

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**The standard of review by courts in competition cases – Note by the United Kingdom**

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This document reproduces a written contribution from the United Kingdom submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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## United Kingdom

### 1. Overview of the UK legal framework and standard of review

1. The UK has an administrative competition enforcement system. The Competition and Markets Authority (CMA) has the power to investigate cases and make decisions which are subject to review by the courts.<sup>1</sup> Appeals are most often taken to the Competition Appeal Tribunal (CAT), although some decisions fall to be judicially reviewed by the High Court. Any judgment can subsequently be appealed to higher courts (Court of Appeal and Supreme Court).

2. The CAT is a specialist Tribunal, established under the Enterprise Act 2002.<sup>2</sup> Prior to that, the judicial review of decisions made by the CMA's predecessors (Office of Fair Trading and the Competition Commission) or the Secretary of State could be sought before the Administrative Court.<sup>3</sup> A key objective of the CAT when it was established was to provide a controlled procedural regime in which cases are actively managed and which would be able to minimise the complexity of issues and the duration of proceedings in competition cases.

3. The CAT consists of the President, the Chairmen and the Ordinary Members. Each case is decided by a panel of three, comprising either the President or one of the Chairmen and two Ordinary Members. The President and Chairmen are appointed by the Lord Chancellor for a fixed term upon the recommendation of the Judicial Appointments Commission and following an open competition as appropriate. Chairmen must be legally qualified and appear to the Lord Chancellor to have appropriate experience and knowledge (either of competition law and practice or any other relevant law and practice). Ordinary Members are recruited in open competition and must have appropriate experience and expertise.<sup>4</sup> In practice, the Ordinary Members include lawyers, economists and individuals with a business background.

4. The CAT operates under the Competition Appeal Tribunal Rules 2015,<sup>5</sup> which set out the rules governing its proceedings. Apart from the examination of the written arguments of the parties, the CAT allows the oral examination of witnesses where there are "*essential evidential issues that cannot be satisfactorily resolved without cross examination*".<sup>6</sup> Expert evidence is also allowed but should be "*restricted to that which is*

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1 In the UK, the concurrent regulators also have the power to investigate firms which have participated in anti-competitive agreements or abused a position of market dominance in their respective sectors and make decisions. The latter are also subject to review by the courts.

2 However, the current appeal regime for competition cases has been in place since 1 March 2000, given that the Competition Act 1998 established CAT's predecessor, the Competition Commission Appeals Tribunal.

3 The Administrative Court is a specialist court within the Queen's Bench Division of the High Court of Justice of England and Wales.

4 Competition Appeal Tribunal Guide to Proceedings 2015, paras 1.6 to 1.9.

5 SI 2015/1648.

6 Competition Appeal Tribunal Guide to Proceedings, 2015, paragraph 3.5.

*reasonably required to resolve the proceedings*".<sup>7</sup> It is for the party seeking to call expert evidence to satisfy the CAT that expert evidence is properly admissible and relevant to the issues which the CAT has to decide and would be helpful to the Tribunal in reaching a conclusion on those issues.<sup>8</sup>

5. The CAT should also indicate, as early as possible, a target date for the main hearing following a case management conference with the parties.<sup>9</sup> In general, the Tribunal will aim to complete straightforward appeals or judicial review applications within six to nine months.<sup>10</sup>

6. Depending on the nature of the decision, the CAT is required to apply different standards of review. Decisions on mergers, and on remedies following market investigations, are subject to ordinary judicial review.<sup>11</sup> There are four established grounds of challenge in judicial review in the UK: illegality, irrationality, procedural irregularity and the principle of proportionality. The CAT's remedial powers are limited to setting aside the decision (in whole or in part) and, where it does so, remitting the matter to the original decision maker.<sup>12</sup> The CAT cannot replace the decision with its own decision.

7. Decisions on Competition Act 1998 cases – that is, in cases where the CMA (or a sectoral regulator) has decided that a firm has participated in an anti-competitive agreement or abused a position of market dominance – are subject to a "full merits" standard of review.<sup>13</sup> This means that, in contrast to a court hearing a judicial review challenge to an administrative decision, the CAT has full jurisdiction to review the factual findings, economic assessment and application of the law underpinning the CMA's decisions and to reach its own decision on the merits of the case. It also has the power to confirm or set aside the decision that is the subject of the appeal, remit the matter to the CMA, impose, revoke or vary the amount of a penalty or give directions.<sup>14</sup>

8. Appealable decisions include infringement decisions, interim measures decisions and decisions as to the imposition of, or the amount of, a penalty.<sup>15</sup> Any CMA decision not releasing binding commitments where the CMA has been requested to do so by the person who gave the commitments or, on the contrary, releasing binding commitments where the CMA has reasonable grounds for believing that the competition concerns addressed by the commitments no longer arise, can also be appealed.<sup>16</sup>

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7 Ibid.

8 Competition Appeal Tribunal Rule 27; Competition Appeal Tribunal Guide to Proceedings 2015, para 7.65.

9 Competition Appeal Tribunal Rule 4(5)(c).

10 Competition Appeal Tribunal Guide 2015, para. 3.5

11 Sections 120(4) and 179(4) of the Enterprise Act 2002.

12 Sections 120(5) and 179(5) of the Enterprise Act 2002.

13 Schedule 8, paragraph 3(1) CA98.

14 Ibid.

15 Section 46 of the Competition Act 1998.

16 Ibid.

9. In case parties are unhappy with certain aspects of the CMA's investigation procedure after a formal investigation under the Competition Act has been opened<sup>17</sup> and wish to challenge procedural acts (such as requests for information), they may raise this issue with the Senior Responsible Officer of the case. If the party is unable to resolve the dispute with the latter, procedural complaints that relate to the certain issues may be referred to the Procedural Officer.

