

**COMPETITION APPEAL  
TRIBUNAL RULES**

Consultation on draft  
Competition Appeal  
Tribunal rules (addressing  
certain Communications  
Act appeals and  
amending the existing  
rules)

CONSULTATION DOCUMENT CCP 001/04

JANUARY 2004

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## Explanation of the wider context for the consultation and what it seeks to achieve

Rules have already been made for proceedings in appeals made to the Competition Appeals Tribunal. However, these rules do not address a new class of appeals which could arise under the Communications Act 2003, namely appeals containing price control matters which should be referred to the Competition Commission for determination. This document sets out the Department's proposals for making further rules to address such appeals and to make some minor corrections to the existing rules; and invites comments on these proposals.

**Issued:** 16 January 2004

**Respond by:** 8 April 2004

**Enquiries to:** John Arnott,  
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E-mail: [john.arnott@dti.gsi.gov.uk](mailto:john.arnott@dti.gsi.gov.uk)

## Executive summary

1. This consultation document seeks your views on the enclosed draft rules to govern the making of appeals to the Competition Appeal Tribunal under the Communications Act, where the matters under dispute include price control matters; and to make minor corrections to the existing rules for appeals to the Tribunal. A commentary on the key features of the draft rules is below. In particular, we would welcome views on the following points:

- (a) Are there any other provisions which would be appropriate to make to alleviate any difficulties for potential appellants which might arise from the timing of the making of the rules?
- (b) Are there other matters which should be added to the specification of matters to be referred to the Competition Commission?
- (c) Is it appropriate to specify a time period within which the referred matters are to be determined, and if so is four months an appropriate period; and should the Tribunal be able to direct both longer and shorter periods?

## How to respond

2. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

3. You can respond to this consultation by letter, e-mail or fax to

Ms Roselyn Rose  
Consumer and Competition Policy Directorate  
Bay 420  
Department of Trade and Industry  
1 Victoria Street  
London SW1H 0ET

[roselyn.rose@dti.gsi.gov.uk](mailto:roselyn.rose@dti.gsi.gov.uk)

Fax 020 7215 0339.

## Additional copies

4. Additional copies are available from Roselyn Rose, address as in previous paragraph (Tel. 020 7215 0336). An electronic version is also available at <http://www.dti.gov.uk/ccp/consultations.htm>

5. The consultation document has been sent to all those who were consulted on the making of the existing rules for the Competition Appeals Tribunal, together with other interested organisations and individuals. We would welcome suggestions as to others who may wish to be consulted.

## **Confidentiality**

6. Your response may be made public by the DTI. If you do not want all or part of your response or name made public, please state this clearly in the response. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax cover sheet will be taken to apply only to information in your response for which confidentiality has been requested. We will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

## **Help with queries**

7. If you would like help with queries or further information about this consultation please contact John Arnott on 020 7215 0172 (e-mail: [john.arnott@dti.gsi.gov.uk](mailto:john.arnott@dti.gsi.gov.uk)). A copy of the Code of Practice on Consultation is at Annex B.

## Commentary on the draft Rules

8. Under S. 192 of the Communications Act 2003, the Competition Appeal Tribunal (CAT) is the appeal body for appeals against most decisions under Part 2 of the Act and under the Wireless Telegraphy Acts 1949 and 1998. Tribunal Rules have already been made (The Competition Appeals Tribunal Rules 2003: SI 2003/1372) to govern proceedings before the CAT in general. The Secretary of State now intends to make amending rules under S. 15 of the Enterprise Act 2002 and ss 192 and 193 of, and paragraph 23 of Schedule 18 to, the Communications Act 2003

- (a) to deal with a particular class of appeals which may be made under the Communications Act, namely appeals raising issues concerned with price control matters which should be referred to the Competition Commission for determination;
- (b) to deal with the handling of wireless telegraphy and telecommunications appeals which were brought before the appeals provisions of the Communications Act 2003 came into force; and
- (c) to make a number of minor corrections or additions to the existing rules;

after consulting the President of the CAT, the Council on Tribunals and such other persons as she considers appropriate.

