Oxford Competition Law

1 Commencing Proceedings

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(p. 1) 1 Commencing Proceedings

Scope of chapter

Breaches of the competition rules broadly give rise to two types of proceedings: claims against individuals for breach of the competition rules, and appeals against decisions of the competition authorities. Proceedings of the first type are based in tort and are of a private law nature, as they concern the rights and obligations of individuals *inter se*. Proceedings of the second type are of a public nature, as they concern the review of decisions adopted by

the competition authorities when exercising their public function of enforcing the competition rules.

This chapter sets out the procedural rules that govern how different types of competition law claims are commenced: Section A considers private actions in the High Court; Section B, private actions in the Competition Appeal Tribunal (CAT); Section C, appeals to the CAT; and Section D, judicial review both in the Administrative Court and in the CAT.[1]

Governing principles

(p. 2) **1.01** The procedure in the High Court is governed by the Civil Procedure Rules 1998 ('the CPR'), as amended. The procedure in the CAT is governed by the Competition Appeal Tribunal Rules 2015 (CAT Rules).[2] Many of the CAT Rules are modelled on the CPR (particularly private damages claims) and both sets of rules pursue a similar philosophy. Both CPR rule 1.1 ('Overriding Objective') and CAT rule 4 ('Governing Principles') stipulate that each case should be dealt with justly and at proportionate cost; this includes ensuring that the parties are on an equal footing, saving expense, and ensuring that the case is dealt with expeditiously and fairly. Regard is had to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party.

A. Private Actions in the High Court

1. Jurisdiction

Stand-alone and follow-on actions

1.02 Private actions for breach of the competition rules, where the claimant must plead a cause of action (i.e. an actionable wrong), may be commenced in the High Court. Such actions may be stand-alone actions where the breach of the Competition Rules (and thus liability) is in issue before the court. Actions may also be follow-on actions where the claim for relief follows on from a binding decision of a competition authority which establishes liability. Actions may be mixed in the sense that a claimant may rely on a prior decision to establish liability while seeking to expand liability (e.g. the period of infringement) on a stand-alone basis provided that the relief sought on the stand-alone basis is not inconsistent with the finding in the infringement decision.

Issuing proceedings

1.03 With the exception of proceedings before the CAT, competition law claims must be brought in the High Court.[3] Any claim raising an issue relating to the application of Article 101 and Article 102 TFEU, or of Chapter I or Chapter II of the Competition Act 1998, should be issued in the Business and Property Courts Competition List.[4] Paragraph 1.5 of the Practice Direction (p. 3) for the Business & Property Court provides that the B&PC courts operate within all the procedural rules and practice directions applicable to the proceedings concerned. Paragraph 1.5 expressly refers to the EU Competition Law Practice Direction. According to the latter practice direction, any claim raising an issue relating to the application of Article 101 and Article 102 TFEU, or of Chapter I or Chapter II of the Competition Act 1998, should be assigned to the Chancery Division, or to the Commercial Court if the matter falls within the scope of a 'commercial claim' within the meaning of CPR rule 58.1(2). Any competition law claim commenced in the Queen's Bench Division, a District Registry of the High Court, or a County Court should be transferred to the Chancery Division or the Commercial Court.

Invariably, as the claim will be issued in the Competition List of the B&PCs, the claim form and other court documents will have the following title:

Claim No CP—no and date of issue

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

COMPETITION LIST (CHD)

BETWEEN

Transfer between relevant divisions of the High Court

1.04 It may be the case that identical claims are issued in the Commercial Court and in the Competition List. In order to case manage such proceedings, the High Court may, under CPR rule 30.5, transfer one set of proceedings to and from the Chancery Division and the Commercial Court. An application should be made to a Judge sitting in the Division to which the proceedings are sought to be transferred, but no order may be made without the consent of the Chancellor.[5]

Transfer from the CAT to the High Court

1.05 Under CAT rule 71, the CAT may at any stage of the proceedings, on the request of a party or of its own initiative, and after considering any observations of the parties, direct that all or part of a claim made in proceedings under section 47A of the Competition Act 1998 be transferred to the High Court.

Transfer to the CAT from the High Court

1.06 Section 16 of the Enterprise Act 2002 envisages two kinds of transfer to the CAT. First, the High Court may transfer (p. 4) to the CAT 'for its determination so much of any proceedings before the court as relates to an infringement issue';[6] which is defined as any question relating to whether an infringement of the Chapter I or Chapter II prohibition or of Article 101 or 102 TFEU has been committed.[7] Second, the High Court may transfer to the CAT 'so much of any proceedings before it as relates to a claim to which s47A of the Competition Act applies' (section 47A being the provision which bestows jurisdiction on the CAT to determine claims for compensation for breach of the competition rules).[8]

Transfers to the CAT will frequently be made. In *Sainsbury's v MasterCard*,[9] Barling J made an order transferring the claim for damages made by Sainsbury's (which related to a claim to which section 47A would apply) to the CAT, on the basis that the claim raised complex economic evidence which the judge regarded as more suitable to be determined in the CAT. The transfer did not delay the trial date, albeit that the proceedings were at an advanced stage at the time of transfer: the CAT could accommodate the existing trial date, and Barling J as designated judge in the Chancery Division presided over the claim in the CAT. On appeal the Court of Appeal, referring to the specialist nature of the CAT, considered that 'such claims should in normal circumstances be transferred to the CAT'.[10]

By contrast, in *Unwired Planet International v Huawei Technologies*,[11] Birss J declined to transfer a competition issue to the CAT on the basis that it would split the overall claim. In an action for patent infringement the central issue was whether Unwired Planet was offering FRAND-compliant royalties: in this respect, it was arguable that the settlement of FRAND licence terms would be determined under Article 102 TFEU and under the contractual head of the ETSI IPR Policy. The competition issue was therefore whether the rate of royalty sought was abusive under Article 102. Birss J considered that section 16 of the Enterprise Act was not wide enough to transfer the contractual FRAND claim, and considered that there had to be some 'positive reason' for a transfer. While acknowledging the specialist nature of the CAT and notwithstanding the complex economic evidence intended to be adduced at trial, Birss J considered that the practical difficulties inherent in splitting the contractual and competition FRAND claims militated against the transfer of the competition claim.

(p. 5) In *Agents' Mutual Ltd v Gascoigne Halman Ltd*[12] the claimant, Agents' Mutual, was an association of estate agents created to operate on an online property portal. A membership rule restricted members from advertising on more than one competing online portal. The defendant estate agent advertised on two. In a claim for breach of contract commenced in the High Court, the defendant estate agent argued that the One Other Portal Rule was a restriction of competition contrary to the Chapter I prohibition. The High Court transferred the 'Competition Issues' but retained the 'non-Competition Issues', subject to a stay. The CAT considered that although it did not have jurisdiction to determine the non-Competition Issues it did have jurisdiction to address 'contractual issues' that were 'intrinsic to the Competition Issues'.

Provision for transfers to the CAT

1.07 Transfers to the CAT are governed by CPR PD 30 paragraphs 8.1–8.13. Transfers may be made on the High Court's own initiative (as in the *Sainsbury's* case) or on an application by a party (as, unsuccessfully, in the case of *Unwired Planet*). If a transfer is made, the High Court will transfer all papers relating to the case. Rule 72 of the CAT Rules further provides that on transfer the claimant should, within seven days of the order, file a certified copy of the order of transfer; file the statement of case by which the claim was begun; and seek directions for the further progress of the claim.

Preserving the parties' rights on a transfer

1.08 What is not always clear is the route of any appeal against the determination by the CAT of a case that has been transferred to it. This has some significance as the grounds of appeal to the Court of Appeal from the High Court are more generous than an appeal from a decision under sections 46, 47, and 47A Competition Act, which are limited to points of law. In practice, the parties' High Court rights of appeal are expressly preserved on transfer. In *Ryder v Man SE (Trucks Litigation)* the transfer from the High Court to the CAT was made on terms that preserved the scope of any appeal rights (any appeal would be determined pursuant to CPR Part 52) and also provided that the statements of case (form, timing, amendment, etc) would continue to be governed by the CPR and not the CAT Rules.[13]

It has also been suggested that the matter may be remitted from the CAT back to the High Court so that the High Court can make the necessary directions: on that basis, any appeal would be made against the final order of the High Court. In *Agents' Mutual Ltd v Gascoigne Halman Ltd*[14] (noted at para 1.06), after the High (p. 6) Court had transferred the several competition issues to the CAT, Marcus Smith J (sitting as a Judge of the Chancery Division) ordered that the CAT judgment be regarded as if it had been a judgment of the Chancery Division. As Newey LJ subsequently remarked, 'Strictly, the present appeal is from that order. In substance, however, the appeal is against the CAT's conclusions.'

Class actions

1.09 Although representative actions and group litigation orders continue to apply in the High Court to assist class actions,[15] it is likely that there will be an increase in the number of class actions brought in the CAT following amendments to the Competition Act 1998 by the Consumer Rights Act 2015.

2. Procedure for commencing claims

Civil procedural rules

1.10 The procedure relating to claims brought in the High Court is governed by the CPR 1998, as amended. The CPR and commentary is set out in the White Book Service, Volume

1. Reference should also be had to the Chancery Guide and the Commercial Court Guide in Volume 2 of the White Book Service.

Letter before action and Italian torpedoes

1.11 It is usual for there to be pre-action correspondence in the form of a letter before action which details the nature of the intended claim.[16] This is to give the defendant sufficient time in which to respond and give the parties the chance of settling their differences without recourse to the courts. However, in competition litigation where there may be several jurisdictions in which to commence proceedings, claimants sometimes issue the claim form without recourse to ordinary pre-action correspondence to ensure that the English courts are first seized. This is to avoid defendants launching 'protective proceedings' in other jurisdictions (colloquially known as Italian torpedo actions).[17] In such a situation, defendants legitimately seek extensions of time to serve a defence.

Statements of case

1.12 Proceedings in the High Court are brought and defended by the parties' statements of case. Under CPR rule 2.3(1), a 'statement of case' means a claim form, particulars of claim, defence, Part 20 claim, reply, and any further information. All statements of case must be verified by a statement of truth signed by the relevant party or the legal representative on behalf of the party.[18] Where (p. 7) a legal representative signs the statement of truth, he thereby states that he has authority to act and that the client believes that the facts alleged are true. Legal proceedings commenced without authority are liable to be struck out.[19]

Claim form

1.13 Where a claim is unlikely to involve a substantial dispute of fact, proceedings may be commenced under the procedure provided by Part 8 (the previous originating summons). Given that competition litigation is likely to be fact-specific, the most common method of commencing a claim for breach of the competition rules is by issuing a claim form pursuant to CPR, Part 7. By CPR rule 7.2(1), proceedings are started by a claim form which is issued by the court at the request of the claimant. The claim form should be served on the defendant within four months of issue (if service is within the jurisdiction) or six months (if outside the jurisdiction) in accordance with CPR rule 7.5. Service is effected in accordance with CPR, Part 6. Pursuant to CPR rule 16.2, the claim form must contain a concise statement of the nature of the claim and the remedy sought.

Particulars of claim

1.14 Particulars of claim must also be served on the defendant. Under CPR rule 16.4 the particulars of claim must include a concise statement of the facts on which the claimant relies; the relief sought, including any claim for exemplary damages; and a claim for interest where appropriate.[20]

A claim alleging breach of the competition rules must be fully pleaded, failing which it is liable to be struck out.[21] A 'generous approach' to the particulars of a pleading may, however, be adopted by the court in relation to pleadings in cartel cases before disclosure on the basis that cartels tend by their very nature to be secret.[22] Nonetheless, in damages actions, care must be taken at the outset to decide whether the claim is a follow-on or stand-alone claim. A claimant may allege and must prove whatever infringements it wishes to rely on as having caused loss, but if a claimant brings only a 'follow-on' action, then it is limited to relying on the infringements that have been found.[23]

The particulars of claim is a more important document than the claim form because it limits the case for the claimant, notwithstanding that the claim form may be pleaded more widely. In *Iiyama Benelux BV v Schott AG*,[24] Mann J considered (p. 8) that the claimants were fixed

with the follow-on claim as pleaded in the particulars of claim even on the assumption that the claim form pleaded a wider cartel than that found in the infringement decision:

> If the claim set out there goes wider than the wording of the claim form then it would be a faulty pleading. If it is narrower than the claim form, the defendants would be entitled to treat the claim which is actually advanced in the Particulars of Claim—that is what they are for. Furthermore, if they are narrower then the claimants cannot look to the claim form somehow to say that the overall claim remains broader. In terms of claims pursued they nail their colours to the mast of Particulars of Claim—see *Chandra v Brooke North* 151 Con LR 113. If they are coterminous with the claim form then there is no particular issue. If the claim form is equivocal, then again a defendant is entitled to assume that the claim advanced against him is that set out in the Particulars of Claim.

Service

1.15 CPR rule 7.4 sets out three ways in which the particulars of claim may be served. The claimant may include the particulars of claim in the claim form itself, may serve detailed particulars of claim with the claim form, or may serve the particulars of claim within fourteen days after service of the claim form. As competition claims need to be fully particularized, claimants in competition cases tend to choose the second or third of these options and serve separate particulars setting out in detail the nature of the breach. Particulars of claim must be served on the defendant no later than the latest time for serving a claim form (e.g. before the end of the four-month period).

Extension of time for the claim

1.16 An extension of time to serve the claim form may be made pursuant to CPR rule 7.6 and the parties may agree to an extension of time for service of the particulars of claim pursuant to CPR rule 2.11.

Acknowledgement of service and defence

1.17 When particulars of claim are served on a defendant, the defendant may (pursuant to CPR rule 9.2) file an acknowledgement of service in accordance with Part 10, an admission in accordance with Part 14, or a defence in accordance with Part 15.

Service out of the jurisdiction

1.18 Where a defendant is outside the jurisdiction in which proceedings are to be commenced, notice should be served upon them in order to effect service of the claim form and/or other relevant documents pursuant to CPR Part 6.[25]

Acknowledgement of service and disputing jurisdiction

1.19 A defendant who disputes jurisdiction should apply pursuant to CPR rule 11(1) for an order declaring that the Court has no such jurisdiction or should not exercise any jurisdiction it may have. In such an event the defendant should first file an acknowledgement of service pursuant to CPR rule 10.1(3)(b), which disputes the Court's jurisdiction. An application pursuant to CPR rule 11(1) must be made within fourteen days (p. 9) after filing an acknowledgement of service and must be supported by evidence[26] (the time is extended to twenty-eight days in the case of claims in the Commercial Court). If the application is not made within the relevant timescale, the defendant is treated as having accepted the Court's jurisdiction.[27] If the defendant's application is dismissed, the defendant may file a further acknowledgement of service within fourteen days. If he does so, the defendant is treated as having accepted that the Court has jurisdiction.[28]

Time for serving a defence

1.20 The time for serving a defence is fourteen days after service of the particulars of claim. However, CPR rule 10.1(3)(a) allows the defendant to file an acknowledgement of service and no defence within the fourteen-day period. In this case the time for serving the defence is extended to twenty-eight days after service of the particulars of claim. Therefore, the defendant has twice as long to defend the claim where only an acknowledgement of service is filed under CPR Part 10.

