COMPETITION APPEAL TRIBUNAL

GUIDE TO PROCEEDINGS

2015

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GLOSSARY

"the 1998 Act"	the Competition Act 1998 (as amended)
"the 2002 Act"	the Enterprise Act 2002 (as amended)
"the 2003 Act"	the Communications Act 2003 (as amended)
"the 2011 Act"	the Postal Services Act 2011
"the 2012 Act"	the Civil Aviation Act 2012
"the 2013 Act"	the Financial Services (Banking Reform) Act 2013
"the 2015 Act"	the Consumer Rights Act 2015
"CAA"	the Civil Aviation Authority
"CC"	the Competition Commission (see also CMA)
"CMA"	the Competition and Markets Authority, which assumed certain functions of the Office of Fair Trading and the Competition Commission on 1 April 2014 pursuant to the Enterprise and Regulatory Reform Act 2013
"CMC"	case management conference
"CPO"	collective proceedings order
"CPR"	Civil Procedure Rules
"CSAO"`	collective settlement approval order
"CSO"	collective settlement order
"the Chapter I prohibition"	the prohibition contained in section 2 of the 1998 Act
"the Chapter II prohibition"	the prohibition contained in section 18 of the 1998 Act
"the EC Treaty"	the Treaty establishing the European Community (as amended)
"Regulation 1/2003"	Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (now Articles 101 and 102 TFEU) OJ 2003 L 1/1
"the CJEU"	the Court of Justice of the European Union
"FCA"	the Financial Conduct Authority

"FTP"	fast-track procedure
"General Court"	the General Court of the European Union, a constituent court of the Court of Justice of the European Union
"GEMA"	the Gas and Electricity Markets Authority
"Guide to Proceedings" "the Guide"	this Guide to Proceedings
"Monitor"	the regulator for the National Health Service in England
"NIAUR"	Northern Ireland Authority for Utility Regulation
"OFCOM"	Office of Communications
"ORR"	Office of Rail and Road
"PSR"	the Payment Systems Regulator
"the 2001 Regulations"	EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (SI 2001/2916)
"the 2004 Regulations"	the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 (SI 2004/1261)
"the Regulators"	CAA, FCA, GEMA, Monitor, NIAUR, OFCOM, ORR, PSR and WSRA
"the 2003 Rules"	the Competition Appeal Tribunal Rules 2003 (SI 2003/1372), revoked (save as provided by Rule 119) pursuant to Rule 118 of the 2015 Rules
"the 2004 Rules"	the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004/2068), revoked (save as provided by Rule 119) pursuant to Rule 118 of the 2015 Rules
"the 2015 Rules" "the Rules"	the Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648)
"TFEU"	the Treaty on the Functioning of the European Union
"the Tribunal"	the Competition Appeal Tribunal
"a Tribunal"	a tribunal of three persons, drawn from the membership of the Competition Appeal Tribunal and including at least one member from the panel of Chairmen, to hear a particular case
"The Tribunal website"	www.catribunal.org.uk
"WSRA"	the Water Services Regulation Authority

PRACTICE DIRECTION

The requirements of this Guide to Proceedings in the Competition Appeal Tribunal (and any supplements that may be issued from time to time) constitute a Practice Direction issued by the President pursuant to Rule 115(3) of The Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648).

The Hon. Mr Justice Roth
President

1 October 2015

PREFACE

This Guide to Proceedings applies to the conduct of proceedings before the Tribunal commenced on or after 1 October 2015 in accordance with The Competition Appeal Tribunal Rules 2015, which came into force on that date and which revoked the 2003 Rules and the 2004 Rules.

The new rules of procedure follow an independent review carried out by Sir John Mummery in 2014. He was appointed by the Secretary of State for Business Innovation and Skills (BIS) following the Government's commitment to undertake a review of the 2003 Rules in its consultation entitled "*Streamlining Regulatory and Competition Appeals*" in June 2013. Sir John Mummery's Report was published on 5 February 2015.[1]

BIS consulted on proposed changes to the rules in February 2015.[2] The statutory instrument containing the 2015 Rules was laid before Parliament on 8 September 2015 and came into force on 1 October 2015.

As well as updating the previous rules, the revised rules reflect the Tribunal's new jurisdiction, as a result of major changes brought about by the Consumer Rights Act 2015, in the sphere of private actions. Under its expanded remit, the Tribunal may hear stand-alone claims in competition cases, including by way of collective proceedings, approve collective settlements of such claims, and (except for proceedings in Scotland) grant injunctions.

As regards collective proceedings and collective settlements, the jurisdiction of the Tribunal is novel. In prescribing directions and providing guidance for such proceedings and settlements, the Tribunal therefore has no prior practice from any part of the United Kingdom on which to draw. While the Guide seeks to provide as much assistance as possible, it is expected that the Tribunal will further develop its approach on a case-by-case basis, and the Guide is likely to need revision accordingly in the light of experience.

Charles Dhanowa OBE, QC (Hon)
Registrar
1 October 2015

[1] *Independent report: review of the rules of procedure of the Competition Appeal Tribunal (CAT)*, BIS/15/73.
[2] BIS, *Competition Appeal Tribunal (CAT) Rules of Procedure: Review by the Rt Honourable Sir John Mummery, Consultation* (February 2015).

INTRODUCTION TO THE GUIDE

1. This Guide to Proceedings applies to the conduct of proceedings before the Tribunal commenced on or after 1 October 2015 in accordance with The Competition Appeal Tribunal Rules 2015 (the "2015 Rules"), which came into force on that date.[3] Proceedings commenced before the Tribunal prior to 1 October 2015 are governed by the Competition Appeal Tribunal Rules 2003 (the "2003 Rules") and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (the "2004 Rules").[4]

2. The Guide describes the Tribunal's procedures chronologically, differentiating where relevant between different types of proceedings. To avoid undue repetition, aspects of the Tribunal's procedure and practice that are common to different types of proceedings are considered separately, in Sections 7 and 8. This means that it is important to consult different sections of the Guide in order to obtain a full overview of the Tribunal's approach to a particular type of case. Moreover, the relevant statutory provisions, including the 2015 Rules, should always be consulted in addition to the Guide. In the event of any conflict between the Rules and the Guide, the Rules prevail.

3. The most up to date version of the Guide can be found on the Tribunal website, www.catribunal.org.uk, which also contains the judgments, orders and other documents relating to proceedings before the Tribunal. New editions and revisions of, and supplements to, the Guide may be issued from time to time and these will be published on the Tribunal website.

4. In respect of matters not addressed by the Rules or the Guide, parties and their representatives are expected to act reasonably and in accordance with the governing principles in Rule 4.

5. The Registry may be consulted on any points of procedure that arise, either before or during proceedings. See Section 9 for details of how to contact the Registry.

6. The Guide is structured as follows:

   - **Section 1** summarises the statutory functions of the Tribunal, describes its constitution and gives an overview of the office of the Registrar.

   - **Section 2** describes the Tribunal's statutory functions and the context in which they arise in more detail.

   - **Section 3** addresses the governing principles enshrined in the 2015 Rules.

   - **Section 4** deals with statutory appeals and applications for review, including those under the Competition Act 1998 (the "1998 Act"), the Enterprise Act 2002 (the "2002 Act") and the Communications Act 2003 (the "2003 Act"). It sets out the time limits for bringing a legal challenge and the requirements relating to notices of appeal/applications, the defence and the intervention procedure; it also outlines the steps immediately following commencement of proceedings. Further steps in these proceedings, such as the first case management conference ("CMC"), adducing

[3] See The Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648), Rule 1.
[4] Rule 118 and Rule 119 of the 2015 Rules.

evidence and hearings are set out in Section 7. Section 4 also covers applications for interim measures.

- **Section 5** deals with private actions, namely claims for damages and injunctions. It also deals with the fast-track procedure ("FTP") under Rule 58 and settlement offers under Rule 45.

- **Section 6** deals with collective actions, including collective settlements.

- **Section 7** addresses procedural elements that are common to some or all of the proceedings dealt with in the preceding sections, for example: case management conferences, forum, consolidation, amendment of pleadings, confidentiality, evidence, hearings and the Tribunal's decision.

- **Section 8** details aspects of the Tribunal's procedure that typically occur after the Tribunal issues its final judgment, namely costs applications and appeals.

- **Section 9** provides some general information about contacting and visiting the Tribunal, filing documents at the Tribunal, legal representation, arrangements for hearings and practical matters such as labelling of files, use of electronic signatures and citation of authorities.

- The **Glossary** at the start of the Guide sets out the meaning of frequently used defined terms and the full form of any abbreviations not defined in the body of the text.

SECTION 1: THE TRIBUNAL

1.1 The Tribunal was created by section 12(1) and Schedule 2 of the 2002 Act and came into existence on 1 April 2003.[5]

1.2 The Tribunal is an entirely independent judicial body.

1.3 The Tribunal is supported by the Competition Service, an executive non-departmental public body established by section 13 of the 2002 Act to provide the administrative staff, finance and accommodation required by the Tribunal to carry out its functions. Although the Tribunal and the Competition Service are, in formal terms, separate bodies, in practice they are different aspects of one integrated organisation; a single body of staff multi-tasks across case-handling and administrative roles using a common pool of resources.

1.4 The principal functions of the Tribunal may be summarised as follows.

- Firstly, the Tribunal may hear *appeals on the merits* in respect of decisions applying the competition rules found in Article 101 TFEU (formerly Article 81 EC) and Article 102 TFEU (formerly Article 82 EC) and Chapters I and II of the 1998 Act, decisions imposing penalties pursuant to sections 114 or 176(1) of the 2002 Act, and decisions applying the relevant provisions of the 2003 Act.

- Secondly, it may entertain *applications for review* of merger and market investigation decisions under the 2002 Act, decisions to accept or release binding commitments under section 31A of the 1998 Act and determinations concerning a price control matter under section 193(7) of the 2003 Act.

- Thirdly, it may determine *claims for damages or other sums of money* brought by claimants who have suffered loss or damage as a result of an infringement of one of the relevant prohibitions contained in the TFEU or the 1998 Act; these are also referred to as "private actions". Such claims may be by way of follow-on action (in which case the claim is based on an infringement decision of the CMA or European Commission and the claimant does not have to prove that the infringement has incurred) or stand-alone action (in which case the claimant also has to establish that there has been an infringement of the relevant competition law provisions). Furthermore, a claim may be made by an individual claimant under section 47A of the 1998 Act or be brought by way of a collective action under section 47B of the 1998 Act. Collective actions may be opt-in or opt-out.

- Finally the Tribunal may entertain applications for interim measures under the 1998 Act. The Tribunal also has the power to issue injunctions in private actions.

1.5 These functions and the context in which they arise are described in more detail in Section 2 of the Guide.

The constitution of the Tribunal

1.6 The constitution of the Tribunal is governed by section 12(2)-(5) and Schedule 2 of the 2002 Act. The Tribunal consists of the President, the Chairmen and the Ordinary

[5] The Tribunal replaced the Competition Commission Appeal Tribunals established under the 1998 Act.

Members. The Tribunal is supported by the Registrar. Details of the current post holders can be found on the Tribunal website (www.catribunal.org.uk).

1.7 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).[6] The Registrar is appointed by the Secretary of State.

1.8 In addition, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland may nominate any suitably qualified judge who is already sitting, respectively, in the High Court of England and Wales, the Court of Session in Scotland or the High Court of Northern Ireland to be deployed as a Chairman of the Tribunal.[7]

1.9 Ordinary Members are recruited in open competition according to the guidelines of the Office of the Commissioner for Public Appointments and are appointed by the Secretary of State for Business Innovation and Skills for a period of eight years. They must have appropriate experience and expertise. Some are professionally qualified economists, lawyers or accountants, while others have backgrounds in business, the public service or other relevant experience.

1.10 Biographical details of the President, Chairmen and the Ordinary Members can be found on the Tribunal website.

1.11 Cases are typically heard by a Tribunal of three persons and chaired by either the President or a Chairman.[8] The other two members are drawn from the Chairmen or the Ordinary Members.

1.12 However, pursuant to Rule 110 the President, or a Chairman, may exercise the powers of the Tribunal acting alone, save in relation to:

- Rules 11 and 26(3) (power to strike out);
- Rule 13 (withdrawal of the appeal, in the case of a withdrawal during or after the hearing);
- Rule 41 (power to strike out);
- Rule 42 (default judgment);
- Rule 43 (summary judgment);
- Rule 44 (withdrawal of the claim, in the case of a withdrawal during or after the hearing);
- Rule 77 (determination of the application for a collective proceedings order);

[6] Section 12(2) and Schedule 2, paragraph 1 to the 2002 Act.
[7] Section 12(2) of the 2002 Act (as amended by section 82 of the Consumer Rights Act 2015 which came into force on 27 May 2015 pursuant to SI 2015 No. 1333).
[8] Section 14 of the 2002 Act.

- Rule 85 (stay, variation or revocation of the collective proceedings order, in the case of revocation of the collective proceedings order);

- Rule 87 (applications for withdrawal by the class representative);

- Rules 94(8) and 97(6) (making of a collective settlement approval order);

- Rule 96(6) (determination of the application for a collective settlement order);

- Rule 108 (decision of the Tribunal on request for permission to appeal); and

- Rule 109 (references to the CJEU).

The Registrar

1.13 The day to day operation of the Tribunal is managed by the Registrar who is the main point of contact for the public.

1.14 Under Rule 5 the Registrar is responsible for the establishment and maintenance of a register in which all pleadings and supporting documents and all orders and decisions of the Tribunal shall be registered; the acceptance, transmission and custody of documents in accordance with the rules of procedure; the enforcement of Tribunal decisions pursuant to paragraphs 4 and 5 of Schedule 4 to the 2002 Act; and certifying that any order, direction or decision is an order, direction or decision of the Tribunal, the President or Chairman as the case may be.

1.15 The Registrar must act in accordance with the instructions of the President (Rule 5(2)). Pursuant to Rule 110(2) (and the practice direction that this Guide constitutes) the Registrar is authorised by the President to:

- make any order by consent, except where Rule 106(2) applies (which concerns cases where the order may have a significant effect on competition);

- make a direction under Rule 9(7) (which stipulates that unless the Tribunal directs otherwise, the signed original of the notice of appeal (and its annexes) must be accompanied by ten certified copies by the appellant or the appellant's legal representative);

- deal with extensions or abridgments of time limits under Rule 19(2)(m), except a request for an extension of time for filing an appeal or application under Part 2 or Part 3 of the 2015 Rules;

- deal with requests for confidential treatment under Rule 101;

- exercise the Tribunal's powers in respect of the service of documents under Rule 111; and

- deliver the Tribunal's decision by handing down in public pursuant to Rule 103(1)(a), where the parties have been informed in advance and there is no other business to conduct on that occasion.

1.16 A party dissatisfied with any exercise by the Registrar of his functions may request in writing a review of that direction by the President. Any request for review of any exercise by the Registrar of his functions must be received by the Tribunal within five

days of the exercise of such functions. The President may determine the matter acting alone or refer the matter to a Chairman or to the Tribunal: Rule 110(3).

SECTION 2: TYPES OF PROCEEDINGS BEFORE THE TRIBUNAL

2.1 A number of different proceedings may be commenced before and heard by the Tribunal, including:

- Private actions by persons who have suffered loss or damage in respect of an infringement decision or alleged infringement: sections 47A and 47B of the 1998 Act.

- Applications for approval of collective settlements of such private actions brought, or which could have been brought, by way of collective proceedings: sections 49A and 49B of the 1998 Act.

- Appeals on the merits by parties or third parties against decisions, including interim measures decisions, made under the 1998 Act by the CMA or a Regulator: sections 46 and 47 of the 1998 Act.

- Appeals on judicial review principles by parties or third parties of decisions by the CMA or a Regulator to accept, vary, release, or not release binding commitments under section 31A of the 1998 Act: sections 46 and 47 of the 1998 Act.

- Applications to review, as the case may be, the decisions of the CMA, a Regulator or the Secretary of State in connection with a reference or possible reference in relation to a relevant or special merger situation, or a market investigation: sections 120 and 179 of the 2002 Act.

- Appeals against a penalty imposed by the CMA for failure to comply with a notice requiring the production of documents and information and the attendance of witnesses: sections 114 and 176(1) of the 2002 Act.

- Appeals against certain decisions made by OFCOM or the Secretary of State under the 2003 Act. Those decisions principally concern the exercise by OFCOM of its powers to regulate electronic communications networks and services under Part 2 of the 2003 Act, the use of the radio spectrum under the Wireless Telegraphy Acts 1949 and 2006 and the exercise of Broadcasting Act 1990 powers for a competition purpose: sections 192 and 317(6) of the 2003 Act. The competition aspects of certain decisions concerning the Channel 3 networking arrangements may also be appealed to the Tribunal: Schedule 11, paragraph 9 of the 2003 Act.

- The Postal Services Act 2011 provides for an appeal to the Tribunal in respect of certain decisions taken by OFCOM in relation to the regulation of postal services: section 57 of the 2011 Act.

- Appeals by parties against the decisions of OFCOM under the Mobile Roaming (European Communities) Regulations 2007 (SI 2007 No. 1933) and the Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations 2010 (SI 2010 No. 672).

- Applications by affected parties for a review of a determination made by GEMA in relation to certain property schemes: Schedule 2A of the Electricity Act 1989 and Schedule 18 of the Energy Act 2004.

- Applications by affected parties for a review of decisions of GEMA in respect of: (i) the application of a market power licence condition to particular types of exploitative behaviour in electricity markets; and (ii) the imposition and amount of any penalty imposed by the Authority: sections 20 and 21 of the Energy Act 2010.

- Appeals against a market power determination or operator determination by the CAA: Schedule 1 of the Civil Aviation Act 2012 (the "2012 Act").

- Appeals against enforcement orders and penalties, and licence revocation decisions, of the CAA: Schedules 3, 4, 5 and 13 of the Civil Aviation Act 2012.

- Applications by persons to review decisions of the Payment Systems Regulator ("PSR") pursuant to the Payment Services Regulations 2009 (SI 209 No. 2009) (as amended) to give a direction under regulation 104(1) to that person or to impose a penalty under regulation 105 on that person.

- Appeals against certain decisions of the PSR: sections 76 and 78 of the Financial Services (Banking Reform) Act 2013 (the "2013 Act").

2.2 Unless specific provision is made in the relevant legislation, the procedures to be followed in respect of the above proceedings before the Tribunal are set out in the Tribunal's 2015 Rules which may be supplemented by practice directions, such as this Guide, issued by the President under Rule 115(3).

2.3 Parts 1 and 6 of the Rules apply to all proceedings before the Tribunal. Part 2 of the Rules applies to all proceedings before the Tribunal save as otherwise provided in Parts 3, 4, 5 and 7. Part 3 applies to proceedings under the 2002 Act, Part 4 applies to claims made pursuant to section 47A of the 1998 Act and, subject to Rule 74 to collective proceedings, Part 5 applies to collective proceedings and collective settlements and Part 7 applies to appeals relating to price control matters: Rule 3.

2.4 In this Guide, unless the context otherwise requires, references to the CMA include reference to the other Regulators competent to apply the relevant provisions of the 1998 Act and the 2002 Act.

Private actions under the Competition Act 1998

2.5 Under section 47A of the 1998 Act any person who has suffered loss or damage as a result of an infringement or an alleged infringement of either UK or EU competition law (i.e. breaches of the Chapter I or Chapter II prohibitions contained in the 1998 Act and breaches of the prohibitions in Article 101(1) or Article 102 TFEU) may bring a claim for damages or for a sum of money before the Tribunal in respect of that loss or damage.

2.6 Consequently, the Tribunal is able to hear any claim for damages (whether brought on a stand-alone basis or following on from a decision of the CMA finding an infringement).

2.7 Pursuant to section 47A(3)(c), in proceedings in England and Wales or Northern Ireland "claims" includes claims for an injunction.

Collective proceedings

2.8 In addition, under section 47B of the 1998 Act collective actions for damages (including both follow-on and stand-alone claims) may be brought in the Tribunal on an "opt-in" or "opt-out" basis.

2.9 Collective proceedings must be commenced by a representative of the claimants, and that person must be authorised by the Tribunal to act as a representative. Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues and are suitable to be brought in collective proceedings.

2.10 The Tribunal is also able to approve the settlement of claims in collective proceedings: see sections 49A and 49B of the 1998 Act.

Proceedings under the Competition Act 1998

2.11 The 1998 Act prohibits:

- certain agreements or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom (section 2 of the 1998 Act, referred to as 'the Chapter I prohibition'); and

- the abuse of a dominant position in a market if it may affect trade within the United Kingdom (section 18 of the 1998 Act, referred to as 'the Chapter II prohibition').

2.12 Those provisions are enforceable by the CMA and Regulators who may, by decision, give directions for bringing the infringement to an end and impose penalties of up to 10 per cent of the turnover of the undertaking concerned.[9] Similar powers are exercisable by the Regulators with concurrent powers within their respective spheres of activity (communications, electricity, gas, water, railways, health, financial services, retail payment systems and air traffic services).

2.13 Under section 46 of the 1998 Act, any party to an agreement in respect of which, or any person in respect of whose conduct the CMA has made a decision, may appeal to the Tribunal against, or with respect to, that decision. Under section 46(3), an appealable decision is:

i. a decision as to whether the Chapter I or the Chapter II prohibition has been infringed;

ii. a decision as to whether the prohibitions contained in Article 101(1) or Article 102 TFEU have been infringed;

iii. a decision to impose a penalty for infringement of the competition provisions under section 36 of the 1998 Act or as to the amount of such penalty;

iv. a decision giving directions under sections 32 or 33 of the 1998 Act with a view to bringing an infringement to an end;

[9] Determined in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000 No. 309) (as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004 No. 1259)).

v. a decision cancelling a block or parallel exemption from the Chapter I prohibition;

vi. a decision withdrawing the benefit of a regulation of the European Commission pursuant to Article 29(2) of Regulation 1/2003;

vii. a decision imposing interim measures under section 35 of the 1998 Act; and

viii. a decision relating to the release or non-release of commitments pursuant to section 31A(4)(b) of the 1998 Act.

2.14 Under section 49D(3) of the 1998 Act, a person required by the CMA to pay an amount of the CMA's costs relating to that person's application for approval of a redress scheme under section 49C of the 1998 Act may appeal to the Tribunal against the amount.

