

EXPLANATORY MEMORANDUM TO
THE COMPETITION APPEAL TRIBUNAL RULES 2015

2015 No. 1648

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Competition Appeal Tribunal Rules 2015 revoke and replace the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) to deliver new improved Rules to strengthen the appeal process against a background of reforms to competition law, and to incorporate new provisions to give effect to certain elements of the private actions reforms introduced under the Consumer Rights Act 2015 <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted/data.htm>.

3. Matters of special interest to the Joint Committee on Statutory instruments

3.1 None.

4. Legislative Context

4.1 The Competition Appeal Tribunal (CAT) plays a key role in the appeals regime, particularly in hearing appeals against competition decisions by the Competition and Markets Authority and sector regulators (under the Competition Act 1998 and the Enterprise Act 2002), and against regulatory decisions in the communications sector (under the Communications Act 2003).

4.2 All cases commenced after 20 June 2003 are governed by the Competition Appeal Tribunal Rules 2003 ("the 2003 Rules").

4.3 The 2003 Rules were amended and supplemented by the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004/2068) ("the 2004 Rules") in respect of matters being heard by the Tribunal under the Communications Act 2003.

4.4 The Competition Appeal Tribunal Rules 2015 revoke and replace the 2003 Rules and the 2004 Rules in order to implement general reforms to the CAT's procedures and in order to give effect to certain elements of the private actions reforms introduced under the Consumer Rights Act 2015 (see section 81 of, and Schedule 8 to, that Act).

4.5 The Rules come into force on 1 October 2015. The Rules include transitional and savings provisions in relation to ongoing proceedings before the CAT and claims for damages under s. 47A and 47B of the Competition Act 1998 where the cause of action arose before 1st October 2015.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales, Scotland and Northern Ireland.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 Over the years there have been many changes to the competition landscape but, other than an amendment in 2004 in relation to appeals under the Communications Act 2003, the 2003 Rules have not been reviewed since the CAT's creation in 2003.

7.2 The Government proposed reforms to appeal bodies in its consultation, "Streamlining Regulatory and Competition Appeals"¹ in 2013 and committed to review the governance of the CAT and its Rules of procedure with a view to ensuring governance arrangements are in line with best practice and promote good governance principles.

7.3 Government published the Triennial Review of the Competition Appeal Tribunal in November 2014.²

7.4 Government invited the Right Honourable Sir John Mummery to carry out an independent review of the 2003 Rules in March 2014.

7.5 In February 2015, Government published a consultation, the Competition Appeal Tribunal (CAT) Rules of Procedure³ Review, which included Sir John Mummery's recommendations regarding amendments to the 2003 Rules. The recommendations were designed to ensure that the CAT continues to operate in an effective and efficient manner with the aim of striking the appropriate balance between providing proper accountability for regulatory decisions, while at the same time minimising unnecessary costs and delays.

7.6 The consultation also included a section focused specifically on private actions in competition law. This follows on from the previous Government response to its consultation on Private actions in Competition law: A consultation on options for reform, published in January 2013⁴. The Office of Fair Trading (many of whose functions were taken over by the Competition and Markets Authority in April 2014) previously concluded that private actions are the least effective aspect of the UK's competition regime. The reforms to private actions (introduced under the Consumer Rights Act 2015) make it easier for consumers and businesses to stand up for their rights when they have suffered from a breach of competition law. This includes an enhanced role for the CAT, a fast-track procedure for simpler cases and a new opt-out collective actions regime.

8 Consultation Outcome

8.1 In summary, we received 15 responses largely from legal representatives, business and other interested organisations. The main recommendations are as follows;

8.2 **Effective case management** formed the main part of the recommendations and the Government has incorporated into the Rules (see rule 4) the five principles from the CAT Guide to Proceedings 2005 as Governing Principles. The new Rule 4 will strengthen the case management powers granted to the CAT, ensuring that each case will be dealt with justly and at a proportionate cost, expeditiously and fairly in accordance with the Rules. All respondents were in agreement with the recommended approach to promote the five principles from the CAT's Guide to Proceedings to be incorporated into Rule 4 as "Governing Principles."