Extension of time for the defence

1.21 Pursuant to CPR rule 15.5(1) the parties may agree that the period for filing a defence may be extended by up to twenty-eight days. The rule is silent as to whether the parties can agree longer periods. Parties frequently do, although usually this is achieved by consent order made on the defendant's application pursuant to Part 23.

Content of the defence

1.22 The content of the defence is dealt with in CPR Part 16. A defence must respond comprehensively to the allegations made in the particulars of claim. Bare denials are insufficient. By CPR rule 16.5 the defendant in the defence must state: (a) which of the allegations it denies; (b) which allegations it is unable to admit or deny; and (c) which allegations it admits. Where the defendant denies an allegation it must state its reasons, and, if it intends to put forward a different version of events from that given by the claimant, must state its own version. A defence alleging breach of the competition rules requires full particularity, failing which the defence is liable to be struck out.

Reply

1.23 There is no obligation to serve a reply.[29] A reply serves not to repeat, but to respond to new matters raised in the defence. Under CPR rule 16.7 a claimant who does not serve a reply to the defence is not taken to admit the allegations made in the defence. Similarly, a claimant who does file a reply, but fails to deal with a matter raised in the defence, shall be taken to require the defendant to prove the matter. A reply must not contract the claim. Any new claim should be (p. 10) made in an amended particulars of claim and should not, as a general rule, be made in the reply.[30]

Set-off

1.24 Pursuant to CPR rule 16.6, where a defendant alleges a payment of money from the claimant and relies on this as a defence to the whole or part of the claim, the set-off may be pleaded in the defence.

Counterclaims and other additional claims

1.25 A defendant's counterclaim is governed by Part 20 (the defendant is deemed a 'Part 20 Claimant'). A counterclaim may take the form of a claim against the claimant or against some other person. A defendant may make a counterclaim without the court's permission where the counterclaim is against the claimant and the counterclaim is contained in the defence (CPR rule 20.4). A defendant who wishes to counterclaim against a person other than the claimant must apply to the court for an order that the person be added as an additional party (CPR rule 20.5). The application should contain the draft counterclaim and be supported by evidence.

Claims for indemnity or contribution

1.26 A contribution may be sought in respect of loss or damage suffered as a result of a competition law infringement by a defendant pursuant to section 1 of the Civil Liability (Contribution Act) 1978 or section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.[31] A defendant may, without the court's permission, make a claim for a contribution or an indemnity against a co-defendant where the claim is filed and served with the defence, or, if the additional claim for contribution is against a defendant added to the claim later, within twenty-eight days after that party has filed its defence.[32] A defendant may, without the permission of the court, seek a contribution or indemnity against a person

who is not already a defendant provided that the claim for contribution is made before or at the same time as the defence to the claimant's claim is filed.[33]

By way of example, where a claimant sues Cartelists A and B, A may make a claim against B without the court's permission provided the contribution claim is served at the time of serving the defence: where a claimant sues only Cartelist A, A may, without the court's permission, seek a contribution against Cartelist B provided that the contribution claim is made before or at the time that A serves the defence in the main proceedings brought by the claimant. Where a claimant sues Cartelists A and B and only A seeks a contribution from Cartelist C, B may, without the court's permission, seek a contribution from C provided that the claim for contribution is brought within twenty-eight days of C serving a defence to B's contribution claim.

(p. 11) In respect of infringements occurring on or after 9 March 2017, Schedule 8A Part 9 of the Competition Act 1998 provides that the amount of contribution that one person may recover from another must be determined in light of their 'relative responsibility for the whole of the loss or damage caused by the infringement'. Determination of this amount must take into account any damages paid by the other person in respect of the loss or damage in accordance with a consensual settlement.[34] This generally reflects the pre-existing practice as regards contribution prior to Schedule 8A entering into force.[35]

Further information

1.27 A request for further information made pursuant to Part 18 is frequently made in competition litigation, as the particulars of claim often fail to meet the required specificity, for example, as to the relevant market or distortion of competition. Further information is often provided voluntarily at a party's request. The court has a wide power under CPR rule 18.1 to order a party at any time to clarify any matter which is in dispute and give additional information in relation to any such matter, whether or not that matter is referred to in a statement of case.[36] However, the request for further information should usually be made by a defendant after service of the defence.[37]

Amendment to statements of case

1.28 Amendments are governed by CPR Part 17. By CPR rule 17.1 a party may amend a statement of case at any time before it has been served on any other party. If the statement of case has been served, a party may amend the statement of case only with the written consent of all the other parties or with the permission of the court.[38] A party amending a statement of case to remove, add, or substitute a party requires the court's permission.

Where a party applies to amend its statement of case after a period of limitation has expired, the court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts, or (p. 12) substantially the same facts, as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.[39] It is good practice for a party amending a statement of case to serve a tracked changed version (amendment in red, re-amendment in green, re-re-amendment in violet, and re-re-re-amendment in yellow) and a clean version which tends then to be used as the working document.

Discontinuance

1.29 Under Part 38 a claimant may discontinue a claim at any time by filing a notice of discontinuance. Unless the court otherwise orders, a claimant who discontinues is liable for the costs which a defendant has incurred on or before the date of discontinuance.[40] Where there is more than one claimant, a claimant may not discontinue all or part of a claim against all or any of the defendants unless every other claimant consents or the court gives permission.[41]

First case management conferences

1.30 A key feature of the CPR is that the court will monitor closely the conduct of the case. This is achieved through court hearings known as case management conferences (CMCs). Case management includes: identifying disputed issues or possible preliminary issues at an early stage; disposing of cases or issues summarily; giving directions (e.g. disclosure); setting out the timetable; and controlling costs. A competition case that proceeds to trial will often have several CMCs and the parties are expected to cooperate in agreeing directions before each hearing. The first CMC will usually take place after service of the defence and before disclosure. In the Commercial Court, a mandatory CMC will normally take place on the first available date six weeks after all defendants have served their defence.

Split trials

1.31 Under CPR rule 3.1 the court has the power to direct a separate trial of any issue. Whether there should be a split trial of liability and quantum will involve a pragmatic balancing exercise. The various considerations (some competing) are: whether the possible saving of costs of a quantum trial outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary; whether a split trial would place unnecessary inconvenience and strain on witnesses (who may have to appear twice); the possible prejudice to a party who may be delayed an ultimate award; the possibility of bifurcated appeals; whether a split trial would assist or discourage settlement; and whether the boundaries between liability and quantum are tolerably clear (whether, e.g., issues of causation are common to liability and quantum).[42]

(p. 13) B. Private Actions in the Competition Appeal Tribunal

1. Jurisdiction

Statutory basis

1.32 The statutory jurisdiction of the Competition Appeal Tribunal ('CAT') is limited to claims based on infringement of Articles 101 and 102 of the TFEU, and the Chapter 1 and Chapter II prohibitions under the Competition Act 1998. Competition claims for damages[43] (or any other claim for a sum of money)[44] and claims for injunctive relief[45] may be brought in the CAT pursuant to section 47A of the Competition Act 1998. Thus, a claimant may obtain, by way of remedy in the CAT, damages in respect of past loss and injunctive relief in respect of future loss. It is uncertain whether the CAT has jurisdiction to grant declaratory relief. The CAT does not have jurisdiction to hear claims where the cause of action is not based on an infringement of competition law.[46]

Stand-alone and follow-on claims

1.33 The CAT has jurisdiction to determine both follow-on and stand-alone claims. A stand-alone claim is where the breach of the competition rules (and thus liability) is in issue before the court. A follow-on claim is where the claim for relief follows on from a decision of a competition authority which establishes liability. Actions may be mixed in the sense that a claimant may rely on a prior decision to establish liability while seeking to expand liability (e.g. the period of infringement) on a stand-alone basis provided that the relief sought on the stand-alone basis is not inconsistent with the finding in the infringement decision.[47]

Injunctive relief

1.34 Pursuant to section 47D Competition Act 1998, an injunction granted by the CAT has the same effect as an injunction granted by the High Court and is enforceable as such. In deciding whether to grant an injunction under section 47A(3)(c), the CAT applies the same

principles which the High Court would apply in deciding whether to grant an injunction under section 37(1) of the Senior Courts Act 1981.[48]

Class actions

1.35 A private action (for monetary compensation or injunctive relief) may be brought on a collective basis by a representative authorized by the CAT to act fairly in the interests of the class members (who may be consumers, businesses, or a mixture of the two). The CAT will determine whether collective proceedings should be on an 'opt-in' or an 'opt-out' basis. Opt-in collective proceedings are (p. 14) brought on behalf of each class member who joins in by notifying. Opt-out collective proceedings are brought on behalf of members of a class and each member within the class is automatically included in the proceedings unless they actively chose not to be: therefore, unlike opt-in proceedings, a person will be included in the action even it has not expressly agreed to join in. In addition to individual and collective private actions, the Consumer Rights Act 2015 introduced a new collective settlement regime that allows victims of competition law infringements to settle cases and thus obtain early redress.[49]

2. Procedure for commencing claims

CAT Rules and Guide

1.36 Section 47A(1) provides that monetary claims and claims for injunctive relief are subject to the CAT's procedural rules. The relevant rules are the Competition Appeal Tribunal Rules 2015.[50] Reference should also be made to the 2015 CAT Guide to Proceedings.[51]

Individual claims

Individual claim form

1.37 Pursuant to rule 30 of the CAT Rules, a claim (for damages, monetary sum, or injunctive relief) made by an individual should be made by way of a claim form and filed with the Registrar. The claim form should specify the claimant's name and address, the name and address of the legal representatives if any, an address for service in the UK, and the name and address of the defendant.[52]

The claim form should further contain:[53] a statement as to whether the claim follows on from an infringement decision and, if so, whether the decision has become final; observations as to in which part of the United Kingdom the proceedings should take place; a concise statement of the relevant facts identifying the relevant findings in any infringement decision; a concise statement of any relevant law; and the relief sought. Where monetary compensation is sought, the claim form should contain a statement of the amount claimed and any calculations undertaken to arrive at the amount claimed. In respect of follow-on actions, the claimant must specify what findings are alleged to have caused the alleged loss. It is insufficient merely to refer to the infringement (p. 15) decision.[54] The claim form must also indicate how the claimant intends to effect service on the defendant. The claim form should be verified by a statement of truth signed by the claimant or its legal representative.[55]

There should be annexed to the claim form a copy of any infringement decision establishing liability, copies of documents referred to in the claim form, and, as far as is practicable, copies of essential documents relied upon.[56] Although it is not necessary to annex witness statements, the claimant should identify in the claim form the nature of the evidence sought to be adduced and, where possible, the identity of the witnesses.[57] The claimant should also annex any application for the claim to be subject to the fast track procedure.[58]

Unless the CAT otherwise directs, the signed original of the claim form and its annexes must be accompanied by five original copies certified by the claimant or the legal representatives.[59] The claimant should also send a copy of the claim form to the Competition and Markets Authority (CMA) at the same time as it is served on the other parties to the claim (notification may be made electronically).[60]

Claim for injunction relief

1.38 By virtue of CAT rule 67, the CAT has power to grant both interim and final injunctions.[61] An application for interim relief should be made in a document separate from the claim form; it should be supported by evidence and should annex a draft order. The applicant will normally be required to provide an undertaking as to damages, although this requirement may be dispensed with in cases subject to the fast track procedure.

Service out of the jurisdiction

1.39 In cases where permission is not required the claimant must, when filing the claim form with the Registrar, also file with the CAT a notice verified by a statement of truth setting out the grounds and the material facts that justify serving out of the jurisdiction.[62] In summary, permission is not required where the CAT would have jurisdiction over the foreign defendant under the Judgments Regulation, Regulation 1215/2012, or the Lugano Convention, and, in particular, if the harmful event occurred in the United Kingdom or the defendant is a co-defendant with a defendant who is domiciled in the United Kingdom.[63]

(p. 16) Where a claimant requires permission to serve out of the jurisdiction (e.g. where the defendant is domiciled in the United States) the claimant must make a separate application in a self-contained document which must be verified by a statement of truth. The application must set out: the address of the foreign defendant, or if that is not known, in what place the defendant is or is likely to be found; a belief that the claim has a reasonable prospect of success; and any material facts relied on. The CAT will apply the principles contained in CPR Part 6, in particular, whether there is a good arguable case that the foreign defendant is a necessary and proper party or that damage was sustained in England, and the CAT is the proper place to commence the claim.[64]

Acknowledgement of service

1.40 Under CAT rule 33(1), the Registrar, on receipt of a claim form, will send an acknowledgement of service and direct the claimant or its representatives to serve it on the defendant. The defendant should, within seven days of receipt of the copy of the claim form, file the acknowledgement of service with the registrar.[65] If the defendant has been served out of the jurisdiction, the time for acknowledging service is varied so as to comply with CPR Part 6.[66] The registrar will thereafter, as soon as is practicable, notify the claimant of receipt of the acknowledgement of service. Failure to acknowledge service may lead to a judgment in default pursuant to CAT rule 42(1)(a).

Disputing the court’s jurisdiction

1.41 A defendant may seek an order that the CAT declines jurisdiction.[67] CAT rule 34(2) requires that the defendant should first acknowledge service, but provides that by doing so he does not thereby lose any right to dispute the jurisdiction.[68] The application must be filed within fourteen days after the acknowledgement of service.[69] If it is not, then the defendant is treated as having accepted the jurisdiction.[70] A declaration that the CAT declines jurisdiction may also make provision for the stay or disposal of the proceedings.[71] If no such declaration is made, then directions should be given for the further conduct of the proceedings.[72]

Amendment to the claim

1.42 Rule 32(1) of the CAT Rules provides that a claim form may be amended with the written consent of all the parties or with the (p. 17) CAT's permission. This applies not only to the main pleading but also, where appropriate, to the schedules/annexes. For example, in *D H Francis v Cardiff City Transport Services Ltd*[73] the claimant (in the light of the Court of Appeal's guidance in *Enron II*)[74] filed a schedule identifying the specific findings of fact in the infringement decision and how they related to the alleged loss.

In *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd*[75] the CAT stated that the 'crucial question [was] whether the Defendant [was] able to deal with this new point'. That the proposed amendment would increase the value of the claim by more than £2 million was considered irrelevant and the fact that the amendment had been sought at a very late stage was addressed by giving consequential permission to amend the defence, to amend written opening submissions, and to adduce new evidence, and ordering the claimant to pay the defendant's costs.

Where a relevant limitation period has expired, the CAT may give permission to amend: (a) to add a new claim, but only if it arises out of the same or substantially the same facts already pleaded; (b) to correct a mistake as to a party's name; or (c) to alter the capacity in which a party is claiming.[76]

Withdrawal of the claim

1.43 Rule 44 of the CAT Rules provides that the claimant may withdraw its claim only with the consent of the defendant or with the permission of the Tribunal. Under CAT rule 44(2), where a claim is withdrawn the CAT may make any consequential order it thinks fit, for example in relation to costs.[77]

Transfer of claims

1.44 Under CAT rule 71, the CAT may at any stage, at the request of a party or on its own initiative, direct that all or part of a claim brought under section 47A (but not a collective claim brought under section 47B) be transferred to the High Court (or the Court of Session as appropriate). This might occur, for example, where the claimant is seeking wider damages than those which simply follow on from an infringement of competition law. The CAT may not do this until it has received observations from the parties.