2.15 Most appealable decisions may also be appealed by a third party whom the Tribunal considers has a sufficient interest in the decision: section 47 of the 1998 Act.

2.16 The Secretary of State has the power to add to the list of decisions that may be appealed pursuant to sections 46 and 47.[10]

2.17 Appealable decisions, other than those relating to commitments, must be determined by the Tribunal on the merits by reference to the grounds of appeal set out in the notice of appeal: Schedule 8, paragraph 3 of the 1998 Act.[11] Under paragraph 3(2) the power of the Tribunal on such an appeal includes the power to:

- confirm or set aside the decision in question;
- remit the matter to the CMA;
- impose or revoke or vary the amount of any penalty;
- give such directions, or take such other steps, as the CMA itself could have given or taken; and
- make any other decision which the CMA could itself have made.

2.18 In respect of appeals concerning the acceptance, release, non-release or variation of commitments, the Tribunal must determine such appeals in accordance with judicial review principles and may:

- dismiss the appeal or quash the whole or part of the decision to which it relates; and
- where it quashes the whole or part of that decision, remit the matter back to the CMA with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal: Schedule 8, paragraph 3A of the 1998 Act.

[10] See for example the Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004 (SI 2004 No. 1078), which adds as decisions for the purposes of sections 46 and 47 of the 1998 Act decisions imposing, varying or removing conditions or obligations subject to which a parallel exemption is to have effect.

[11] See also the analogous paragraph 3B concerning an appeal under section 49D(3) of the 1998 Act.

2.19 Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal to the Tribunal does not suspend the effect of the decision to which the appeal relates, unless the Tribunal orders otherwise: section 46(4) and section 47(3) of the 1998 Act.

Proceedings under the Enterprise Act 2002

2.20 Parts 3 and 4 of the 2002 Act set out the UK competition law regime for the supervision of mergers and markets.

Part 3 - Mergers

2.21 Part 3 of the 2002 Act provides, subject to a number of exceptions, that where the CMA believes that:

- a relevant merger situation has been created or believes that arrangements in progress or contemplation will result in such a situation if carried into effect; and

- it is or may be the case that that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services;

it must make a reference to the CMA Panel Chair: sections 22 and 23.

2.22 Once a reference has been made in respect of a completed or anticipated merger, the CMA must decide whether a relevant merger situation has been, or would be created, and if so whether that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services. Where this is the case, the CMA must decide whether any action should be taken by it for the purpose of remedying, mitigating or preventing the substantial lessening of competition and/or any adverse effects which arise from the substantial lessening of competition: sections 35 to 41.

2.23 Although the CMA is the principal decision maker under Part 3 of the 2002 Act, the Secretary of State may in certain prescribed circumstances intervene in the decision-making process in relation to certain public interest cases: sections 42 to 68.

Part 4 – Market investigations

2.24 Part 4 of the 2002 Act provides that market investigation references may be made to the CMA Panel Chair where the CMA (or a Regulator with concurrent powers) has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom: see section 131. The CMA must then determine whether any feature, or combination of features, of each relevant market prevents, restricts, or distorts competition in the United Kingdom or a part of the United Kingdom: section 134.

Applications to the Tribunal for review of decisions adopted under Parts 3 and 4

2.25 Any person aggrieved by a decision of the CMA or the Secretary of State in connection with a reference or possible reference in relation to a merger situation or market investigation may make an application for a review under section 120 (mergers) or section 179 (market investigations) of the 2002 Act. A “decision”

includes a failure to take a decision permitted or required by the 2002 Act. The 2002 Act (unlike the 1998 Act) does not set out a list of decisions which may be challenged on a review.

2.26 In determining an application for a review the Tribunal must apply the same principles as would be applied by a court on an application for judicial review: section 120(4) (mergers) and section 179(4) (market investigations). The standard of review was considered by the Court of Appeal in *British Sky Broadcasting v CC* [2010] EWCA Civ 2.

2.27 Under section 120(5) (mergers) and section 179(5) (market investigations) the Tribunal may dismiss the application or quash the whole or part of the decision to which it relates and, where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal.

Appeals against penalties in merger and market investigations

2.28 Where the CMA imposes a penalty for failure to comply with a notice issued by it requiring the production of documents or information or the attendance of witnesses in a merger or market investigation under the 2002 Act, the person on whom the penalty is imposed may appeal to the Tribunal against the imposition of the penalty, the amount of a penalty or the date by which the penalty is required to be paid: section 114 (mergers) and section 176(1)(f) (market investigations).

Proceedings under the Communications Act 2003

2.29 In February 2002 the European Parliament and Council of Ministers enacted a number of measures designed to create a common regulatory framework for electronic communications networks and services.[12] A significant number of the obligations imposed by those measures on the United Kingdom are implemented by Part 2 of the 2003 Act.

2.30 Part 2 of the 2003 Act confers power on OFCOM to regulate the provision of electronic communications networks and services by the setting, modification or revocation of general or specific conditions of entitlement to provide such networks or services in accordance with section 45 of that Act.

2.31 Part 2 of the 2003 Act also confers power on OFCOM relating to the use of the radio spectrum under the Wireless Telegraphy Acts. The decisions under Part 2 of the 2003 Act or under the Wireless Telegraphy Acts that may be appealed to the Tribunal are set out in section 192 of the 2003 Act.

[12] Those measures are: Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (2002 OJ L 108/7; the "Access Directive"); Directive 2002/20/EC on the authorisation of electronic communications networks and services (2002 OJ L 108/21; the "Authorisation Directive"); Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (2002 OJ L 108/33; the "Framework Directive"); Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (2002 OJ L 108/51; the "Universal Service Directive"); Directive 2002/58/EC on the processing of personal data and the protection of privacy in the electronic communications sector (2002 OJ L 201/37; the "Privacy Directive"); and EU Decision No. 676/2002/EC of the European Parliament and the Council of 7 March 2002 on a regulatory framework for radio spectrum policy on the European Community (2002 OJ L108/1; the "Radio Spectrum Decision").

2.32 A person affected by any such decision may appeal to the Tribunal: section 192(2).

2.33 Certain appeals may also be brought by a Channel 3 licence holder against a decision made by OFCOM pursuant to sections 290 to 294 and Schedule 11, paragraphs 9 and 10, concerning the competition aspects of networking arrangements.

2.34 Appeals may also be made against decisions of OFCOM using powers under the Broadcasting Act 1990 for a competition purpose: section 317.

2.35 The Tribunal must decide an appeal under the 2003 Act on the merits and by reference to the grounds of appeal set out in the notice of appeal: section 195(2). If the Tribunal allows the appeal, its decision must include a decision as to what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal, and the Tribunal shall then remit the decision under appeal to OFCOM with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision: section 195(3) and (4).

2.36 In the case of an appeal against a decision given effect to by a restriction or condition set by regulations under section 109 of the 2003 Act, the Tribunal must take only such steps as it considers are not detrimental to good administration: section 195(7).

Specified price control matters

2.37 If an appeal raises a price control matter (as specified in Rule 116(1)), the Tribunal must, before reaching its decision, refer the matter to the CMA for determination in accordance with section 193 of the 2003 Act and Rule 116. Subject to the Tribunal's direction, the CMA shall then determine the specified price control matter within four months of receipt of the reference: Rule 117(1). The Tribunal may give directions as to the procedure in accordance with which the CMA is to make its determination: Rule 117(2).

2.38 In its final decision the Tribunal must follow the CMA's determination concerning the specified price control matter unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination of the CMA would fall to be set aside on such an application: section 193(7) of the 2003 Act.

Proceedings under the Postal Services Act 2011

2.39 Section 57 of the 2011 Act stipulates that where OFCOM takes a decision to: (i) impose or modify a regulatory condition; (ii) give, modify or withdraw a direction, consent or approval; (iii) impose a penalty, or give or modify a direction; (iv) give or modify a direction under section 89A or 116(2A) of the Postal Services Act 2000; or (v) give a direction under section 25(5) of the Consumers, Estate Agents and Redress Act 2007, a person affected by such a decision may appeal against it to the Tribunal.

2.40 In determining the appeal, the Tribunal must apply the same principles as would be applied by a court on an application for judicial review. The Tribunal must either dismiss the appeal, or quash the whole or part of the decision to which the appeal relates.

Proceedings under the Electricity Act 1989 and the Energy Acts of 2004 and 2010

2.41 Under Schedule 2A of the Electricity Act 1989 (inserted by section 44(4) of the Energy Act 2008) GEMA may, on application, make a property scheme in the context of tenders in relation to offshore electricity transmission licences so that property,

rights and liabilities can be transferred from the existing owner to the successful bidder. Any person aggrieved by such a decision may apply to the Tribunal for a review: paragraph 23 of Schedule 2A to the 1989 Act.

2.42 Under Schedule 18 of the Energy Act 2004 GEMA may, on application, make a property arrangements scheme which provides for the transfer of property, rights or liabilities from an existing transmission licence holder to a new system operator. Any person aggrieved by such a decision may apply to the Tribunal for a review: paragraph 10 of Schedule 18 to the Energy Act 2004.

2.43 The Tribunal is able to hear appeals in relation to decisions taken by GEMA in respect of: (i) orders made to secure compliance with a licence condition pursuant to section 25 of the 1989 Act; and (ii) the imposition and amount of any penalty imposed by GEMA under section 27A of the 1989 Act: sections 20 and 21, of the Energy Act 2010.

Proceedings under the Civil Aviation Act 2012

2.44 Under the regime introduced by the 2012 Act, the CAA grants licences to operators of "dominant areas" located at "dominant airports" which enable those operators to levy charges for airport operation services. These licences may contain price control conditions. In order to determine whether an airport area is dominant within the meaning of the 2012 Act, the CAA conducts a market power test.

2.45 The Tribunal's jurisdiction includes the hearing of appeals in respect of certain decisions of the CAA taken pursuant to the 2012 Act, namely:

- Section 13 and Schedule 1 of the 2012 Act (determinations): market power determinations and operator determinations by the CAA.

- Section 47 and Schedule 3 of the 2012 Act (orders and penalties): where the CAA takes action to enforce licence conditions by making an enforcement order or imposing a penalty for contravention of a licence condition.

- Section 49 and Schedule 4 to the 2012 Act (licence revocations): where the CAA gives a notice revoking a licence, or a further notice withdrawing a licence revocation notice.

- Section 55 and Schedule 5 of the 2012 Act (penalties: information): where the CAA imposes a penalty for failure to provide information, or for provision of false or misleading information, under section 51 or section 52 of the 2012 Act.

- Section 90 and Schedule 13 of the 2012 Act (penalties): where the CAA imposes a penalty under section 86 or section 87 of the 2012 Act for failure to provide information requested, or for provision of false or misleading information, in relation to the CAA's duty to publish information for the benefit of users of air transport services and environmental information.

2.46 The Tribunal's powers in respect of appeals under the 2012 Act are set out in the relevant Schedules. In particular, the Tribunal may only allow an appeal to the extent that it is satisfied that the decision being challenged is based on an error of fact, was wrong in law, or an error was made in the exercise of discretion. The Tribunal may then confirm or set aside the decision and give the CAA such other directions as it considers appropriate. In the case of market power determinations and operator determinations, the Tribunal also has the power to direct the CAA to make a further

determination and, if the CAA fails to do so, to make the determination itself. The Tribunal is required to have regard to the CAA's duties under section 1 in any appeal under the 2012 Act.

Proceedings under the Financial Services (Banking Reform) Act 2013

2.47 The 2013 Act created a new statutory regulator for retail payments systems, the Payment Systems Regulator ("PSR").

2.48 The Tribunal has jurisdiction to hear appeals against certain enforcement decisions of the PSR pursuant to section 77 of the 2013 Act. Other enforcement decisions are appealable to the CMA (subject to a permission requirement). In essence, an affected party will be able to challenge before the Tribunal any "CAT-appealable decisions" and decisions to impose a penalty in respect of a compliance failure:

- CAT-appealable decisions are defined by section 76(4) of the 2013 Act as a decision to: (i) give a direction under section 54; (ii) impose a requirement under section 55; or (iii) publish details under section 72(1). In such an appeal, the Tribunal must apply the same principles as would be applied by a court on an application for judicial review. The Tribunal must either dismiss the appeal or quash the whole or part of the decision to which it relates. Where the Tribunal quashes the whole or part of a decision, it may refer the matter back to the PSR.

- Section 76(5) of the 2013 Act provides that decisions to impose a penalty taken under section 73 can be appealed to the Tribunal in accordance with section 78. An appellant may challenge the imposition of the penalty, its amount or the date for payment. The Tribunal has the power to uphold the penalty, set it aside and/or vary the amount or the date for payment.

Proceedings under the Payment Services Regulations 2009

2.49 Under the Payment Services Regulations 2009 (as amended), the PSR supervises and enforces the prohibition of restrictive rules on access to payment systems. Pursuant to regulation 106, a person affected by a decision of the PSR under regulation 104(1) or 105 may appeal to the Tribunal. In determining the appeal, the Tribunal must apply the same principles as would be applied by a court on an application for judicial review.

SECTION 3: THE GENERAL APPROACH OF THE RULES

3.1 The 2015 Rules seek to achieve the general objective of enabling the Tribunal to deal with cases justly and at proportionate cost, in particular by ensuring that the parties are on an equal footing, that expense is saved and that appeals are dealt with expeditiously and fairly. This is set out in the **governing principles** in Rule 4. The Rules will be interpreted in accordance with those principles: Rule 2(2).

3.2 The Rules pursue the same philosophy as the CPR of the High Court and many of the rules are modelled on the CPR. Where, in particular as regards private actions, a rule mirrors the CPR, the Tribunal would generally expect to interpret that rule in the same way as the High Court or Court of Appeal. However, the Tribunal's Rules are different in various respects and parties should not assume that the approach of the CPR applies to a particular procedural issue. Furthermore, the Tribunal is a United Kingdom, not an English, tribunal and it may therefore also have regard to the procedural rules that apply in Scotland or Northern Ireland, in particular in a case where the proceedings are to be treated as proceedings in either of those jurisdictions: see Rule 18.

3.3 A particular feature of all proceedings before the Tribunal is **active case management**: Rule 4(4). Rule 4(5) sets out what is meant by active case management. Essentially the concept involves the Tribunal and the parties working together to ensure that the case proceeds in the quickest and most efficient manner possible. Rule 4(1) places a duty on the parties to co-operate with the Tribunal to give effect to that aim and the governing principles as a whole.

3.4 As part of the process of active case management, the Tribunal constituted to deal with the case will generally handle it from inception through to the final hearing, dealing with all procedural points as they arise. However, the Chairman may be appointed first and may deal with preparatory matters before being joined by the other two Ordinary Members to concentrate on the substantive issues in the case. Collective proceedings, for the reasons explained in Section 6, may be conducted on a different basis.

3.5 In all cases, the Tribunal will seek to identify and concentrate on the main issues at as early a stage as possible, to avoid undue prolixity or delay and to ensure the efficient preparation of the case for a final hearing and that evidence is presented in an efficient manner. Four general features of the Tribunal's procedure should be noted:

- *Early disclosure in writing*

  Each party's case must be fully set out in writing as early as possible, with supporting documents produced at the outset so far as practicable: (Rule 4(3). The Tribunal's proceedings rely more on written argument than traditional court pleadings. However, it is recognised that in private actions, it may not be possible to set out in full a party's case prior to disclosure.

- *Strict timetables*

  The Tribunal will generally indicate, as early as possible, a target date for the main hearing: Rule 4(5)(c). The main stages of the case, and the planning of the Tribunal's work, will then be geared to meeting this timetable. In general, the Tribunal will aim to complete straightforward appeals or judicial review applications within six to nine months. Private claims assigned to the Fast-track (see Rule 58) should be completed within six months of that

designation. In urgent cases, and where appropriate, the Tribunal will pursue an expedited procedure, giving case management directions as appropriate. However, it is recognised that many private actions may take longer to get to a main hearing for various reasons, for example due to the time required to conduct disclosure. Where a claim concerns an actual or contemplated infringement decision by a competition authority, a final hearing may not be possible before the infringement decision becomes final: see section 58A of the 1998 Act and Article 16 of Regulation 1/2003.

- *Effective fact-finding procedures*

  The Tribunal will pay close attention to the probative value of documentary evidence. Where there are essential evidential issues that cannot be satisfactorily resolved without cross-examination, the Tribunal will permit the oral examination of witnesses. As regards expert evidence, the Tribunal expects the parties to make every effort to narrow the points at issue and to reach agreement where possible: Rule 4(5)(a).

- *Structured oral hearings*

  The structure of the main oral hearings of the Tribunal will be planned in advance, in consultation with the parties, and will be fixed with a defined time limit: Rule 4(5)(e)-(f). Since the written arguments of the parties will already have been fully set out and since the main issues will have been identified prior to the main oral hearing, lengthy oral argument can normally be avoided.

3.6 At the conclusion of the main hearing, the Tribunal will normally inform the parties when judgment is likely to be given. In the event of unexpected delay, the parties will be kept informed.

SECTION 4: STATUTORY APPEALS AND APPLICATIONS FOR REVIEW

4.1 This part of the Guide outlines the procedures for statutory appeals from and applications for review of decisions of the CMA or a Regulator listed at paragraphs 2.11 - 2.49 above. It also deals with applications for interim measures.

4.2 The structure of this section mirrors the typical sequence of procedural steps in proceedings before the Tribunal, including:

- commencing proceedings: time limits for filing the notice of appeal/application and its form and content;

- steps immediately following receipt by the Tribunal of the notice of appeal or application: acknowledgment, defective notices of appeal/applications, service on the respondent, publication of the web summary, constitution of the Tribunal and preparation for the first CMC;

- the defence: the time limits for filing, its form and content; and

- the intervention procedure.

4.3 Other and subsequent procedural steps, including case management, evidence, hearings and the Tribunal's decision, are dealt with in Section 7.

4.4 Generally, the word "appeal" is used where the jurisdiction of the Tribunal extends to "the merits". The party appealing is referred to as the "appellant" and the claim is commenced by filing a "notice of appeal". Where the jurisdiction of the Tribunal is one applying the standard of judicial review, for example in merger and market investigation cases, the person applying for review is referred to as "the applicant", and proceedings are commenced by filing an "application". The term "applicant" is also used in connection with applications for interim measures. The party defending the decision that is being challenged, usually the CMA or a Regulator, is referred to as "the respondent". However, in certain contexts (for example commitment decisions under the 1998 Act) the relevant legislation provides for an appeal on judicial review grounds. The terminology is therefore not determinative of the standard of review, and where this Guide refers to an appeal, the comment will often apply equally to applications for review unless the context indicates otherwise.

Time limits for commencing proceedings under the 1998, 2002 and 2003 Acts

4.5 The following paragraphs set out the time limits for commencing proceedings and the manner of calculating them. The time limits vary according to the decision in respect of which a legal challenge is raised. As well as consulting this Guide, advisers must ensure they have taken into account the relevant statutory provisions.

4.6 It is useful if parties intending to commence proceedings contact the Registry as early as possible in order to indicate, on an informal and confidential basis, that an appeal or application is imminent. That will enable the Registry to make preparations for an efficient start to the proceedings. Until such time as the relevant notice of appeal or application has been served on the respondent and, if relevant, the summary of the appeal or application has been published on the Tribunal website. Generally, Tribunal staff will not be at liberty to disclose whether the Tribunal has received a notice of appeal or application before publication of the summary on the website, but where a time limit has clearly expired they may disclose the fact that a notice of appeal or application was not received before the expiry of the time limit.

4.7 Parties are also strongly advised not to wait until the last possible moment to commence proceedings. The Tribunal is only permitted to extend the relevant time limits if it is satisfied that the circumstances are exceptional.

Proceedings under the 1998 Act and the 2003 Act

4.8 The filing of an appeal under the 1998 Act or the 2003 Act is governed by Rule 9 of the Rules. Under Rule 9(1) an appeal must be made by filing a notice of appeal **within two months** of the date on which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.[13]

4.9 The Tribunal may not extend this time limit unless it is satisfied that the circumstances are exceptional: Rule 9(2).

Applications for review under the 2002 Act: Market investigations

4.10 Applications pursuant to section 179 of the 2002 Act for review of a decision in connection with a reference or possible reference under Part 4 of the 2002 Act must be filed within the same timescale as that applicable to appeals under the 1998 and 2003 Acts, that is by filing a notice of application **within two months** of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier: Rule 25(2).

4.11 The Tribunal may not extend this time limit unless it is satisfied that the circumstances are exceptional: Rule 25(3).

Applications for review under the 2002 Act: Mergers

4.12 These applications must be made within a much shorter time period than other types of proceedings.

4.13 An application for a review under section 120 of the 2002 Act must be made by filing a notice of application **within four weeks** of the date on which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier: Rule 25(1).

4.14 The Tribunal may not extend this time limit unless it is satisfied that the circumstances are exceptional: Rule 25(3).

Calculation of time limits for commencing proceedings governed by Rules 9 and 25

4.15 The combined effect of Rule 112(2) and (3) is that the last day for filing a notice of appeal under the 1998 Act, the 2003 Act, or an application pursuant to section 179 of the 2002 Act in respect of market investigations (but *not* mergers: see paragraph 4.17 below), is normally the day which falls on the same date in the month which occurs two months after the date on which the appellant/applicant was notified of the disputed decision. Thus, if the appellant/applicant was notified of the decision on 10 June, the last date for filing proceedings is 10 August. Time is not suspended during legal vacations. The Tribunal considered the time for filing an appeal in *Casting Book v OFT* [2006] CAT 16.

[13] As to what may constitute notification see *Federation of Wholesale Distributors v OFT* [2004] CAT 11 at [22].

4.16 If the decision is notified on a date that does not exist in the month in which the time for making the appeal expires, time expires on the last day of that month. Thus for a decision notified on 31 July (and assuming that the two month time limit for commencing proceedings is applicable) the last day for filing the notice of appeal is 30 September. For a decision notified on 31 December, the last day for filing the notice of appeal is 28 February (29 February in a leap year).

4.17 In respect of applications pursuant to section 120 of the 2002 Act (mergers), the last day for filing the application is normally the day which falls on the same day in the fourth week after the date on which the applicant was notified of the disputed decision. In *Federation of Wholesale Distributors v OFT* [2004] CAT 11, the Tribunal indicated that for the purpose of Rule 25(1)[14] time starts to run from the date on which the reasoned decision is notified to the applicant or published (and not from the date of the press announcement of the fact of the decision).