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf

² <https://www.gov.uk/government/publications/competition-appeal-tribunal-and-competition-service-triennial-review-2013-to-2014>

³ <https://www.gov.uk/government/consultations/competition-appeal-tribunal-rules-of-procedure-review>

⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf

8.3 A number of the other recommendations have also been incorporated into, or otherwise reflected in, the new revised Rules. These include:

8.4 Target times and timetables for cases have been left at the discretion of the CAT. The majority of respondents agreed the Rules should not provide for automatic outcomes and fixed timetables which preclude the decision-maker from taking account of all relevant considerations in each individual case.

8.5 There is **no statutory time limit for a decision**, as each case will be different and will vary greatly from case to case. The majority of respondents were supportive of there not being a statutory time limit for a decision, as the time needed to reach a decision and to set out the reasons for it will vary from case to case.

8.6 The Rules include a new provision allowing **strike out** where the CAT considers that the Tribunal has no jurisdiction to hear or determine an appeal has been incorporated into the Rules. The majority of respondents were supportive of the new provision.

8.7 Evidence (i) New provisions have been inserted to require the **notice of appeal and the defence** to contain a brief statement by the respective party identifying any **new evidence**. Respondents to the consultation raised some concerns in this area, believing the proposed changes may limit the extent of new evidence they can submit on appeal and that the statement of new evidence may be onerous.

8.8 (ii) Rule 21 (2), which lists the factors the CAT will consider when determining whether it would be just and proportionate **to admit or exclude evidence**, allows the CAT to consider as one of the relevant criteria, whether evidence was available to the regulator before the disputed decision was taken. The majority of respondents raised concerns with the criteria and in response to the concerns Rule 21 (2) (c) has been amended to take into account, in cases where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time.

8.9 Government's policy is to ensure that the process for the CAT hearing appeals in a reasonable timeframe is as efficient and cost effective as possible. Rather than preventing the introduction of any new evidence on appeal, the revised Rules will assist both parties by demonstrating transparency of the new evidence being relied upon and will make it easier for parties to understand the other party's case and supporting evidence

8.10 The Rules give the CAT wider discretion to permit **amendments to the Notice of Appeal**. All respondents agreed that removing the restrictions would give the CAT more flexibility in deciding whether to permit amendments, taking into account all relevant circumstances in reaching its decision.

8.11 New rules on **settlement offers and cost consequences** have been introduced similar to those in Part 36 of the Civil Procedure Rules (CPR) to encourage and facilitate the settlement of cases. Respondents welcomed the addition of new Rules along these lines and the additional provisions clarifying the position in relation to multi defendant proceedings.

8.12 Transfer of mixed/hybrid claims – The Rules give the CAT the power to transfer a case which is outside the CAT's jurisdiction to the right court or tribunal at an early stage. There are also provisions for the transfer of claims to the CAT if they are within its jurisdiction. Respondents were generally supportive of the proposed approach.

8.13 The Rules also specify in more detail the circumstances in which the Tribunal may exercise powers relating to **additional parties and additional claims**. - Respondents welcomed the new rules, highlighting that the rules will clarify an area which has previously created additional complications.

Private Actions

8.14 The revised rules will also implement a number of the private actions reforms introduced under the Consumer Rights Act 2015. The overall purpose of these reforms is to help consumers and businesses who have been harmed by a breach of competition law to seek the redress they are entitled to. A key aspect of these reforms is to establish the CAT as a major venue for competition actions in the United Kingdom. This includes introducing a ‘Fast Track’ procedure for simpler cases in the CAT, which will provide for swifter and cheaper litigation, to try and help small businesses to challenge the anti-competitive behaviour that is restricting their ability to grow. It also includes a limited opt-out collective actions regime to allow consumers and businesses to collectively bring a case to obtain redress for their losses. This will sit alongside the existing opt-in regime and will allow a class representative to take forward an action, and eligible consumers or businesses would automatically be included in the proposals unless they proactively choose not to be.