Defence

(p. 18) **1.45** Under CAT rule 35(1), the defendant must within twenty-eight days of receipt of the claim file a defence with the CAT and serve it on the claimant. The defence should set out in sufficient detail which facts and contentions of law are admitted, denied, or averred. The defence should annex all documents relied (except where they have already been referred to in the claim). Where the defendant is domiciled outside the UK, the period for filing the defence is extended so as to be consistent with CPR Part 6.[78] The defence must be verified by a statement of truth signed by the defendant or its legal representative and the signed original of the defence and its annexes must be accompanied by five certified copies. A copy must also be sent to the CMA at the same time as it is served on the other parties to the claim.[79] The defence may only be amended with the CAT's permission pursuant to its case management powers under CAT rule 53.

Reply

1.46 CAT rule 36(1) provides that the claimant may file a reply to the defence within twenty-one days of the defence being served. It must be verified by a statement of truth, and a copy of it and any accompanying documents should be served on all parties at the same time it is filed. A copy of the reply should also be sent to the CMA.

Additional parties

1.47 Under rule 38 the CAT may grant permission to remove, add, or substitute a party to the proceedings. An application may be made by an existing party or by a person wishing to become a party. Generally, the CAT will grant permission where it is desirable to resolve all matters in dispute. The CAT's power to add or substitute a party is more restricted where the limitation period has expired. CAT rule 38(7) provides that a new party can only be added or substituted where the original party was named in the claim form by mistake; where the claim cannot properly be carried out unless the new party is added; or where the original party was made bankrupt (or died) and liability has passed to the new party.

Counterclaim and additional claims

1.48 CAT rule 39(3) provides that a defendant may counterclaim against a claimant or make a claim against any other person provided that it is a competition claim under section 47A of the Competition Act 1998. The additional claim may be made without the CAT's permission if the claim is included in the defence, and at any other time with the CAT's permission. Any additional claim is treated as a claim for the purposes of the CAT Rules.

Claims for contribution or indemnity

1.49 Under CAT rule 39(4) a defendant who has filed an acknowledgement of service of a defence may make a claim for indemnity or contribution.[80] The claim may be made without the CAT's permission if it is made with the defence or if the claim is made against a defendant (p. 19) added to the claim later, within twenty-eight days after that party files its defence. Otherwise the claim may be made at any time with the CAT's permission. The rules on contribution broadly mirror CPR Part 20. Part 9 of Schedule 8A of the Competition Act 1998 provides for contribution to be recovered in respect of loss or damage suffered by a person as a result of an infringement of competition law, and how any such contribution should be assessed.[81]

Further information

1.50 Requests for further information on a claim or a defence are usually made by consent and often in correspondence. A formal request for further information requires the CAT's permission under the CAT's case management powers provided by CAT rule 53(2)(d), which gives the CAT power to order 'clarification of any matter in dispute or additional information in relation to any such matter'.

Fast track procedure

1.51 Under rule 58 the CAT may order that a claim be subject to a fast track procedure (FTP).[82] Where such an order is made the main substantive hearing will be fixed to commence as soon as possible, and in any event within six months. In deciding whether to order an FTP the CAT will take account of whether a party is an individual or a SME, and whether the hearing would exceed three days. The length of the hearing will be dictated by the number of witnesses, the extent of disclosure, the need for expert evidence, and the complexity of the issues. The FTP cannot be used in collective proceedings and is unlikely to be suitable where there are multiple claimants (it is not three days per claimant) and where disclosure is liable to be significant (even when limited to follow-on actions).[83] The CAT Guide states:[84]

> Given that competition cases generally tend to be heavy, complex and often involve consideration of novel issues, it is unlikely that the Tribunal will designate a case as suitable for the FTP unless it is a clear-cut candidate for such an approach. Generally, such a case is likely to arise or be linked to a scenario where injunctive relief is being sought, or, in the case of a claim for damages, where all the parties

are clearly committed to a tightly constrained and exceptionally focused approach to the litigation.

A key advantage of the FTP is that costs are capped by the CAT. A claimant would normally annex an application for FTP to the claim form and should provide a costs budget at the same time so that the CAT can determine the amount of costs to be capped as fully as possible.[85]

First case management conference

(p. 20) **1.52** In the case of a claim for damages, the first CMC will not generally take place until after receipt of the reply. This is an opportunity for the CAT to explore with the parties the future conduct of the case having regard to the governing principles set out in CAT rule 4. The matters to be considered at a CMA or pre-hearing review are set out in CAT rule 54(3) and include: setting a timetable for trial; understanding the arguments of fact and law between the parties and the points at issue between them; determining the extent of disclosure; discussion of any confidentiality issues; and whether expert evidence should be adduced, and, if so, to what extent.[86]

Collective actions

Collective proceedings order

1.53 The procedure governing collective proceedings in the CAT is set out in Part 5 of the CAT Rules and Part 6 of the CAT Guide. Collective proceedings are governed by rules 75–93 and have four main stages: (a) making a collective proceedings order, (b) trial of common issues, (c) determination of any individual issues, and (d) distribution of any damages. Collective proceedings and the principles of opt-in and opt-out are explained in more detail in Chapter 2.

Collective proceedings claim form

1.54 Unlike ordinary claims for damages commenced in the CAT pursuant to section 47A of the Competition Act 1998, the commencement of collective proceedings pursuant to section 47B must be approved by the CAT. In order to commence proceedings, the proposed class representative must first apply for a collective proceedings order ('CPO'). To obtain a CPO the class representative must file a collective proceedings claim form with the CAT, pursuant to CAT rule 75(1).

Collective proceedings claim form

1.55 The commencement of collective proceedings is subject to its own specific rules: CAT rule 74 provides that CAT rule 30 (commencement of individual claims) and CAT rule 33 (acknowledgement of service) do not apply and modifications are made to rules relating to service of the defence and reply. Under CAT rule 75(2) the claim form should specify the claimant's name and address, the name and address of the proposed class representative and of the legal representative, an address for service in the UK, and the name and address of the defendant. The claim form must also state that the proposed class representative is making an application for a CPO, whether the application relates to proposed opt-in or opt-out proceedings, whether the parties have used ADR, and whether the proposed class representative believes the claims have a real prospect of success.

(p. 21) CAT rule 75(3) requires that a collective proceedings claim form must also contain: (a) a description of the proposed class; (b) a description of possible sub-classes, together with proposals for best representing their interests; (c) an estimate of the number of the class and sub-classes, and the basis for that estimate; (d) a summary of the basis on which the proposed class representative should be authorized under CAT rule 78; (e) a summary of how the certification and approval requirements in CAT rule 79 have been complied with; (f) a statement of whether the claims are based on an infringement decision, and, if so, whether it has become 'final' under section 58A of the Competition Act 1998; (g) a concise statement of the relevant facts, including any relevant infringement findings; (h) a concise

statement of the relevant contentions of law relied on; (i) the relief sought, including the total amount of and basis of calculation of damages, any other sum of money claimed, and whether an injunction is sought; and (j) observations on which part of the UK should be the forum of proceedings under CAT rule 18.

There must be annexed to the claim form a copy of any relevant infringement decision, a draft CPO, and a draft of the notice to be given to class members under CAT rule 81.[87] The claim form must also be verified by a statement of truth.[88] The signed original of the claim form must be accompanied by five certified copies of the form and annexes.[89] The proposed representative should indicate the method by which service is to be effected on the defendant.[90]

Acknowledgement of service

1.56 Once the collective proceedings claim form has been filed, the Registrar will send an acknowledgement of receipt to the proposed class representative pursuant to CAT rule 76(1) and direct service of the claim form on the defendant. As with individual claims, where permission to serve a defendant outside the jurisdiction is required, permission must be first obtained. The defendant has seven days from service to file an acknowledgement of service, which (as with individual claims) is extended to comply with CPR Part 6 where the defendant is outside the jurisdiction.[91]

First CMC

1.57 Collective proceedings require intensive case management by the CAT to ensure that the interests of the class are adequately protected.[92] The first CMC will generally take place as soon as is practicable and before the defence.

Hearing of the CPO

1.58 At the first CMC the CAT may make a CPO after hearing the parties, provided that it has authorized the proposed class representative and has certified the claims in accordance with CAT rule 79.

Defence

(p. 22) **1.59** Unlike in ordinary individual claims, the defendant is not required to file a defence before the hearing of the CPO.[93] If the CAT makes a CPO at the hearing, it will also set out a timetable for services of the defence and a reply.

C. Appeals to the CAT

1. Jurisdiction

Types of proceedings

1.60 The CAT has jurisdiction to hear appeals on the merits against decisions adopted pursuant to the Competition Act 1998, the Communications Act 2003, and the Civil Aviation Act 2012. The CAT Rules set out procedural rules relating to appeals (Part 2 of the CAT Rules) and proceedings under the 2003 Communications Act (Part 7 of the CAT Rules).

Appeals under the Competition Act 1998

Appealable decisions under the Competition Act

1.61 Section 46(1) of the Competition Act 1998 provides that any party to an agreement in respect of which the CMA has made a decision may appeal to the CAT against the decision. Section 46(2) provides that any person in respect of whose conduct the CMA has made a decision may appeal to the CAT against the decision. Section 46 is headed 'Appealable decisions' and section 46(3) lists the type of decision that may be appealed:

- A decision as to whether the prohibition contained in Chapter I, Chapter II, Article 101(1) and Article 102 of the TFEU has been infringed,
- A decision cancelling or withdrawing the benefit of a block exemption,
- A decision concerning the release of commitments,
- A decision as to the imposition of any penalty,
- A decision regarding directions (e.g. interim measures).

The list set out in section 46 is exhaustive and the CAT does not have jurisdiction to review a decision of a type not listed. Particular areas where the Administrative Court will retain some supervisory jurisdiction concern procedural disputes involving such matters as disclosure of documents, extensions of time, access to a case file, or treatment of early settlements.

Third party appeals

1.62 Section 47(1)(a) provides that any person who does not fall within section 46(1) or (2) (e.g. an addressee) may appeal to the CAT with respect to certain decisions:

- A decision as to whether the prohibition contained in Chapter I, Chapter II, Article 101(1) and Article 102 has been infringed,

(p. 23) • A decision cancelling or withdrawing the benefit of a block exemption,

- A decision concerning the release of commitments (a decision to release a commitment must be material),
- A decision regarding the grant of interim measures.

The category of decision that may be appealed by third parties is narrower than the list of decisions that may be appealed by addressees. There is, for example, no provision whereby third parties can appeal a penalty imposed on another person.

Third parties can only appeal if they have sufficient interest. The test of having a sufficient interest is similar to the standing test conventionally applied in judicial review proceedings.

Decisions whether prohibitions have been infringed

1.63 Decisions made under the Competition Act 1998 as to whether the Chapter I or Chapter II prohibitions or Articles 101 and 102 of the TFEU have been infringed are appealable decisions. Whether a competition authority has made such a decision is primarily a question of fact to be decided in each case. It is a question of substance, not form, and it is not enough to point to disparate passages in a decision said to evidence a restriction of competition. There must be a link between the passage in the decision relied on (to support an infringement) and the conclusion set out in the decision.[94]

There is a distinction between a situation where the authority is merely exercising an administrative discretion without proceeding to a decision as to whether the prohibition has been infringed, and a situation where the authority has in fact reached a decision on the question of infringement.[95]

- In *BetterCare* [96] the complainant was engaged in the provision of nursing home care services. It complained to the authority that the North and West Belfast Health and Social Services Trust was abusing its dominant position by offering unreasonably low prices. The authority rejected the complaint on the basis that the Trust was not an ‘undertaking’ for the purposes of section 18 of the Competition Act 1998. The CAT rejected the authority’s argument that the decision was not an appealable decision within the meaning of section 46. In substance, the rejection of the complaint was a

decision that the Chapter II prohibition had not been infringed, and thus the CAT had jurisdiction under section 47 to hear the appeal.

• In *Claymore Dairies* [97] the CAT held that the authority's conclusion that an infringement was not sufficiently established by the evidence gave rise to an appealable decision.

(p. 24) • In *Freeserve* [98] a case closure letter was considered an appealable decision as the regulator had, after a preliminary investigation, rejected the complainant's arguments in the light of the available evidence.

• By contrast, in *Cityhook*, [99] Cityhook complained to the authority about third parties collectively boycotting Cityhook's technology. For reasons of administrative priority, the authority chose not to pursue the complaint. The CAT held that the administrative priority decision did not fall within section 46 and could only be reviewed by the Administrative Court. [100] The lawfulness of the authority's administrative priority was left to the Administrative Court, which subsequently upheld the authority's approach. [101]

• Similarly, in *Independent Water Co Ltd v Water Services Regulation Authority* [102] the regulator postponed consideration of a complaint made under the Competition Act 1998 pending further consideration of certain matters under the Water Industry Act 1991. The CAT held that the regulator had not made a decision falling within the Act because the regulator had abstained from expressing a view, one way or the other, on the question whether there had been an infringement of the Chapter II prohibition. As a result, the appeal was held to be inadmissible.

It is apparent, therefore, that an appealable decision is likely to exist where the authority has taken a considered position on the merits even if only after a preliminary examination. By contrast, where the authority decides not to investigate because of, for example, administrative priority or parallel proceedings, an appealable decision is unlikely. Where the nature of the 'decision' is unclear it is advisable to issue two sets of proceedings and then apply to stay the application for judicial review pending the determination by the CAT as to whether it has jurisdiction under section 46. If it is found not to have jurisdiction, the stay of the judicial review application can subsequently be lifted, as happened in *Cityhook*[103] and in *T-Mobile (UK) Ltd & Telefónica O2 UK Ltd v OFCOM*.[104]

Effect of appeal on the decision

1.64 Except in the case of an appeal against the imposition or the amount of a penalty, the making of an appeal does not suspend the effect of the decision to which the appeal relates. However, the CAT does have power, upon application, to suspend the operation of an appealable decision, pending the determination of that appeal.[105]

CAT's powers on appeal

(p. 25) **1.65** The CAT's powers are extensive and are much wider than those of the Administrative Court exercising its functions of judicial review. Paragraph 3 of Schedule 8 to the Competition Act 1998 provides, *inter alia*, that:

> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—
>
> (a) remit the matter to the CMA,
>
> (b) impose or revoke, or vary the amount of a penalty,
>
> (c) … [106]

(d) give such directions, or take such other steps, as the CMA could itself have given or taken, or

(e) make any other decision which the CMA could itself have made.

(3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the CMA.

(4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.

The reference to 'any other decision which the CMA could itself have made' in paragraph 3(2)(e)is not limited to a decision that the authority could have made at the time it took the decision under appeal. Paragraph 3(2)(e) confers jurisdiction on the CAT to make a decision of a kind that the authority, if still seized of the matter, could have made on the basis of material currently available. This is a wide-ranging power. For example, in *Albion Water Ltd v Dwr Cymru Cyfyngedig*[107] the Court of Appeal upheld the power of the CAT to find an undertaking dominant, notwithstanding no finding to this effect by the regulator.