4.18 The effect of Rule 112(3) is that if the last day for filing proceedings falls on a Saturday, Sunday or Bank Holiday, time expires on the following day which is not a Saturday, Sunday or Bank Holiday. Thus for a decision under the 1998 Act notified on 28 March, the last day for filing the appeal would normally be 28 May. Suppose, however, that 28 May is a Saturday and that 30 May is the Spring Bank Holiday Monday: in this hypothetical example the last day for filing the notice of appeal would be Tuesday, 31 May.

4.19 In accordance with Rules 111(4)(a) and 111(5), the latest time for personally delivering a notice of appeal to the Registry is 5.00 pm on the last day for filing an appeal. A notice of appeal sent by first class post is deemed to be received on the second day after posting: Rule 111(4)(b).

Limited power to extend the time limit for commencing proceedings

4.20 As noted above, under Rule 9(2) and Rule 25(3), the Tribunal may not extend the time limit for commencing proceedings 'unless it is satisfied that the circumstances are exceptional'. Any application for an extension of time must be made a reasonable time before the prescribed period has expired and reasons for the application must be given.

4.21 In *Hasbro v DGFT* [2003] CAT 1, the President indicated that respect for the deadline for commencing proceedings is, in many ways, the keystone of the whole procedure. The possibilities of obtaining an extension of the time limit for commencing proceedings are thus extremely limited. In order to demonstrate the existence of unforeseen circumstances, the party concerned may have to point to an excusable error or a situation of force majeure which prevented it from complying with the time limit. For examples of cases where the Tribunal has considered the concept of exceptional circumstances see orders of the President in: *Prater v OFT* [2006] CAT 11; *Fish Holdings v OFT* [2009] CAT 34; and *Somerfield Stores & others v OFT* [2013] CAT 5 (and the Court of Appeal judgment [2014] EWCA Civ 400). In the context of an application for review under section 120 of the 2002 Act, see *British Sky Broadcasting v CC & the Secretary of State* [2008] CAT 1.

[14] This decision was made in respect of the Tribunal Rules 2003; the equivalent rule was Rule 26.

Time limits for commencing appeals under other legislation

Where the time limit in Rule 9 applies

4.22 The **two month** time period set out in Rule 9 of the Rules also applies when commencing proceedings in the Tribunal under certain other legislation by virtue of the following provisions in that legislation:

- Appeals against certain decisions of the PSR: see sections 77(3) and 78(4) of the 2013 Act.

- Applications for review of certain decisions of GEMA: see section 20(6) of the Energy Act 2010.

- Applications for review of certain decisions of the PSR: see Regulation 106(3) of the Payment Services Regulations 2009 (as amended).

- Appeals against certain decisions of OFCOM: Regulation 10 of the Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations 2010.

- Appeals against certain decisions of OFCOM: Regulation 14(3) of the Mobile Roaming (European Communities) Regulations 2007.

Where the time limit in Rule 28 applies

4.23 The time for filing an appeal under sections 114 or 176(1)(f) of the 2002 Act is governed by Rule 28.[15] Such an appeal must be made by sending a notice of appeal to the Registrar so that it is received within the period of **28 days** from:

- in the case of an appeal against a penalty imposed by a notice under section 112(1) of the 2002 Act, the day on which a copy of the notice was served on the person concerned;

- in the case of an appeal against a decision on an application under section 112(3), the day on which the person concerned was notified of the decision.[16]

Where a different time limit is set by legislation

4.24 Some statutory appeals that fall within the jurisdiction of the Tribunal are governed by different time limits which are set out in the relevant legislation rather than the Rules:

- Schedule 18 of the Energy Act 2004 empowers the Tribunal to review determinations made by GEMA in relation to certain property schemes. Paragraph 10(3) of that schedule states that an application may be made at any time before the end of the period of **seven days** beginning with the day on which the scheme is made.

[15] See also section 114(3)-(4) of the 2002 Act.

[16] The requirements mentioned in sub-paragraphs (2), (3), (4), (6) and (7) of Rule 9 apply also to notices of appeal against a penalty made under sections 114 or 176(1)(f) of the 2002 Act: Rule 3(b).

- Schedule 2 of the Energy Act 2008 also enables the Tribunal to review determinations made by GEMA in relation to certain property schemes. Paragraph 23(3) of that schedule states that an application must be made either: **21 days** beginning with the day on which a notice in respect of the scheme is published or in any other case, 21 days beginning with the day on which the determination was made.

- Schedule 1 (paragraph 2) of the 2012 Act states that an appeal against a market power determination made by the CAA must be made by sending a notice of appeal to the Tribunal, to be received by the Registrar before the end of the period of **60 days** beginning with the relevant day.[17] The "relevant day" means the later of: (a) the day on which the CAA publishes the notice of the determination; or (b) the day on which the CAA publishes the reasons for the determination.

- Schedule 4 (paragraph 2) of the 2012 Act provides for a **30 day** limitation period for bringing an appeal against a decision of the CAA to revoke a licence.[18]

The notice of appeal: requirements

4.25 There is no prescribed form that must be used to commence proceedings in the Tribunal. However, the 2015 Rules set out a number of requirements relating to the content of notices of appeal/applications: see Rules 9(3)-(7) and the guidance given below. This guidance should also be borne in mind when commencing proceedings under any of the statutory provisions not specifically covered here.

Formal requirements: Rule 9(3)

4.26 Under Rule 9(3), the notice of appeal must be signed and dated by the appellant, or on its behalf by a duly authorised officer or by its legal representative, and must state:

- the appellant's name and address;
- the name and address of the appellant's legal representative, if any;
- an address for service in the United Kingdom; and
- the name and address of the respondent.

Substantive requirements

4.27 The notice of appeal must be clear, concise and complete. The notice of appeal is intended to be a fully pleaded statement of the appellant's case, and the Tribunal should be able, on a single reading, to apprehend all the essential matters of fact and law that are in issue.

4.28 Rule 9(4) sets out a list of substantive requirements for the notice of appeal. Those requirements are:

- a concise statement of the facts;

[17] Schedule 1, paragraph 2(4)(b) provides that the 60 day time limit stipulated in paragraph 2(2) of that Schedule applies subject to provisions in rules made under section 15 of the 2002 Act that provide that a notice of appeal must be received within a longer or shorter period.
[18] Schedule 4, paragraph 2(5)(b) provides that the 30 day time limit stipulated in paragraph 2(2) of that Schedule applies subject to provisions in rules made under section 15 of the 2002 Act that provide that a notice of appeal must be received within a longer or shorter period.

- details of the decision to which the proceedings relate;
- observations on which part of the UK the proceedings are to be treated as taking place under Rule 18;
- a summary of the grounds for contesting the decision, including: (i) the statutory provisions under which the appeal is brought; and (ii) to what extent (if any) the appellant contends that the disputed decision was based on an error of fact or was wrong in law or is an appeal against the respondent's exercise of its discretion;
- a succinct presentation of the arguments supporting each ground of appeal;
- the relief sought and any directions in accordance with Rule 19;
- a schedule listing all documents annexed to the notice of appeal; and
- a statement identifying the evidence (witness statements or other documents annexed to the notice of appeal) the substance of which, so far as the appellant is aware, was not before the maker of the disputed decision.

4.29 It is a key feature of the above requirements that the notice of appeal should contain not only *all* the grounds relied on for the appeal, but also a succinct presentation of *each* of the arguments supporting those grounds. The notice of appeal will therefore contain a written development of each of the factual, legal or other grounds of appeal relied on, so that the Tribunal is seized in writing, from the outset, with the substance of the case advanced on appeal.

4.30 To achieve that aim, it will normally be appropriate to set out first the factual context in which the appeal arises, with a brief mention of the course of events leading to the decision that is being challenged. If the primary facts are not themselves in dispute, for example where the appeal turns largely on questions of law, reference may be made to the facts as summarised in the contested decision. There will be other cases where the primary facts are themselves contested, and the appeal will turn largely on questions of fact and evidence. Parties should pay careful attention to distinguishing in the notice of appeal between disputes about primary facts and disagreements which are more appropriately characterised as ones of appraisal or assessment of those primary facts. **The application should clearly identify which of the primary facts found by the respondent authority are contested by the appellant and upon what grounds.**

4.31 Having briefly set out the factual context, the notice of appeal should clearly identify each principal ground of appeal relied on – for example that the facts found in the decision are not supported by the evidence; that the respondent has defined the relevant market incorrectly; that the decision is insufficiently reasoned; that the penalty imposed for an infringement of competition law is excessive; and so on. The extent to which the appellant contends that the relevant decision was based on an error of fact, or was wrong in law, or that the respondent wrongly exercised its discretion, should be specifically stated (Schedule 8, paragraph 2(2)(b) and (c) of the 1998 Act and section 192(5)(b) of the 2003 Act). Each main ground of appeal should then be developed by a succinct presentation of the arguments in support of that ground, avoiding repetition. Where grounds overlap, it is sufficient to refer back to the arguments already developed.

4.32 When dealing with the arguments in support of each ground, it is unnecessary to set out lengthy extracts from decided cases: short citations, accompanied by the case reference and paragraph number, will normally suffice.

4.33 In setting out the grounds, arguments and details of the relief sought, appellants should bear in mind that the Registrar will draw on those details when drafting the

summary of the notice of appeal required for the Tribunal website pursuant to Rule 14(2). If it is possible to provide a brief encapsulation of any part of more extensive sections dealing with the grounds, arguments and relief sought that would be of assistance in the production of the website summary.

The documents to be annexed

4.34 The following should be annexed to the notice of appeal:

- a copy of the disputed decision: Rule 9(6)(a); and

- as far as practicable, a copy of every document (or part of a document) on which the appellant relies, including the written statements of all witnesses of fact or expert witnesses, if any: Rule 9(6)(a).

4.35 The notice of appeal should clearly explain the relevance of each of the annexed documents and which passages of the document are relied on.

4.36 Documents that might be annexed to a notice of appeal include: (i) pertinent documents relating to the administrative procedure prior to the adoption of the contested decision; (ii) documents relating to primary facts; (iii) witness statements relating to primary facts; (iv) documents related to market characteristics and other economic issues; and (v) expert opinion and other evidence directed to economic or technical issues. **Documents of only peripheral relevance to the case should not be annexed.**

4.37 It is important that a common sense approach is taken to these requirements. If a document is voluminous (or might, as in the case of the disputed decision, be produced by several appellants) it might be preferable for the appellant to annex extracts (provided such extracts are not taken out of context) or perhaps rely on the fact that the document is being produced by another appellant. Where complications of this kind are likely to occur, appellants should liaise with the Registrar on the most efficient approach.

4.38 As regards witness statements on issues of primary fact (for example as to whether a particular agreement was entered into, or whether conduct took place or not), statements by witnesses on whose evidence the appellant will rely must be provided with the notice of appeal.

4.39 Similarly, any experts' reports (see Section 7 (Evidence)) or other documents relied on relating to market characteristics and information such as market surveys, consumer research, trade statistics, price studies, etc. or going to technical matters, must be annexed to the notice of appeal. The Tribunal may request certain documents and any underlying calculations (spreadsheets for example) to be supplied in electronic form.

4.40 In proceedings where a confidentiality ring is established, the Tribunal may find it appropriate to order disclosure of all annexed documents into the ring. In the event that this is likely to be problematic (for example because the document contains information that is confidential to a third party), appellants ought to consider if they can rely on, and annex, non-confidential versions of the relevant document.

New evidence

4.41 Rule 9(4)(h) provides that any new evidence (that is, material the substance of which – to the knowledge of the appellant - was not before the maker of the challenged decision) relied must be identified in a statement. See further paragraphs 7.71 - 7.78 below.

Confidential treatment

4.42 If an appellant wishes to request confidential treatment over any information included in the notice of appeal, the notice should be accompanied by a written request indicating the relevant words, figures or passages for which confidentiality is claimed, and supported in each case by specific reasons: see Rule 101(1) and Section 7 (Confidentiality) which deal with the procedure to be followed with regard to such a request.

The relief sought

4.43 The relief sought – for example, that the decision be set aside, or the penalty be reduced, or the matter be remitted to the respondent, etc. – must be set out in the concluding section of the notice of appeal. If an order is sought that the respondent pay the appellant's costs, this should be specifically mentioned. If the appellant wishes to invite the Tribunal to 'give such directions, or take such other steps, as the CMA could itself have given or taken' or 'make any other decision which the CMA could itself have made' (Schedule 8, paragraphs 3(2)(d) and (e) of the 1998 Act), this should be made clear in the notice of appeal, providing an appropriate level of detail as to the particular relief sought.

4.44 If the appellant wishes to seek any directions in the context of the Tribunal's case management powers under Rule 19, for example, as to the disclosure of documents, or the presentation of evidence (Rule 21), these should be requested in the notice of appeal: Rule 9(4)(f). The early identification of case management issues will facilitate the first CMC which will normally be held around four weeks after the appeal has been filed. See Section 7 (Case management conferences: planning the case).

The length and format of the notice of appeal

4.45 Modern technology and the understandable desire of parties' representatives to leave no stone unturned may lead to the notice of appeal (and other pleadings) being longer than is necessary or useful. However, this is a matter that requires a common sense approach. In general, a notice of appeal which is too long or badly organised is likely to be counterproductive, especially if it contains repetition, irrelevant information or padding.

4.46 In the interest of ensuring that cases are dealt with expeditiously and at proportionate costs, appellants and their legal representatives are requested to make every effort to express themselves logically and concisely and to limit the length of pleadings as much as possible. In general, in a case of no particular difficulty or complexity a short notice of appeal will suffice, and a length of 20 to 30 pages should not normally be exceeded. Even in complex and difficult cases, a notice of appeal of more than 75 pages should be regarded as highly exceptional.

4.47 The notice should have a table of contents, and pages and paragraphs should be numbered. The notice and all annexed documents should be printed on both sides of

A4 paper. All materials should be hole-punched and placed in two or four-hole ring binders that are clearly indexed and labelled on the spine, the front cover and the inside front cover.

4.48 Every notice of appeal must include a schedule listing the documents annexed in a numbered sequence: Rule 9(4)(g). It is preferable if the disputed decision is put as the first document in the list.

Number of copies

4.49 Rule 9(7) requires the appellant/applicant to provide the Tribunal with the signed original of the notice of appeal/application and the annexes and ten copies, certified by the appellant or the appellant's legal representative as conforming to the original. Like the original, copies should be double-sided and placed in appropriately indexed and labelled ring binders.

Amendment, striking out and defective notices of appeal/applications

4.50 The Tribunal's permission is required to amend the notice of appeal: Rule 12(1). The Tribunal may grant permission on such terms as it thinks fit: Rule 12(2). Rule 12(3) provides that the Tribunal, in deciding whether or not to grant permission to amend, shall take into account all the circumstances including whether: (i) the proposed amendment involves a substantial change or addition to the appellant's case; (ii) is based on matters of law or fact which have come to light since the appeal was made; or (iii) could not otherwise practicably have been included in the notice of appeal; see for example *Carphone Warehouse v OFCOM (Local Loop Unbundling)* [2009] CAT 30 (decided under the 2003 Rules).

4.51 The Tribunal may refuse to hear argument on a matter that has not been set out as a ground of appeal, but has been raised subsequently in the appellant's skeleton argument.[19]

4.52 Under Rule 11 (Power to strike out), the Tribunal has power to strike out an appeal in whole or in part at any stage in the proceedings if it considers that the Tribunal has no jurisdiction to hear or determine the appeal, or it considers that the notice of appeal, or part of it, discloses no valid ground of appeal. See further paragraph 7.110 of Section 7 (Power to strike out).

4.53 Under Rule 10 (Defective notices of appeal), the Tribunal has power to give directions for putting a notice of appeal in order if it considers that it 'is materially incomplete, or is unduly prolix or lacking in clarity', and – if satisfied that the efficient conduct of the proceedings so requires - to defer service of the notice of appeal on the respondent until any defect has been remedied. The exercise of this power may be appropriate in cases where the notice of appeal is excessively long or confused.[20]

[19] See *Albion Water v DGWS (Thames Water / Bath House)* [2005] CAT 23 at [8] and *Independent Media v OFCOM* [2008] CAT 13 at [82]-[83].

[20] See *Brannigan v OFT* [2006] CAT 28 at [81]-[82]. The Tribunal made critical comments about a notice of appeal in *National Grid Plc v GEMA* [2009] CAT 14 at [228]; see also the ruling on costs in that case: [2009] CAT 24 at [12].

The notice of application: requirements

4.54 By virtue of Rule 3, Rule 9 applies to proceedings for review under section 120 or section 179 of the 2002 Act. This means that the requirements mentioned in sub-paragraphs (2), (3), (4), (6) and (7) of Rule 9 and the guidance outlined above at paragraphs 4.25 - 4.49 applies equally to applications for review.

4.55 In addition, Rule 27 provides that if the applicant in proceedings for a review under section 120 or section 179 of the 2002 Act wishes to rely on expert evidence that was not before the decision maker whose decision is the subject of the application, it must serve with its application for review an application to adduce that evidence, attaching either the statement of expert evidence on which it wishes to rely or a detailed explanation of the nature of the expert evidence that it wishes to adduce. See further paragraph 7.78(a) below.

4.56 The Tribunal's power to strike out an appeal under Rule 11 includes a power to reject an application for review under sections 120 or 179 of the 2002 Act if it considers that the applicant is not a "person aggrieved" by the decision in respect of which the review is sought: see Rule 26(3). As to the meaning of "person aggrieved", see *Merger Action Group v Secretary of State* [2008] CAT 36 at [38]-[48] and *Stagecoach v CC* [2010] CAT 1 at [10]-[18].

Filing the proceedings

4.57 See Section 9 of the Guide for information about how to file documents at the Tribunal. Unlike claims for damages (where the responsibility for service of the proceedings rests with the party commencing proceedings) service on the respondent authority will be carried out by the Registrar. However, in relation to applications for review pursuant to section 120 of the 2002 Act the applicant should provide any likely interveners with copies of the notice of application at the same time as filing it with the Tribunal.

The initial procedure after the proceedings are filed

Checking the notice

4.58 Once the notice of appeal or application has been filed with the Registrar, it will be checked by the Registry to ensure that the various requirements of the Rules and this Guide have been complied with. Documents that do not constitute appeals or applications, or which are out of time, will not be registered.

4.59 Where a notice of appeal or application does not comply with one of the requirements of Rule 9, is materially incomplete, or is unduly prolix or lacking in clarity, the Tribunal may give directions for putting the document in order (Rule 10(1)) and may defer service on the respondent until this has been done: Rule 10(2). Failure to comply with such a direction may lead to the notice of appeal or application being struck out under Rule 11(1)(e).

Acknowledgment and notification

4.60 If the notice of appeal or application is in order, the Registrar will send an acknowledgment of receipt to the appellant or applicant and send a copy of the notice to the respondent: Rule 14(1)(a)-(b).

4.61 A summary of the notice of appeal or application will be published on the Tribunal's website in accordance with Rule 14(2) to notify the fact that a notice of appeal or application has been received and to invite those who consider that they have a sufficient interest in the outcome of the proceedings to seek permission to intervene (see paragraph 4.92 et seq. for further details of the intervention procedure).

Constitution of the Tribunal

4.62 Following receipt of a notice of appeal or application, a Tribunal will be constituted to hear the matter and the Registrar will write to the parties informing them which Tribunal members will hear the case. If there are no immediate steps to be taken (because, for example, the case has been immediately stayed on request of the parties) the constitution of a Tribunal may be deferred until the case becomes active. Alternatively, if the only immediate steps in the case relate to case management, a Chairman may be appointed to the case and the other members of the Tribunal appointed at a later date when substantive issues have come to the fore.

Setting the date for the first case management conference

4.63 The Registrar's letter notifying the constitution of a Tribunal will, usually, also state the date for the first CMC. Unless the case is urgent, this will usually take place around four weeks after the proceedings have commenced and approximately two weeks **before** the defence is due to be filed. Once set, the date of the first CMC will seldom be changed. For further information with regard to the first CMC, see Section 7 of this Guide.

Correspondence on the case

4.64 The Registrar's letter will also set out the usual principle on the basis of which correspondence in respect of the proceedings ought to be conducted, namely that all correspondence to the Tribunal should be copied by the originator to all other parties, save where it is clear that only one of the parties has an interest in the correspondence, or where considerations of confidentiality or possible settlement prevail. Where several cases are being managed together it may also be expedient for correspondence to be copied to all parties in the other cases.

4.65 The Tribunal will generally address correspondence in proceedings to the appellant/applicant, copied to all other parties, including (proposed) interveners, unless there is good reason to do otherwise.

Special points on applications for review under section 120 of the 2002 Act

4.66 Parties should be prepared for the fact that the Tribunal will adapt its procedures to the individual circumstances of the case.

4.67 The Tribunal will normally regard applications for review of a decision relating to a merger as meriting a high degree of urgency.[21] As a result it is quite likely that the parties will be expected to assemble and present their respective cases within demanding timescales.[22] It is therefore important that the Registry is contacted as soon as it becomes likely that such an application will be made. It is also imperative

[21] See *Co-operative Group v OFT*, Transcript of first CMC, 11 May 2007, page 1, lines 4-8.
[22] See *Merger Action Group v Secretary of State* [2008] CAT 36 at [5].

that the applicant takes steps at an early stage to make all interested parties aware of the applicant's intention to make an application and to provide their contact details to the Registry.[23] Where possible, the applicant should provide a copy of the application to the respondent (and any known interested parties who are likely to wish to apply to intervene in the proceedings) at the same time as filing the application with the Registry, although the Registrar will still formally serve a copy of the application on the respondent.

4.68 The first CMC in an application for review under section 120 of the 2002 Act is likely to take place quite quickly after the application is filed. The precise timing of the CMC will depend on the urgency of the application[24] but it may well be listed to take place within a few days of the application being filed. For example, in *Sports Direct v CC* (Case 1116/4/8/09) a CMC was held two working days following the receipt of the notice of application. The Tribunal Registry will liaise with the parties on such matters. If urgency so requires, the Tribunal may dispense with the CMC altogether and proceed directly to a substantive hearing (subject to directions contained in an order of the President or Chairman – see below).

4.69 In urgent cases it is usual for the President (or Chairman, if appointed) to make an order as soon as the application is filed setting out whatever abridgment of the timetable is deemed necessary in the circumstances.