9. The existing rules would suffice for the making of the generality of appeals which might be made under the Communications Act. However, the Act provides in S. 193 for price control matters arising an appeal made to the CAT under S. 192 to be referred to the Competition Commission for determination, and further rules are necessary to deal with such cases. The Department recognises that certain decisions have already been made by Oftel<sup>1</sup> which may contain price control matters; and that further such decisions may be made by Ofcom before these further rules can be made and brought into force. The draft rules therefore contain a transitional provision (Rule 4) which will allow appeals relating to price control, or in which a specified price control matter arises, to be made within two months of the Rules coming into force even if they would otherwise be out of time. Also, if an appeal relating to price control, or in which a specified price control matter arises, is made before the Rules come into force, the rule about reference of price control matters applies as long as the Tribunal has not delivered its decision (Rule 3(7)). These provisions should alleviate any difficulties for potential appellants which might otherwise arise from the timing of the making of the rules. **Are there any other provisions which would be appropriate to that end?**

10. Otherwise, no special provision is made is made for the period within which appeals arising under the Communications Act must be made. They must therefore in general be made within two months of the decision appealed against

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<sup>1</sup> Exercising the powers of Ofcom as provided for in S. 408 of the Communications Act and Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 (S.I. 2003/1900 (C.77)).

(see rule 8(1) of the existing Rules). This is a shorter timescale than permitted under the Telecommunications Act 1984 and the Wireless Telegraphy Act 1949<sup>2</sup>, which applied up until 24<sup>th</sup> July 2003, and which generally allowed three months. However, the shorter timescale will lead to earlier resolution of appeals, which should be to the benefit of all parties; and its application in the existing rules does not appear to have given rise to practical problems (including in non-price control appeals already made under the Communications Act). Against that background, there seems to be no case for a different time period for this sub-category of Communications Act appeals.

11. Rule 3(1) specifies the matters which, to the extent that they are in dispute, are to be referred to the Competition Commission, which has particular expertise in price control issues, developed from its role in various regulatory statutes (including the 1984 Act), in relation to disputed licence amendments. This specification - comprising principles, methods, calculations and the provisions imposing the price control, including the level at which the control is set - is intended to cover all the aspects of price control matters, as defined in S. 193(10) of the Communications Act, which it is appropriate to refer because of the Commission's expertise. **Are there any other matters which should be added to this specification?**

12. The period allowed in the 1984 Act for determination of a reference of a disputed licence amendment by the Commission was six months. It would appear to be helpful to all parties to retain such a provision, as a basic indication of the time period likely to be required for resolution of the issues. (As with the 1984 Act, it can be extended if that is necessary in a particular case; and unlike under the 1984 Act, it can also be reduced.) However, the nature of the determination required of the Commission under the Communications Act is different, being part of a judicial process. In that context, it appears possible to aim for a shorter timescale, and the draft rules propose that this should be four months (Rule 5(1)). **Is it appropriate to specify a time period within which the referred matters are to be determined, and if so is four months an appropriate period; and should the Tribunal be able to direct both longer and shorter periods?**

13. Representations have been received by the Department that it would not be appropriate for price control matters to be referred to the Commission where these relate to the Commission's report in January 2003 to the Director General of Telecommunications on charges for call termination on mobile networks. The concern is one of perceived ("apparent") bias, because of the Commission's previous involvement in these issues. The Department agrees that impartiality of process is a central requirement for a fair and effective appeal mechanism. However, it notes that such issues can be effectively addressed through the ability of the Tribunal, under s. 193(7) of the Communications Act, to set aside the determination of the Commission where that would be appropriate on principles of judicial review. It does not therefore see a need to make special provision through the rules on this matter.

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<sup>2</sup> As amended by the Telecommunications (Appeals) Regulations 1999, SI 1999/3180.

## **What happens next?**

14. In the light of responses to this consultation, the Secretary of State intends to make rules as soon as reasonably practical. Allowing for the time required for the laying of the rules before Parliament (21 days), before they come into force, it is unlikely that these rules will come into force sooner than May 2004.

**Annex A: Draft Rules**

**Annex B: Code of practice on consultations**

**Annex C: List of individuals and organisations consulted**

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 STATUTORY INSTRUMENTS
 

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**2004 No. XXXX**

**COMPETITION**

**ELECTRONIC COMMUNICATIONS**

**The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004**

<i>Made</i> - - - -	2004
<i>Laid before Parliament</i>	2004
<i>Coming into force</i> - -	2004

The Secretary of State, after consultation with the President of the Competition Appeal Tribunal and such other persons as she considers appropriate in accordance with section 15(1) of the Enterprise Act 2002<sup>(3)</sup>, and after consultation with the Council on Tribunals in accordance with section 8(1) of the Tribunals and Inquiries Act 1992<sup>(4)</sup>, in exercise of the powers conferred by section 15 of and Part 2 of Schedule 4 to the Enterprise Act 2002 and by sections 192(3) and (4) and 193(1), (2)(b) and (3) of, and paragraph 23(5) of Schedule 18 to, the Communications Act 2003<sup>(5)</sup>, hereby makes the following Rules:

**Citation and commencement**

**1.**—(1) These Rules may be cited as the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 and shall come into force on *[insert date]* 2004.