However, in *Albion Water Ltd* the possibility of the CAT exercising its powers under paragraph 3(2)(e) was part and parcel of the appeal from the outset and the parties were able to respond in their pleadings and evidence on that basis (the Notice of Appeal lodged by Albion Water had sought relief which included a finding of infringement and thus by its nature a finding of dominance). Paragraph 3(2)(e) does not give the CAT jurisdiction to determine an infringement unconnected to the decision being appealed. Thus, in *Imperial Tobacco Group Plc v Office of Fair Trading*[108] Imperial Tobacco had been fined in respect of agreements concluded between several retailers the object of which was to coordinate the prices of Imperial Tobacco's products with that of its competitor, Gallaher. However, during the course of the appeal the OFT concluded that the nature of the agreement as found in the infringement decision could not be supported. Instead the OFT argued for a 'refined case'. The CAT concluded that this 'refined case' was not contained in the infringement decision and set the decision aside. The CAT emphasized that a section 46 appeal is against an 'appealable decision' and that (p. 26) the CAT should determine the appeal by reference to the grounds of appeal in the Notice of Appeal.

Where there is a sufficient connection between the case as advanced in the appealable decision and that on appeal, the CAT will tend to decide the infringement issue itself, as it recognizes that an appeal on the merits will throw up new facts and new evidence. The general policy behind the 1998 Act is for the CAT 'to decide a case on the facts before it … and to avoid remitting the case'.[109] The CAT in *Burgess v OFT*[110] confirmed this position, stating:

> In our judgment … the Tribunal should, if necessary, take its own decision rather than remit if (i) it has or can obtain all the necessary material (ii) the requirements of procedural fairness are respected and (iii) the course the Tribunal proposes to take is desirable from the point of view of the need for expedition and saving costs. Such an approach in our view is compatible with the overriding objective of deciding cases justly.

Whether the CAT exercises its powers of remittal depends on the justice of each particular case. 'Everything will depend on what is necessary to meet the justice of the individual case.'[111] Where the CAT does not have the necessary material to decide the case, it may remit if it considers that the justice of the case requires it. The CAT has stated that there is an important public interest in seeing that the competition rules are respected[112] and

consequently, on partially successful appeals, where the CAT has set aside a part of the decision, a remittal of that part is more likely.

Thus, in *Flynn & Pfizer v CMA*[113] the CMA adopted a decision that both applicants had abused a dominant position by excessively pricing a pharmaceutical drug. The CAT set aside part of the decision that related to abuse on the basis that the CMA had incorrectly examined the issue of excessive pricing. The CAT upheld the decision on market definition and dominance. The CAT did not set aside the entire decision, but merely remitted the issue of abuse. By contrast, in *Aberdeen Journals* the CAT remitted the question of the relevant product market and at the same time set aside the whole decision on the basis that the paragraphs relating to market definition 'constitute the foundation upon which the rest of the Decision is based'.[114] Where the facts are stale and the events in question date back a considerable period, the CAT may decide against remitting the examination of (p. 27) conduct which is 'purely historic' and where there would be no useful purpose in making any further order.[115]

Where the CAT sets aside a decision and remits the matter back to the authority, the CAT does not have the power to make directions as to how the authority is to conduct the investigation. The CMA must decide what to do in accordance with its own statutory duties and functions.[116]

The CAT has a separate power to 'refer back' a disputed decision 'in whole or in part' under rule 19.2(o) of the CAT Rules. The effect of exercising such a power is that the appeal remains, pending the authority's consideration of the issues(s) referred back.[117]

Appeals in telecommunications cases[118]

Communications Act 2003

1.66 Part 2 of the Communications Act 2003 confers power on OFCOM to regulate the provision of electronic communications networks and to regulate the use of radio spectrum under the Wireless Telegraphy Act 2006. Under section 192(2) of the 2003 Act, decisions adopted by OFCOM may be appealed to the CAT by a person affected by a decision to which section 192 applies.

Powers on appeal

1.67 By section 195(3)–(4) of the Communications Act 2003, the CAT must decide what, if any, action the decision maker should take. The CAT may remit the decision under appeal with such directions as are necessary for giving effect to the CAT's decision.[119] The CAT is only empowered to order the decision maker to make decisions that it would otherwise have power to take.[120]

Price control

1.68 Where the appeal raises a price control matter the CAT must, before reaching its decision, refer the matter to the CMA for determination.[121] The CAT must decide the price control issues in accordance with the determination of the CMA unless it considers, applying the principles applicable on an application (p. 28) for judicial review, that there are grounds for not upholding the findings of the CMA: see for example *TalkTalk Group v BT*.[122]

Proceedings under the Civil Aviation Act 2012[123]

Market power determinations

1.69 The Civil Aviation Act 2012 provides that the Civil Aviation Authority (CAA) may licence operators at dominant airports to levy charges for use of airport services. The CAT's jurisdiction includes the hearing of appeals in respect of certain decisions taken by the CAA concerning market power determinations and the enforcement of licence conditions.

Powers on appeal

1.70 The CAT's powers on appeal are set out in various schedules to the 2012 Act. In the case of market power determination, the CAT has the power to direct the CAA to make a further determination, and, if the CAA fails to do so, to make the determination itself.

2. Procedure

Time for appealing

1.71 Rule 9(1) of the CAT Rules provides that an appeal must be made by filing a Notice of Appeal to the Registrar within two months of the date upon which the appellant was notified of the disputed decision, or the date of publication of the decision, whichever is earlier. A press statement publicizing the fact of a decision is not notification or publication within the meaning of rule 9 of the CAT Rules.[124]

Calculation of time for making an appeal

1.72 Rule 112 of the CAT Rules concerns the calculation of time for making an appeal. Generally, the last day for filing a Notice of Appeal under the Competition Act 1998 is the day which falls on the same day in the month two months after the date on which the appellant was notified of the disputed decision (month means calendar month). Therefore, if the appellant was notified of the decision on 10 June, the last date for filing an appeal is 10 August. Time is not suspended during legal vacations. If time expires on a Saturday, Sunday, or Bank Holiday, it is extended to the next following day.

Extension of time

1.73 Pursuant to rule 9(2) of the CAT Rules, the CAT may not extend the time limit of two months provided by rule 9(1) unless 'it is satisfied that the circumstances are exceptional'. Thus, the possibilities of obtaining an extension of time for appealing are extremely limited. The CAT applies by analogy the comparable rule of the General Court in Luxembourg, which requires the party concerned to prove the existence of unforeseen circumstances or a *force majeure* before time will be extended.[125] In *Fish (p. 29) Holdings*[126] the applicant sent its Notice of Appeal to the wrong address and thus lodged its appeal three days late. The CAT refused to extend time on the basis that the mistake was not unforeseeable and could not be regarded as exceptional.

Service of the Notice of Appeal

1.74 Service of the Notice of Appeal is affected in accordance with CAT rule 111. The Notice of Appeal may be delivered physically to the Registrar of the Tribunal at the CAT's address for service (Victoria House, Bloomsbury Place, London, WC1A 2EB), by sending the application by first class post to that address, by document exchange, or electronically (if authorized by the CAT). A Notice of Appeal must be served by 5pm on a business day if it is to be treated as served on that day. Otherwise it is treated as being served on the next business day.

Contents of the Notice of Appeal

1.75 The Notice of Appeal should contain the following:[127]

- The name and address of the appellant, the name and address of the appellant's legal representatives, the address for service in the UK, and the name and address of the respondent in the proceedings. The Notice of Appeal should be signed and dated by the appellant or on the appellant's behalf by its duly authorized officer or legal representative. [128]
- A concise statement of the facts, which identifies the primary facts found by the respondent that are contested.

- A summary of all the grounds for contesting the decision with supporting arguments. This should include in particular under what statutory provision the appeal is brought, to what extent it is contended that the decision was based on an error of fact or law, and to what extent the respondent's exercise of its discretion is being challenged. [129]
- A statement identifying the evidence which was not, so far as the appellant is aware, before the maker of the disputed decision. [130]
- Observations on the question of forum under CAT rule 18.
- Any request for confidential treatment. [131]
- The relief sought by the appellant and any directions sought pursuant to rule 19 of the CAT Rules. [132]
- A schedule listing all the documents annexed to the Notice of Appeal. [133]

(p. 30) • Annexed to the Notice of Appeal, a copy of the disputed decision and as far as is practicable a copy of every document (or part of a document) on which the appellant relies, including the written statements of all witnesses of fact or expert witnesses, if any. [134] Documents of only peripheral relevance should not be annexed.

In cases of no particular complexity the Notice of Appeal should not normally exceed 20–30 pages. Even in a complex case a Notice of Appeal should not exceed seventy-five pages. Under CAT rule 10 the CAT has power to give directions for putting a Notice of Appeal in order if it considers that the application is unduly prolix or lacking in clarity and to defer service of a Notice of Appeal on the respondent until this has been done. The Notice of Appeal should be typed and printed on both sides of A4 paper and also be capable of being supplied on disk or as an email attachment. The Notice of Appeal should not be sent as a loose document with the files but should be put inside a two-hole ring binder that is clearly labelled on the spine.[135] Under CAT rule 9(7), unless the CAT otherwise directs, a signed original of the Notice of Appeal and its annexes must be accompanied by ten copies certified by the appellant or its legal representative as conforming to the original.

Amending the Notice of Appeal

1.76 Appellants should develop all the grounds of appeal relied on together with any supporting documents in the initial Notice of Appeal and should not add wholly new grounds of appeal in the course of proceedings. In *Floe Telecom*[136] the CAT considered that the strict rules on amendments were necessary to enable the authority properly to respond to the Notice of Appeal, and the CAT to read into the case at an early stage. It follows that a skeleton argument should also remain within the scope of the Notice of Appeal.[137]

Rule 12(1) of the CAT Rules provides that the appellant may amend the Notice of Appeal only with permission of the CAT. Rule 12(3) provides that the CAT shall, in deciding whether to allow an amendment, take into account whether the amendment: (a) involves a substantial change to the case; (b) is based on matters of law or fact that have come to light since the original appeal; and (c) for any other reason could not have been included in the Notice of Appeal.[138]

The distinction between new grounds of appeal and new arguments is not always easy to make. For example, it appears that in *National Grid* the CAT was prepared to be flexible in allowing both parties the ability to fully develop their (p. 31) arguments provided that the parties had had sufficient opportunity to make submissions on them.[139]

Striking out the Notice of Appeal

1.77 Pursuant to rule 11 of the CAT Rules, the CAT has the power to strike out a Notice of Appeal or any part of it if it considers that any of the following conditions are met: the CAT has no jurisdiction to hear or determine the appeal; the Notice of Appeal discloses no valid ground of appeal; the appellant does not have a sufficient interest in the decision; the appellant has habitually and persistently without any reasonable ground instituted vexatious proceedings or made vexatious applications within proceedings; or the appellant has failed to comply with any rule, direction, practice direction, or order of the CAT.[140]

The first CMC

1.78 Once the Notice of Appeal has been filed, it will be checked in the Registry to ensure that the various formal requirements have been complied with. The Registrar will send an acknowledgement of receipt to the appellant and send the Notice of Appeal to the respondent. Under CAT rule 20(2), the first CMC will be held as a soon as practicable after the filing of the appeal. The Registrar will inform both parties of the date of the first CMC. In the case of appeals under the Competition Act 1998, this usually takes place around four weeks after the proceedings have been commenced and approximately two weeks before the defence is due to be filed.

Defence

1.79 In accordance with rule 15(1) of the CAT Rules, the respondent should send to the Registrar a defence within six weeks (or such further time as the CAT may allow) of the date on which the respondent received a copy of the Notice of Appeal. Under rule 15(2) of the CAT Rules the defence must state the name and address of the respondent, the name and address of the respondent's legal representative if appropriate, and an address for service in the UK. It should be signed and dated by the respondent or on the respondent's behalf by a duly authorized officer or its legal representative.

Requirements of the defence

1.80 The defence must contain: observations on the question of forum under CAT rule 18; a succinct presentation of the arguments of fact and law upon which the respondent will rely; the relief sought by the respondent and any directions sought pursuant to CAT rule 19; details of any objections to the admissibility of evidence put forward by the appellant; a statement of the evidence which, so far as the respondent is aware, was not referred to in the disputed decision or disclosed to the appellant; and a schedule listing all the documents annexed to the defence (CAT rule 15(3)). Under CAT rule 15(5), the defence should annex a copy of every document upon which the respondent (p. 32) relies. CAT rule 15(6) states that the signed original of the defence and its annexes must be accompanied by five copies certified by the respondent or the duly authorized officer or legal representative. Under CAT rule 15(8) the Registrar will send a copy to the appellant on receiving the defence.

3. Appeal on merits

Appeals generally

1.81 Paragraph 3(1) of Schedule 8 to the Competition Act 1998 provides that the CAT must determine the appeal on the merits by reference to the grounds of appeal set out in the Notice of Appeal. Section 194A of the Communications Act 2003 provides that an appeal is by reference to the grounds of appeal set out in the Notice of Appeal and by reference to judicial review principles.[141] The CAT summarized the nature of a merits-based appeal in *Napp*,[142] stating:

> If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the roles of 'prosecutor' and 'decision maker', becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional role of

> judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case 'on the merits' and may, if necessary and appropriate, 'make any other decision which the Director could have made': paragraph 3(2)(e). If confirming a decision, the Tribunal may nonetheless set aside a finding of fact by the Director: paragraph 3(4) of Schedule 8. Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts … and may do so even if the evidence was not available to the Director when he took the decision.

Therefore, an appeal on the merits involves the CAT examining the matter afresh, hearing evidence if necessary, and forming its own view. In this respect, the CAT is more disposed to examining fresh arguments not advanced by either party during the administrative phase during the competition authorities' investigation. For example, in *National Grid plc v Gas and Electricity Markets Authority*[143] the authority had fined National Grid for abusing its dominant position in the market for the provision of installed domestic-sized gas meters. Both the decision and the Notice of Appeal were fairly complex and lengthy documents. In the appeal itself both (p. 33) parties argued that some of the arguments advanced at the hearing were inadmissible either as regards National Grid (because they had not figured in the pleadings) or as regards the authority (because they departed from the reasoning set out in the decision). The CAT was prepared to hear full arguments on both sides. It considered that the appeal was not simply about an alleged abuse occurring in the past, but was likely to have an important impact on the development of competition in the relevant market for some time to come. It stated:

> This is an appeal on the merits, not a judicial review of the Authority's decision: see paragraph 3(1) of Schedule 8 to the 1998 Act. It is appropriate in the public interest for the Tribunal to consider all relevant arguments raised in the appeal provided that the parties have had sufficient opportunity to make submissions on them.

The reference to the parties having sufficient opportunity to make submissions on opposing arguments is an important part of the CAT's determination of an appeal on the merits. Referring to paragraph 3(2)(e) of Schedule 8, in *Albion Water Ltd v Water Services Regulation Authority*[144] the CAT stated that it:

> has its own procedures and must act fairly when reaching a decision under that provision … Respect for the rights of the defence in proceedings before the Tribunal requires that the undertakings concerned be afforded the opportunity during the appeal to make known its views on the relevance of the facts, arguments and circumstances relied on by each party.