4.70 It is likely that the order will abridge the time for submitting a request for permission to intervene. By way of illustration, in the case of *CTS Eventim v CC* (Case 1150/4/8/10) the normal period of three weeks was abridged to ten days. In *Ryanair Holdings Plc v CMA*, the period for intervention requests was abridged to three days.[25]

4.71 In appropriate cases the order may also set a timetable for preparatory steps leading up to the hearing and dispense with the need to file a defence, instead ordering that skeleton arguments are to stand as pleadings in the matter.

Applications for review under section 179 of the 2002 Act

4.72 In general, an application for review under section 179 of the 2002 Act will be dealt with, at this initial stage of the proceedings, in the same way as an appeal under the 1998 Act.

Special points on appeals against a penalty under sections 114 and 176 of the 2002 Act

4.73 In the case of appeals pursuant to sections 114 and 176(1)(f) of the 2002 Act, the Registrar will not publish a summary of the appeal, and interventions are not permitted: Rule 28(3).

The defence

4.74 In most types of proceedings before the Tribunal (the exception being claims for damages) the first CMC generally takes place before the service of the defence. At

[23] See *British Sky Broadcasting v CC & Secretary of State* [2008] CAT 1 at [16], *Merger Action Group v Secretary of State* [2009] CAT 19 at [33] and *Wm Morrison Supermarkets plc v CC (Interim Relief)* [2009] CAT 33 at [23].
[24] The notice of application should explain whether, and why, the matter is urgent.
[25] Order of the President dated 19 June 2015 in Case 1239/4/12/15.

that CMC the Tribunal may have taken the opportunity to establish in outline what will be the areas covered by the defence and other related questions, such as witness statements and expert evidence.

4.75 The formal requirements applicable to the defence (Rule 15(2)) are broadly similar to those applicable to the notice of appeal.

4.76 Rule 15(3)(a) stipulates that the defence must contain observations on forum. Rule 15(3)(c) stipulates that the defence should contain details of any objections to the admission of evidence put forward by the appellant. In this regard it should also be noted that the respondent must also include a statement identifying the evidence (witness statements or documents annexed to the defence) the substance of which, so far as the respondent is aware, was not referred to in the disputed decision or disclosed to the appellant before that decision was made: Rule 15(3)(f). See further paragraph 7.71 et seq. of Section 7 (Evidence).

4.77 The defence is intended to respond, in a reasoned manner, to the grounds contained in the notice of appeal or application. It must contain a succinct presentation of the arguments of fact and law upon which the respondent relies: Rule 15(3)(b). Where the respondent's position in fact and law has already been set out in the decision under appeal, it may be sufficient to refer to the passages in the decision which deal with the arguments advanced, rather than rehearsing the contents of the decision.

4.78 The defence should set out the relief sought by the respondent and any directions sought under Rule 19.

4.79 The powers of the Tribunal in relation to a defective notice of appeal, mentioned at paragraph 4.53 above, apply equally to the defence: see Rule 15(7).

4.80 Rule 15(5) requires the respondent, as far as practicable, to annex to the defence a copy of every document (or part of a document) upon which the respondent relies. However, where a large number of those documents have already been annexed to the notice of appeal, it may well be more convenient to cross refer to them rather than duplicating documents that are already in the Tribunal's file. The practical application of Rule 15(5) as regards documents may be one of the matters to be discussed at the first CMC, before the defence is served.

4.81 Rule 15(5) further requires the respondent to annex to the defence 'the written statements of all witnesses of fact, and expert witnesses, if any'. In so far as the respondent's case depends on findings of primary fact, for example whether a particular concerted practice took place or not, the evidence relied on by the respondent will normally be already referred to in the contested decision. In so far as that evidence consists of statements of witnesses, the production of those statements should present no difficulty. Similarly, in so far as the respondent relies on expert evidence, it is important, for the expeditious conduct of proceedings, that such evidence is annexed to the defence.

4.82 Pursuant to Rule 3, the requirements of Rule 15 will also apply to a defence to a notice of application pursuant to the 2002 Act (except in relation to the time limit for filing the defence in merger cases – see further below). Rule 15 also applies to a defence to a penalty appeal under section 114 of the 2002 Act (again subject to a variation of the time limit for filing the defence – see further below).

Time for filing the defence in appeals under the 1998 and 2003 Acts

4.83 The respondent must file the defence and its annexes, together with ten copies certified as conforming to the original, within **six weeks** (or such further time as the Tribunal may allow) of the date on which the respondent received a copy of the notice of appeal: Rule 15(1) and Rule 15(6).

4.84 In principle the Tribunal will treat requests for extensions of time to file the defence in the same way as requests to extend the time for the filing of the notice of appeal, that is to say an extension of time will only be granted if the circumstances are exceptional: see *Napp v DGFT* [2001] CAT 2; *Freeserve v DGT* [2002] CAT 9; and *Vodafone v OFCOM* [2008] CAT 4.

4.85 It should be noted that the Tribunal may enquire at the first CMC (which, as already noted, will generally take place before service of the defence) whether it is possible for the defence to be served before the time calculated in accordance with Rule 15(1).

Time for filing the defence to an application for a review under section 120

4.86 The respondent to an application for a review under section 120 of the 2002 Act must file the defence within **four weeks** of the date on which the respondent received a copy of the notice of application (Rule 26(2) read with Rule 15(1)), unless the Tribunal directs otherwise.

4.87 In practice, the notice of application should indicate the urgency of the proceedings: see paragraph 4.68 of this Guide. In particularly urgent cases, the Tribunal will be prepared to abridge the time limit for filing the defence, or indeed order that the respondent's skeleton argument stand as the defence (see, for example: the Order of the President of 24 November 2003 in *IBA Health v OFT;* the Order of the Tribunal of 3 December 2008 in *Merger Action Group v Secretary of State*; the Order of the President dated 19 November 2009 in *Sports Direct v CC*; and the Order of the Chairman of 24 June 2015 in *Ryanair Holdings PLC v CMA*).

Time for filing the defence to an application for a review under section 179

4.88 The respondent to an application for a review under section 179 must send its defence to the Registrar so that it is received within **six weeks** of the date upon which the respondent received a copy of the notice of application: Rule 15(1).

Time for filing the defence to an appeal against a penalty imposed under sections 114 or 176(1)(f)

4.89 The respondent must file a defence within **three weeks** of the date on which it received a copy of the notice of appeal: Rule 28(2), read with Rule 15(1). The reason for this shorter period is that in most cases the CMA will have set out its case in the notice required to be served on the person in respect of whom the penalty has been imposed.

Service of the defence on the other parties

4.90 Rule 15(8) provides that the respondent must provide a copy of the defence and any accompanying documents to each other party to the proceedings at the same time as it files the defence.

Further pleadings after the defence

4.91 Rule 19(2)(b) provides that the Tribunal may give directions that the parties file a reply, rejoinder or other additional pleadings or particulars; see for example, the Order of 21 September 2004 in *Albion Water (Dŵr Cymru/ Shotton Paper) v DGWS*. However, the filing of a reply and a rejoinder is not standard practice in the Tribunal, and will only be permitted where the Tribunal considers that they are appropriate.

The intervention procedure

4.92 The Tribunal's decisions may have far-reaching consequences for third parties and the wider public interest. Interventions give those who are sufficiently interested in the outcome of proceedings the right to be heard and assist the Tribunal to consider the issues fully.

Publication of a summary of the proceedings

4.93 As mentioned above, pursuant to Rule 14(2) the Registrar must publish a summary on the Tribunal website (and in any other manner as the President may think fit) indicating that an appeal or application has been received and containing the information referred to in Rule 14(3) (the "notice'). The notice will be based on the appellant's summary of the principal grounds of appeal as it appears in the notice of appeal. For this reason it is helpful if the appellant does not include confidential information in the summary of its grounds.

Requesting permission to intervene

4.94 Persons wishing to intervene in the proceedings and who have 'sufficient interest in the outcome' have **three weeks** from the date of publication of the notice, **or such other period as directed by the President**, in which to make a request for permission to intervene: Rule 16(2) read with Rule 14(3)(f). The period within which such a request must be filed will be set out in the notice. The request must be sent to the Registrar.

4.95 If the circumstances require it, the President or the Tribunal may abridge the three week period in order to ensure the swift conduct of the proceedings. This is highly likely in applications for review pursuant to section 120 of the 2002 Act (mergers) – see, for example: Order of the President of 20 January 2005 in *Unichem v OFT* (Case 1049/4/1/05) and Order of the President of 19 June 2015 in *Ryanair Holdings PLC v CMA* (Case 1239/4/12/15); see paragraph 4.70 above.

4.96 **Parties who wish to request permission to intervene should do so at the earliest moment without waiting until the end of the period allowed** (see, for example *T-Mobile & Ors v OFCOM (Truphone's intervention)* [2007] CAT 31). The earlier a request to intervene is made, the greater the possibility for the intervener to participate in the development of the case (particularly at the first CMC which is the key planning stage in the Tribunal's procedure) and the more efficiently the Tribunal will be able to carry out its case management functions. Under Rule 19(2)(m), the Tribunal may extend the time period for making applications for permission to intervene: see, for example: *Cityhook v OFT (Interventions)* [2006] CAT 26; and *Tesco v CC (ACS's intervention)* [2008] CAT 20.

4.97 Persons should not make a request for permission to intervene unless they have a sufficient interest in the outcome of the particular case before the Tribunal.

4.98 The request for permission to intervene must contain the information set out in Rule 16(4). It must also show a 'sufficient interest' by including 'a concise statement of the matters at issue in the proceedings which affect the person making the request': Rule 16(5)(a). It should state the name of the party whose position the person making the request intends to support and include a succinct presentation of the reasons for making the request: Rule 16(5)(b) and (c). The request to intervene should be as clear and concise as possible.

4.99 The request for permission to intervene will be sent to the other parties by the Registrar and their observations will be invited, usually within a fairly short time frame (Rule 16(3)), for example one to three days. At this stage the main issue is whether the potential intervener has 'a sufficient interest'.

Considering the request for permission to intervene

4.100 If the Tribunal is satisfied, having taken into account the observations of the parties, that the proposed intervener has a sufficient interest, it may permit the intervention on such terms and conditions as it sees fit: Rule 16(6). Often, requests for permission to intervene will be considered by the Tribunal before or at the first CMC, so if permission is granted the intervener will be able to participate in the proceedings (to the extent allowed by the Tribunal) from that point onwards.

4.101 With regard to the criterion of sufficient interest, see: *BT v DGT (O2's intervention)* [2003] CAT 20*; Umbro v OFT (Sports World's intervention)* [2003] CAT 25*; Floe Telecom v OFCOM (Intervention)* [2004] CAT 2*; Albion Water v DGWS* [2004] CAT 19*; Umbro v OFT (Sports World's intervention on costs)* [2005] CAT 26; and *Barclays v CC (permission to intervene)* [2009] CAT 15. A party with a more general interest in the proceedings, such as a consumer body, may have a sufficient interest, depending on the circumstances: Order of the Tribunal of 7 September 2004 granting the Consumers' Association permission to intervene in *Burgess v OFT* (Case 1044/2/1/04). Conversely, there is no need for an interested party to intervene if the interests of that party are already adequately protected by the position taken by one or other of the principal parties (see *Umbro v OFT (Sportsworld's intervention)* [2003] CAT 25).

4.102 Interventions may sometimes be permitted at a later stage of a case where a specific issue arises, for example as to remedy, as in *Genzyme v OFT* [2005] CAT 32.

4.103 If the Tribunal gives permission, the Tribunal will give any necessary directions with regard, for example, to the service on the intervener of the documents filed with the Tribunal, admission to any confidentiality ring, the time limit for filing of the statement of intervention and, if appropriate, the submission by the main parties of a response to the statement of intervention and any objections to the admission of evidence put forward by the intervener: Rule 16(7). The nature and form of the directions for the conduct of the intervention will depend on the particular circumstances of the case, and may need to be determined after hearing the parties, for example at the first CMC.

4.104 Since the proceedings are primarily between the appellant/applicant and the respondent, the role of the intervener is by its nature an ancillary one.[26] Moreover,

[26] However, note the comments made by the Tribunal when proposing to take its own decision in *Burgess v OFT* [2005] CAT 25 at [138].

there is a risk that the arguments put forward by the intervener will, in practice, largely duplicate the arguments already advanced by the principal parties (see *National Grid v GEMA* [2008] CAT 26 and [2008] CAT 30). Particularly in cases where multiple interventions are made in support of one party, the Tribunal will generally order the interveners to liaise with each other and the party they support in order to avoid unnecessary duplication (see: Order of the Tribunal of 28 April 2009 in *Barclays v CC;* and Order of the Tribunal of 26 January 2010 in *Carphone Warehouse v OFCOM (Wholesale Line Rental)*).

4.105 In some circumstances the Tribunal may give directions as to the scope of the intervention (see Ruling of the Tribunal in *Albion Water v DGWS* [2004] CAT 19) or the admissibility of evidence filed by an intervener. Where it is appropriate to do so, the Tribunal may direct that the intervention be limited to the filing of a statement of intervention, without the scope for further oral or written submissions.

4.106 However, in appeals pursuant to section 192(2) of the 2003 Act against the determination by OFCOM under section 190 of a dispute resolution between private parties, although OFCOM will be the respondent to the appeal, the party in whose favour OFCOM resolved the dispute is generally permitted to intervene in support of OFCOM. OFCOM is not obliged to take an active part in the proceedings and may leave it to the intervener to resist the appeal.[27] In those circumstances, the intervener plays a much more prominent role, akin to that of a respondent in other appeals, and the Tribunal will give directions accordingly.

The statement of intervention

4.107 When directing the intervener to file a statement of intervention the Tribunal will also stipulate the deadline by which it should be filed. The statement of intervention must comply with the requirements of Rule 16(8) and Rule 16(9): it must contain a succinct presentation of the facts and arguments supporting the intervention; the relief sought by the intervener; a schedule listing all documents annexed to the intervention and, as far as practicable; a copy of every document or part of a document on which the intervener relies, including written statements of fact and expert witnesses, if any. It is not necessary to annex documents on which the intervener relies if these have been annexed to the notice of appeal or defence.

4.108 The statement of intervention must also contain a statement identifying the evidence (witness statements or documents annexed) the substance of which – to the best of the intervener's knowledge – was not before the maker of the disputed decision: Rule 16(8)(d). See further Section 7 (Evidence).

4.109 As mentioned above, duplication of material contained in statements of intervention filed by other interveners and the pleadings of the party in support of whom the intervention is made should be avoided.

4.110 The statement of intervention and any accompanying documents must be served by the intervener on all parties at the same time as it is filed with the Tribunal: Rule 16(11).

[27] *BT v OFCOM ("08 Numbers (Preliminary Issues")* 2011 EWCA Civ 245 at [87].

Defective statements of intervention and amendment

4.111 If the Tribunal considers that a statement of intervention is defective, it may give directions to ensure that the defects are remedied: Rule 16(10) and Rule 10(1). The intervener may amend the statement of intervention only with the Tribunal's permission: Rule 16(10) and Rule 12.

Intervention in applications for review

4.112 The intervention procedure in applications for review is similar to that in appeals save that in applications under section 120 of the 2002 Act where the matter is usually urgent, the President or Chairman will often direct that any request to intervene be made earlier than within three weeks of publication of the notice and/or order that the intervener's skeleton argument stand as the statement of intervention: see Order of the President of 24 November 2003 in *IBA Health v OFT*; and Order of the President of 20 January 2005 in *Unichem v OFT*.

4.113 For examples of circumstances in which the Tribunal granted or refused permission to intervene in applications for review, see: *Somerfield v CC (Vue's intervention)* [2005] CAT 37; *Tesco v CC (ACS's intervention)* [2008] CAT 20; *Barclays Bank v CC (Permission to intervene)* [2009] CAT 15; and *BAA v CC* [2009] CAT 22.

Intervention in appeals against penalties under the 2002 Act

4.114 Rule 16 (Intervention) does not apply to appeals against penalties under sections 114 or 176(1)(f) of the 2002 Act.

Intervention in private actions

4.115 For information concerning intervention in private actions, see paragraph 5.92 below.

References of price control matters under the 2003 Act

4.116 There are specific arrangements under Rule 116 and Rule 117 for the reference to the CMA of certain "price control matters" arising in appeals under section 192 of the 2003 Act in respect of decisions made by OFCOM.

Specified price control matters

4.117 Identifying an issue as a specified price control matter is a two-stage process. First the issue must relate to a form of price control set by a significant market power ("SMP") condition within the meaning of section 193(10) of the 2003 Act. If that test is satisfied, the second stage is to consider whether it is a "specified" price control matter for the purpose of the Rules. Under Rule 116(1), a specified "price control matter" is a matter relating to the imposition of any form of price control by way of an SMP condition imposed by OFCOM under sections 87(9), 91 or 93(3) of the 2003 Act which is disputed between the parties and which relates to:

- the principles applied in setting the condition imposing the price control in question;

- the methods applied, calculations used or data used in determining the price control; or

- what the provisions imposing the price control contained in the condition should be (including at what level the price control should be set).

4.118 To the extent that matters in an appeal under section 192 of the 2003 Act are specified price control matters, those matters must be referred by the Tribunal to the CMA: section 193(1) of the 2003 Act.

4.119 Price control matters raised by the appeal which are not specified price control matters are to be decided by the Tribunal on the merits: section 195(2) of the 2003 Act.

4.120 The notice of appeal must include a statement indicating the extent to which the appeal relates to price control, or a specified price control matter arises in the appeal: Rule 9(5). The defence must also include such a statement, as well as a statement in rebuttal of the appellant's statement under Rule 9(5): Rule 15(4).

4.121 Appellants are expected to develop in full all the grounds of appeal relied on in relation to both specified and non-specified price control matters, together with any supporting documents, in the notice of appeal as it may be difficult to amend the notice of appeal at a later date: Rule 12.

4.122 In appeals that raise both specified price control matters and non-specified price control matters it is particularly important that all pleadings indicate clearly which section(s) of the pleadings (and which evidence or parts of evidence) relate to each.

4.123 If there appears to be a dispute about whether matters raised in an appeal are specified price control matters to be determined by the CMA or non-specified price control matters to be determined by the Tribunal, it is likely that this will be considered in the context of the first CMC and the matter listed to be heard and decided as a preliminary issue. In light of this, parties should set out their reasoned position on the issue (and how it should be addressed) in any written observations submitted in advance of the first CMC.

4.124 The Tribunal has previously considered the scope of specified price control matters in *Hutchison 3G v OFCOM* [2007] CAT 26 and [2007] CAT 27. See also *TalkTalk Telecom Group v OFCOM* and *BT v OFCOM* [2015] CAT 13.

4.125 Given the role of the CMA in determining specified price control matters, it is likely to be expedient, in the context of appeals that raise such matters, to provide the CMA with copies of pleadings and to copy the CMA in on relevant correspondence in the proceedings.

Procedure for the reference of specified price control matters to the CMA

4.126 Once the issues in the appeal have been divided into specified price control matters and non-specified price control matters and any dispute over that subject has been dealt with, the Tribunal must decide whether it will deal with the non-specified matters first, postponing any reference to the CMA until after the Tribunal has come to a conclusion on those matters; whether the Tribunal should refer the price control matters to the CMA without delay and allow the CMA investigation to run in parallel

to the Tribunal's proceedings; or whether the Tribunal should stay the part of the proceedings before it pending the determination by the CMA.

4.127 The Tribunal will formulate the questions to be referred to the CMA on the basis of the pleadings. This is normally done in consultation with the parties. It may be helpful if the parties provide drafts of how they think the questions might be formulated.

4.128 The reference may be made by the Tribunal at any time prior to delivery of its decision on the substance of the appeal: see Rule 116(3) and *H3G v OFCOM and BT v OFCOM (Mobile Call Termination)* [2008] CAT 5.

4.129 Subject to any directions by the Tribunal to the contrary, the CMA must determine the matter within four months of receipt of the terms of reference. The Tribunal may give directions, either of its own motion or upon the application of the CMA or any party, as to the procedure which the CMA must follow in making its determination: Rule 117(2) and (3); see, for example: Orders of the Tribunal of 15 September 2008 and 7 January 2009 in *Hutchison 3G v OFCOM and BT v OFCOM (Mobile Call Termination)* extending time for the CMA's determination of the referred price control matters referred in those appeals; see also the Orders of the Tribunal dated 27 November 2009 and 18 February 2010 in *Carphone Warehouse v OFCOM (Local Loop Unbundling)*; and the Order of the Tribunal dated 16 December 2009 in *Cable & Wireless UK v OFCOM (Leased Lines Charge Control)*.

4.130 Once the CMA has determined the issues set out in the reference, it is required to notify the Tribunal of its determination as soon as practicable under sections 193(4) and (5) of the 2003 Act. The Tribunal must, when deciding the appeal on the merits under section 195 of the 2003 Act, decide any specified price control matters raised in the appeal in accordance with the determination made by the CMA: section 193(6) of the 2003 Act. The sole exception is where the Tribunal, applying the principles applicable on an application for judicial review, decides that the determination of the CMA would fall to be set aside on such an application: in such circumstances the Tribunal is not obliged to determine the price control matter in accordance with the CMA's determination: section 193(7) of the 2003 Act. Generally the Tribunal is unlikely to take this course of its own motion. It will be for the parties to raise any challenge to the CMA's determination in a reasoned application to the Tribunal; see *Hutchison 3G v OFCOM and BT v OFCOM (Mobile Call Termination)* [2009] CAT 11.

Interim orders and interim measures

4.131 The powers of the Tribunal (or, as the case may be, the President or a Chairman acting alone) to make interim orders or take interim measures, and the procedures to be followed, are set out in Rule 24. These powers will be exercised flexibly, according to the particular circumstances of the case. Where the interests of justice so require, an application for interim measures may be made before a notice of appeal or application has been filed and may seek an order against third parties as well as the maker of the decision founding the right to commence proceedings in the Tribunal.

4.132 Under Rule 24, the Tribunal may, with regard to a decision that is being challenged in proceedings before it, make an order on an interim basis that: (i) suspends the effect of the decision in whole or in part; (ii) in the case of an appeal under section 46 or 47 of the 1998 Act, varies the conditions or obligations attached to an exemption; or (iii) grants any remedy which the Tribunal would have the power to grant in its final decision. Moreover, where this is necessary as a matter of urgency, the Tribunal may

give any directions it considers appropriate for the purpose of preventing significant damage to a particular person or category of person, or to protect the public interest: Rule 24(2).