8.15 Wider private actions reforms include the introduction of Voluntary Redress Schemes. The purpose of this change is to make it easier for businesses and consumers to gain compensation for harm caused by infringements of competition law, and for businesses which have infringed competition law to offer reparation to affected parties quickly, and at lower cost than through court proceedings. As such, it is designed to encourage parties to resolve disputes voluntarily as an alternative to private litigation in the courts, which can prove costly to both parties. Further details on this can be found in The Competition Act 1998 (Redress Scheme) Regulations 2015 Explanatory Memorandum, which was laid before Parliament on 17 August 2015.

8.16 A final set of reforms is proposed which will enable courts throughout the United Kingdom to transfer cases which raise competition issues directly to the CAT rather than having to dismiss the case and for the claimant then to bring proceedings before the CAT. This will help to help make the CAT the main venue for competition cases and make it easier for businesses, especially small and medium sized enterprises (SMEs), to challenge anti-competitive behaviour as the CAT is quicker and cheaper than the general courts. It is proposed that a Statutory Instrument under section 16 of the Enterprise Act 2002 allowing for the transfer of cases to the CAT will be made and laid in parallel with the Rules to come into force on 1st October 2015.

Fast Track Procedure

8.17 The Rules make provision for a **fast track procedure** to enable consumers and smaller business to obtain swift and cheap access to redress. A number of respondents welcomed the fast track procedures and were in favour of the CAT being able to resolve cases speedily and efficiently. However, several respondents expressed concerns that it may prove difficult to satisfy the various eligibility criteria for fast track proceedings. The CAT revised Guide to proceedings will therefore set out the criteria that will be considered by the CAT when determining whether a case is eligible for the fast track. Concerns were also raised about the feasibility of sticking to the timescales required by the fast track procedure, which included a period of six months to prepare for the final hearing, and a period of three days for the final hearing itself. We have decided to continue with the requirement for fast track cases under these timescales in order to ensure the delivery of expedited results where possible. However to address the concerns raised by respondents, the CAT will have flexibility to extend this period in exceptional circumstances where it determines that it is in the interests of justice.

8.18 Power to grant injunction – The new Rules will ensure the CAT has the flexibility to grant an interim injunction within the ‘fast track’ procedure without requiring the applicant to provide an undertaking as to damages; or to cap the amount of the undertaking as to damages where it determines that it is in the interests of justice. The Government recognises that a balance must be struck between not exposing defendants to potentially vexatious or unmeritorious claims while also ensuring that small businesses that have potentially suffered a breach of competition law are provided with sufficient interim relief. Without this protection, we believe that many small businesses would be unlikely to bring forward claims due to the financial risks involved. Frequently redress and damages are less important to the claimant than getting the anti-competitive activity to stop – a view that was echoed by many respondents

to the initial consultation on Private Actions. This approach will therefore ensure that the CAT can make a balanced judgement, which takes into account the financial limitations of the applicant and protects them from potentially becoming liable for an unlimited sum from a potentially much better funded defendant.

Disclosure

8.19 The majority of respondents agreed that it is sensible to have equivalent powers to those available under the CPR. Differing views were however expressed on the safeguards needed around disclosure of documents before proceedings in order to avoid abuse of the system. Many respondents suggested that the CAT had a role to play in dealing with such requests in a fair and proportionate manner. The Rules therefore make provision for **disclosure in private actions** that will permit pre-action disclosure where the CAT judges that disclosure could facilitate the fair disposal of proceedings; potentially assist the dispute to be resolved without proceedings; or save costs

Collective Proceedings

8.20 The Rules set out procedure for **the authorisation of a class representative**. The Rules will allow only those who would fairly and adequately act in the interests of the class members to be authorised to act as the class representative. The question of whether to introduce a presumption that legal firms, special purpose vehicles and third party funders should not be able to act as class representative has proven to be particularly divisive amongst respondents. Many considered a rule of this kind unnecessary as the CAT has sufficient flexibility to prevent inappropriate class representatives whilst others argued that the presumption was helpful in clarifying the types of organisation that would **not** typically be allowed to act as class representative. The Government considered both arguments and has decided that an explicit presumption is unnecessary as Rule 78 already enables the CAT to only permit those who would fairly and adequately act in the interests of the class members to **be authorised to act as the class representative**. The Rules contain a number of factors the CAT must consider before approving a class representative in collective proceedings in order to ensure that unsuitable individuals or bodies are not permitted to act as the class representative.