In *British Telecommunications plc v Telefónica O2 UK Limited and ors*[145] the Supreme Court noted that an appeal on the merits is a rehearing and is not limited to judicial review or points of law. The CAT is entitled to make factual findings which differ from those made by OFCOM and can receive substantial additional evidence including economic evidence. In a related dispute about the admissibility of evidence in the same case (*The 080 admissibility of evidence* case)[146] the Court of Appeal stated that the CAT's task is not confined to the merits as they appeared at the time of the decision under appeal or considering the material available at the time the decision was made (paragraph 60), or with OFCOM's process of determination (paragraph 70). However, in *Mobile Call Termination Statement*[147] the Court of Appeal noted that an appeal is against the decision and not the reasons for the decision: it is not enough to identify an error in the reasoning; it is also necessary to show

that the decision is wrong. If the CAT concludes that the original decision can be supported on a different basis from that relied on, the appeal is likely to fail.

(p. 34) Even though an appeal is on the merits, the CAT will not necessarily start with a blank sheet of paper. Where the appeal is directed against an error of appreciation rather than an error of fact or law, and where there are a number of different reasonable approaches, the CAT has indicated that it might be slow to interfere. For example, in *Albion Water*, where one of the issues was the lawfulness of an access price, the CAT stated:[148]

> We are conscious, however, that in determining the lawfulness of an access price, there may be a number of different approaches which a regulator, exercising its concurrent powers with the OFT, could reasonably adopt in arriving at its decision. There may well be no single 'right price' … To that extent, the Tribunal will, whilst still carrying out an assessment of the merits of the case, give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would also have been reasonable and which might have resulted in a resolution more favourable to its case.

Penalty appeals

1.82 The CAT has held,[149] and the Court of Appeal has upheld its view,[150] that the CAT 'has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance'.

Appeals against commitment decisions

1.83 In the case of appealable decisions relating to commitments made under section 31 of the Competition Act 1998, the CAT must determine the appeal by applying the same principles as would be applied by a court on an application for judicial review. The appeal is not therefore on the merits. The CAT may dismiss the appeal or quash the whole or part of the decision to which it relates and, where it quashes the whole or part of that decision, remit the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the CAT's ruling.[151]

Fresh evidence

1.84 As noted previously, unlike a statement of case in the High Court, the Notice of Appeal in the CAT which challenges an appealable decision must set out the grounds of appeal and the evidence relied on. The appeal on the merits therefore raises the issue of the applicant (and in turn the authority) adducing fresh evidence. The CAT's power to admit new evidence is set out in rule 21 of the CAT Rules and paragraphs 7.71–7.78 of the CAT Guide. It is for the party (p. 35) seeking to rely on it to show good reason why it should be admitted.[152] Rule 21(2) provides that the CAT will have regard to what is just and proportionate and the likely prejudice, having regard in particular to the (non-exhaustive) factors:

> (a) The statutory provision under which the appeal is brought and the standard of review
>
> (b) Whether the evidence was available or made available to the authority before the decision was taken
>
> (c) Any reason why the appellant had not made the evidence available
>
> (d) Any prejudice suffered by either party if the evidence is admitted or excluded

(e) Whether the evidence is necessary for the CAT to decide the case.

An appellant will generally be permitted to adduce new evidence at the judicial stage because an appeal is on the merits and there will have been no right to test the evidence at the administrative stage.[153] Although the appellant may seek to impugn the decision on any ground, whether or not that ground was put before the original decision maker, and may seek to adduce fresh evidence, the same liberty is not generally open to the competition authority.[154] Where the appellant is allowed to adduce new evidence, the authority will generally be allowed to adduce fresh evidence in rebuttal. However, it is unlikely that the CAT will admit new evidence that was available at the time when the relevant decision was reached, but which was not relied upon in the decision. The more likely course is that the matter will be remitted to the competition authority to allow the parties the opportunity to respond to the evidence in the renewed administrative phase. In the meantime, the CAT may quash the decision[155] or merely stay the appeal pending the adoption of a fresh decision.[156]

D. Judicial Review

1. Judicial review in the Administrative Court

Jurisdiction

Statutory basis

1.85 Section 31 of the Senior Courts Act 1981 recognizes the pre-existing common law jurisdiction for the courts to hear an application for judicial review. CPR Part 54, which is a modified version of the Part 8 procedural rules, provides the detailed rules for making such an application. CPR rule 54.1(2) (p. 36) defines a claim for judicial review as a 'claim to review the lawfulness of: (i) an enactment; or, (ii) a decision, action or failure to act in relation to the exercise of a public function'. Therefore, an application for judicial review involves challenging the lawfulness of some administrative act or omission. In general, the courts adopt a broad approach to the definition of 'public function', and take into account a non-exhaustive range of factors when determining whether a particular decision is amendable to judicial review.[157]

Limited jurisdiction

1.86 The legality of decisions by the competition authorities remains susceptible to judicial review by the High Court. In practice, however, the majority of challenges to decisions of the CMA and the other regulators are brought in the CAT pursuant to the statutory provisions of the Competition Act 1998 and the Enterprise Act 2002. This includes decisions by the competition authorities that the Chapter I and Chapter II prohibitions have been infringed, penalty decisions, merger decisions, and market investigation decisions.

With the creation of the CAT and its wide remit to review decisions of the competition authorities, instances where the Administrative Court will review such decisions are limited: permission to bring an application for judicial review will normally be refused where there is a suitable alternative remedy such as a statutory appeal.[158] Nevertheless, the CAT, being the creation of statute, has no inherent jurisdiction, and the Administrative Court will continue to fulfil a vital role protecting the rights of individuals where there is a lacuna in the statutory protection.

Appealable decision

1.87 The availability of judicial review of a competition decision before the Administrative Court is most likely to turn on the nature of the decision challenged. If, on a proper interpretation of the relevant statutory provision the authority has not adopted an

appealable or reviewable decision, the aggrieved party must proceed by way of judicial review. As the CAT stated in *BetterCare Group Ltd v Director General of Fair Trading*:[159]

> As to the various arguments concerning the availability of judicial review to Bettercare in the circumstances of this case, it seems to us, respectfully, that the position is relatively straightforward. If there is a relevant decision for the purposes of section 47(1), then a disappointed complainant has an appeal to this Tribunal. If, on a true analysis, there is no relevant decision, but only an exercise of discretion not involving a decision whether the Chapter I or II prohibition has been infringed, then a disappointed complainant may have a remedy, if at all, by way of judicial review at common law. Which route applies depends solely on whether there is a 'relevant decision' or not.

Types of remedy available

(p. 37) **1.88** Section 31(1) of the Senior Courts Act 1981 and CPR rule 54.2 provide that an application for a mandatory, prohibiting, or quashing order may be made by way of a judicial review.[160] Further, under section 31(2) of the Senior Courts Act 1981 and CPR rule 54.3(1) the Administrative Court may make a declaration or grant an injunction where it would be just and convenient having regard to the sufficiency of the mandatory, prohibiting, or quashing orders and the nature of the persons against whom relief is sought.

By section 31(4) the court may, on an application for judicial review, also award damages or restitution if satisfied that such an award could have been made if begun by action. However, CPR rule 54.3(2) makes clear that damages and restitution cannot be sought on their own but must be sought in combination with an application for an injunction or the administrative orders.

Under section 31(5) the court may, when making a quashing order, remit the matter back to the decision maker with a direction that the person reconsider the matter in accordance with the court's findings. Where a court determines that a public body has acted unlawfully, the court retains a discretion as to whether to grant or refuse a remedy. In practice remedies are ordinarily awarded to successful claimants.

Procedure for commencing claims in the Administrative Court[161]

Judicial review claim form

1.89 An application for judicial review is made by a claim form pursuant to CPR rule 54.6. The claim form is filed in the Administrative Court Office and should be served on the defendant within seven days after the claim form is issued.[162] The claim form must also be served on any person that the claimant considers to be an interested party, defined as 'any person (other than the claimant and defendant) who is directly affected by the claim'.[163]

The claim form must be accompanied by a detailed statement of the claimant's grounds for bringing the claim, a statement of the facts relied on, and any application to extend time for filing the claim form or directions. It must be accompanied by any written evidence and documentation in support of the claim, and must also set out details of the claimant, defendant, any interested parties, the relevant decision, and the remedy sought. Applications for urgent consideration (e.g. interim relief) are made separately.

Permission

1.90 Section 31(3) of the Senior Courts Act 1981 and CPR rule 54.4 provide that a claimant must first obtain permission to bring the application for judicial review.[164] A (p. 38) number of issues are addressed at the permission stage. The court may consider whether the action or omission in question is amenable to judicial review, whether or not

the proper procedural route has been adopted, and whether the claim has been brought in time.

A claimant is also required to show that they have standing to bring the claim, defined as having ‘a sufficient interest in the matter to which the application relates’. The courts will first apply a threshold test at the permission stage to ‘prevent abuse by busybodies, cranks, and other mischief-makers’[165] and to prevent hopeless cases going forward (the question of the nature and extent of the claimant’s interest may also affect the court’s exercise of discretion at the remedies stage[166]).

While there is no statutory requirement for the court to address the issue, it will also consider whether the claim has sufficient merit to proceed to a substantive hearing. The burden lies on the claimant to satisfy the court that the grounds of review are ‘arguable’.[167] The court may determine that some but not all of the grounds for judicial review satisfy that test. Permission is almost always considered in the first instance on paper. The judge may, at that point, certify that the matter is totally without merit, and, in that case, the matter may not proceed. In the absence of such a certification, an unsuccessful claimant may renew the application for permission and request that the matter is reconsidered at an oral hearing.[168] Such hearings should not become a detailed examination of the merits of the case. A defendant that attends an oral hearing, and successfully resists a permission application, is not ordinarily entitled to recover the costs of attendance.[169]

Timing

1.91 CPR rule 54.5 provides that the claim form must be filed promptly and in any event not later than three months after the grounds for making the claim first arose. Where the claim is brought within the prescribed three-month period there is a rebuttable presumption that it has been brought promptly.[170]

Response and acknowledgement of service

1.92 An acknowledgement of service must be filed within twenty-one days of service of the claim form and served on the claimant and any interested party within seven days after it is filed.[171] If the defendant intends to defend the claim, it should set out a summary of its grounds (p. 39) for doing so in the acknowledgement.[172] Those summary grounds should, in theory, be brief.[173] However, in practice they are frequently substantial and there is no provision preventing a defendant (or interested party) from filing witness evidence at this stage. The summary grounds provide the basis on which the court will consider the application on paper and ultimately at a renewed oral hearing. Where permission is granted, the defendant is given thirty-five days from the date of permission in which to file and serve a response setting out in more detail the grounds for contesting the claim and any supporting evidence. In cases that raise complicated issues, such as competition law claims, that period is frequently extended by the consent of the parties.

Directions

1.93 The court may give directions at the permission stage. These may include expediting the hearing and abridging the time for serving the response.

2. Judicial review in the CAT

Types of judicial review proceedings

1.94 The CAT has jurisdiction to hear judicial review applications under the following statutes: the Enterprise Act 2002 (mergers and market investigations); the Communications Act 2003 (as amended by s 87 Digital Economy Act 2017); the Postal Services Act 2011; the Electricity Act 1989; the Energy Acts of 2004 and 2010; the Financial Services (Banking

Reform) Act 2013; and the Payment Services Regulations 2009. These types of proceedings are explained in the CAT Guide at paragraphs 2.11–2.49.

Applications for review of merger and market investigation decisions

Mergers

1.95 Part 3 of the Enterprise Act 2002 provides that where the CMA believes that a relevant merger situation has been created or believes that arrangements are in place that will result in a merger, and where it believes that this may be expected to result in a substantial lessening of competition within any market in the UK for goods or services, it must make a reference to the chair of the CMA for the constitution of a group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 ('ERRA13'). Where the CMA considers that a merger has resulted or may be expected to result in a substantial lessening of competition, it must decide what action to adopt.[174]

Market investigations

1.96 Part 4 of the Enterprise Act 2002 provides that the CMA may make a reference to its chair for the constitution of a group under Schedule 4 to the ERRA13 if the CMA has reasonable grounds to believe that there are features of a market in the UK for goods or services that prevent, restrict, or distort (p. 40) competition.[175] If the reference is made, the CMA group must consider whether in fact the features prevent, restrict, or distort competition in the UK.

Notice of application for review

1.97 Any person aggrieved by a decision of the CMA or the Secretary of State in connection with a merger or investigation may make an application to the CAT for a review under section 120 (mergers) or section 179 (market investigations) of the Enterprise Act 2002. A 'decision' includes a failure to take a decision. A decision 'in connection with' covers an application for disclosure or more time in which to respond to the CMA.[176] Unlike in the case of appeals under the Competition Act 1998, there is no list of reviewable decisions in the Enterprise Act 2002. Under rule 25 of the CAT Rules an application for review is made in a notice of application. Rule 26 of the CAT Rules provides that CAT rules 9–16 (most of those concerning appeals under the 1998 Act) are to apply to applications for review under the Enterprise Act 2002, with certain necessary modifications. Consequently, the requirements as to the form of the application and the defence apply to applications for review and the respondent's defence.

Person aggrieved

1.98 Applications for review may be made by a person aggrieved by the decision. The category of persons aggrieved is wide.[177]

Time limits in the case of reviewing merger decisions[178]

1.99 Rule 25(1) of the CAT Rules provides that an application under section 120 of the Enterprise Act 2002 must be made within four weeks of the date on which the applicant was notified of the disputed decision or the date of the publication of the decision, whichever is earlier. In *Federation of Wholesale Distributors v OFT*[179] the CAT stated that time starts to run from the date on which the decision was notified to the applicant or published, and not from the date of the press announcement of the fact of the decision. There is often a need to proceed promptly in reviewing a merger decision and the CAT Guide requires that the applicant notify the Registry as soon as it becomes likely that an application will be made. Where possible the applicant should serve the application upon the respondent and interested third parties directly, as well as filing the application with the Registry.

Time for service of the defence

1.100 By virtue of CAT rule 26(2), time for service of the defence in an application for review of a merger decision is abridged to four weeks.

Time limits in the case of reviewing market investigation decisions[180]

(p. 41) **1.101** CAT rule 25(2) provides that an application under section 179(1) of the Enterprise Act 2002 must be made within two months of the date on which the applicant was notified of the disputed decision, or the date of the publication of the decision, whichever is earlier. With analogy to the position for merger decisions, a press announcement does not amount to 'notification' of the applicant within the meaning of the rule.

Time for service of the defence

1.102 Time for service of the defence in an application for review of a market investigation decision is six weeks, as required by CAT rule 15(1).

Powers of the CAT on an application for review

1.103 Under section 120(5) (mergers) and section 179(5) (market investigations) of the Enterprise Act 2002, the CAT may dismiss the application or quash the whole or part of the decision to which it relates. Where the CAT quashes the whole or part of the decision it may refer the matter back to the decision maker to reconsider and make a new decision in accordance with the CAT's ruling.