4.133 The requirements which a request for an order or direction under Rule 24 must satisfy are set out in Rule 24(6): the request must state the subject matter of the proceedings; the circumstances giving rise to urgency (in relation to a request under Rule 24(2)); the factual and legal background establishing a prima facie case for the granting of interim relief; and the relief sought. Where no substantive appeal or application for review has yet been made to the Tribunal, the application must also provide an outline of the information required by Rule 9(4) (see paragraph 4.28 above). In such cases the Tribunal would normally require from the person making the request for interim relief a firm indication of the date on which the substantive appeal or application for review would be lodged as well as an undertaking to pursue that appeal or application with due expedition.

4.134 The request for interim relief must be verified by a statement of truth, signed and dated by the applicant or on the applicant's behalf: Rule 24(7).

4.135 The Registry should be consulted on how many copies of the request should be provided to the Tribunal.

4.136 The request, when received, will be sent by the Registrar to the respondent (or the person who made the decision if no substantive proceedings have yet been commenced) and any other parties, and a timetable will be set for the submission of written and/or oral observations: Rule 24(8). A request for interim relief may be decided on paper or following a hearing.

4.137 If the urgency of the case so requires, the Tribunal may grant a request for interim relief before the observations of the other parties have been submitted: Rule 24(10). However, that is an exceptional course and if the applicant seeks an order in those circumstances it has a duty of full and frank disclosure in respect of all relevant matters, including those adverse to the grant of the order that might reasonably be put forward by those other parties.

4.138 An order or direction for interim relief may be sought against a person who is not a party to the proceedings but that person must first be given an opportunity to be heard: Rule 24(9). Only if the urgency of the case so requires may the request be granted before that person has been heard: Rule 24(10) (see also above).

4.139 In accordance with Rule 24(3), the Tribunal must take into account all the relevant circumstances, including: the urgency of the matter; the effect on the party making the request if the interim order or direction is not made; the effect on competition if the order is made; and the existence and adequacy of any offer of an undertaking as to damages.

4.140 Any interim order made by the Tribunal may be subject to such conditions as the Tribunal thinks fit.

4.141 The Tribunal has adjudicated on requests for interim relief that were decided under the 2003 Rules in: *Napp v DGFT* [2001] CAT 1; *Genzyme v OFT* [2003] CAT 8; *VIP v OFCOM* [2007] CAT 12; and *Wm Morrison v CC* [2009] CAT 33. Agreed orders were made in *Albion Water v DGWS* (Order made on 2 June 2005 and mentioned in [2005] CAT 19); *Burgess v OFT* (Order made on 6 July 2005 in case 1037/2/1/04(IR)); *National Grid v GEMA* (Order of 14 March 2008) and *BskyB v*

OFCOM (Pay TV) (Order of 29 April 2010 in case 1152/8/3/10(IR)). The President considered an application to vary an interim relief order in *BskyB v OFCOM* [2014] CAT 17.

4.142 The Tribunal considered an application for interim relief in the context of a decision taken by the CC in the exercise of its remedial powers under Part 3 of the 2002 Act in *Wm Morrison v CC* [2009] CAT 33.

SECTION 5: DAMAGES CLAIMS AND INJUNCTIONS UNDER SECTION 47A OF THE 1998 ACT

Introduction

5.1 This part of the Guide deals with all civil proceedings in the Tribunal apart from collective proceedings and collective settlements which are dealt with in Section 6 of the Guide. However, where a provision in Part 4 of the Rules applies to collective proceedings, the guidance in this section concerning that provision may be relevant to those collective proceedings.

The claims that may be made in the Tribunal

5.2 The following claims may be made in the Tribunal pursuant to section 47A of the 1998 Act: (i) a claim for damages; (ii) any other claim for a sum of money; and (iii) a claim for an injunction.

5.3 The claim must be in respect of:

(i) an infringement of the Chapter I and/or Chapter II prohibitions or Articles 101 and/or 102 TFEU established by a decision of a UK competition authority, the Tribunal itself, or the European Commission; and/or

(ii) an alleged infringement of the above provisions.

5.4 A claim made in respect of (i) above is sometimes referred to as a "follow-on" claim since it follows on from a prior infringement decision made by a competition authority. A claim made in respect of (ii) above, since it is not made in the wake of a competition authority's infringement decision, is sometimes referred to as a "stand-alone" claim. An action may combine both follow-on and stand-alone claims.

5.5 Generally, if the claim for damages or a sum of money (whether follow-on or stand-alone) could be made in civil proceedings in any part of the United Kingdom then it can be made in proceedings before the Tribunal.

5.6 However, a claim for an injunction can be made in the Tribunal only if it could be made in proceedings in England and Wales or Northern Ireland.[28] The Tribunal does not have jurisdiction to grant an injunction in relation to Scotland, and such a claim has to be brought before the Scottish Courts.

The rules applicable to claims

5.7 The rules applicable to claims under section 47A of the 1998 Act are principally those set out in Part 4 of the 2015 Rules. However Parts 1 and 6 of the Rules also apply to claims, and Part 2 of the Rules will also apply unless otherwise provided for in Part 4: Rule 3.

Time for filing a claim for damages: limitation

5.8 Claimants do not have an indefinite time within which to make claims in the Tribunal. Whether a claim can be made to the Tribunal depends, crucially, on whether it is brought within a period of time usually known as a limitation period.

[28] Section 47A(3)(c) of the 1998 Act.

Claims made outside the applicable limitation period are "time barred" and cannot proceed.

5.9 Section 47E of the 1998 Act establishes that claims made in the Tribunal under section 47A are subject to the law on limitation periods applicable in the part of the UK in which the proceedings arise.[29]

5.10 Therefore, in the case of claims arising in England and Wales, the Limitation Act 1980 applies to a claim under section 47A as if the claim were an action in the High Court.[30] Usually that means that a claimant has six years from the date on which the cause of action accrued in which to make a claim in the Tribunal.[31] A similar position applies in respect of claims arising in Northern Ireland.[32] Since claims made pursuant to section 47A are essentially claims for breach of statutory duty, the cause of action will generally accrue once the breach has caused damage to the claimant.

5.11 In relation to proceedings in Scotland, the position is different.[33] Section 6 of the Prescription and Limitation (Scotland) Act 1973 applies, and the limitation period in respect of such claims will generally be five years.

5.12 Section 47E of the 1998 Act sets out limitation rules that apply both to claims under section 47A and to collective proceedings brought pursuant to section 47B. However, those limitation rules do not apply to claims which arose before 1 October 2015.[34]

5.13 Where a claim arose prior to 1 October 2015, the limitation periods set out in Rule 31(1) to (3) of the 2003 Rules continue to apply: Rule 119. Although the permission of the Tribunal is required under rule 31(3) for a follow-on claim to be made before the end of the period specified in section 47A(7) or (8) of the 1998 Act as it was prior to the amendments made by the 2015 Act,[35] the decision on whether to grant such permission will be made in the context of the new regime for private actions before the Tribunal introduced by the 2015 Act and the implementation of section 16(1) of the 2002 Act. The approach adopted by the Tribunal prior to 1 October 2015 will therefore not govern its exercise of this discretion.

5.14 These limitation rules apply only to claims commenced in the Tribunal and have no effect on claims commenced in any other court in the United Kingdom.

5.15 It should be stressed that these are merely general guidelines, and it is beyond the scope of this Guide to provide definitive advice. Determining whether a particular claim is still in time can be a complex matter, and potential claimants should seek legal advice at the earliest available opportunity.

Commencing a claim under section 47A of the 1998 Act

5.16 A claim for damages under section 47A of the 1998 Act should be made by sending a claim form to the Registrar.

[29] If it is not obvious from the outset, the Tribunal will, at an early stage, need to determine the forum of the proceedings in accordance with Rules 52 and 18.
[30] Section 47E(2)(a) of the 1998 Act.
[31] See section 9(1) of the Limitation Act 1980.
[32] Section 47E(2)(c) of the 1998 Act and the Limitation (Northern Ireland) Order 1989.
[33] Section 47E(2)(b) of the 1998 Act.
[34] Paragraph 8(2) of Schedule 8 of the 2015 Act.
[35] In effect, when the infringement decision on which the claim is based becomes final.

5.17 The claim form is a document which sets out the nature of the cause of action alleged against the defendant together with details of the relief being sought (for example damages in respect of an overcharge and/or an injunction).

5.18 The required contents of the claim form are set out in Rule 30 and may be divided into formal requirements and substantive requirements.

Formal requirements of the claim form

5.19 A claim form must contain:

- the claimant's full name and address;
- the full name and address of its legal representative, if any;
- an address for service in the United Kingdom; and
- the name and address of the defendant.

5.20 The contents of the claim form must be verified by a statement of truth signed and dated by the claimant, or on the claimant's behalf by its duly authorised officer or legal representative. However, a claim form will remain effective even if not verified by a statement of truth unless it is struck out.

Substantive requirements of the claim form

5.21 The claim form should:

- State whether the claim is following on from an infringement decision and if so, whether that infringement decision has become final within the meaning of section 58A of the 1998 Act (that is, whether it is a final decision which will bind the Tribunal or whether it is still open to appeal and therefore possible reversal or modification).
- Make observations on the question in which part of the United Kingdom the proceedings of the Tribunal are to be treated as taking place pursuant to Rule 18. This will assist the Tribunal in determining whether the case is to be treated as an English and Welsh case, a Scottish case or a Northern Irish case. This can be important since it will affect questions such as which limitation period applies to the claim (see above).
- Contain a concise statement of the relevant facts, identifying, in a follow-on claim, any relevant findings in the decision on the basis of which the claim is being made.
- Set out a concise statement of any contentions of law which are relied on.
- State the relief which the claimant is requesting from the Tribunal.[36] Where applicable, this should include:

[36] See paragraphs 5.119 - 5.138 for specific guidance in relation to claims for injunctions.

- a statement of the amount claimed in damages, supported by an explanation of how that amount has been calculated;

- details of any other claim for a sum of money;

- a statement that the claimant is making a claim for an injunction (the Tribunal only has power to grant injunctions in cases arising in England and Wales and Northern Ireland. It does not have this power with regard to Scottish cases (see above);

- any matters that may from time to time be specified by a practice direction.

The structure of the claim form

5.22 Whilst the Rules do not prescribe a structure for the presentation of the claim, it is vital that the Tribunal is able fully to understand the claim from the moment of its receipt. Clarity, concision and common sense should underpin the drafting and presentation of the claim form.

5.23 It is useful to have the names and contact details of the parties set out at the beginning of the document so that the Tribunal does not have to search through the document for that information.

5.24 After that, it is helpful to have a brief summary of the factual and legal nature of the claim (in no more than a few paragraphs). This might form the basis of the summary which the Registrar will, at a later stage, place on the Tribunal website in accordance with Rule 33(8).

5.25 Next, it will normally be appropriate to set out fully the factual background to the claim, how it has arisen and how those facts are alleged to have caused loss to the claimant. If the claim is following on from an infringement decision, the claimant should be particularly careful to identify concisely the facts found in the relevant infringement decision that are relied on. Whilst extensive quotations from the infringement decision should be avoided, the claim form should cross-refer to the relevant parts of that decision.

5.26 Having identified the facts on which the claim is based, the claim form should identify the grounds which entitle the claimant to recover the sums claimed. The arguments supporting those grounds should then be developed in a concise manner. Where grounds overlap, it is sufficient to refer back to the arguments already developed. Any calculations relied on as to the amounts claimed and any interest thereon should be clearly set out, either in the body of the claim form or, if lengthy in nature, in a document annexed to the claim form.

5.27 In setting out the arguments in support of each ground, it is unnecessary to set out lengthy extracts from decided cases: short citations, accompanied by the case reference and paragraph number, will normally suffice.

Documents to be annexed

5.28 The claimant should annex to the claim form:

- a copy of any infringement decision on the basis of which the claim is being made;

- copies of any documents that are referred to in the claim form;

- any application for the claim to be subject to the fast-track procedure (see paragraphs 5.139 - 5.149 below).

5.29 At this stage it is not necessary to produce every document on which the claimant will rely; it suffices to include any relevant infringement decision forming the basis of the claim and any document to which reference is made in the claim form. In this regard, the claim form should only refer to documents of central importance and should not include material of a peripheral nature.

5.30 If a particular document is very lengthy and production of the full document would serve no purpose, the claimant need only annex the relevant extracts in between the first and the last pages of the document. Where this is done, the claimant should of course be ready to produce full copies of the document if requested by the Tribunal or another party to the proceedings.

5.31 The claimant is not required to annex the statements of any witnesses (whether factual or expert), unless the witness evidence is fundamental to a proper understanding of the claim. If witness evidence is not annexed, the claimant should indicate in the claim form the nature of the evidence that will be relied on and, where possible, identify the witness, or witnesses, concerned. See also Section 7 of the Guide (Evidence).

Copies

5.32 Unless the Tribunal otherwise directs, the signed original of the claim form and any annexes should be accompanied by five copies certified by the claimant or its legal representative as conforming to the original: Rule 30(6).

Other practical points concerning the preparation of the claim form and annexes

5.33 The claim form and its annexes should be hole-punched on the left hand side and bound in ring binders or lever arch files. All documents in the claim form bundle should be printed on both sides of A4 paper unless there are common sense reasons for doing otherwise. See also Section 9 of the Guide (Files and labelling).

5.34 A schedule of annexes should be included with the claim form.

Indication of method of service

5.35 When sending the claim form to the Registrar, the claimant must also provide details of how the claimant proposes to serve the claim form on the defendant: Rule 30(7). This is to enable the Registrar to provide suitable directions for service in accordance with Rule 33(1). The claimant must not proceed with service before receiving the Registrar's directions.

Claims against defendants outside the jurisdiction: additional requirements

5.36 There are very important additional considerations to be taken into account when assembling a claim against a defendant outside the jurisdiction (a "foreign

defendant"). These flow from the provisions concerning service of a claim form on a foreign defendant set out in Rule 31. However, since the Tribunal has UK-wide jurisdiction, these provisions do not apply as regards service in another part of the United Kingdom.

5.37 The position is fundamentally different according to whether or not the permission of the Tribunal is required for service of the claim form out of the jurisdiction.

Where permission is not required

5.38 In a case where permission is not required, the claimant **must,** when sending the claim form to the Registrar, also file with the Tribunal a notice verified by a statement of truth setting out the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction and any material facts relied on: Rule 31(1). This notice must be a self-contained document, separate from the claim form.

5.39 In summary, permission for service of the claim form on a foreign defendant is not required if:

(i) the defendant is domiciled in any Member State of the European Union and each claim made against that defendant is a claim which the Tribunal has power to determine under Regulation (EU) No. 1215/2012 of the European Parliament and the Council ("the Judgments Regulation"); *and/or*

(ii) the defendant is domiciled in any territory to which the Lugano Convention or the Brussels Convention, as defined in section 1(1) of the Civil Jurisdiction and Judgments Act 1982, applies (in either case, a "Convention territory")[37] and the claim made against that defendant is a claim which the Tribunal has power to determine under the respective Convention; *and in either case*

(iii) no proceedings between the parties concerning the same claim are pending in the courts of any other Member State or Convention territory, as the case may be.

But where the conditions in (i) apply, then if the defendant is party to an agreement within Article 25 of the Judgments Regulation that confers exclusive jurisdiction as regards the claim on the courts of any part of the United Kingdom, then condition (iii) does not apply.

5.40 In general, apart from the case where there is an agreement between the parties conferring jurisdiction on the courts of any part of the United Kingdom, the Tribunal will have power under the Judgments Regulation, the Lugano Convention or the Brussels Convention to determine a claim under section 47A of the 1998 Act:

(i) if the United Kingdom is the place where the harmful event occurred (or in the case of an injunction application, may occur): see Article 7(2) of the Judgments Regulation, Article 5(3) of the Lugano Convention and the Brussels Convention; and/or

[37] The Lugano Convention will apply where the defendant is domiciled in Iceland, Norway or Switzerland. The Brussels Convention will apply where the defendant is domiciled in the territory of a Member State which falls within the territorial scope of that Convention but is excluded from the Judgments Regulation pursuant to Article 355 TFEU.

(ii) if the foreign defendant is one of a number of defendants at least one of whom is domiciled in the United Kingdom: see Article 8(1) of the Judgments Regulation, Article 6(1) of the Lugano Convention and the Brussels Convention.

5.41 For ground (i), the place where the harmful event occurred means the place where the event giving rise to the damage occurred or the place where the damage occurred: Case C-189/08 *Zuid-Chemie* [2009] ECR I-6917 at [19] and [23]. See generally *Deutsche Bahn AG v Morgan Advanced Materials* [2013] CAT 18.

Where permission is required

5.42 Where a claimant requires permission to serve out of the jurisdiction, it **must** make an application to the Tribunal verified by a statement of truth setting out the matters specified in Rule 31(2). The application must be a self-contained document, completely separate from the claim form.

5.43 The claim form will include observations as to which part of the United Kingdom in which the proceedings should be treated as taking place pursuant to Rule 18: see paragraph 5.21 above. The Tribunal will determine the application for permission to serve out of the jurisdiction according to the relevant principles that apply under the law of that part of the United Kingdom: for example, if the claimant states that the proceedings should be treated as taking place in England and Wales, the Tribunal will apply the approach of the High Court and the grounds for service out of the jurisdiction must satisfy one of the 'gateways' under paragraph 3.1 of CPR Practice Direction 6B. See *DSG Retail Ltd v MasterCard, Inc* [2015] CAT 7.

5.44 Applications for permission need not be served on the defendants and will usually be determined on the papers. Since the Tribunal will not at that stage generally hear submissions from the defendants, the claimant is under duty to make full and frank disclosure of matters material to the application: see *DSG Retail* at [44]-[45].

5.45 If permission is granted, the Tribunal will normally give directions as to service on the foreign defendant.

The initial procedure after the claim form has been sent to the Registrar

5.46 Upon receipt of the claim form and annexes, the Tribunal Registry will check to see that the claim form is in order. Claim forms that clearly fail to meet the requirements of the Rules or which are clearly out of time will not be registered and will be returned to the claimant.

5.47 Claimants should note that, pursuant to Rule 3(b), the provisions of Rule 10 (Defective notices of appeal) will also apply to claim forms. Therefore if a claim form does not comply with the requirements of the Rules, or is materially incomplete, or is unduly prolix or lacking in clarity, the Tribunal may give directions for putting the document in order: Rule 10(1).

5.48 Once satisfied that the claim form is in order, the Registrar will register it and write to the claimant to acknowledge receipt.

5.49 The Registrar's letter of acknowledgement will usually contain directions allowing the claimant to proceed with service of the claim form on the defendant: Rule 33(1) and (3). Where the claimant is seeking permission to serve the claim form on a

defendant outside the jurisdiction, any directions for service must await the Tribunal's determination of that application and, if the application is granted, will be notified to the claimant thereafter.

5.50 Where the claim is ready to proceed to the service stage, the Registrar will provide the claimant with the Tribunal's form of acknowledgment of service (bearing the Tribunal's official stamp) which the claimant will need to include with the claim form when serving it on the defendant.

Service of the claim form

5.51 When the claimant has received directions allowing service of the claim form from either the Registrar (or, in the case of permission to serve outside the jurisdiction, the Tribunal), the claimant should promptly comply with those directions and proceed to serve on the defendant:

- the claim form and annexes; and

- the acknowledgement of service form provided by the Registrar.

5.52 In addition, where service is taking place outside the jurisdiction, the claimant must at the same time serve on the defendant:

- a copy of the claimant's notice pursuant to Rule 31(1), indicating that the permission of the Tribunal is not required to serve the claim form on the defendant; or

- a copy of the claimant's application, pursuant to Rule 31(2), for permission to serve the claim form on the defendant; and

- a copy of the Tribunal's order granting permission and giving directions for service outside the jurisdiction.

5.53 The claimant must provide a copy of the claim form to the CMA at the same time as serving it on the defendant: Rule 33(7). The relevant address for this purpose is:

The Director of Competition Policy
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

Documents can also be sent to the CMA electronically at the following address: privateactions@cma.gsi.gov.uk

5.54 Further guidance may be found on the CMA website.

Acknowledgment of service

5.55 Where the claim form is served on a defendant within the United Kingdom, the defendant should ensure that the acknowledgment of service form is completed and filed with the Registrar within seven days of the date on which the defendant received the claim form: Rule 33(4).

5.56 Where the claim form is served on a defendant outside the jurisdiction, the period of seven days for filing the acknowledgment of service form with the Registrar is extended so as to accord with the period applicable under the CPR (or equivalent provisions in Scotland or Northern Ireland): Rule 33(5). Usually this period will be specified in the directions of the Tribunal regarding service out of the jurisdiction. Rule 34(3) provides that the filing of an acknowledgment of service does not deprive a defendant of any right to dispute the jurisdiction of the Tribunal; on the contrary, it is a pre-condition for the making of an application to challenge the jurisdiction: Rule 34(2).

5.57 Failure by a defendant to ensure that the acknowledgment of service form is filed with the Registrar within the specified period may result in judgment being entered against it: Rule 42(1)(a).

Disputing the jurisdiction

5.58 Where after service upon it of the claim form a defendant wishes to challenge the jurisdiction, it must:

- file an acknowledgment of service to the Registrar in accordance with Rule 33(4) or (5); and

- within 14 days thereafter, make an application, supported by evidence, for an order declaring that the Tribunal has no jurisdiction: Rule 34(4).

5.59 Any application to dispute the jurisdiction will usually be set down for oral hearing by a Chairman sitting alone. The defendant need not serve a defence until the application has been heard: Rule 34(3).

Getting the case underway

Constitution of the Tribunal

5.60 After the Registrar has received the acknowledgment of service, the President will allocate the case to a Chairman who will normally sit alone during most of the preparatory and intermediate stages of the proceedings. The President will constitute a full Tribunal for the case as and when appropriate in the circumstances, for example if there is a particular need for wider expertise in relation to any particular aspect of the case or if there is a matter which the Chairman cannot deal with sitting alone (see Rule 110(1) – which essentially deals with situations in which the case is being brought to an end before a final hearing). In many cases, the allocation of the other members of the Tribunal will take place nearer the time fixed for the final hearing.

