COMPETITION APPEAL TRIBUNAL

COMPETITION APPEAL TRIBUNAL USER GROUP MEETING
DRAFT MINUTES OF TENTH MEETING HELD ON 7 APRIL 2014

Attendees:

On behalf of the Tribunal:

Sir Peter Roth – President
Charles Dhanowa – Registrar
George Lusty – Référendaire

On behalf of the Users:

Martin Ballantyne – Legal Director, Office of Communications
Roland Green – Deputy General Counsel, Competition and Markets Authority
Jon Lawrence – Partner, Freshfields Bruckhaus Deringer LLP
Catriona Munro – Partner, Maclay Murray & Spens LLP
Jon Turner QC – Barrister, Monckton Chambers
Stephen Wisking – Partner, Herbert Smith Freehills LLP

Also attending:

Sir John Mummery
Sandra McNeish – Department for Business, Innovation and Skills

Apologies:

Euan Burrows – Partner, Ashurst LLP
Tom de la Mare QC – Barrister, Blackstone Chambers
Polly Weitzman – General Counsel, Office of Communications

President's introduction

The President welcomed everyone to the User Group meeting and introduced Sir John Mummery (SJM), who is assisting in overseeing the ongoing review of the Tribunal rules.

Minutes of meeting of 10 January 2014

The President noted that the minutes of the User Group meeting on 10 January 2014 had already been approved, and were now on the Tribunal's website.

Draft Practice Direction for service outside the jurisdiction

The President referred to the discussion – at the meeting on 10 January 2014 – of a proposed practice direction regarding service out of the jurisdiction. He said that the Tribunal now proposes to issue the practice direction.

Draft rules on collective actions

The President referred to the work that had been undertaken by a separate working party to prepare draft rules dealing with collective actions. He extended thanks to members of that working party, which had worked at some speed, and the draft rules are now available on the Tribunal's website and have been placed in the Parliamentary libraries. He noted that the working party had identified a particular issue that had led BIS to introduce an amendment to the Consumer Rights Bill.

Review of the Tribunal rules

Introduction by SJM

SJM explained that he has recently been asked to assist in reviewing the Tribunal's rules. He said that he has already started to read the various responses to the Government's consultation on regulatory appeals, and has attended meetings with BIS and with those at the Tribunal who will take the lead in drafting the revised rules. He noted that BIS has not yet published its response to the consultation. The President noted that the proposed revisions to the rules, in particular as regards private actions, go beyond the scope of the Government's consultation in any event.

SJM said that he has been asked to present his conclusions, together with a proposal for revised Tribunal rules by 1st August 2014, and it is hoped that a first draft will be ready by the end of April 2014. He said that it is also proposed to update the Tribunal's Guide to Proceedings, although not by the same deadline. He explained that his preference is for the rules to be quite "bare" and for the Guide and practice directions to be used, and amended as appropriate, to afford flexibility. He said that, more generally, the rules should be as simple as possible, avoiding any undue delay and unnecessary expense in proceedings before the Tribunal.

SJM said that he is keen to engage in the widest possible consultation, and hopes to seek views from the User Group and the wider legal community. He said that he was also proposing to meeting with Mr Justice Birss regarding the rules of IPEC (formerly the Patents County Court), which has received much praise for its case management and which might provide some guidance in the preparation of rules for "fast track" cases in the Tribunal. He said that, once a full first draft of the revised rules has been finalised, this will be circulated for wider comment.

SJM explained that he was keen to seek views from members of the User Group at this meeting on the issue of new evidence in Tribunal proceedings. He said that he was also interested to hear from Users about the amendments that they most favour, and those to which they are most hostile.

New evidence in Tribunal proceedings

The issue of new evidence in Tribunal proceedings was discussed. The President suggested that it would be helpful to distinguish between the different types of proceedings before the Tribunal, and in particular between infringement appeals and regulatory appeals.

New evidence in appeals under the Competition Act 1998

There was discussion of the criticism directed at the OFT in the *Tobacco* and *Dairy* proceedings in relation to its evidence-gathering processes and the historic lack of any power to gather witness statements other than voluntarily. It was suggested that the new power in section 26A of the Competition Act 1998 will assist in this regard, although the administrative phase of competition investigations tends to be primarily documents-based, with little chance to test the credibility of evidence before the appeal stage.