(2) In these Rules—

“the Act” means the Communications Act 2003;

“the Commission” means the Competition Commission;

“principal rule” means a rule of the Competition Appeal Tribunal Rules 2003<sup>(6)</sup>;

“specified price control matter” means a price control matter specified in rule 3(1).

**Amendment of Principal Rules**

**2.** The Competition Appeal Tribunal Rules 2003 shall be amended as provided in the Schedule to these Rules.

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<sup>(3)</sup> 2002 c. 40.

<sup>(4)</sup> 1992 c. 53; *see* Schedule 1 to the Act, which is amended by paragraph 27 of Schedule 25 to the Enterprise Act 2002.

<sup>(5)</sup> 2003 c.21.

<sup>(6)</sup> S.I. 2003/1372.

### Reference of price control matters to the Competition Commission

3.—(1) For the purposes of subsection (1) of section 193 of the Act, there is specified every price control matter falling within subsection (10) of that section where there is a dispute relating to—

- (a) the principles applied in setting the condition which imposes the price control in question,
- (b) the methods applied or calculations used in determining that price control, or
- (c) what the provisions imposing the price control which are contained in that condition should be (including at what level the price control should be set).

(2) In a notice of appeal under principal rule 8, the appellant may include a statement indicating the extent to which—

- (a) the appeal relates to price control, or
- (b) a specified price control matter arises in the appeal.

(3) In a defence under principal rule 14, the respondent may include a statement indicating the extent to which the appeal relates to price control or a specified price control matter arises in the appeal, including a statement in rebuttal of a statement under paragraph (2).

(4) In a request to intervene under principal rule 16, the person making the request may include a statement indicating the extent to which the appeal relates to price control or a specified price control matter arises in the appeal, including a statement in rebuttal of a statement under paragraph (2) or (3).

(5) The Tribunal shall refer to the Commission for determination in accordance with section 193 of the Act and rule 5 every matter which, either upon consideration of the statements provided for in paragraphs (2) to (4) or in the subsequent course of the appeal, it decides is a specified price control matter.

(6) The Tribunal may make a reference to the Commission under paragraph (5) at any time before it delivers its decision.

(7) This rule applies in all cases in which the Tribunal has not delivered its decision before *[insert date upon which Rules come into force]*.

### Appeals relating to price control: transitional provision

4. Notwithstanding principal rule 8(1) (which provides a time limit of two months from notification or publication of a decision for making an appeal), an appeal to the Tribunal may be made at any time before *[insert date two months after Rules come into force]* if—

- (a) the appeal relates to price control, or
- (b) a specified price control matter arises in the appeal.

### Determination by Competition Commission of price control matters

5.—(1) Subject to any directions given by the Tribunal (which may be given at any time before the Commission have made their determination), the Commission shall determine every price control matter within four months of receipt by them of the reference.

(2) The Tribunal may, of its own motion or upon the application of the Commission or of any party, give directions as to the procedure in accordance with which the Commission are to make their determination.

**Appeals under repealed enactments**

6. If an appeal under section 1F of the Wireless Telegraphy Act 1949<sup>(7)</sup> or section 46B of the Telecommunications Act 1984<sup>(8)</sup> (“the old appeal”) is stayed or sisted under subparagraph (3) of paragraph 23 of Schedule 18 to the Act and a new appeal is brought under subparagraph (4) of that paragraph—

- (a) all pleadings and (except in Scotland) written evidence in the old appeal shall be treated as pleadings and written evidence in the new appeal,
- (b) all other steps taken and things done in the old appeal shall be taken into account in the new appeal to the extent directed by the Tribunal, and
- (c) the Tribunal may give directions to OFCOM as to the carrying out of their functions which are the same as or correspond to directions which could have been given by the court before 25<sup>th</sup> July 2003 under subsection (4) of the said section 1F or (as the case may be) 46B.

Minister of State for Energy, E-Commerce and Postal Services  
Department of Trade and Industry

2004

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<sup>(7)</sup> 1949 c.54; section 1F is repealed by the Communications Act 2003(c. 21), section 406(7) and Schedule 19.  
<sup>(8)</sup> Section 46B is repealed by the Communications Act 2003(c. 21), section 406(7) and Schedule 19.