Correspondence on the case

5.61 The Registrar's letter to the parties informing them of the constitution of the Tribunal will also set out the usual principle on which correspondence in respect of proceedings is to be conducted, namely that all correspondence to or from the Tribunal will be copied to all other parties save where it is clear that only one of the parties has an interest in the correspondence or where considerations of confidentiality or possible settlement prevail.

Summary of proceedings

5.62 Following acknowledgment of service, the Registrar will publish a summary of the claim form on the Tribunal website in accordance with Rule 33(8). In a case where there are several defendants, this will be done after the last defendant has acknowledged service.

The first case management conference

5.63 In the case of claims pursuant to section 47A, the first CMC will not generally take place until after the filing of the defence and reply. The Tribunal will be in a better position to understand how the case should proceed having reviewed the pleadings (see paragraph 5.83 below).

5.64 However a different approach may be taken if there is an early application requiring judicial determination, for example an application to contest the jurisdiction, move the case to the fast track or for injunctive relief. In such cases, a consideration of the future shape of the case, such as would occur at the first CMC, may be brought forward.

5.65 See Section 7 (Case Management) for further information about CMCs.

The defence

5.66 Within 28 days of service of the claim form, the defendant should file a defence setting out in sufficient detail which of the facts and contentions of law in the claim form it admits or denies and on what grounds, and on what other facts or contentions of law it relies: Rule 35(1). If the defendant is outside the jurisdiction then the period for filing the defence will be extended so as to accord with the period applicable under the CPR (or equivalent provisions in Scotland or Northern Ireland) in such circumstances: Rule 35(7). Usually this period will be specified in the directions of the Tribunal regarding service out of the jurisdiction: see paragraph 5.56 above.

5.67 The defence should also make observations on the question in which part of the United Kingdom the proceedings are to be treated as taking place under Rule 18. If there is no dispute between the parties concerning that issue, a simple statement that the defendant agrees with the observations in the claim form will suffice. Failure to make any observations on this aspect will mean the agreement of the defendant will be presumed by the Tribunal.

5.68 The contents of the defence must be verified by a statement of truth signed and dated by the defendant or on its behalf by its duly authorised officer or legal representative: Rule 35(2).

5.69 The defence should contain the same level of detail as required in respect of the claim form and, as far as practicable, annex a copy of every document referred to in the defence.

5.70 Unless the context requires otherwise, the guidance given above in respect of the claim form applies equally to the preparation and presentation of the defence. Overall, the defendant should ensure that there is no unnecessary duplication of material between the claim form and the defence. Rule 35(3) makes clear that it is not necessary to annex to the defence any document which has already been annexed to the claim form.

5.71 The defendant must serve a copy of the defence and annexes on each party at the same time as it files the defence with the Tribunal. The defendant should at the same time send a copy of the defence to the CMA: see paragraph 5.53 above for the CMA's address for this purpose.

Reply to the defence and further pleadings

5.72 Rule 36(1) allows the claimant, within 21 days of receipt of the defence, to file a reply. However, this is not a requirement. If the claimant does not wish to file a reply, it should inform the Registrar and the other parties of that fact as soon as possible rather than let the 21 day period expire. Similar considerations to those mentioned above in respect of the claim form and defence apply to the preparation and presentation of the reply.

5.73 Following the reply, no further pleadings may be filed by any party without the permission of the Tribunal: Rule 37.

Amendment of pleadings

5.74 Amendment of the claim form can only be made with the written consent of all the parties or with the permission of the Tribunal: Rule 32(1). Rule 32(2) makes provision for certain types of amendment outside the limitation period.

5.75 Amendments of other pleadings may only be made if the Tribunal gives permission in exercise of its general power of case management under Rule 53.

Additional parties and additional claims

5.76 Rule 38 governs the removal, addition or substitution of parties in the proceedings. These changes require the permission of the Tribunal and it will therefore be necessary for any party (whether an existing party or a person seeking to become a party) wanting to make such a change to make an application to the Tribunal. The application should be served on the other parties and any new person whom it is sought to introduce to the proceedings. Rules 38(6) and (7) make clear that the scope for adding or substituting parties is more restricted when a relevant limitation period has expired.

5.77 Rule 39 allows for the possibility of additional claims. The Rule covers both a counterclaim by a defendant against a claimant and claims made by a defendant against a third party (and by that third party against another third party). Any such additional claim has to fall within the ambit of section 47A of the 1998 Act (Rule 39(3)).

5.78 An additional claim will require the permission of the Tribunal unless filed at the same time as the defence (Rule 39(3) and (4)) and will be treated as if it were a claim for the purposes of the Rules: Rule 39(2). Therefore, in respect of an additional claim against a third party, the procedures in respect of the filing and service of a claim have to be observed by the person making the additional claim; and the third party recipient of the additional claim has to file an acknowledgement of service and defence in accordance with the Rules and will become a party to the proceedings. Where the additional claim is a counterclaim by the defendant against the claimant, the claimant has to comply with Rule 35 regarding the filing of a defence.

5.79 Rule 40 sets out the powers of the Tribunal upon receipt of an additional claim. Whether or not the permission of the Tribunal is required to make the additional claim, the Tribunal has power to decide whether the additional claim may be dealt with alongside the main claim or dismissed, or whether it should proceed separately or be transferred to another court: see Rule 40(1)(c) and (d). In deciding whether to exercise its powers under Rule 40(1) with regard to the additional claim, the Tribunal will consider the matters set out Rule 40(2) so as to ensure the whole case is dealt with justly and at proportionate cost in accordance with the governing principle set out in Rule 4(1).

Case management

5.80 Rules 53 to 57 contain case management powers for the Tribunal when dealing with claims for damages. These rules also apply to cases proceeding under the fast-track procedure and to collective proceedings.[38]

5.81 The Tribunal may at any time, on the request of a party or of its own initiative, at a CMC, pre-hearing review or otherwise, give such directions as are provided for in Rule 53(2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost: Rule 53(1).

5.82 Although Rule 53(2) contains a list of types of directions the Tribunal may make, this should be regarded as indicative. As Rule 53(1) makes clear, the Tribunal may make other types of directions if that is necessary or appropriate for the just and proportionate determination of the case. It should be noted that the Tribunal may be pro-active in seeking further information, submissions or documents: Rule 53(3).

5.83 In general, a CMC will be held as soon as practicable after the reply is served (or the time for service of a reply has expired). This will be an opportunity for the Tribunal to consider with the parties and their legal representatives the future conduct of the case, having regard to the governing principles set out in Rule 4. The matters usually addressed at the first CMC are set out in Rule 54(3). For more information about CMCs, see Section 7 (Case management conferences).

5.84 Where a party wishes to ask the Tribunal to make a direction, it should make a reasoned application supported by any evidence on which it wishes to rely: Rule 53(4)

5.85 Rule 57 sets out the Tribunal's powers to deal with a failure to comply with its directions. These include the power to debar a party from taking any further part in the proceedings without the permission of the Tribunal and power to make a costs order against a party or its representative.

Disclosure

5.86 Disclosure in proceedings before the Tribunal is not automatic and proceeds on the order or direction of the Tribunal. The only exception is that a party may request disclosure of any document referred to in the pleadings or in witness statements or affidavits or in an expert report: Rule 61.

5.87 In general, the Tribunal will consider at the first CMC whether and when each party should file a disclosure report and, where appropriate, an electronic documents questionnaire, in the form set out in the schedule to CPR Practice Direction 31B. On

[38] See also Rule 88 (Case management of the collective proceedings).

consideration of these reports and questionnaires, at a further CMC the Tribunal will determine what disclosure should be provided, having regard to the governing principles as set out in Rule 4. This is an area in which the Tribunal will expect the parties to pay close attention to the requirement of co-operation in Rule 4(7) and to the need to devise a sensible and practical approach to the conduct of the proceedings. The purpose of disclosure is to obtain documentary material that assists in determination of the issues raised by the pleadings and it is not to be used as a weapon in a war of attrition.

5.88 The ambit of the duty to disclose documents is set out in Rule 60(4) to (7). Basically a party has a duty to disclose documents which are or have been in its "control" (a wider term than physical possession). That duty continues until the proceedings are concluded and extends to any documents which come to a party's notice at any time during the proceedings.

Pre-action disclosure

5.89 An application may be made to the Tribunal for disclosure before any proceedings have started, where the applicant is likely to be a party to such subsequent proceedings and the respondent from whom disclosure is sought is likely to be a defendant: Rule 62. However, such disclosure will only be ordered if it is desirable to dispose fairly of those anticipated proceedings, assist in avoiding them altogether or otherwise to save costs. Any such application must be supported by evidence. The Tribunal is likely to order pre-action disclosure only of specific documents or a very limited category of documents, and it will be alert to reject any purely speculative disclosure requests. The applicant must satisfy the Tribunal that there is good reason why the disclosure requested should not come in the usual way after proceedings have started and the applicant has set out its full case.

Disclosure against non-parties

5.90 A party to proceedings before the Tribunal may apply for an order of disclosure by someone who is not a party of documents likely to support the applicant's case or adversely affect the case of another party: Rule 63. Such an application must be supported by evidence. As with pre-action disclosure, the Tribunal is only likely to order disclosure of clearly defined documents or a very limited category of documents, and it will have regard to the fact that the person from whom disclosure is sought is not involved in the proceedings. Any such application must be served on the person from whom disclosure is sought, as well as on the other parties. If the Tribunal makes such an order, it may include provision for the payment of the costs incurred by the non-party in making disclosure.

5.91 Rule 64 governs both the procedure for seeking an order to withhold disclosure of a document on the ground of damage to the public interest (Rule 64(1) and (2)) and privilege claims: Rule 64(3). Rule 64(6) indicates how the Tribunal may proceed to decide such matters.

Intervention, consolidation and forum

5.92 Whilst Rule 50 indicates that the intervention procedure can (with modifications) be invoked in the context of a claim under section 47A, it is likely to be confined to cases where a third party can make useful observations to the Tribunal on the broader policy context in which a particular case arises.

5.93 Rule 50(2) makes specific provision for the CMA to make written observations to the Tribunal on issues relating to the application of European competition law and the Chapter I and Chapter II prohibitions. Further, the CMA may, with the permission of the Tribunal, make oral observations on those matters at a hearing. This rule follows Article 15(3) of Regulation 1/2003 and applies the same approach to the relevant provision of national competition law.

5.94 Rules 51 and 52 apply Rules 17 (Tribunal's power to consolidate proceedings) and 18 (Determination of which part of the UK is to be treated as the forum of the proceedings) to claims under section 47A. See also Section 7 of this Guide.

Summary disposal

5.95 Rules 41 to 44 set out a number of ways in which a claim may be terminated without a settlement or proceeding to a full hearing.

Power to strike out

5.96 Rule 41 provides that the Tribunal may strike out in whole or part a claim at any stage of the proceedings if it considers that: (a) it does not have jurisdiction; (b) there were no reasonable grounds for making the claim; (c) the claim is vexatious; or (d) the claimant has failed to comply with any rule, practice direction, order or direction of the Tribunal.

5.97 This is a severe sanction which the Tribunal will not invoke without hearing the parties. Any application for the Tribunal to exercise its power under Rule 41 should be fully reasoned and supported by evidence. The application should be made when it becomes apparent that grounds for the application exist, which should normally be well before the substantive hearing of the claim.

5.98 Where a claimant fails to comply with a rule, practice direction or order, the Tribunal will not usually exercise its power to strike out the claim without making a further 'unless' order giving the claimant an opportunity to remedy the default and thereby avoid the claim being struck out.

5.99 Although Rule 41 applies only to claims (and additional claims: Rule 39(2)), the Tribunal also has power to debar any party that has failed to comply with a direction of the Tribunal from taking any further part in the proceedings: Rule 57(1)(c).

Default judgment

5.100 Rule 42 provides that the Tribunal may of its own initiative or on the application of a party give default judgment (without consideration of the merits) where the defendant has not filed an acknowledgment of service or a defence to the claim or where the claimant has not filed a defence to a counterclaim within the time required by the Rules.

5.101 In most cases, it will be for a party to make an application to the Tribunal for a default judgment. That application should provide proof of service (Rule 42(3)) and should indicate the amount as to damages, costs and interest and any other relief in respect of which the default judgment is sought. If the application relates to only some of the defendants, it should also set out the basis on which the applicant contends that the claim against those defendants can be dealt with separately from the claim against the other defendants: Rule 42(6).

5.102 A default judgment cannot be given where the defendant has made one of the applications listed in Rule 42(2) that has not yet been determined, i.e. where the defendant is disputing the jurisdiction or has applied to strike out the claim or for summary judgment. For Rule 42(2) to apply, the defendant must have filed and served such an application. Mere mention of the intention to make an application in correspondence with the Tribunal or the claimant will not be sufficient.

5.103 If a defendant seeks to set aside a default judgment, it should make a reasoned application supported by evidence.

Summary judgment

5.104 Summary judgment may be given against a claimant or a defendant on the whole of a claim or a particular issue if the Tribunal considers that the relevant party has no real prospect of success in relation to the claim or that issue and if there is no other compelling reason why the case or issue should await determination at a substantive hearing: Rule 43.

5.105 The broad purpose of summary judgment is to allow a claim or an issue as to which there is a clear and unanswerable case to be disposed of without the need to devote further resources to the proceedings through to a final substantive hearing. It is a mechanism for ensuring that the case is handled in a proportionate way in order to satisfy the governing principles set out in Rule 4(1).

5.106 Ordinarily, the Tribunal would not expect to receive an application by a claimant for summary judgment until the defendant has filed an acknowledgment of service. If the defendant intends to apply for summary judgment against the claimant then that application should be filed after filing an acknowledgment of service and preferably at the same time as the defence. An application for summary judgment should be filed with the Tribunal and served on the other party at the same time. The application should append a draft of the order being sought and state the reasons for the application. It should include a statement of belief that the other party has no real prospect of succeeding and that the applicant knows of no other reason why the matter should proceed to a final hearing. The application may be supported by one or more witness statements, but the Tribunal would not ordinarily expect oral evidence to be given at the hearing of the application.

Withdrawal of the claim

5.107 A claimant can only withdraw its claim with the consent of the defendant or with the permission of the Tribunal: Rule 44. If the parties agree that the claim should be withdrawn, they should submit an agreed draft order to the Tribunal for its consideration.

Settlement Offers

5.108 Any party to proceedings may make an offer to one or more other parties to settle the case as between them in whatever way it chooses. As noted above, the parties may by consent seek an order for withdrawal of the claim pursuant to Rule 44. Alternatively, they may by consent apply for an order that the proceedings are stayed except for the purpose of giving effect to agreed terms of settlement: Rule 53(2)(k).[39]

[39] Referred to in England and Wales as a "Tomlin order": see CPR, Vol. 1, para 40.6.2.

5.109 However, Rule 45 introduces a special regime which carries potentially significant implications for costs if an offer of settlement that complies with its requirements is either accepted or not accepted. Such an offer is referred to as a "Rule 45 Offer".

5.110 A Rule 45 Offer may be made by either a claimant or a defendant. However, the regime does **not** apply to collective proceedings and it is accordingly not possible to make a Rule 45 Offer in those proceedings. It will be possible to make an offer to settle such proceedings by way of a *Calderbank* letter (i.e. a written offer made "without prejudice save as to costs").

5.111 The regime is modelled on CPR Part 36 and will be interpreted accordingly, but there are some important differences which are highlighted below.

5.112 To constitute a Rule 45 Offer, the offer must comply with the provisions of Rule 45(3). In particular, the offer must be in writing and state expressly that it is intended to be a Rule 45 Offer. If the terms of the offer are unclear, the offeree may within seven days ask for clarification; and if that is not provided the offeree may apply to the Tribunal for an order to that effect: Rule 46.

5.113 There are particular provisions and restrictions regarding the withdrawal or amendment of a Rule 45 Offer: see Rule 47.

If the Rule 45 Offer is accepted

5.114 The costs consequences of acceptance of a Rule 45 Offer are set out in Rule 48.

5.115 For the costs implications of a Rule 45 Offer when the offer is accepted, it is necessary to distinguish between: (i) offers made at least 21 days before trial; and (ii) offers made less than 21 days before trial.

(i) *Offers made at least 21 days before trial*

a. Offer is accepted within the Relevant Period:[40] the claimant is entitled to its costs up to the date of acceptance (or Rule 45(11)(b)(i) notice);

b. Offer is accepted after the expiry of the Relevant Period: if the parties cannot agree liability for costs, the claimant is entitled to its costs up to the expiry of the Relevant Period and the offeree shall pay the offeror's costs incurred between the expiry of the Relevant Period and the date of acceptance (or Rule 45(11)(b)(i) notice), unless the Tribunal otherwise directs.

(ii) *Offers made less than 21 days before trial.* The Tribunal will make an order as to costs unless the parties agree liability for costs.

5.116 There are particular provisions (which differ from the CPR in certain respects) concerning the situation where a claim is brought against a number of defendants and only one or more, but not all, of those defendants make a Rule 45 Offer: Rules 45(11) and 48. Such an offer must state whether it is made in satisfaction of the claim against all defendants or only against those making the offer: Rule 45(3)(f). It is then necessary to distinguish the position according to whether: (i) the claimant alleges that the defendants are jointly and severally liable; (ii) the claimant alleges that the

[40] The Relevant Period is defined in Rule 45(1).

defendants are liable severally but not jointly; or (iii) the claimant alleges that the defendants are liable only jointly or in the alternative:

(i) *Defendants' alleged liability is joint and several*. If the offer is to settle the claim against all defendants and the claimant accepts the offer, the Tribunal will direct that the claim against the other defendants is discontinued: Rule 45(11)(a). The costs which the claimant is entitled to recover under Rule 48(1) will then be its costs of the proceedings against all defendants: Rule 48(3). On the other hand, if the offer is to settle the claim only against those defendants making the offer, the claimant may serve notice on them agreeing not to continue with its claims against them in return for payment, and continue its claim against the other defendants: Rule 45(11)(b). Such a notice means that the resulting agreement is to be interpreted as a covenant not to proceed against the offerors and not as a release of liability that might discharge the other defendants.[41] The costs to which the claimant is entitled under Rule 48(1) will then be its costs related to the proceedings against only those defendants: Rule 48(3).

(ii) *Defendants' alleged liability is several but not joint*: The claimant may accept the offer and continue with its claims against the other defendants: Rule 45(11)(c). The costs to which the claimant is entitled under Rule 48(1) will then be its costs related to the proceedings against only those defendants: Rule 48(3).

(iii) *Defendants' alleged liability is only joint or in the alternative*. The claimant may only accept the offer if the claimant also discontinues its claim against the other defendants and those defendants give their written consent: Rule 45(11)(d). The costs to which the claimant is entitled under Rule 48(1) will then be its costs related to the proceedings against only those defendants: Rule 48(3).

If the Rule 45 Offer is not accepted

5.117 The costs consequences of a Rule 45 Offer which is not accepted are set out in Rule 49.

5.118 For the costs implications of a Rule 45 Offer following judgment, it is necessary to distinguish between: (i) a defendant's Rule 45 Offer: and (ii) a claimant's Rule 45 Offer:

(i) *Defendant's offer*. If the claimant fails to obtain a judgment more advantageous than the offer, then – subject to (iii) below - any defendant who made the offer is entitled to its costs from the date on which the Relevant Period (as defined in Rule 45(1)) expired, and interest on those costs: Rules 49(1)(a) and 49(2).

(ii) *Claimant's offer*. If the claimant obtains a judgment against a defendant at least as advantageous as the offer, then – subject to (iii) below – the claimant will receive interest on the sum recovered (excluding interest) at a rate not exceeding 10% above base rate for some or all of the period starting from the expiry of the Relevant Period; costs on the indemnity basis from the expiry of the Relevant Period; interest on those costs at a rate no more than base rate + 10%; and an additional amount determined by the Tribunal in accordance with CPR rule

[41] See *Watts v Aldington* (1993) [1999] L&TR 578.

36.17(4)(d) (as amended from time to time): Rules 49(1)(b) and 49(3). The 'additional amounts' currently prescribed are:

Amount awarded	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to a cap of £75,000) 5% of any amount above.

(iii) However, where the Tribunal considers that it would be unjust to make an order in terms of (i) and (ii) above, it will not make such an order. It is impossible to set out all the possible circumstances which may render such an order unjust, but guidance is given in Rule 49(4). It is to be noted that the circumstances include the information available to the parties at the time the Rule 45 Offer was made and the conduct of the parties with regard to the provision of information in order for the Rule 45 Offer to be evaluated.[42] The Tribunal will also have regard to whether the offer was a genuine attempt to settle the proceedings or a cynical attempt to benefit from the costs rules, although the latter is unlikely to apply to a claim for damages as opposed to a fixed sum.[43] Further, the Rules deliberately do not contain a definition of "advantageous" corresponding to CPR rule 36.17(2), and the Tribunal may not adopt the same approach.

Injunctions

5.119 The Tribunal has power to grant an injunction on both an interim or final basis: Rule 67(2). However that power is confined to proceedings in England and Wales or Northern Ireland. The Tribunal has no jurisdiction to grant an injunction (whether final or interim) in connection with proceedings before it (or likely to come before it) in Scotland. Any application for injunctive relief in such cases must be made to the Court of Session.

5.120 An injunction granted by the Tribunal has the same effect as an injunction granted by the High Court and is enforceable as if it were an injunction granted by the High Court.[44]

Interim or interlocutory injunctions

5.121 Applications for interim injunctions in proceedings before the Tribunal in England and Wales and Northern Ireland are governed by Rules 67 to 70.

When may an application be made?

5.122 An order for an interim injunction may be made at any time including before proceedings are started and after judgment has been given: Rule 68(1).

5.123 The Tribunal will, however, grant an interim injunction before a claim has been made only if the matter is urgent or it is otherwise necessary to do so in the interests of justice: Rule 68(3).

[42] See the observations of Lord Woolf MR in *Ford v GKR Construction Ltd* [2000] 1 WLR 1397.
[43] Cp *Huck v Robson* [2002] EWCA Civ 398.
[44] Section 47D(1) of the 1998 Act.

Making the application

5.124 In order to ensure that an application for an interim injunction can be served on the defendant ahead of the formal service of the claim form, it should not be included in a claim form but should be made in a separate document.