10. The Procedural Officer is independent of the investigation, the case team and the Case Decision Group and does not have jurisdiction to review decisions relating to the substance of the case. The role of the Procedural Officer does not prejudice the party's rights in respect of judicial review and/or any appeal before the Competition Appeal Tribunal. Appealable decisions are the ones prescribed in section 46 of the Competition Act as described (in paragraph 8) above. Where the law does not provide for an appeal, an application for judicial review may be brought in certain circumstances.<sup>18</sup>

11. Finally, third party appeals before the CAT are allowed, provided that the third party has a sufficient interest in the decision with respect to which the appeal is made.<sup>19</sup>

## 2. The CMA's experience of Competition Act appeals in practice and suggestions for reform

12. The courts' rigorous oversight and review of decisions made by competition authorities, such as the CMA, is critical to the fairness and integrity of the UK's competition enforcement regime. An effective appeal mechanism, by holding competition authorities to account for their decisions, ensures that high standards of procedural fairness and analytical rigour are adhered to and thereby builds confidence in the system on the part of businesses and consumers.

13. Based on its experience, the CMA considers that there is scope for the current appeal arrangements for Competition Act cases to be made more efficient, without compromising due process. The CMA Chairman wrote to the Secretary of State for Business, Energy and Industrial Strategy on 21 February 2019, calling for the reform of the competition and consumer protection regimes in the UK.<sup>20</sup> Among wider proposed reforms, the letter included proposals concerning the court review of the CMA's decisions. The letter set out:

- The need for a faster review process, which could be achieved through greater restrictions on the admissibility of new evidence and less reliance on oral testimony.

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17 Section 25 of the Competition Act 1998.

18 A judicial review application may be brought before the Administrative Court of the Queen's Bench Division under Part 54 of the Civil Procedure Rules.

19 Section 47 of the Competition Act 1998.

20 See the CMA Press Release and the letter of the CMA Chairman to the Secretary of State here.

- The need to move away from the current “full merits” standard in Competition Act cases, either to a judicial review standard, or to a new standard of review, setting out specified grounds of permissible appeal.

14. Regarding the first proposal, the amount of time devoted to oral evidence (both factual evidence and expert evidence) has been a factor in the length of hearings in recent appeals against CMA decisions.

15. Moreover, in the CMA’s view, a key driver of the increased duration of appeal hearings, and the extensive use of evidence, is the fact that the parties are not under any real constraint from raising new issues and presenting new evidence at the appeal stage. In the *Ping* appeal,<sup>21</sup> the CMA applied to the CAT for new evidence adduced by the appellant on appeal to be excluded, but the CAT rejected this application. Although the CAT considered that Ping had been misguided in not providing the evidence to the CMA during its investigation, it concluded that excluding the evidence would deprive the CAT of relevant factual and expert evidence on a central issue in the case and Ping would suffer prejudice if the evidence was excluded.<sup>22</sup>

16. Arguably, allowing appellants to put forward new evidence on appeal may have the following consequences: 1) The CAT will become a court of first instance instead of an appeal body. Such an approach is fundamentally inefficient and imposes significant and unnecessary costs on the CMA and ultimately the taxpayer. 2) The CMA has limited ability to respond to new evidence put before the CAT, given that it is not able to use its statutory investigative powers during the appeal stage. This risks the CAT getting a one-sided view and reaching a decision based on incomplete information.

17. Regarding the second proposal, the CMA recognises that any amended appeal regime must meet the requirements of Article 6 of the European Convention of Human Rights. However, judicial review has been recognised as being flexible enough to be adapted to different statutory contexts and to meet the requirements of human rights law.<sup>23</sup> In the CMA’s view, recent experience shows that the appeal stage in Competition Act cases which are subject to a “full merits” review has moved beyond a review of the CMA’s findings, and the evidence and reasoning to support those findings. Rather, it has become a means by which appellants can raise new arguments and evidence on appeal which could and should properly have been raised during the administrative phase.

18. The reforms proposed in the CMA Chairman’s letter to the Secretary of State would bring proceedings in competition cases more in line with the original intentions for the CAT (as described in paragraphs 2 and 4 above) and with international practice. For example, the General Court can annul a decision of the European Commission on one of four grounds: lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or any rule of law relating to their application; and misuse of powers.<sup>24</sup> If it annuls the decision, the General Court cannot replace its decision for that of the European Commission – the latter must rather take the measures necessary to comply

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21 See case page here: <https://www.catribunal.org.uk/cases/127911217-ping-europe-limited>

22 *Ping Europe Limited v CMA*, [2018] CAT 8.

23 See, for example, *T-Mobile (UK) Ltd and Telefónica O2 UK Ltd. V. Office of Communications*, [2008] EWCA Civ 1373, in particular at [22] and [23].

24 Article 263 TFEU.

with the judgment. In addition, the procedure before the General Court is primarily a written procedure and oral hearings are short, even in the most complex cases.

19. In sum, the rationale for amending the regime is to ensure that the appeal process is as efficient and effective as possible, without compromising due process and rights of defence. The features of the appeal arrangements must ensure that any action to address manifest consumer harm that can arise when companies collude or abuse their dominant position is not delayed.

20. At the time of this submission, the UK Government has not adopted any formal position, provisional or otherwise, on the proposals set out in the CMA Chairman's letter to the Secretary of State.