

**Department of Trade and Industry
Consumer and Competition Policy Directorate**

**THE GOVERNMENT'S RESPONSE TO ITS CONSULTATION ON THE
COMPETITION APPEAL TRIBUNAL RULES**

1. The Enterprise Act creates the Competition Appeal Tribunal (previously the Competition Commission Appeal Tribunals) and gives it new responsibilities to hear consumer claims for damages arising from competition infringements and reviews of decisions in merger and market investigations. These are in addition to the responsibilities the CAT has inherited from the CCAT for hearing appeals in Competition Act 1998 cases. As a result of these changes we needed to update the CCAT's rules for the CAT and therefore carried out a consultation on a new set of draft rules that ended on 16 December 2002. We have now considered the comments and recommendations in the fifteen responses we received. See attached annex for list of respondents.

2. We asked a number of specific questions in the consultation document and this response will deal first with these issues before turning to other points raised by respondents.

Registrar's Interlocutory Powers

3. There was almost unanimous support for our proposal to extend the power to act in certain interlocutory matters to the Registrar of the CAT, subject to review by the President. One respondent suggested that there should be a five day time-limit on how long parties had to seek to have the Registrar's decision reviewed (under Rule 4(4)). We intend to adopt this proposal.

4. It was suggested that the Registrar also be given delegated powers under Rule 9(1) to assess whether notices of appeal were defective. We considered this but concluded that such action by the Registrar could be controversial and would in any case be unnecessary. One respondent expressed doubts about the Registrar's suitability to handle requests for confidential treatment and to be the recipient of payments to settle. Other respondents did not share this concern, and we see the ability to have such decisions reviewed as an adequate safeguard.

5. We have clarified the scope for members of the Competition Service to stand in for the Registrar in respect of his "administrative functions" (an addition to Rule 4(5)).

Time Periods for CA98 appeals, market investigation and merger review cases

6. Following the wide range of responses we received on the issue of time periods, we have concluded as follows:

- CA98 cases should continue to provide two months to appeal and six weeks for the defence to respond;
- Intervention – the period for any third party with a sufficient interest to intervene should be shortened by one week to three weeks from publication of the notice on the website
- Market investigations should allow two months for the filing of the application for review of the decision and 6 weeks for the response – this will mirror the CA98 regime
- Merger investigations should allow four weeks for a party to apply to have the decision reviewed and four weeks for the response.

7. The responses on this issue ranged from those who suggested shortening every period even beyond the range suggested in the consultation document to others who felt that all the periods should be left as long as possible. In light of these responses and on the basis of further reflection we are not convinced that it would be sensible to shorten the time periods for CA98 cases. We believe the period to seek review of decisions in market investigations can safely be shortened to provide greater business certainty and have chosen to align the periods in market investigations with those in CA98 cases as suggested by a number of respondents.

8. The consultation showed the strongest level of support for shortening the merger periods. Only two respondents thought that the time period in merger cases should be left at the three months originally envisaged in the Bill. Six of the fifteen supported shortening to four weeks, some of whom were keen to see even shorter time periods to support greater business certainty following a merger inquiry. The Government is convinced that merger cases should be treated differently. They involve time-critical transactions that risk collapsing in the face of any undue delay. We therefore propose that applications for review should be made within four weeks of the decision and that the same period be allowed for the preparation of the response. We recognise that this tight timescale will place demands on all parties involved in the process but feel that these are justified to expedite the consideration of merger cases. The CAT will have the power to extend the four week time period for the defence where it considers it appropriate.

9. One respondent suggested that the parties be given ten days to lodge notice of an application and then a further ten days to complete it. We considered this proposal but concluded that it could lead to a culture of precautionary applications and that parties during this period should be focused on developing the substance of their case.

Response to other suggestions from respondents

Rule 7. One respondent asked whether the current wording would allow parties to be represented by in-house Counsel. We can confirm that it would.

Rule 8(4) and Rule 15. One respondent suggested that we should revise the approach to interventions by requiring appellants to provide a list of parties with an interest in the case. These parties should then be furnished with a non-confidential version of the appellant's appeal document which the appellant would be required to provide at the same time as they file their application. Although an interesting idea,

mirroring the procedure under Part 54 of the Civil Procedural Rule (CPR), we are not convinced that it is necessary at this time. The CAT's rules are focused on ensuring that cases can be heard as quickly as possible and that momentum is maintained and we are not aware of any concerns about the current intervention arrangements. Such an approach to confidentiality issues could in fact lead to delay if there is any dispute between the parties and the Tribunal as to what constitutes genuinely confidential information. We will though keep the suggestion under review.