5.125 Such an application should, as far as possible, follow the format and requirements of the claim form. Therefore, the application should start with the names and contact details of the parties; provide a brief summary; describe the factual background insofar as it relates to the application for an interim injunction; and set out the grounds on which the application is made and the arguments in support of those grounds. The contents of the application must be verified by a statement of truth.

5.126 The Tribunal is required to apply the principles which the High Court would apply in deciding whether to grant an injunction.[45] Although there are no fixed rules governing the grant of an interim injunction, the application should address the guidelines developed by the courts following *American Cyanamid v Ethicon Ltd* [1975] AC 396,[46] namely whether:

- there is a serious question to be tried (the applicant has to show a real prospect of success but an in-depth analysis of the merits of the case is not required and resolution of contested evidence or complex questions of law will be inappropriate);

- damages would be an inadequate remedy for the applicant;

- if an injunction were granted, compensation under the applicant's cross-undertaking in damages would be an adequate remedy for the respondent;

- the balance of convenience is in favour of the grant of an injunction (or which course carries the least risk of injustice as between the parties);[47] and

- there are any special factors applicable in the case (e.g. whether the grant or refusal of the injunction will effectively determine the case;[48] or whether the injunction would have an effect on third parties, and if so, whether a cross-undertaking is offered to those parties as well as to the respondent[49]).

Evidence in support

5.127 The application must be supported by evidence of the facts relied on in support of the application and must contain all material information regarding the applicant's ability to pay under any undertaking as to damages that the Tribunal may require the applicant to give.

5.128 If the application is made without notice (see paragraphs 5.134 - 5.137):

- the applicant has a duty to the Tribunal to give full and frank disclosure of all relevant facts that both support and undermine its case (and to carry out proper enquiries to ensure this duty is met) and these must be included in a witness

[45] Section 47D(2) of the 1998 Act.
[46] See also *Series 5 Software Ltd v Clarke* [1996] 1 All ER 853.
[47] *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16.
[48] *NWL Ltd v Woods* [1979] 1 WLR 1294.
[49] See e.g., *Adidas-Salomon AG v Draper and Howorth and ors.* [2006] EWHC 1318 (Ch) at [54].

statement. Failure to give full and frank disclosure may lead to the injunction being refused or discharged (if already granted); and

- the application must set out why notice was not given.

Draft order

5.129 The applicant should also provide with the application a draft order the terms of which should contain:

- the relief being sought by the applicant by indicating clearly what the respondent must not do;

- the undertaking as to damages to be provided by the applicant to the Tribunal (see below);

- if the application is made without notice to the respondent, an undertaking by the applicant to the Tribunal to serve on the respondent, as soon as practicable, the application, evidence in support, a note of the hearing (which took place without the respondent being present) and any order made by the Tribunal; and

- a penal notice (so that the injunction can be enforced in any subsequent committal proceedings). This is a warning to the person subject to the injunction that disobeying the order may be a contempt of court punishable by imprisonment, a fine or sequestration of assets.

5.130 The applicant should also be prepared to provide the Tribunal with the order in electronic form.

Undertaking as to damages

5.131 In cases that are not subject to the fast-track procedure (Rule 58), the provision by the applicant of an undertaking as to damages will normally be a prerequisite to the grant of an interim injunction by the Tribunal. The purpose of the undertaking is to provide a means of compensating the respondent in the event that it subsequently emerges that the injunction should not have been granted.

5.132 Where the applicant for an injunction is not able to show sufficient assets within the jurisdiction of the Tribunal to provide substance to the undertaking as to damages (and any other financial undertakings the applicant may be required to provide), the applicant may be required to reinforce its obligation by providing security. Security will be ordered in such form as the Tribunal decides is appropriate but may, for example, take the form of a payment to be held by the Tribunal, a bond issued by an insurance company or a first demand guarantee or standby credit issued by a first-class bank.

5.133 In proceedings which are subject to the fast-track procedure, the Tribunal may grant an interim injunction without requiring the applicant to provide an undertaking or subject to a cap on the amount of the undertaking as to damages: see paragraph 5.147 below.

On or without notice

5.134 Generally, the Tribunal would expect an application for an interim injunction to be made on notice and the applicant should serve a copy of the application on the respondent at the same time as filing it with the Tribunal. The applicant should inform the Registrar of the steps that have been taken to serve the respondent with the application. Even where urgency prevents formal service being carried out, modern communications should enable the applicant to give at least informal notice to the respondent.

5.135 In cases of extreme urgency, or where giving notice would frustrate the purpose of the order, the Tribunal may be prepared to proceed to hear the applicant and make an order for an interim injunction without the respondent having been given notice of the application. The applicant should state the reasons why the application is being made without notice.

5.136 Without notice applications in competition cases will be wholly exceptional. If the Tribunal is persuaded to make an interim order without notice, that order will only cover the period pending the full hearing of all the parties. When the Tribunal makes an order on a without notice application, it will generally give directions for bringing the application and the Tribunal's Order to the immediate attention of the defendant and for the fixing of a further hearing to fully consider the application in the light of observations from all parties.

5.137 Certain applications may be heard in private if the President or Chairman thinks it appropriate to do so.

Enforcement

5.138 Failure to comply with an injunction granted by the Tribunal may be treated as a contempt of court, with the consequent sanction of imprisonment, a fine or sequestration of assets. In cases where the Tribunal considers that an injunction has not been complied with, it will certify the matter to the High Court which will then carry out its own inquiry before making any appropriate contempt order.[50]

Fast-track procedure

5.139 Rule 58 makes provision for a fast-track procedure ("FTP").[51] A claim brought pursuant to Section 47A of the 1998 Act may be subject to the FTP. The FTP cannot be used in collective proceedings: Rule 74(3)(d).

5.140 The FTP is a particular procedure intended to enable less complex claims to be brought, in particular by individuals and small businesses, and decided quickly with limited risk as to costs. The Tribunal has power to expedite any proceedings before it, and the fact that proceedings are not subject to the FTP does not preclude the Tribunal from treating a case as urgent and directing a short time-frame to a hearing when the circumstances of the case justify this.

5.141 In any case subject to the FTP, the final hearing will be fixed to take place as soon as practicable and *in any event* within six months, and the recoverable costs will be capped at a level to be determined by the Tribunal: Rule 58(2)

[50] See paragraph 1A of Schedule 4 to the 2002 Act.
[51] Pursuant to paragraph 15A of Schedule 4 to the 2002 Act.

5.142 In general, the Tribunal will only assign a claim to the FTP on application by one or more of the parties, although it has the right to do so on its own initiative; if an interim injunction is applied for, it may in an appropriate case raise with the parties the possibility of the case being handled under the FTP. Equally, the fact that an application for the case to be subject to the FTP is not opposed does not mean that the Tribunal will necessarily grant it.

5.143 The application for the assignment of the claim to the FTP should be made at the earliest possible time. Normally the application will be annexed to the claim form: see Rule 30(5)(c). In order to allow the Tribunal to consider the costs position as fully as possible, the applicant should provide a budget setting out the costs and disbursements likely to be incurred by the applicant in the future conduct of the proceedings.

5.144 Where an application for FTP designation is made, as soon as practicable after receipt of the defendant's acknowledgement of service, the Tribunal will direct the defendant to file a response to the application and fix a date for an early CMC. Whether the CMC should take place before or after service of the defence will be determined by the Tribunal in the light of its assessment at that stage of the proceedings.

5.145 In determining whether it should be subject to the FTP, the Tribunal will consider all the circumstances of the case. However, it will have particular regard to those matters set out in Rule 58(3), namely:

- Whether one or more of the parties is an individual or a micro, small or medium-sized enterprise ("SME") as defined in Commission Recommendation No. 361 (EC) of 2003.[52] In essence, an SME is an entity engaged in economic activity which employs fewer than 250 people and has annual turnover of no more than €50 million or an annual balance sheet total of no more than €43 million. For further details, see the Recommendation and the Commission's guide, available at:
  http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf

- Whether the time estimate for the final hearing is no more than three days. This criterion is aligned to the purpose of the FTP as designed for less complex or 'heavy' cases. However, this is not an absolute limit and in appropriate circumstances the Tribunal may direct that the case is subject to the FTP if the estimate is a little longer.

- The complexity and novelty of the issues involved. As stated above, the FTP is designed for less complex cases.

- Whether any additional claims have been or will be made.

- The number of witnesses involved (including expert witnesses, if any).

- The scale and nature of the documentary evidence involved.

- Whether any disclosure is required and if so, the likely extent of such disclosure.

- The nature of the remedy being sought and the amount of any damages claimed.

[52] OJ 2003 L124/36.

5.146 Given that competition cases generally tend to be heavy, complex and often involve consideration of novel issues, it is unlikely that the Tribunal will designate a case as suitable for the FTP unless it is a clear-cut candidate for such an approach. Generally, such a case is likely to arise or be linked to a scenario where injunctive relief is being sought, or, in the case of a claim for damages, where all the parties are clearly committed to a tightly constrained and exceptionally focused approach to the litigation. Cases where interlocutory issues involving major points of principle are anticipated are unlikely to be suitable for the FTP procedure.

5.147 Where the Tribunal grants an interim injunction in an FTP case, it may do so without requiring the applicant to provide an undertaking as to damages or impose a cap on the amount covered by the undertaking: Rule 68(5).[53] The Tribunal will only dispense with or cap the undertaking as to damages where in all the circumstances this is necessary or appropriate in the interests of justice. In that regard, the Tribunal will in particular consider the following:

- the strength of the claimant's case (however, this will not involve a 'mini-trial'on the merits);

- the loss which the respondent is likely to suffer from the grant of the injunction in the event that it subsequently emerges that it should not have been granted; and

- the financial resources of, or available to, the claimant.

5.148 FTP cases will be closely case-managed, in particular as regards the extent of any disclosure and the evidence which the parties can adduce at trial. Any disclosure ordered will be specific: there will be no standard disclosure in cases subject to the FTP.

5.149 The Tribunal may, at any time, order that a case cease to be subject to the FTP: Rule 58(1). However, before doing so, the Tribunal will raise the matter with the parties and consider what changes might be made to the conduct of the case so as to preserve it in the FTP. The Tribunal will further have regard to the prejudice that may be caused to the parties if the case ceases to be subject to the FTP, and in particular may maintain a cap on the recoverable costs either in the same or in an adjusted amount.

Interim Payments

5.150 The Tribunal may order a defendant to make an interim payment of damages: Rule 66. An interim payment is a payment on account of any damages or other sum or money (except costs) which the Tribunal may hold the defendant liable to pay.

5.151 The Tribunal may make an interim payment order if the defendant against whom the order is sought has admitted liability to pay damages to the claimant or where the claimant has obtained judgment against the defendant for damages or a sum to be assessed: Rule 66(4)(a) and (b).

5.152 The Tribunal may also order an interim payment where satisfied that if the claim were to be heard, the claimant would obtain judgment for a substantial amount of money (other than costs) against that defendant: Rule 66(4)(c). It is unlikely that a case under the FTP would meet this criterion.

[53] Following paragraph 15A(3) of Schedule 4 to the 2002 Act.

5.153 The Tribunal must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment: Rule 66(5).

5.154 An application for an interim payment may not be made before the time for filing the defence has expired: Rule 66(2). A claimant may make more than one application for an order for an interim payment: Rule 66(3). The application must set out the grounds on which the interim payment is sought and any directions necessary in the opinion of the claimant for the determination of the application: Rule 66(6).

5.155 Rule 66(7) indicates that on receiving an application for an interim payment, the Registrar shall send a copy to all the other parties to the proceedings (Rule 66(7)), but the claimant should nonetheless serve the other parties with copies of the application at the same time as filing it at the Tribunal. Upon receipt of the application the Registrar will write to the other parties informing them of the date by which they may submit observations to the Tribunal.

5.156 Rule 66 applies to collective proceedings as well as claims under section 47A of the 1998 Act.

Security for costs

5.157 A defendant to a claim for damages may apply for security for its costs of the proceedings: Rule 59. That application should be supported by written evidence setting out the basis on which security is sought: Rule 59(2). The defendant's written evidence shall address the question of why it would be just for the Tribunal to make an order for security for costs and either refer to any enactment that permits the Tribunal to require security for costs or establish that one or more of the conditions contained in Rule 59(5) or (6) applies. Those conditions are all essentially matters which make it difficult for the defendant to recover any costs to which it might be held entitled following a successful defence of the claim.

5.158 The Tribunal will only order security for costs if it is just to do so in the circumstances of the case. Amongst the circumstances to which the Tribunal will have regard are: (a) whether it appears that the application is made in order to stifle a genuine claim, or would have that effect; (b) the stage of the proceedings at which the application is made and the amount of costs which the claimant has incurred to the date of the application; (c) the claimant's financial position, whether it is impecunious and if so why it is impecunious and particularly, whether the impecuniosity can be attributed to the defendant's infringement; (d) the likely outcome of the proceedings and the relative strengths of the parties' cases if that can be discerned without prolonged examination or voluminous evidence; (e) any admissions by the defendant and, for example open offers - but the defendant should not be adversely affected in seeking security because it had attempted to resolve the matter using alternative dispute resolution; and (f) the provisions in the Tribunal's rules as to orders for costs: see *BCL Old Co v Aventis* [2005] CAT 2, at [27].

5.159 Security for costs is unlikely to be ordered in respect of a case that is subject to the FTP.

5.160 It is possible to apply for security of costs in collective proceedings.

Transfer of Proceedings

5.161 Rules 71 and 72 govern the transfer of claims to and from the Tribunal.

Transfer of claims from the Tribunal

5.162 If at any stage of the proceedings the Tribunal considers, whether upon the application of a party or on its own initiative, that the claim or any part of it could be more appropriately dealt with by another court, it may direct that a claim made in proceedings under section 47A of the 1998 Act be transferred to the High Court in England and Wales or Northern Ireland, or to the Court of Session or the Sheriff Court in Scotland: Rule 71.[54] In England and Wales, such a transfer will generally be to the Chancery Division of the High Court.

5.163 Where the Tribunal makes an order transferring proceedings to another court it shall direct one of or all the parties to file with that court a bundle of all documents filed with the Tribunal up to the date of the Tribunal's order. Usually it will be the claimant who bears this responsibility. The Tribunal shall send a copy of its order to the court receiving the case.

Transfer of claims to the Tribunal

5.164 The Section 16 Enterprise Act 2002 Regulations 2015[55] enable the High Court in England and Wales[56], the Court of Session or a Sheriff Court in Scotland[57] and the High Court or the county court in Northern Ireland to transfer to the Tribunal for its determination so much of any proceedings as relates to "an infringement issue".

5.165 Section 16(6) of the 2002 Act defines an infringement issue as any question relating to whether or not an infringement of the Chapter I or Chapter II prohibition or Article 101 or 102 TFEU has been or is being committed.

5.166 Within seven days of the order of the court transferring the proceedings, the claimant must file with the Registrar the documents specified in Rule 72(2). The claimant should also be prepared to provide these documents to the Tribunal in electronic form.

5.167 Following such a transfer, the Tribunal will usually convene a CMC at which it will discuss the future conduct of the case with the parties. It would therefore assist the Tribunal if the parties could work together on a plan for the future conduct of the case that can be submitted to the Tribunal in advance of the CMC.

[54] Rule 71 also provides for transfer to the County Court, but in practice this is unlikely since the County Court is obliged to transfer competition cases to the High Court: CPR Rule 30.8.
[55] SI 2015 No.1643.
[56] For transfers from the High Court in England and Wales see CPR Part 30, Practice Direction 8.1 to 8.8.
[57] For transfers from Scotland see Chapter 32A of the Rules of the Court of Session and Chapter 42 of the Ordinary Cause Rules.

SECTION 6: COLLECTIVE PROCEEDINGS, COLLECTIVE SETTLEMENTS

Introduction

6.1 Collective proceedings filed in accordance with section 47B of the 1998 Act and collective settlements made under sections 49A or 49B are governed by Rules 73 – 98. The legislative background to these provisions is explained in Section 2 of the Guide.

6.2 Collective proceedings are proceedings brought on behalf of a defined class of persons by a representative. Such proceedings can be 'opt-in' (where each class member actively signs up to participate in the proceedings) or 'opt-out' where, in broad terms, each person within the class is automatically included in the proceedings unless they actively choose not to be).

6.3 However, collective proceedings are a form of procedure and do not establish a new cause of action. The claims of the class members brought together in collective proceedings, or subject to collective settlement, must each be claims to which section 47A of the 1998 Act applies. They may indeed include claims that have already been started on an individual basis under section 47A, provided that the individual claimant consents.[58] Part 4 of the Rules (Claims pursuant to section 47A of the 1998 Act) also applies to collective proceedings and collective settlements, save as set out in Rule 74.

6.4 Collective proceedings are governed by Rules 75 – 93. They have four main stages: (i) making a collective proceedings order ("CPO"); (ii) trial of the common issues; (iii) determination of any individual issues; and (iv) distribution of any damages.

6.5 A collective settlement is a specific procedure whereby the Tribunal authorises a settlement reached between the class representative, on behalf of the class, and the defendant(s) such that the terms of the settlement bind the entire class. The parties may apply to have a collective settlement approved by the Tribunal:

- after an "opt-out" collective proceedings order has been made: Rule 94; or
- by commencing the settlement process directly, where no collective proceedings order has been made: Rules 96 – 97.

6.6 The collective settlement procedure does not apply to opt-in collective proceedings, although the Tribunal's permission is required to settle opt-in collective proceedings in certain circumstances: Rule 95.

6.7 Collective proceedings, and in particular opt-out collective proceedings, require intensive case management by the Tribunal, so as to ensure that the interests of the class are adequately protected. Furthermore, an application for approval of a collective settlement will often involve a Tribunal being shown material which, in the event that the settlement is not approved and the case continues to trial, should not be placed before a Tribunal hearing the trial and deciding the merits. Accordingly, if the proceedings are certified as opt-out collective proceedings, the panel conducting the case management (the "case management tribunal") will at an appropriate stage prior to the trial determine that the proceedings should thereafter be heard by a separate panel (the "trial tribunal"). If at any stage (including after the commencement of the

[58] Section 47B(3)(b)-(c) of the 1998 Act.

trial) the parties come to terms and seek approval of a settlement, the application for a collective settlement order will be determined by the case management tribunal.

6.8 Where a class member opts in to opt-in proceedings, or (if he or she is domiciled in the UK on the domicile date) does not opt out of opt-out proceedings, that member becomes a "represented person". Similarly, a foreign class member who opts in to opt-out proceedings becomes a "represented person".[59]

Commencing collective proceedings

6.9 Unlike ordinary civil proceedings under section 47A, the bringing of collective proceedings must be approved by the Tribunal. This approval involves two aspects: (a) authorisation of the class representative; and (b) certification of the claims as eligible for inclusion in collective proceedings: Rule 77(1).[60] The approval process is governed by Rules 75 – 81. The Tribunal approves collective proceedings by issuing a CPO; only then can the claims proceed.[61]

Applying for a collective proceedings order

6.10 To commence collective proceedings, the proposed class representative must first apply to the Tribunal for a CPO by sending a collective proceedings claim form to the Tribunal's Registrar in accordance with Rule 75. The collective proceedings claim form must contain the information required by Rule 75(2) - (3). Many of the formal and substantive requirements for the collective proceedings claim form mirror those of an ordinary claim form, save that the contact information relates to the proposed class representative rather than the claimant. In addition, a collective proceedings claim form must:

- state that the proposed class representative is making an application for a CPO;
- state whether the order is sought for opt-in or opt-out proceedings;
- state whether the parties have used an alternative dispute resolution procedure;
- state that the proposed class representative believes that the claims which it seeks to combine in the collective proceedings have a real prospect of success;
- describe the proposed class and any sub-classes;
- estimate the number of class (or sub-class) members and explain the basis for that estimate;
- summarise how the proposed class representative satisfies the requirements of Rule 78; and
- summarise how the claims meet the eligibility criteria for collective proceedings in Rule 79. The claim form should accordingly identify the common issues which are raised by the claims and which it is proposed should be determined in the collective proceedings.

6.11 The claim form should accordingly be in three parts:

[59] See section 59(1) of the1998 Act.
[60] Following section 47B(5) of the 1998 Act.
[61] Section 47B(4) of the 1998 Act.

- Part 1 should set out the information and statements to comply with Rule 75(2);

- Part 2 should set out the information and statements to comply with Rule 75(3)(a)-(e); and

- Part 3 should set out the information and statements to comply with Rule 75(3)(f)-(j).

6.12 The proposed class representative is required to annex certain documents to the collective proceedings claim form pursuant to Rule 75(5). As for ordinary claims before the Tribunal, this includes a copy of any infringement decision and any other document referred to in the collective proceedings claim form. The proposed class representative must also annex the following draft documents:

- *Collective proceedings order*

  The content requirements for a CPO are set out in Rule 80 and discussed further at paragraphs 6.46 - 6.52 below. The main functions of a CPO are to authorise the class representative to act as such in continuing the collective proceedings and to set out the basic details of the collective proceedings, such as the parties' names, the definition of the class (and any sub-classes), the common issues to be determined and the remedy sought.

- *Notice of the collective proceedings order*

  The content requirements for the notice of the CPO are set out in Rule 81(2) and discussed further at paragraphs 6.58 - 6.59 below. The purpose of the notice is to inform the class members of the nature of the proceedings in plain and easily understood language, explain the potential effect of a judgment on the common issues for the class members and set out how the class member can opt in or out of the proceedings and the deadlines for doing so.

  While the proposed class representative may have had contact with some or all class members prior to the filing of the collective proceedings claim form, this is the first formal notice and will be carefully scrutinised by the Tribunal.

6.13 The proposed class representative should send with the collective proceedings claim form any evidence relied on in support of the application for a CPO. That may include, for example, a witness statement by or on behalf of the proposed class representative addressing the considerations raised by Rules 78 and 79; and an expert's report regarding the way in which the common issues identified in the claim form may suitably be determined on a collective basis.

6.14 Unless the Tribunal otherwise directs, the signed original of the collective proceedings claim form should be accompanied by five copies certified by the proposed class representative or its lawyer as conforming to the original: Rule 75(6). Five copies of any evidence submitted should also be provided.

Response to a collective proceedings claim form: checking and acknowledgment

6.15 Once the collective proceedings claim form has been filed, the Registrar will check it and send an acknowledgment of receipt to the proposed class representative pursuant to Rule 76(1).

