

30. Rule 58 of the CAT Rules currently provides for the possibility for the CAT, either of its own initiative or on the application of a party, to make an order that proceedings be subject to a fast-track procedure. This currently only applies in private damages actions before the CAT. However, the CMA considers that there may be benefit in introducing a similar procedure for appeals under the Competition Act or challenges under the Enterprise Act.

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[7] Paragraph 68

[8] [2018] CAT 8.

31. Where the CAT has ordered that particular proceedings be subject to the fast track procedure, the main substantive hearing is fixed as soon as practicable and, in any event, within six months and the amount of recoverable costs is capped at a level determined by the CAT. In deciding whether to order a fast track procedure, the CAT is required to take into account, among other things, the size of the parties, the time estimate for the hearing, the complexity and novelty of the issues and the nature/amount of evidence.

32. The CAT already deals with judicial review challenges in merger cases expeditiously; there may well be other cases which could be dealt with on a fast-track basis, which would enhance the CAT's overall efficiency.

Allowing the chairman to hear an appeal sitting alone

33. Under Rule 110 of the CAT Rules, the President or a Chairman of the CAT may make certain decisions acting alone, but this does not apply to the determination of the appeal or certain other substantive decisions, which are required to be taken by the full CAT panel.

34. In practice, the requirement to have a full panel can make it harder to schedule hearing dates and is likely to have an impact on how quickly the CAT can give judgment. Extending Rule 110 to cover all decisions by the CAT would give it greater flexibility to schedule hearings at short notice and would likely reduce the amount of time taken to deliver judgments. This may be particularly appropriate in urgent cases or cases subject to the fast track procedure mentioned above.

35. It is not self-evident that judicial review challenges under section 120 or section 179 of the Enterprise Act need to be dealt with by a full CAT panel. Such challenges are, by definition, limited to a review of the legality of a decision, rather than a review of the underlying merits. As such, the specialist expertise that the lay panel members bring may be considered less critical. Indeed, in the Administrative Court, judicial review challenges are heard by a single judge.

Page limits for written submissions/evidence

36. The CAT Guide to Proceedings currently sets an expectation that parties limit the length of pleadings as much as possible and states that, even in complex and difficult cases, a notice of appeal of more than 75 pages should be regarded as highly exceptional. However, there is no requirement in the CAT Rules limiting the length of pleadings and thus no sanction if the parties fail to do so.

37. The EU courts follow a much stricter approach and do place limitations on the length of pleadings.[9] Where the limits are exceeded by more than a certain amount, the court can require the party to "regularise" the pleadings to comply with the relevant rule.

38. The CMA considers that similar requirements should be introduced in the CAT Rules as a way of keeping pleadings within manageable bounds, and ultimately as a way to reduce the overall length of proceedings. The CAT should still retain a discretion to allow longer pleadings if required in the interests of fairness.

[9] EU General Court, Consolidated Practice Rules, paragraphs 105 and 109-111; EU Court of Justice, Practice Directions, paragraphs 11, 12, 15 and 16

Conclusion

39. The CMA and the CAT are, together with BEIS, the guardians of the competition regime and share a a common interest in an effective and efficient competition enforcement system which works for all stakeholders We support the recent changes made which streamline processes, in particular electronic filing, and believe that further, tailored amendments to the CAT Rules could help it to achieve its objectives to the fullest extent.

40. We are ready and willing to engage with BEIS and the CAT to ensure that the competition appeals process is as effective as possible in the face of new and challenging demands on the end to end regime. The recent reforms in the wider judicial context demonstrate that strengthening procedural frameworks can be effective in enhancing the efficiency, quality and cost effectiveness of the overall system. We support all efforts to ensure that the CAT's procedural framework is best adapted to achieve its objectives.

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