## SCHEDULE

## Rule 2

## Amendments to the Competition Appeal Tribunal Rules 2003

1. In rule 12(2)–
  - (a) at the end of paragraph (a) the word “and” is deleted;
  - (b) at the end of paragraph (b) there are added the words–  
“and  
(c) publish any decision which it would have made had the appeal not been withdrawn.”
2. In rule 16(9), the words “and any response thereto” are deleted.
3. In rule 43(7), the words “Notwithstanding rule 55(3)” are deleted.
4. In rule 55–
  - (a) in paragraph (3), for the words “paragraph (1), (2) or (3)” there are substituted the words “paragraph (2)”;
  - (b) in paragraph (4), for the words “paragraphs (1) and (2)” there are substituted the words “paragraph (2) or a direction made pursuant to paragraph (3)”.
5. In rule 62–
  - (a) in paragraph (1)(a), for “28(2)” there is substituted “28(4)”;
  - (b) in paragraph (1)(f), for the words “rules 58 (Permission to appeal) and 59” there are substituted the words “rule 59”.
6. In rule 63(6), after the words “is served” there are inserted the words “or is treated by virtue of paragraph (5) as having been served”.

**EXPLANATORY NOTE**

*(This note is not part of the Order)*

Rule 2 introduces the Schedule. Paragraph 1 of the Schedule enables the Competition Appeal Tribunal to publish what would have been its decision in an appeal which is withdrawn. Paragraphs 2 to 6 make minor amendments correcting errors in the Competition Appeal Tribunal Rules 2003 (“the principal Rules”). A copy of the Schedule is available separately from Consumer and Competition Policy Directorate, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET or from [glenn.fisher@dti.gsi.gov.uk](mailto:glenn.fisher@dti.gsi.gov.uk).

Rule 3 provides for reference by the Tribunal to the Competition Commission of price control matters arising in an appeal which relate to principles, methods and calculations used in setting price control conditions.

Rule 4 provides that price control appeals may be made to the Tribunal up to two months after the Rules come into force even though they may otherwise be out of time.

Rule 5 provides that, subject to directions from the Tribunal, the Commission must complete their determination of price control matters within four months and that the Tribunal may give other directions as to the Commission’s procedure.

Rule 6 makes provision to facilitate the conversion of appeals under sections 1F of the Wireless Telegraphy Act 1949 and section 46B of the Telecommunications Act 1984 into appeals under section 192 of the Communications Act 2003.

## CODE OF PRACTICE ON CONSULTATION

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated. The complete code is available on the Cabinet Office's web site, address [www.cabinet-office.gov.uk/servicefirst/index/consultation.htm](http://www.cabinet-office.gov.uk/servicefirst/index/consultation.htm).

## COMMENTS OR COMPLAINTS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to

Mr P Martin,  
DTI Consultation Co-ordinator,  
Room 725, 1 Victoria Street,  
London SW1H 0ET

or telephone him on 020 7215 6206  
or email [philip.martin@dti.gsi.gov.uk](mailto:philip.martin@dti.gsi.gov.uk).

## LIST OF CONSULTEES

Allen & Overy	Mid-Yorkshire Chamber of Commerce and Industry
Ashurst Morris Crisp	Morgan Cole Solicitors
Association of Lloyd's Members	National Association of Citizens Advice Bureaux
Association of Newspaper & Magazine Wholesalers	National Consumer Council
Barclays plc	National Federation of Retail Newsagents
BBC	Newspaper Publishers Association
British Brands Group	Newspaper Society
British Retail Consortium	Northumbrian Water
British Sky Broadcasting Ltd	Norton Rose
BT	O <sub>2</sub>
Centrica plc	Ofcom
Chamber of Shipping	Office of Fair Trading
Clifford Chance	OFGEM
CMS Cameron McKenna	OFWAT
CompEcon Limited	Ofwat National Customer Council
Competition Commission	Orange
Competition Law Association	Pricewaterhouse Coopers
Confederation of British Industry	Richards Butler
Consumers' Association	Simkins Partnership
Council on Tribunals	Simmons & Simmons
EMI Recorded Music	Slaughter & May
Energywatch	Taylor Joynson Garrett
European Commission (Emil Paulis)	Tesco Plc
Freshfields Bruckhaus Deringer	T-Mobile
Herbert Smith	Trading Standards Institute
Hutchison 3G UK	Transco
Innogy	Travers Smith Braithwaite
Institute of Chartered Accountants in England & Wales	TUC
Institute of Directors	UNIFI
Joint Bar/Law Society Working Party on Competition Law	Unilever
Linklaters & Alliance	UKCTA
Lord Borrie	Vodafone plc
Martin Howe	Water UK
Merseytravel	Wragge & Co
Michael Hutchings	

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