Rule 20. A number of suggestions were made in relation to the case management conference stage of the procedure. The CAT's aim in every case is to have a CMC within four weeks of receipt of the appeal. The CAT will continue to give the parties reasonable notice of the timing of a CMC, but we have decided to remove the formal requirement to give two weeks notice that was in the CCAT's rules since it introduces unnecessary inflexibility into the system. One strength of the CMC is that it can take place before the defendant has filed its defence which allows the Tribunal to assist the respondent with identifying the important issues to concentrate on. The CMC is also an opportunity to discuss whether or not oral witnesses will be needed. This gives the parties the opportunity to make a case for or against any oral witness before the Tribunal decides whether or not to permit their involvement.

Rule 31. A number of respondents raised issues with Rule 31, some seeking clarification. The CBI was keen that the period should be shortened to one year albeit with a new power for the CAT to extend the period in exceptional circumstances. We intend to retain the two year period provided for in the draft rules because we believe such a period is necessary for claimants to prepare their case and is sufficiently short to offer a reasonable level of certainty for business. This two year period is already shorter than the six year limitation period in cases before the court; reflecting the fact that the CAT only considers cases that have already been the subject of a decision by the OFT or European Commission.

We have decided to leave the approach to time periods in Rule 31(2)(a) and (b) as set out in the draft rules. Although the vast majority of cases should fall to be dealt with under 31(2)(a), we have to provide for those rare cases in which claimants may need to rely on the period provided for by 31(2)(b).

Rule 38. Concern was expressed that the ability of the defendant to introduce a counter-claim may lead to the CAT ruling on non-competition matters. We see the ability to consider a counter-claim as a way of ensuring fair consideration of all the factors in a case without delaying unduly the judicial process. We expect situations where the counter-claim brings in a significant non-competition issue to be relatively rare and the Tribunal will be under no obligation to consider such claims where it deems them to be outside its jurisdiction.

Rule 43. It was suggested that wording similar to Part 36.5(7) of the CPR be introduced to cover the issue of offers to settle made less than fourteen days before the start of the hearing. We considered this suggestion but have decided to rely on the flexibility offered by Rule 43(10). The CAT will however include the issue of offers made in this period in its guidance.

Rule 58(1). The suggestion was made that we shorten the option of appealing against interlocutory decisions from the one month period allowed for in the draft rules. Rule 58 is principally concerned with final decisions, however the CAT is able to abridge any time period where this is appropriate (Rule 19(2)(i)) (e.g. in relation to a challenge to an interlocutory decision). . It should not be assumed that interlocutory issues necessarily raise matters of subsidiary importance justifying a shorter period in which to seek permission to appeal. The decisions taken by the Tribunal in the recent Bettercare and Freeserve cases as to its jurisdiction were technically interlocutory decisions.

Group litigation management. One respondent suggested that we should make provision for multiple claimants in claims for damages along the lines set out in Part 19 of the CPR. We may want to return to this suggestion in the future but would prefer to wait and see how well the current arrangements handle cases involving multiple claims.

Concrete timetable for consideration of merger cases. The CAT has as an objective the completion of all straightforward cases within six months. This guideline will apply to its new responsibilities under the Enterprise Act, and indeed we would hope that in merger cases it will be able to move even more quickly. Given the nature of the CAT's decision-making process it would not though be appropriate to impose a rigid time limit on its proceedings.

Confidential business information. One respondent suggested that specific guidance be issued on how the CAT will deal with confidential business information. The CAT intends to give such guidance initially on a case by case basis before considering whether in the light of such experience of real cases it is appropriate to issue some form of practice direction on this topic.

The Newspaper Society suggested the Tribunal's rules be revisited to take into account the particular needs of newspaper mergers once the newspaper merger regime has been agreed in the Communications Bill currently before Parliament. We will have to make a number of changes to the rules in light of the Communications Bill and have noted their concerns.

10. A number of other minor points were raised by respondents and these will be considered as we finalise the Rules. It is our intention to bring the rules into force when we commence the competition provisions of the Enterprise Act in the summer.

11. Copies of the responses, apart from one where confidentiality was requested, are available for viewing in the DTI Library at 1 Victoria Street, London SW1H 0ET. (Call the Open Government Unit on 020 7215 6618).

CCP3
DTI
March, 2003

List of Respondents

Association of Lloyd's Members

Baker & McKenzie

CBI

Clifford Chance

Competition Commission

Competition Commission Appeal Tribunals

Denton Wilde Sapte

Freshfields Bruckhaus Deringer

Joint Working Party of Bars and Law Societies of United Kingdom on Competition Law

Office of Fair Trading

Office of Gas and Electricity Markets

Slaughter and May

The Council on Tribunals

The Newspaper Society

Wragge & Co