8.21 Certification criteria – There was general agreement that approval that a case is suitable to proceed on a collective basis acts as a legitimate safeguard to unmeritorious claims. There were however very differing views as to what the criteria should include. The Rules include **‘the strength of the claims’** as part of the certification criteria for opt-out collective proceedings to prevent vexatious or unmeritorious claims from being brought. We believe this is particularly important as cases can be brought without class members’ knowledge or consent, as they do not need to actively participate in the claim. When certifying claims the CAT will also consider whether Alternative Dispute Resolution is available, and as part of this whether a voluntary redress scheme exists, where it judges that this could potentially be a positive solution for both parties as it can facilitate the speedy resolution of disputes without the need for costly litigation.

8.22 Settlement offers – The Rules provide that formal settlement offers should apply to collective proceedings (i.e. that a claimant who rejects an initial settlement offer and then receives a lower settlement offer through litigation, could potentially be liable for some of the defendant’s costs). There was general agreement with this approach but there were strong concerns that a claimant might not be able to assess whether the initial settlement offer is just and reasonable. The Rules therefore allow parties to **make ‘Calderbank offers’ in collective actions** in the CAT without prejudice save as to costs. The CAT may then take the offer into account when deciding on the **costs at the end of proceedings**. We believe this strikes a balance in protecting both parties by providing for cost-shifting protections where appropriate, but not making such protections automatic as would be the case under Part 36 of the CPR. We have decided not to make these cost-shifting protections automatic in recognition that a claimant might not always be able to assess whether an offer is reasonable at the time that it was made and because it is difficult to take instructions in collective actions. This approach will therefore allow the CAT to take the original offer into account when deciding on costs after the case has concluded, and to assess based on

how the case developed, whether the claimant should have accepted the original offer. The CAT can then use its discretion to decide how to distribute costs.

9. Guidance

9.1 The CAT will revise its Guide to Proceedings to reflect the changes to the Rules. It will be a source of practical guidance for both the parties and for their legal representatives on the conduct of proceedings. The Guide to proceedings will be published on the CAT's website.

10. Impact

10.1 An Impact Assessment was produced for the consultation on the CAT Rules of Procedure, published in February 2015 and can be reviewed here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401682/bis-15-74-competition-appeal-tribunal-cat-rules-2015-impact-assessment.pdf

The recommended Rule changes have at their root a regard for the efficiency, cost effectiveness and proportionality of the CAT procedures. As such the changes to the Rules are expected to streamline procedures in the CAT and reduce the length and cost of CAT cases.

The final Impact Assessment will be published alongside the Government Response and is also published alongside this Explanatory Memorandum on the legislation.gov.uk website. The policy change qualified as a 'fast track' low cost measure under the Better Regulation Framework and the impact on business is now awaiting validation from the Regulatory Policy Committee.

11. Regulating small business

This Order applies to small business to the extent that the private actions reforms will better enable small businesses that have been harmed by a breach of competition law to seek the redress they are entitled to by making it easier and cheaper for them to bring a private case. In particular the introduction of a fast track procedure within the CAT for simpler cases will help to deliver swift and, cheap results for small businesses that might otherwise struggle to challenge the anti-competitive behaviour that is restricting their ability to grow.

12. Monitoring & review

12.1 In accordance with the normal Triennial Review process for public bodies the CAT and the Rules will remain subject to regular reviews to ensure the CAT is operating efficiently. In addition, the Rules provide for a formal review by the Secretary of State of the operation of the Rules before 1st October 2020.

12.2 Government will also monitor the effectiveness of the private actions regime to assess whether it is operating efficiently and providing consumers and businesses with access to redress from those who have breached competition law and caused them harm.

13. Contact

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