Appeals against penalties in merger and market investigation decisions

1.104 In the case of merger investigations the CMA may impose penalties for failure to comply with a notice requiring production of documents or information of the attendance of witnesses.[181] Any person aggrieved by the imposition of the penalty, or its amount, or the date by which the penalty is to be paid may appeal to the CAT.[182] Similar provisions apply in the case of market investigations.[183]

CAT rule 28(1) provides that an appeal against a penalty imposed by the CMA must be made by sending a Notice of Appeal to the Registrar so that it is received within twenty-eight days, which begins in respect of section 110 and 174A penalties on the day the notice of penalty is served on the relevant person, and, in respect of section 112(3) penalties, on the day the person was notified of it. The CMA must lodge its defence within three weeks of the date on which it receives the Notice of Appeal (CAT rule 28(2)).

3. Grounds of review

Judicial review principles

1.105 Section 120(4) (mergers), section 179(4) (market investigations) of the Enterprise Act 2002, and section 194A Communications Act 2003, as amended by section 87 Digital Economy Act 2017 (Ofcom decisions) require the CAT, in determining applications for review, to 'apply the same principles as would be applied by a court on an application for judicial review'. (p. 42) It follows that, unlike appeals under the Competition Act 1998, such applications are not appeals on the merits.

Same principles apply in the CAT and in Administrative Court

1.106 Although the CAT is a specialist competition tribunal, it does not scrutinize decisions with greater intensity than the Administrative Court does on an ordinary judicial review. While the CAT's high level of expertise in its specialist area has been acknowledged judicially,[184] such arguments about differing intensity of review or application of judicial review principles have been rejected.

In *OFT v IBA Health Ltd*[185] the Court of Appeal held that section 120(4) required the CAT to apply the same principles as the Administrative Court. The CAT emphasized the same point in *British Sky Broadcasting Group plc v (1) Competition Commission (2) Secretary of State for Business, Enterprise and Regulatory Reform*,[186] in which it recognized that it should use its specialist expertise wherever possible when reviewing the validity of findings and the lawfulness of decisions in the context of section 120 reviews, but commented that this did not mean the CAT was applying the principles of judicial review 'in a different way from the Administrative Court'.[187] The CAT's view on this point was subsequently endorsed on appeal.[188] Lord Justice Lloyd stated:[189]

> [T]he Tribunal is to apply the normal principles of judicial review, in dealing with a question which is not different from that which would face a court dealing with the same subject-matter. It will apply its own specialised knowledge and experience, which enables it to perform its task with a better understanding, and more efficiently. The possession of that knowledge does not in any way alter the nature of the task.

Relevant grounds of review

1.107 Grounds of review are often categorized under three headings: illegality, substantive errors, and procedural unfairness. The grounds reflect the limited extent to which the courts impugn administrative decisions in a judicial review procedure. Essentially, they review the legality of decisions and the process by which the decision is made.

Illegality

Mistake of law

1.108 A decision will be unlawful if the decision maker misunderstands the scope of its duties or powers or applies the wrong legal test. Therefore, in *IBA Health Ltd v OFT* the CAT concluded that the OFT had applied the wrong test in applying section 33 of the Enterprise Act 2002 when refusing to refer a (p. 43) merger to the Competition Commission.[190] Likewise in *Groupe Eurotunnel SA v Competition Commission*[191] the CAT held that the Competition Commission had failed to properly consider whether Eurotunnel had acquired an 'enterprise' (for the purposes of section 129(1) of the Enterprise Act 2002). As a result, it had not satisfactorily determined that it had jurisdiction to determine the matter.

Substantive grounds of challenge

Irrationality

1.109 Irrationality highlights the limited extent to which the court will review errors of fact or of appreciation of the facts. The ground is often termed 'Wednesbury unreasonableness' because the courts will only impugn a decision when the decision maker has acted in such a way that no reasonable decision maker could have adopted the decision on the basis set out by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*:

> It may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere.[192]

Judicial interference is particularly slow when the reviewable decision is made by an expert. Generally, the more complex or political the decision, the greater the margin of error left to

the decision maker and the less likely it is that the courts will intervene.[193] As Moses LJ explained in *Everything Everywhere Limited v Competition Commission*:[194]

> Everything Everywhere cannot successfully impugn the Commission's assessment of the adequacies of the evidence and material before it, unless that assessment was outwith the range of reasonable conclusions. It is not an exaggeration to describe that task as almost insuperable where the assessment is made by an expert tribunal in relation to matters of prediction and economic judgment.

In *Skyscanner v CMA*[195] the CAT summarized the proper approach to rationality challenges before it:

> (a) [A regulator] must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it.
>
> (p. 44) (b) The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the [decision maker], as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it.
>
> (c) The standard to be applied in judging the steps taken by the [decision-maker] in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test.
>
> (d) The Tribunal should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable competition authority could have been satisfied on the basis of the inquiries made.
>
> (e) A rationality test also applies to determine whether the [decision-maker] has a sufficient basis in light of the totality of the evidence available to it for making the assessments and in reaching the decisions it did.
>
> (f) It is not the function of the Tribunal to trawl through the contested decision with a fine-tooth comb to identify arguable errors; the decision must be read as a whole.

Irrationality is not an insuperable hurdle, as the *Skyscanner* case suggests. The CAT held that the CMA had acted irrationally when it accepted commitments to remedy a flaw in the market that were not sufficient to properly address the identified flaws.[196] That irrational decision was closely connected to the CMA's failure to take proper account of the evidence provided by Skyscanner.

When determining whether a decision is irrational, the available factual material will be reviewed in order to establish whether the decision maker was entitled to make a particular finding of fact. The relevant factual material may include witness statements from the respondent authority which serve to 'elucidate' the decision.[197] It is not enough for a challenger to demonstrate that the evidence gathered might have been relied upon to support alternative conclusions. In order for a decision to be irrational, it must be shown that the decision maker could not have drawn the conclusion it reached from the evidence available.[198]

The CAT has been prepared to find that a decision maker has acted irrationally when it failed to gather the relevant evidence to inform its decision: in *Unichem Ltd v OFT*[199] the CAT quashed a decision by the OFT not to refer a proposed merger to the Competition Commission, and remitted it back to the OFT for reconsideration. The CAT considered that matters material to the decision were not supported by evidence and the decision did not

therefore remain within the (p. 45) boundaries of reasonableness. Likewise, in *Stagecoach Group plc v Competition Commission*[200] the CAT upheld a challenge by Stagecoach to the Competition Commission's decision on the completed acquisition of Preston Bus Ltd by Stagecoach (the acquisition was agreed in 2008 and completed in January 2009). The CAT found that the Commission had failed to explain why, in assessing the effects of the merger, the choice of counterfactual had been based on an assumption that Stagecoach had *not* launched any bus services on the intra-urban bus services in Preston in June 2007, when (a) Stagecoach had in fact launched such services, and (b) the reasoning elsewhere in the decision (in particular, the analysis of Stagecoach's 'failing firm' defence) had taken this fact into account, being based on the position that actually existed as at September 2008 instead of a hypothetical position that disregarded events on the market.[201] The CAT further found that the Commission's inadequately justified choice of counterfactual had followed from its finding that Stagecoach's expansion onto intra-urban Preston routes in June 2007 had been undertaken with little regard for profit and normal considerations. The CAT did not consider that that finding was reasonably open to the Commission on the basis of the evidence that it had seen.[202]

The intrusiveness of a remedy required by the competition authority will be an important factor to be considered. In the case of a completed merger the merging parties had the foreseeable risk that the CMA may make an order for divesture. In contrast, an order for divestment in a market investigation may be more intrusive because it requires a change in the status quo. Nevertheless, in both cases the CAT will expect the CMA to have exercised care in the analysis and selection of the remedy required.[203]

Relevant/irrelevant considerations

1.110 The failure to take account of relevant considerations and, conversely, taking account of irrelevant considerations constitutes another possible 'substantive' ground for judicial review. In *Tesco plc v Competition Commission*[204] the CAT allowed an application for review under section 179 on the ground that in its Report the Competition Commission had failed to take account of certain matters which were relevant to its recommendation. As the CAT stated:[205]

> The grounds of judicial review are well-established. They frequently overlap with each other. It is not uncommon for a particular flaw in a decision or a decision-making process to fall within more than one ground. Failure of a decision-maker (p. 46) properly to take account of a relevant consideration in reaching its decision is among the grounds most frequently relied on in judicial review. It is sometimes considered under the broad label of irrationality, but is also (and perhaps more appropriately in the present case) treated in its own right as a ground of challenge to the validity of a decision. This ground, and its converse ground of taking account of an irrelevant consideration, clearly reflect the fact that judicial review is in general about legality and the decision-making process rather than the merits of a decision.

In reaching its decision, the CAT emphasized that it would not necessarily quash every decision in respect of which it is established that a relevant consideration has been left out of account. Rather, it would normally consider whether the factor could have been material to the challenged decision.[206]

Thus, in *Barclays Bank plc v Competition Commission*,[207] the Competition Commission's report on payment protection insurance (PPI) had imposed in its remedies package a prohibition on the sale of PPI at the point of sale of credit (the 'point of sale prohibition' (POSP)). The CAT quashed this determination and remitted the remedies issue back to the Competition Commission on the ground that the Competition Commission had failed properly to consider the loss of convenience arising from the POSP, which could

potentially have led to a reduced take-up of PPI. This loss of convenience was such a material factor that the CAT could not safely determine that the decision would have been the same had it been considered. The CAT stated:[208]

> it is not every perceived failure in fact-finding or analysis by a decision-making body which requires or permits its finding or decision to be quashed. The relevant failing must satisfy a materiality test. Generally, speaking, a relevant failing will require the finding or decision to be quashed unless the Tribunal is satisfied that a reasonable decision-maker in the position of the Commission would still have reached the same finding or decision. If a decision-making process which had not included that failing could have led a reasonable decision-maker to a different conclusion, then the relevant finding or decision will usually have to be quashed.

Proportionality

1.111 Regulators frequently take decisions that interfere with parties' rights that are protected either by EU law or by the law of the European Convention on Human Rights. Common examples include remedies imposed by a regulator following market investigations or as a result of merger control. When a challenge before the CAT concerns interests protected under EU or ECHR law, the CAT must assess that remedy by reference to a proportionality test (as indeed must the regulator when considering which remedy to implement).[209]

(p. 47) The proportionality tests under EU and Convention law are similar but differ to at least some extent.[210] The proportionality test, in the context of EU law, was summarized by the Supreme Court in *Lumsdon*. Lord Reid stressed that a court or tribunal should adopt the approach taken by the CJEU in such cases. The proper test breaks down into three elements:

- the measure in question must be effective to achieve the legitimate aim in question;
- it must be the least onerous measure that will meet that objective;
- and it must not produce adverse effects that are disproportionate to the aim pursued. [211]

The proportionality of a measure that interferes with the human rights of the parties, as protected under the European Convention, is assessed by reference to a slightly different test. The court should determine:[212]

- whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
- whether the measure is rationally connected to the objective;
- whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective;
- whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

Notwithstanding the differences in formulations of the test under EU and ECHR law, the courts have examined proportionality by reference to three broad questions, namely: (a) whether the decision (or regulations) are suitable or necessary to achieve a legitimate objective; (b) whether they are necessary to achieve that objective or whether there were

equally effective but less restrictive measures; and (c) whether they strike a fair balance between the legitimate objective and the interference with the individual's rights.[213]

(p. 48) Any proportionality assessment involves a significant degree of judgment, in particular when weighing up the importance of the public interest pursued against the adverse effects it will produce.[214] In such cases, the decision maker is granted a 'margin of appreciation'. That margin of appreciation extends to the methodology employed by the regulator in the course of its decision making.[215] This does not mean that the claimant must prove 'manifest inappropriateness'. There is simply a recognition that domestic courts cannot act as primary decision makers and must attach appropriate weight to informed legislative choices.[216]

Fairness

Elements of procedural fairness

1.112 Competition authorities have a duty to act fairly and in accordance with the rules of natural justice protected by the common law and Article 6 of the European Convention on Human Rights. Procedural fairness may be breached when there is unequal treatment between two rival bidders.[217] The core elements of procedural fairness include the right to know the case (or evidence) against you and the right to be heard and make submissions. However, fairness cannot be condensed into a rigid set of steps, rules, or principles:

> What is 'fair' is something that is not immutable: it may develop over time in order to adapt to or take account of changing circumstances. It is certainly context sensitive. Above all else, it is a standard that is flexible. By this, we do not mean that the standard of fairness can be sacrificed: in that respect, the rule is much closer to an absolute. However, what is, or is not, 'fair' in a given case depends on all of the circumstances. What can be said with confidence is that one standard does not fit all cases.[218]

The CAT has accepted that a CMA investigation is a 'criminal' proceeding for the purposes of Article 6 of the European Convention on Human Rights. As a consequence, a party to those proceedings benefits from Articles 6(2) and (3) including the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', the presumption of innocence, and the right to 'examine or have examined witnesses against him.' However, the fact that the procedure is 'criminal' does not mean that a regulator (or the CAT) must be satisfied 'beyond reasonable doubt' on the relevant facts.[219]

Substantive fairness

(p. 49) **1.113** Whereas procedural fairness is well established, substantive unfairness is not a distinct legal criterion. In *Gallaher*[220] the OFT had found that two cigarette manufacturers, Gallaher and Imperial Tobacco, had restricted retailers' ability independently to determine retail selling prices. Gallaher had entered into an early resolution agreement ('ERA') and consequently did not appeal the finding of infringement made against it. After Imperial Tobacco and several other retailers successfully appealed the decision made in respect of them, the Court of Appeal refused Gallaher permission to appeal out of time.[221] Gallaher nevertheless sought repayment of the fine on the basis that a retailer, TM Retail Group Ltd, had also entered into an ERA but had (erroneously) been promised by the OFT that it would be able to take advantage of any successful appeals. The Supreme Court dismissed Gallaher's argument that it had been unfairly treated. Substantive unfairness was not a separate ground of review. As Lord Sumption explained: 'Absent a legitimate expectation of a different result arising from the decision-maker's

statements or conduct, a decision which is rationally based on relevant considerations is most unlikely to be fair in any legal cognisable sense.'

The 'gist' of the case

1.114 The right to know the 'case against you' is a fundamental feature of procedural fairness. For example, in *Sports Direct International plc v Competition Commission*, the claimants challenged the Competition Commission's decision to redact material from the working papers of a merger file.[222] Similarly, in *BMI v Competition Commission*, the CAT held that the Competition Commission acted unfairly when it provided only limited access to material in a data room on restrictive terms.[223] Even where a regulator may not be able to provide all of the confidentiality materials that it holds, it may be obliged to provide at least the 'gist' of the case or evidence in question:

> what constitutes the 'gist' of a case is acutely context-sensitive. Indeed, 'gist' is a particularly vague term. Competition cases are redolent with technical and complex issues, which can only be understood, and so challenged or responded to, when the detail is revealed. Whilst it is obviously, in the first instance, for the Commission to decide how much to reveal when consulting, we have little doubt disclosing the 'gist' of the Commission's reasoning will often involve a high level of specificity.[224]

The obligation to provide a party with the 'gist' of the case is closely connected to the requirement that parties should be able to make proper, relevant, and (p. 50) informed submissions.[225] For example, a regulator should not rely on what a third party tells them without providing the entity concerned with an opportunity to make submissions on that question.[226] If the regulator decides that fairness requires the disclosure of a particular document, or body of evidence, but that the material in question is too confidential to share, the ordinary position is that the regulator should not rely on that material.[227] Evidence should not be relied upon without providing a proper opportunity to the 'other' side to comment on it.