It was suggested that any rule on new evidence should maintain a strong incentive to provide information during the administrative phase. There was discussion of the incentives of parties during

the administrative and appeal phases, and the expenditure that parties would be likely to commit to rebutting a case at each phase.

SJM referred to the ability, in the Employment Tribunal, to seek a "review" before the Tribunal, to take account of new evidence that has come to light since the relevant decision was taken, but before an appeal is formally commenced. The Registrar noted that a similar power had previously been included in the Competition Act, allowing third parties to seek a review from the Director General of Fair Trading, but had been rarely used and had never led to a change in the decision.

The Tribunal's ability to sanction the late provision of evidence through costs orders was also discussed, as well as the risk, if there was a restriction on new evidence, of satellite litigation in relation to the question of whether particular evidence was "new". The scope of the existing rule (rule 22) was discussed, along with the jurisprudence that has emerged from cases such as *Napp*. There was discussion of various alternative approaches going forward, including the use of a flexible practice direction to supplement the existing rule. The importance of recognising the differences between the Tribunal's separate areas of statutory jurisdiction was emphasised.

New evidence in regulatory appeals

Martin Ballantyne provided an overview of the three main types of appeal brought in the Tribunal under the Communications Act 2003, namely: (1) appeals from dispute resolution determinations in relation to access terms; (2) appeals from market review and price control decisions; and (3) appeals from ex ante regulatory decisions. He explained that each type of decision is arrived at in different ways, but generally involves a high degree of engagement between the parties and Ofcom. He said that Ofcom is concerned that parties who do not engage with Ofcom's process can come to the Tribunal late in the day and present new arguments, and engage experts who raise new issues, when these could have been advanced at an earlier stage. The existing Tribunal rules place the burden on Ofcom to identify new evidence and apply to strike it out as appropriate, when it may be more appropriate to require appellants to flag new material. Although Ofcom has the ability to retake a decision, time is of the essence in many regulatory contexts, and retaking numerous decisions would cause lengthy delays.

There was general discussion of the suggestion that appellants might be required to specifically highlight, in their notice of appeal, any points that were not specifically advanced before the regulator. It was noted that, in cases involving multiple parties, each appellant might not be aware of the arguments deployed by other parties, and the rules currently require parties to advance all of the material on which they rely "up front". The Tribunal's general ability to control the amount of factual and expert evidence was also discussed.

Reference was also made to the provisions that apply when the CAA hears aviation appeals, which circumscribe the evidence that may be advanced on appeal.

Fast track proceedings

The criteria and conditions for fast track cases were discussed, in light of the brief note circulated by the President ahead of the meeting. There was discussion of the monetary threshold for such cases, and it was suggested that, rather than specifying any particular threshold, the rules might provide that the Tribunal take account of the "amount claimed in damages" as a relevant factor when determining whether a case was suitable for the fast track. It was also suggested that the number of main and third parties involved in the proceedings be included as a relevant criterion.

Other issues:

Potential revisions to the Tribunal rules in order to address the following issues were raised:

- Disclosure: There was discussion of third party disclosure, pre-action disclosure and the interaction between the Tribunal's rules and the provisions of the proposed EU directive on private actions.

- Transfers of claims: There was discussion of mechanisms to allow competition and non-competition elements of claims to be appropriately managed between the Tribunal and other courts.

- Offers to settle: There was discussion of the differences between the current Tribunal rules and the CPR (Part 36) as regards offers to settle, a matter which has been canvassed in previous meetings of the User Group.

- Consolidation of claims: It was suggested that the rules provide an appropriate mechanism for the consolidation of claims by direct and indirect purchasers, to allow common issues, such as passing-on, to be determined at the same time.

- Recovery of costs by regulators: There was discussion of the recovery of costs by the CMA in price control matters, and by regulators more generally in regulatory appeals. It was also noted that the Tribunal rules currently limit costs awards to those "by one party to another" and this may need to be broadened.

- Decisions on permission to appeal: It was suggested that the Tribunal can take some time to deliver a decision on permission to appeal, and that it might be preferable for the Tribunal to issue decisions with reasons to follow.

SJM thanked those present for their helpful comments, and welcomed any further brief written observations in relation to topics to be covered by the revised rules (a note prepared by Euan Burrows in advance of the meeting was circulated to those present), and also whether particular issues should be addressed by way of rules or practice directions. Any written material should be sent to George Lusty in the first instance. It was agreed that a further meeting would be held in late May, by which point it was hoped that a first draft of the revised rules would be in circulation.