Bias

1.115 The requirement that decisions should not be taken by an individual who is biased, or appears to be biased, provides a further aspect of procedural fairness. The Tribunal should ask itself whether or not the decision maker was biased or if a 'fair minded observer' would conclude that there was a real possibility of bias.[228] In *Competition Commission v BAA Ltd*[229] the Court of Appeal overturned the CAT's decision that a decision of the Competition Commission should be set aside on the grounds of apparent bias. One of the members of the Competition Commission's panel of decision makers was an adviser to a pension fund that had an active interest in Manchester airport (a commercial rival of BAA). The Court of Appeal concluded (differing from the CAT) that he was 'too remote' from the other entity for apparent bias to be a real concern.[230]

In *British Sky Broadcasting Limited v Office of Communications*[231] two allegations of bias were raised. The background was that the CAT had upheld Sky's appeal against Ofcom's decision that Sky's wholesale prices charged to BT for access to premium sports channels prevented effective competition. The Court of Appeal allowed BT's appeal to the extent that the CAT had not considered the competitive position of other retailers (e.g. other than BT and Virgin) and remitted this matter back to the CAT for determination. On the issue of bias BT first argued that the constitution of the tribunal should be different for the purposes of the remittal, alleging there would be apparent (or confirmation) bias, given that the CAT had broadly found in Sky's favour at the first appeal. The CAT rejected this argument on the basis that a fair-minded observer would not consider a real possibility of bias against BT on the remitted matter. BT separately argued that the Chairman should have recused himself on the basis of a speech given to a meeting of anti-trust lawyers. In the speech, he cautioned against abandoning appeals on (p. 51) the merits even in regulatory matters.

Given OFCOM's public stance against an appeal on the merits in favour of the more restricted judicial review, BT argued that the fair-minded observer could have believed that the Chairman was referring to the particular Sky case. On the basis that doubt should be resolved in favour of recusal, the Chairman recused himself from determination of the remitted matter. It was further determined that that neither wing member was tainted by the apparent bias and there was no need therefore for them to stand down as well.[232]

Footnotes:

1 For practice and procedure in Scotland see Chapter 23, and in Northern Ireland see Chapter 24; for appeals to the Court of Appeal see Chapter 18.

2 Available on the CAT website: <www.catribunal.org.uk/240/Rules-and-Guidance.html>.

3 It is not necessarily an abuse for a claim to be brought in both jurisdictions. See *Deutsche Bahn AG and Others v MasterCard Incorporated and Others*, Judgment (Abuse of Process Point) [2016] CAT 13, in which MasterCard applied to have the claim in the CAT struck out on the basis the claimants had lodged the exact same claim in the High Court, which had been ongoing for three years. At para 32, the CAT considered that the fact there are two overlapping jurisdictions does not mean that a claimant must make an irrevocable election as to which it pursues. A claimant resorting to two overlapping jurisdictions 'is not in itself an abuse, and indeed may be well justified when the second is invoked because of a potential obstacle to his claim that applies only in the first [in this case a limitation point]. The question is whether such conduct is oppressive or amounts to harassment of the defendant' (para 33).

4 The B&PCs became operational on 2 October 2017. See also CPR r 30.8 and 'Practice Direction: Competition Law Claims relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998', at Section B of the White Book Service.

5 In the Visa Interchange Fee litigation, a claim brought in the Chancery Division by Sainsbury's Supermarkets Ltd (Claim No HC13C05443) was transferred to the Commercial Court so that it could be heard at the same time as other similar proceedings commenced by other retailers.

6 Para 2(a) of the Section 16 Enterprise Act 2002 Regulations (SI 2015/1643) adopted pursuant to section 16(1)(a) of the Act. The regulations make similar provision about transfer in Scotland and Northern Ireland.

7 Section 16(6) of the Act.

8 Section 16(4) of the Act.

9 [2015] EWHC 3472 (Ch): see also *(T) Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2016] CAT 21; [2017] Comp AR 58. See also *Agents' Mutual Ltd v Moginie James Ltd* [2016] CAT 15; [2017] Comp AR 39, Order of the High Court dated 5 July 2016, which transferred the competition issues in both cases to the CAT for determination.

10 [2018] EWCA 1536 (Civ), at 354–357.

11 [2016] EWHC 958 (Pat). FRAND: fair, reasonable, and non-discriminatory royalties.

12 [2017] CAT 22, at 11 (permission to appeal): [2017] CAT 15 (main judgment): see also *(T) Agents' Mutual Ltd v Gascoigne Halman Ltd (t/a Gascoigne Halman)* [2016] CAT 21; [2017] Comp AR 58. See also *Agents' Mutual Ltd v Moginie James Ltd* [2016] CAT 15;

[2017] Comp AR 39, Order of the High Court dated 5 July 2016, which transferred the competition issues in both cases to the CAT for determination.

13 Claim no CP-2017-000022.

14 Gascoigne Halman Ltd v Agents'Mutual Ltd [2019] EWCA Civ 24, at para 8: See the argument advanced at para 18 in *Unwired Planet* [2016] EWHC 958 (Pat). Also note the comment by the CAT in *Sainsbury's Supermarkets v MasterCard* [2016] CAT 11; [2016] Comp AR 33, at para 3, as to whether the issue of declaratory relief should be remitted back to the High Court (the case having been transferred from the High Court to the CAT). In fact, on appeal the court of appeal made a declaration that the schemes agreement breached Article 101(1).

15 See Chapter 2.

16 See the Practice Direction on Pre-Action Conduct, at Section C of the White Book Service.

17 See, for example, *Cooper Tire & Rubber v Shell Chemicals UK Ltd* [2010] EWCA Civ 864. See also Chapter 5, Jurisdiction.

18 CPR, Part 22.

19 See *BAO Xiang International Garment Centre v British Airways PLC* [2015] EWHC 3071 (Ch), where claims relating to the air cargo cartel were struck out.

20 For a claim in the Commercial Court, the particulars of claim should be limited to twenty-five pages unless permission for a longer statement of case has been obtained: Admiralty and Commercial Courts Guide, section C1.1.

21 See Chapter 7, Strike-Out and Summary Judgment.

22 *Cooper Tire* [2010] EWCA Civ 864, para 43. See also *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 1190, para 32. See also *Arcadia Group Brands and ors v Visa Inc. and ors* [2014] EWHC 3561 (Comm), paras 33–34 (confirmed on appeal [2015] EWCA Civ 883).

23 *Enron Coal Services v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, para 8.

24 [2016] EWHC 1207 (Ch), para 17: see also *Chandra v Brooke North* (a firm) [2013] EWCA Civ 1559, at 92.

25 CPR, PD 6B, para 3.1: see Chapter 5, Jurisdiction , at paras 5.07 – 5.11

26 CPR r 11(4).

27 CPR r 11(5).

28 CPR r 11(8). A defendant that appeals a decision dismissing the jurisdiction application and wishes to preserve objection to the jurisdiction may apply for a stay of the proceedings pending the appeal: *Toshiba Carrier UK Ltd v KME Yorkshire Ltd* [2012] EWCA Civ 1190. An alternative is to agree an extension of time for filing the further acknowledgement of service.

29 CPR r 15.8.

30 *Hendry and ors v World Professional Billiards and Snooker Association Ltd* [2002] UKCLR 5.

31 See Chapter 16, Damages, at para 16.52.

32 CPR r 20.6.

33 CPR r 20.7.

34 Schedule 8A of the Competition Act 1998, paras 37–41 (Part 9), introduced by the Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (SI 2017/385): para 16 further provides for contribution between cartelists where one is an immunity applicant.

35 Part 9, Schedule 8A came into force on 9 March 2017 and applies to competition claims, including contribution proceedings, relating to loss or damage suffered on or after 9 March 2017, as a result of a competition law infringement that occurs on or after this date.

36 A request for further information may, for example, be appropriate in the context of a cartel damages action where there is an asymmetry of information as between claimant and participants in the cartel: *National Grid Electricity Transmission plc v ABB Ltd* [2014] EWHC 1555 (Ch), paras 40–41.

37 *National Grid Electricity Transmission plc v ABB Ltd and ors* [2009] EWHC 1326 (Ch), para 47, where it was held to be oppressive to require a party to answer requests well in advance of witness statements. See also *National Grid Electricity Transmission plc v ABB Ltd and ors* [2012] EWHC 869 (Ch), paras 71–79, and *National Grid Electricity Transmission plc v ABB Ltd* [2014] EWHC 1555, para 41.

38 See *Secretary of State for Health v Servier Laboratories Ltd* ([2016] EWHC 2381 (Ch)), in which Servier successfully applied to re-amend its defence under CPR r 17.1(2)(b).

39 CPR r 17.4(2): see *Nokia Corp v AU Optronics Corp* [2012] EWHC 731. See also the cases of *Wm Morrison Supermarkets Plc v MasterCard Incorporated* [2013] EWHC 3271 (Comm) and *Sainsbury's Supermarkets Ltd* [2016] CAT 11, at para 96.

40 CPR r 38.6: *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472.

41 CPR r 38.2(2)(c).

42 *Electrical Waste Recycling Group Ltd v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch). See also *Leaflet Company Ltd v Royal Mail Group Ltd* [2009] UKCLR 323.

43 Section 47A(3)(a).

44 Section 47A(3)(b).

45 Section 47A(3)(c).

46 *Unwired Planet* [2016] EWHC 958 (Pat).

47 See Chapter 16, Damages.

48 See Chapter 8, Interim Remedies.

49 See Chapter 2, Parties and Group Litigation.

50 Competition Appeal Tribunal Rules 2015, SI 2015/1648. All cases commenced on or after 1 October 2015 are governed by the CAT Rules 2015. Cases commenced before 1 October 2015 are governed by the CAT Rules 2003. These are available on the CAT's website: <www.catribunal.org.uk>.

51 The Guide to Proceedings explains in straightforward terms how cases commenced on or after 1 October 2015 are conducted before the CAT. For cases commenced before 1 October 2015, the previous 2005 version of the Guide to Proceedings will still be relevant. These are also available on the CAT's website.

52 CAT r 30(2).

53 CAT r 30(3): see also the CAT Guide, paras 5.16–5.35.

54 CAT Guide, at para 5.25: see also Lloyd LJ in *Enron Welsh & Scottish Railway Ltd v Enron Coal Services 'Enron II'* [2011] EWCA Civ 2, para 139.

55 CAT r 30(4).

56 CAT r 30(5): refer also to the CAT Guide, paras 5.28–5.30.

57 CAT Guide, at para 5.31.

58 CAT r 30(5)(c).

59 CAT r 30(6).

60 CAT r 33(7) and (8).

61 See Chapter 8, Interim Remedies and Chapter 17, Final Orders. The CAT does not have jurisdiction to grant injunctions in Scotland where the application must be made to the Court of Session.

62 CAT r 31(1).

63 See Chapter 5, Jurisdiction at para 5.12

64 See the case of *DSG Retail Ltd v MasterCard Inc* [2015] CAT 7; [2015] Comp AR 199. See also the Order made 9 September 2016 in *Dixons Carphone Plc (UK) v MasterCard Incorporated and others* Case No 1265/5/7/16.

65 CAT r 33(4).

66 CAT r 33(6).

67 CAT r 34(1).

68 CAT r 34(3).

69 CAT r 34(4).

70 CAT r 34(5).

71 CAT r 34(6).

72 CAT r 34(7).

73 Cases 1175–1178/5/7/11.

74 *Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2.

75 [2012] CAT 4; [2012] Comp AR 179, paras 6–8. See also *Albion Water Ltd v Dŵr Cymru Cyfyngedig* [2012] CAT 17; [2012] Comp AR 403.

76 CAT r 32(2).

77 Such a consequential order for costs was made in *The Consumers' Association v JJB Sports plc* [2009] CAT 2; [2009] Comp AR 117 (Order of the Tribunal dated 14 January 2008). In *Deutsche Bahn AG & Others v Morgan Crucible Company PLC & Others* [2011] CAT 16; [2011] Comp AR 569, the CAT gave permission for one of the claimants, Angel Trains Ltd, to withdraw its claim with no consequential order as to costs: see *Deutsche Bahn* (Order of the Chairman (Withdrawal of claim by Twenty-First Claimant)) dated 19 April 2011.

78 CAT r 35(7).

79 CAT r 35(6).

80 See Chapter 16, Damages, at para 16.51.

81 At paras 16 and 38 respectively. Part 9 applies to competition claims relating to loss or damage suffered on or after 9 March 2017 as a result of an infringement of competition law that takes place on or after this date.

82 CAT Guide, at paras 5.139–5.149.

83 *Breasley Pillows Limited and Others v Vita Cellular Foams (UK) Limited* [2016] CAT 8; [2016] Comp AR 15.

84 Para 5.146.

85 *Socrates Training Limited v The Law Society of England and Wales* [2016] CAT 10. In this ruling, the president of the CAT stated that 'the measure of cost capping under the FTP is not to be approached as a form of *ex ante* standard assessment', and that 'there is no magic formula which produces an objectively "correct" figure' (paras 14 and 15). The final costs ruling is at [2017] CAT 12.

86 CAT Guide, paras 5.80–5.85. See also Chapter 15, Hearings.

87 CAT r 75(5).

88 CAT r 75(4).

89 CAT r 75(6).

90 CAT r 75(7).

91 CAT r 76(4)–(5).

92 CAT Guide, at para 6.7.

93 CAT r 76(ii).

94 *Imperial Tobacco v Office of Fair Trading* [2011] CAT 41, at para 46.

95 *Claymore Dairies Ltd and Express Dairies plc v Director General of Fair Trading* [2003] CAT 3; [2004] Comp AR 1, para 122.

96 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 6; [2002] Comp AR 226, para 90.

97 [2003] CAT 3; [2004] Comp AR 1.

98 *Freeserve.com plc v Director General of Telecommunications* [2002] CAT 8; [2003] Comp AR 1.

99 *Cityhook Ltd v OFT* [2007] CAT 18; [2007] Comp AR 813.

100 Ibid, para [222] onwards.

101 *R (on the application of Cityhook Ltd) v OFT* [2009] EWHC 57 (Admin); [2009] UKCLR 255, *per* Foskett J.

102 [2007] CAT 6; [2007] Comp AR 614.

103 [2007] CAT 18; [2007] Comp AR 813.

104 [2008] EWCA Civ 1373; [2009] 1 WLR 1565.

105 *Napp Pharmaceutical Holdings Ltd (Interim Relief) v Director General of Fair Trading* [2001] CAT 1; [2001] Comp AR 1. See also Chapter 8, Interim Remedies.

106 Sub-section (2)(c) has been repealed.

107 [2008] EWCA Civ 536, at para 112.

108 [2011] CAT 41.

109 Hansard 18 June 1998 col 496, citing the then Minister for Competition and consumer Affairs, as cited in *Napp v OFT* CAT 1, at para 118.

110 [2005] CAT 25, at [132].

111 *Freeserve.co. v Director of Telecommunications* [2003] CAT 5, at para 113.

112 *Aberdeen Journals Ltd v Director General of Fair Trading* [2002] CAT 4, at para 191.

113 [2018] CAT 11 (judgment): [2018] CAT 12 (remittal and permission to appeal ruling); also Skyscanner v CMA [2014] CAT 16 at para 174; *Freeserve.co. v Director of Telecommunications* [2003] CAT 15, at para 2.

114 [2002] CAT 4, at para 189.

115 *Claymore Diaries v OFT* [2005] CAT 30, at para 141.

116 *OFCOM v Floe Telecom* [2006] EWCA Civ 768, at paras 30–34.

117 *OFCOM v Floe Telecom* [2006] EWCA Civ 768, at paras 28–29.

118 The Communications Act 2003 was amended by the Digital Economy Act 2017, s 87; see also the CAT Guide, at paras 2.29–2.38.

119 For a discussion of the CAT's powers in disposing of an appeal, see *Vodafone Ltd v BT* [2010] EWCA Civ 391.

120 Section 195(5).

121 Communications Act 2003, s 193, the CAT Guide, para 2.38, and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, SI 2004/2068. See, for example, the mobile phone price control appeals brought against OFCOM by Hutchison 3G and British Telecom in relation to the control of mobile phone wholesale termination charges, dated 18 March 2008; Competition Commission's decision of 16 January 2009, *BT v OFCOM* [2009] CAT 11, *Mobile Call Termination Statement* 2, *BT and Ors v OFCOM* [2013] EWCA Civ 154, *BSkyB v OFCOM* [2013] CAT 8.

122 [2015] CAT 13, at para 18.

123 CAT Guide, at para 2.44.

124 *Federation of Wholesale Distributors v OFT* [2004] CAT 11; [2004] Comp AR 764, para 22.

125 *Hasbro UK Ltd v Director General of Fair Trading* [2003] CAT 1; [2003] Comp AR 47.

126 See Chpater 4, Limitation Periods, at paras 4.36-4.38; *Fish Holdings v OFT* [2009] CAT 34; [2010] Comp AR 169. *Prater v OFT* [2006] CAT 11; [2006] Comp AR 624. See also *Somerfield Stores v OFT* [2013] CAT 5; [2013] Comp AR 165, and the Court of Appeal ruling in [2014] EWCA Civ 400. See also the CAT Guide, at paras 4.20–4.21.

127 CAT Guide, at paras 4.27–4.39.

128 CAT r 9(3).

129 CAT r 9(4)(a)–(d).

130 CAT r 9(4)(h).

131 CAT Guide, at para 4.42.

132 CAT r 9(4)(f).

133 CAT r 9(4)(g).

134 CAT r 9(6).

135 CAT Guide, at paras 4.45–4.48.

136 *Floe Telecom Ltd v OFCOM* [2004] CAT 7; [2004] Comp AR 559.

137 *Albion Water Ltd v Director General of Water Services* [2005] CAT 23; [2005] Comp AR 1129.

138 *Independent Media v OFCOM* [2008] CAT 13; [2008] Comp AR 161, at paras 82–83; *Carphone Warehouse v OFCOM (Local Loop Unbundling)* [2009] CAT 30 (decided under the 2003 CAT Rules); CAT Guide, at para 4.50.

139 *National Grid plc v Gas and Electricity Markets Authority* [2009] CAT 14; [2009] Comp AR 282, para [33].

140 See Chapter 7, Strike-Out and Summary Judgment.

141 Such appeals are no longer on the merits in respect of decisions from Ofcom made on or after 1 August 2017, by virtue of s 87 of the Digital Economy Act 2017. In the case of proceedings under the Civil Aviation Act 2012 the CAT may confirm or set aside a CAA decision on the basis of an error of fact or of law: see CAT Guide, at para 2.46.

142 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1; [2002] Comp AR 13, para 117.

143 [2009] CAT 14; [2009] Comp AR 282, para 33. See also *Albion Water Ltd v Water Services Regulation Authority* [2006] CAT 36; [2007] Comp AR 328, where the CAT ruled that it had jurisdiction to consider the issue of dominance even though the regulator had not reached a clear view.

144 [2008] CAT 31; [2009] Comp AR 28, para 70.

145 [2014] UKSC 42; [2014] 4 All ER 907 (*the 08x number case*): see in particular paras 13, 24, and 46.

146 *British Telecommunications Plc v OFCOM and others* [2011] EWCA Civ 245; [2011] 4 All ER 372.

147 *Everything Everywhere Ltd v Competition Commission and ors* [2013] EWCA Civ 154, at para 24.

148 [2008] CAT 31; [2009] Comp AR, at para 72. *T-Mobile (UK) Ltd v OFCOM* [2008] CAT 12, para 82, cited with approval in *Vodafone v OFCOM* [2008] CAT 22, paras 45–46. See also *British Telecommunications Plc and ors v OFCOM* [2014] CAT 14, at para 67, following a citation from *BSkyB v OFCOM (Pay TV*) [2012] CAT 20, at para 87, approved on appeal by the Court of Appeal in the *Pay TV* case [2014] EWCA Civ 133, at para 88.

149 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1; [2002] Comp AR 13, para 499.

150 See *Argos Ltd v OFT* [2006] EWCA Civ 1318; [2006] UKCLR 1135, para 230.

151 Competition Act 1998, Sch 8, para 3A(3).

152 *British Telecommunications Plc and ors v OFCOM* [2014] CAT 14 (fresh evidence admitted) and *BT and Gamma v OFCOM* [2015] CAT 6 (fresh evidence refused).

153 *Ping Europe Ltd v CMA* [2018] CAT 8; *Tesco v OFT* [2012] 31; *Napp v DGFT* [2002] CAT 1 and [2001] CAT 3.

154 *Imperial Tobacco v Office of Fair Trading* [2011] CAT 41, at para 61.

155 *Aberdeen Journals Ltd v Director General of Fair Trading* [2002] CAT 4; [2002] Comp AR 167.

156 *Argos Ltd and Littlewoods Ltd v OFT* [2003] CAT 16; [2004] Comp AR 80. See Chapter 12, Factual Evidence.

157 *R v Panel on Take-Overs and Mergers, ex p Datafin Plc* [1987] QB 815, CA, 847 *per* Lloyd LJ.

158 *Sivasubramaniam v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475.

159 [2002] CAT 6; [2002] Comp AR 226, para 90. What constitutes an appealable decision is further discussed at pars 1.61 – 1.63

160 See also the Judicial Review Guide 2018, chapter 11.

161 See generally the Judicial Review Guide 2018.

162 CPR r 54.7.

163 CPR r 54.1.

164 See Judicial Review Guide 2018, chapter 8.

165 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] AC 617, 653, *per* Lord Scarman.

166 *R v Criminal Injuries Compensation Board, ex p P* [1995] 1 WLR 845, 863; [1994] EWCA Civ 34.

167 *R v Secretary of State for the Home Department ex p Swati* [1986] 1 All ER 717; [1986] 1 WLR 477.

168 CPR r 54.12.

169 However, see the judgment in *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346 on the exceptional circumstances in which costs may be awarded. A successful defendant will ordinarily be entitled to recover the costs of the acknowledgement of service.

170 See Chapter 4, Limitation Periods, para 4.39.

171 See Judicial Review Guide 2018, chapter 7.

172 CPR r 54.8.

173 See the comments of Carnwath LJ and Brooke LJ in *R (Ewing) v Office of the Deputy Prime Minister* [2005] EWCA Civ 1583, paras 43 and 51–53.

174 Enterprise Act 2002, ss 22–3, as amended by Schedule 5, para 67, and ss 35–41, as amended by Schedule 5, para 75 ERRA13.

175 Ibid, s 131, as amended by Schedule 5, para 163, ERRA13.

176 *Sports Direct International plc v Competition Commission* [2009] CAT 32; *J Sainsbury's plc and Asda Group Limited v CMA* [2019] CAT 1.

177 *IBA Health Ltd v OFT* [2003] CAT 28; [2004] Comp AR 294. *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 34; [2009] Comp AR 127.

178 See also Chapter 4, Limitation Periods.

179 [2004] CAT 11; [2004] Comp AR 764, para 23.

180 See also Chapter 4, Limitation Periods.

181 Enterprise Act 2002, s 110.

182 Ibid, s 114.

183 Ibid, s 176.

184 See the comments of Lord Justice Richards in *National Grid plc v Gas and Electricity Markets Authority* [2010] EWCA Civ 114; [2010] UKCLR 386, at paras 25–26.

185 [2004] EWCA Civ 142; [2004] 4 All ER 1103.

186 [2008] CAT 25; [2008] Comp AR 223.

187 Ibid, para 63. See more generally paras 59–67.

188 See [2010] EWCA Civ 2; [2010] 2 All ER 907, paras 28–41 (although the CAT's decision was reversed in part on other grounds).

189 Ibid, para 37.

190 [2003] CAT 28, [2004] Comp AR 294; appeal dismissed on different grounds.

191 [2013] CAT 30; [2014] Comp AR 77.

192 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 234, *per* Lord Greene MR. See also *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410, *per* Lord Diplock: 'By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness".'

193 *OFT v IBA Health Ltd* [2004] EWCA Civ 142; [2004] 4 All ER 1103, paras 100–101, *per* Carnwath LJ, cited by the CAT in *Unichem Ltd v OFT* [2005] CAT 8; [2005] Comp AR 907, paras 162–167.

194 [2013] EWCA Civ 154.

195 *Skyscanner v CMA* [2014] CAT 16; [2015] Comp AR 41, para 34, summarizing the conclusions reached in *BAA Ltd v Competition Commission (No 2)* [2012] CAT 3; [2012] Comp AR 134. See also *SRCL Limited v Competition Commission* [2012] CAT 14; [2012] Comp AR 17, para 33.

196 *Skyscanner v CMA* [2014] CAT 16; [2015] Comp AR 41, para 156.

197 *Celesio AG v OFT* [2006] CAT 9; [2006] Comp AR 515, para 170.

198 *Stagecoach Group Plc v Competition Commission* [2010] CAT 14; [2010] Comp AR 267, para 45; also *R v Parliamentary Commissioner for Administration ex p. Balchin (No 1)* [1998] 1 PLR 1, at para 77

199 [2005] CAT 8; [2005] Comp AR 907, paras 263 and 278.

200 [2010] CAT 14; [2010] Comp AR 267.

201 Ibid, para 130.

202 Ibid, paras 131–132.

203 *Intercontinental Exchange Inc v CMA* [2017] CAT 6 at [101], citing *BAA v CC* [2012] CAT 3 at 20 and *Ryanair Holdings plc v CC* [2014] CAT 3 at [182].

204 [2009] CAT 6; [2009] Comp AR 168.

205 Ibid, paras 77 - 78. See also the decision in *Skyscanner* [2014] CAT 16; [2015] Comp AR 41 paras 108 and 158–159.

206 See also *R (on the Application of Lunt) v Liverpool City Council* [2009] EWHC (Admin) at para 44

207 [2009] CAT 27; [2009] Comp AR 381.

208 Para 28. By contrast, the CAT found various other errors in the methodology used by the Competition Commission in connection with its quantitative modelling of consumer welfare but was not persuaded that those errors would, in themselves, have amounted to material failures that would have justified the quashing of the report: see ibid, paras 161–163 and 175.

209 *Tesco v Competition Commission* [2009] CAT 6; [2009] Comp AR 168, para 129.

210 *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41, para 26; see also *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; *Pham v Secretary of State for the Home Department* [2015] UKSC 19; *Bank Mellat v HM Treasury* (No 2) [2013] UKSC 39.

211 *Lumsdon* [2015] UKSC 41, para 26, paras 33–34. See also *Barclays Bank Plc v Competition Commission* [2009] CAT 27; [2009] Comp AR 381. Proportionality is a general principle of EU law: see *R v Minister of Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-4023; ECLI:EU:C:2005:202, para 13, and Case C-333/14; ECLI:EU:C:2015:845, *Scotch Whisky Association and others v The Lord Advocate and The Advocate General for Scotland*.

212 Per Lord Reed in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39, para 74.

213 *The Queen on the application of British American Tobacco and others* [2016] EWCA Civ 1182 (and the judgment of Green J at [2016] EWHC 1169 (Admin).

214 *Lumsdon* [2015] UKSC 41, para 26, para 108(5).

215 *Tesco v Competition Commission* [2009] CAT 6; [2009] Comp AR 168 paras [138–139]. See also *Lumsdon* [2015] UKSC 41, para 26, paras 65–66.

216 *The Queen on the application of British American Tobacco and others* [2016] EWCA Civ 1182 at para 226 referring to the observations of Lord Mance in *In re Medical Costs for Asbestos Diseases* [2015] UKSC 3 at paras 44–54.

217 For example, *R v National Lottery Commission ex pa Camelot group* [2001] EMLR 3.

218 *Groupe Eurotunnel v OFT* [2013] CAT 30; [2014] Comp AR77, para 167(b). See also *Pernod Ricard SA v OFT* [2004] CAT 10, para 235; *Sainsbury's and Asda Group Plc v CMA* [2019] CAT 1, paras 54-59; and also the statement of Mustill J in *R v Secretary of State for the Home Department ex p Doody* [1994] 1 AC 531; [1993] 3 WLR 154.

219 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, paras 98–107.

220 *R (on the application of Gallaher Group Ltd) v CMA* [2018] UKSC 25, at 50.

221 [2014] EWCA Civ 400.

222 *Sports Direct International plc v Competition Commission (supported by the OFT and JJB Sports plc)* [2009] CAT 32; [2010] Comp AR 175.

223 *BMI v Competition Commission* [2013] CAT 24; [2014] Comp AR 8.

224 Ibid, para 39(7); see also *Groupe Eurotunnel SA v Competition Commission* [2015] UKSC 75, para 226. In the context of search warrants see *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1, at para 60 (gist is fact-specific).

225 *Ryanair Holdings plc v Competition and Markets Authority (supported by Aer Lingus Group plc)* [2014] CAT 3; [2014] AR 213, para 133.

226 *Unichem Limited v OFT* [2005] CAT 8; [2005] Comp AR 907, para 176.

227 *Ryanair Holdings plc* [2014] CAT 3; [2014] AR 213, para 134. See further Chapter 9, Disclosure, at par 9.63. As regards non-disclosure of material subject to public interest immunity (PII) see para 9.60

228 *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 at para 103.

229 [2010] EWCA Civ 1097.

230 *BAA v Competition Commission* [2010] EWCA Civ 1097, para 26.

231 [2015] CAT 9.

232 On 22 June 2015, following an application by BT, the CAT refused permission to appeal against the ruling concerning the wing members ([2015] CAT 12). Further, on 27 July 2015 the Court of Appeal made an order refusing BT permission to appeal.