Service of the collective proceedings claim form

6.16 The Registrar will direct the proposed class representative to serve on the defendant the collective proceedings claim form and any evidence relied on, save where the Tribunal's permission is required to serve out of the jurisdiction (see Rules 76(1) – (2)). The Registrar's direction in relation to service may specify the time and method by which service must be carried out, as well as any other matter, including those set out in Rule 76(3). The Tribunal will provide the claimant with the acknowledgment of service form, which is to be included with the claim form when it is served on the defendant.

6.17 The proposed class representative must also send a copy of the collective proceedings claim form to the CMA: Rule 76(6).

6.18 Sending the collective proceedings claim form to the defendant constitutes service of the application for the CPO and of the claim form itself.

6.19 Upon receipt of the collective proceedings claim form, the defendant must send the acknowledgment of service to the Registrar. Defendants domiciled in the UK must file the acknowledgment of service within seven days of receipt of the claim form: Rule 76(4); for foreign defendants, the period for acknowledging service will be varied in accordance with CPR Part 6, or the equivalent provisions in the procedural rules for Scotland or Northern Ireland: Rule 76(5). The filing of an acknowledgment of service does not constitute agreement by the defendant that the proposed collective proceedings should be allowed to continue.

6.20 The Registrar will notify the proposed class representative that the acknowledgment of service has been received: Rule 76(7).

6.21 Unlike in an ordinary private action, the defendant is not required to file its defence before the hearing of the application for the CPO: Rule 76(11).

Service out of the jurisdiction

6.22 If one or more defendants are domiciled outside the Tribunal's jurisdiction, the Tribunal's permission may be required for service. The position is analogous to that which applies for a claim under section 47A (see paragraphs 5.36 - 5.45 above), except that the obligations here rest on the class representative, not on the claimant. In summary:

- *Where permission is not required for service out of the jurisdiction*

  The proposed class representative must file a notice verified by a statement of truth with the collective proceedings claim form: (Rules 31(1) and 74(1). As in an ordinary section 47A claim, this notice must set out the grounds on which the proposed class representative is entitled to serve the claim form out of the jurisdiction and any material facts relied on. The Tribunal will then direct that the proposed class representative serve the collective proceedings claim form on each foreign defendant named in the collective proceedings claim form.

- *Where the permission of the Tribunal is required to serve the collective proceedings claim form out of the jurisdiction*

The proposed class representative should file its application for permission at the same time as the collective proceedings claim form. The application for permission must contain the information required by Rule 31(2). The Tribunal will address the application for permission to serve out of the jurisdiction prior to the application for a CPO, unless the circumstances make an alternative course more appropriate.

When considering the application for permission to serve out, the Tribunal may make such directions as it thinks fit: Rule 76(10)(a). However, it will generally apply the provisions of the CPR, or the equivalent rules applicable in Scotland and Northern Ireland, with regard to service out of the jurisdiction (as if the references to "claim form" read "collective proceedings claim form").

Summary of the collective proceedings claim form

6.23 A summary of the collective proceedings claim form will be published on the Tribunal website: Rule 76(8). The summary will ordinarily be published after the collective proceedings claim form has been served or otherwise notified to the proposed defendant(s) and the acknowledgment of service has been filed.

6.24 The web summary performs an important function in publicising the existence of the claim to any other potential class representative who may be contemplating bringing collective proceedings on behalf of the same or a similar class. If a CPO is made, wider publication of the proceedings will then be required: see paragraphs 6.58 - 6.59 below.

The first case management conference: pre-approval

6.25 The first CMC will generally take place as soon as practicable (Rule 76(9)), unlike in an ordinary claim (where the CMC would normally take place after the filing and service of the defence: see paragraph 5.63 above).

6.26 The purpose of the first CMC is to determine directions in relation to the application for a CPO and the two aspects to be decided: (i) authorisation of the class representative; and (ii) certification of the claims: see paragraph 6.9 above.

6.27 Typically, the Tribunal's directions will provide for the manner in which the application should be publicised (which will depend on the nature of the proposed class) and will fix a timetable for the filing of any written submissions and evidence in relation to the application for a CPO by the prospective defendant and any other relevant party (such as potential class members or a potential competing proposed class representative), and for the hearing of the application: Rule 76(10). A defendant who opposes the application for a CPO does not lose any right to dispute jurisdiction: Rule 76(12).

6.28 The Tribunal does not encourage requests for disclosure as part of the application for a CPO. However, where it appears that specific and limited disclosure or the supply of information (cf Rule 53(2)(d)) is necessary in order to determine whether the claims are suitable to be brought in collective proceedings (see Rule 79(1)), the Tribunal may direct that such disclosure or information be supplied prior to the approval hearing.

Authorisation of class representative

6.29 The class representative need not be a member of the class and is not required to have a personal claim against the proposed defendant: Rule 78(1).[62] However, the Tribunal must consider that it is "just and reasonable" for that person to act as the class representative in the proceedings: Rule 78(1)(b).[63] The central purpose of this assessment is to ensure that class members are adequately and appropriately represented. This is particularly important in opt-out proceedings, where the class representative and its lawyers will not be in contact with many members of the class or be subject to their instructions, but must act in the interests of the class as a whole. Hence, being a class representative involves significant and serious obligations, and is not a responsibility to be taken on lightly.

6.30 The factors the Tribunal will take into account when considering whether it would be just and reasonable for the proposed class representative to act in that capacity are set out in Rule 78(2). The first of these factors is whether the proposed representative would fairly and adequately act in the interests of the class members. The fairness and adequacy test is further elaborated on in Rule 78(3), which lists the circumstances the Tribunal will take into account:

- *Where the proposed class representative is a class member, the Tribunal will consider its suitability to manage the proceedings (Rule 78(3)(a))*

  As part of this analysis, the Tribunal will consider whether the proposed class representative is competent to manage what is likely to be a large and complex piece of litigation, while also adequately representing the class members' interests. Recognising the inevitable complexity of collective proceedings, the Tribunal is also likely to consider the suitability of the proposed class representative's lawyers. The proposed class representative would usually be expected to have the ability to provide proper instructions to its lawyers and be capable of exerting sufficient control over the legal work conducted and costs incurred. Indeed, the Tribunal may require the proposed class representative to demonstrate at least a basic understanding of the facts relevant to the claim, and the nature of the claims themselves, so as to satisfy the Tribunal that it is capable of instructing its lawyers.

- *Where the proposed class representative is not a class member, the Tribunal will consider whether it is a pre-existing body and the nature and functions of that body (Rule 78(3)(b))*

  There is a range of pre-existing bodies which could potentially seek to carry out the role of class representative, such as consumers' organisations, trade associations, law firms, third party funders or special purpose vehicles ("SPV"). While there is no blanket prohibition against certain types of organisation taking on the role of class representative, the Tribunal will closely consider the nature of that body, its motivations for being involved and, crucially, whether there is an actual or potential conflict between that body and the interests of the class members. The potential conflict between the interests of a law firm or third party funder and the interests of the class member may mean that such a body is unsuitable to act as a class representative. Where the proposed class representative is a SPV, the Tribunal will expect to be given details of the constitution and management

[62] Section 47B(8)(a) of the 1998 Act.
[63] Section 47B(8)(b) of the 1998 Act.

of the SPV and the reason why it was established. The Tribunal will consider each application in its individual circumstances and proposed class representatives should be prepared to explain why they are suitable to carry out that role. As in the case of class members seeking to act as the class representative, the Tribunal will also consider the body's ability to manage the proceedings and instruct its lawyers.

- *Any plan for the collective proceedings (Rule 78(3)(c))*

  The Tribunal will expect the proposed class representative to have prepared a plan for the collective proceedings which addresses the matters set out in the relevant sub-rule. Such a plan should be sufficiently detailed and comprehensive to correspond to the nature of the particular case. It should explain how the proposed class representative and its lawyers intend to ensure that the collective proceedings will be effectively and efficiently pursued in the interests of the class, referring to the issues likely to arise in the particular case. Matters that may appropriately be set out in the plan include:

  - the way the class representative intends to publicise the proceedings to class members, including a sample notice;
  - the method proposed for communicating with and reporting to class members going forward;
  - how inquiries from class members will be dealt with;
  - the degree of disclosure likely to be required in the proceedings;
  - whether disclosure from individual class members is likely, and if so, the intended process for collection of relevant documents from class members;
  - how exchange of documents will be managed, including any issues of e-disclosure;
  - how necessary witnesses will be identified and what steps will be taken to obtain their evidence;
  - whether experts will be needed, and if so of what kind and how appropriate experts will be identified and retained;
  - where only part of the claims are proposed to be covered by the CPO, if the collective proceedings are decided in favour of the class, what it is proposed should happen to the balance of the claims;
  - if it is proposed that the collective proceedings should result in an aggregate award of damages, how that award would be distributed as between members of the class; and
  - a proposed timetable for the litigation.

  There should be appended to the litigation plan a costs budget to the end of trial. The purpose of the plan is to assist the Tribunal in deciding whether to make a CPO. It does not constrain the jurisdiction of the Tribunal to determine the appropriate procedures and, if a CPO is made, the plan may be subject to revision as the litigation proceeds.

6.31 The second factor the Tribunal is required to consider is whether the proposed class representative has a material interest that is in conflict with the interests of the class members, so far as concerns the common issues to be decided in the collective proceedings: Rule 78(2)(b). It is not possible to set out the myriad of ways in which a conflict may arise between the class representative and the class members. However, examples include where the class representative has a stake in the legal fees incurred on behalf of the class, or where the class representative represents the class in a

separate but related collective action which might affect the class recovery in the instant proceedings. As made clear by Rule 78(2)(b), a conflict which does not pertain to the common issues will not usually be relevant.

6.32 The third factor relevant to the assessment of the proposed class representative applies where more than one applicant is seeking approval to act as the class representative for opt-out proceedings in respect of the same or overlapping claims. In such a scenario, the Tribunal will consider who would be the most suitable representative: Rule 78(2)(c). The Tribunal will seek to arrive at a decision which is in the best interests of all class members and is fair to the defendants. The factors that are likely to be relevant to this assessment include: the proposed class definition and scope of the claims; the quality of the litigation plan referred to above; and the experience of the lawyers of the competing proposed class representatives.

6.33 The fourth factor the Tribunal is required to consider relates to the proposed class representative's financial resources: would the proposed class representative be able to pay the defendant's recoverable costs if ordered to do so? (Rule 78(2)(d)) By extension, the proposed class representative's ability to fund its own costs of bringing the collective proceedings is also relevant. In considering this aspect, the Tribunal will have regard to the proposed class representative's financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan referred to above is likely to assist the Tribunal's assessment in this regard.

6.34 Finally, where an interim injunction is sought, the proposed class representative must demonstrate that it would be able to satisfy any undertaking as to damages required by the Tribunal (Rule 78(2)(e)). However, such interim remedies will rarely be suitable for collective proceedings.

6.35 Where the claim covers a sub-class of persons, the Tribunal may authorise a separate class representative for that sub-class pursuant to Rule 78(4). The use of sub-classes may be appropriate where there is a potential conflict between the interests of members of the broader class. For example in cartel damages claims, different categories of purchasers may have conflicting interests that require separate representation.

6.36 Although the Tribunal is formally required to consider the suitability of the proposed class representative only at the stage of making a CPO, the Tribunal will continue to have regard to the requirements throughout the proceedings. Where it appears that the class representative no longer meets the requirements set out in Rule 78, the Tribunal may on its own initiative, or following an application, vary or revoke the CPO authorising the class representative to act in that capacity: Rule 85. Such an order may provide for the substitution of the class representative by another person who satisfies the criteria for approval: Rule 85(3)(b).

Certification of eligible claims

6.37 To make a CPO, the Tribunal must be satisfied that the claims are eligible to be included in collective proceedings. The three requirements for determining eligibility are set out in Rule 79(1):

- *The claims must be brought on behalf of an identifiable class of persons*

  It must be possible to say for any particular person, using an objective definition of the class, whether that person falls within the class. The need for

an identifiable class of persons serves several purposes. It sets the parameters of the claim by clearly delineating who is within the class and who is not, thus determining who will be bound by any resulting judgment. It affects the scope of the common issues raised by the collective proceedings. And it has practical implications, such as in relation to the requirements to give notice. Indeed, it is the class definition which potential class members will read when considering whether to opt in or out of the proceedings. However, although the claim form must give an evidence based estimate of the size of the class, it is not necessary to identify each class member (in an opt-out claim) or specify exactly how many persons are within the class.

Accordingly, class definitions based on subjective or merits-based criteria (for example "persons having suffered loss as a result of the defendant's conduct") should be avoided. Further, the class should be defined as narrowly as possible without arbitrarily excluding some people entitled to claim. If the class is too broad, the proposed collective proceedings may raise too few common issues and accordingly not be worthwhile.

- *The claims must raise "common issues"*

The core notion of collective proceedings is that they group together similar claims which raise common issues. Common issues are defined in Rule 73(2) as the same, similar or related issues of fact or law, mirroring section 47B(6) of the 1998 Act. It is accordingly important that the claim form identifies the common issues which it is contended can suitably be determined on a collective basis.

Although the claims must raise common issues to satisfy the criteria for approval, the final resolution of the claims will often require the assessment of individual issues. The existence of such individual issues is not fatal to an application for a CPO. For example, the determination of liability for an infringement may raise common issues of fact and law which justify a CPO, while causation and the quantification of any damages may not be common to the class. In such circumstances, the Tribunal may decide to approve collective proceedings in relation to only part of the claims (Rule 74(6)). Once a judgment in those proceedings on the common issues is given, if an aggregate award of damages is inappropriate the claims will continue thereafter on an individual basis.

- *The claims must be "suitable" to be brought in collective proceedings*

When determining whether the claims are suitable to be brought in collective proceedings, the Tribunal will take into account all matters it thinks fit. Specific factors the Tribunal will consider are set out in Rule 79(2). Most of these are self-explanatory and there is considerable overlap between them.

By way of illustration, the Tribunal may consider the costs and benefits of continuing the collective proceedings in various ways (Rule 79(2)(b)) having regard to the likely loss incurred, any potential damages award and the financial cost of continuing proceedings collectively. Where the estimated legal fees and expenses appear disproportionate compared to the likely damages award, the costs of pursuing collective proceedings may outweigh the benefits. The Tribunal may also consider whether collective proceedings should be preferred, in the circumstances, to ordinary individual proceedings, or other ways of resolving the dispute. In this respect, the size and nature of

the class may be relevant (see Rule 79(2)(d) – it may be that where the class is small, but each individual member's loss is significant, redress would be more effectively obtained by an ordinary individual action).

Where only certain issues in the claims constitute common issues, there is no requirement that those must predominate over the remaining individual issues in order for it to be suitable for the part of the claims covering the common issues to be brought in collective proceedings. However, the common issues must be significant such that resolution of those issues will significantly advance the claims of the members of the class.

Whether proceedings should be opt-in or opt-out

6.38 As mentioned above, a judgment in opt-out proceedings binds all persons within the class, save for those who have opted out (or foreign class members who have not opted in), whereas a judgment in opt-in proceedings binds only those class members who have opted in to the proceedings. Where the class representative seeks approval to bring opt-out proceedings, it will need to make submissions as to why that form of proceedings is more appropriate than opt-in proceedings.

6.39 The Tribunal will consider all matters it thinks fit in determining whether proceedings should be opt-in or opt-out. Rule 79(3) lists two specific factors the Tribunal will consider:

- *Strength of the claims (Rule 79(3)(a))*

  Given the greater complexity, cost and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case, the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form. For example, where the claims seek damages for the consequence of an infringement which is covered by a decision of a competition authority (follow-on claims), they will generally be of sufficient strength for the purpose of this criterion.

- *Whether it is practicable for the proceedings to be brought as opt-in proceedings (Rule 79(3)(b))*

  The Tribunal will consider all the circumstances, including the estimated amount of damages that individual class members may recover in determining whether it is practicable for the proceedings to be certified as opt-in. There is a general preference for proceedings to be opt-in where practicable. Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high, or the fact that it is straightforward to identify and contact the class members.

Approval hearing

6.40 At the hearing, the proposed class representative will make its application for a CPO. The Tribunal will also hear any submissions in response from the proposed defendant(s). Typically, the Tribunal will have directed at the first CMC that written submissions and any evidence relied on be filed at a suitable time prior to the approval hearing, together with any bundles of documents and authorities.

6.41 Where putative class members intend to make oral submissions at the hearing, they must apply to the Tribunal for permission to do so pursuant to Rule 79(5). Such applications should be made in writing in advance of the hearing and be copied to the other parties. The same approach is to be followed in the event that the Tribunal directs that the issue of the authorisation of the class representative is to be determined at a preliminary hearing.

6.42 In determining whether to make a CPO, the Tribunal will sit as a panel of three. As well as the parties' legal representatives, it will usually be appropriate for the proposed class representative to attend the hearing. Where the proposed class representative does not intend to attend the hearing, the Tribunal should be notified in advance.

6.43 Where the defendant makes an application for strike out or summary judgment prior to the approval hearing, it will ordinarily be appropriate to hear those applications at the approval hearing: Rule 79(4). Similarly, any application for security for costs pursuant to Rule 59 will usually be heard at the approval hearing.

6.44 The Tribunal may invite the parties to make submissions on the future conduct of the case at the approval hearing, as if the claims had been made the subject of a CPO. Therefore, the parties should be prepared to assist the Tribunal in drawing up a timetable for the next steps in the proceedings, such as the time for filing the defence and any reply. In this sense, there is an overlap between the approval hearing and what would be considered at the first CMC in an ordinary section 47A claim.

6.45 The Tribunal will generally reserve judgment on the question of whether to make a CPO.

Collective proceedings order

6.46 The CPO authorises the claims to continue as collective proceedings and authorises the proposed class representative to act in that capacity. Where the Tribunal considers, after hearing the parties at the approval hearing, that the requirements in Rules 78 and 79 have been met it will issue such an order.

6.47 The content of the CPO is set out in Rule 80(1). This includes details of the parties, a description of the class and claims, whether the proceedings are to be opt-in or opt-out, the procedure for opting in or out of the proceedings and the arrangements for giving notice to the class members. The class representative is required to file a draft CPO for the Tribunal's consideration with the collective proceedings claim form.

6.48 It is important that detailed consideration is given to the wording of the CPO, particularly in describing the class and the claims certified for inclusion. Although the identification of the class must be clear and objective, it is not necessary to name or specify the number of class members: Rule 80(2). As regards the specification of the claims, the class representative may not bring different claims, or bring claims against

different defendants, to those specified in the CPO: Rule 84. However, where the circumstances so require, the Tribunal may subsequently vary the CPO on its own initiative or the application of a party: Rule 85.

6.49 The process for opting in or out of the collective proceedings will be set out in the CPO: Rule 80(1)(h).

6.50 In opt-in proceedings, the CPO will specify the time and manner by which a class member may opt-in. After that date, the class is closed and other class members can no longer opt-in.

6.51 In opt-out proceedings, the CPO will specify a "domicile date", which is the date for determining whether a person is domiciled in the UK. Class members domiciled in the UK on the domicile date are automatically included in the class unless they opt out by the date specified in the CPO. By contrast, class members not domiciled in the UK need to opt in by the specified date in order to be included.

6.52 In addition to the content requirements specified in Rule 80(1), the CPO may also contain directions as to the future conduct of the case: Rule 77(2). For example, it may set the date for the filing of a defence and reply.

6.53 Where a class member does not opt in to opt-in proceedings or opts out of opt-out proceedings (or, in the case of a foreign class member, does not opt in to opt-out proceedings), he or she will not be bound by any subsequent judgment in the proceedings. That person may also be entitled to commence their own proceedings. Where they have failed to opt in or opt out within the specified time, a class member may apply to the Tribunal for permission to opt in or out of the proceedings: Rule 82(2). In determining such an application, the Tribunal will consider all the circumstances, including whether the delay was the fault of the class member and whether the defendant would suffer substantial prejudice if permission were granted: Rule 82(3).

6.54 Where opt-out proceedings lead to a collective settlement, there is a further opportunity for represented persons to opt out. Non-UK domiciled persons who opted in to the collective proceedings need separately to opt in to the collective settlement if they are to be bound (see further paragraphs 6.145 - 6.146 below).

Notices

6.55 The Rules require the class representative to provide the class members with information about the proceedings at the following stages of the litigation:

- when the Tribunal makes a CPO: Rule 81;
- in opt-in proceedings, if the class representative is a member of the class and settles its personal claim included in the collective proceedings: Rule 86;
- if the class representative intends to withdraw from the role: Rule 87(2);
- when the Tribunal issues a judgment or order in the proceedings: Rule 91(2); and
- when the Tribunal intends to have a hearing to determine how to quantify individual represented persons' claims from an aggregate award of damages: Rule 92(3).

6.56 The Tribunal may also require the class representative to give notice to class members at other stages of the proceedings: Rule 88(2)(d). These notice requirements perform an important role in making the class members aware of the proceedings and updating them throughout. The class representative may of course wish to provide additional information to class members beyond these requirements.

6.57 Additional notice requirements apply to collective settlements (see paragraph 6.94 et seq. below).

Notice of the collective proceedings order

6.58 The class representative must notify the class members when the Tribunal makes a CPO: Rule 81. The Tribunal will attach particular importance to the content of this notice and the method by which it will be given, since for many class members this will be the first they hear of the proceedings. Therefore, the class representative is required to annex a draft notice of the CPO to its collective proceedings claim form (Rule 75(4)(c)), which the Tribunal will consider and approve, subject to any changes it considers appropriate.

6.59 The content requirements of this first formal notice are set out in Rule 81(2). As well as annexing the CPO and identifying the defendant(s), the notice must set out in plain and easily understood language a summary of the collective proceedings claim form and common issues. It must also set out in a straightforward manner how class members opt in or out of the proceedings, the deadlines which apply, and explain the consequences of doing so. The Tribunal may require the class representative to include additional information in the notice: Rule 81(2)(f).

Notice of judgment or order

6.60 The class representative must give notice of any judgment or order to all class members in a form and manner approved by the Tribunal: Rule 91(2). The content requirements of such notices are set out in Rule 91(3).

6.61 The notice should incorporate or annex the judgment or order, or give a reference to the copy of the judgment available online. Where the judgment deals with the common issues, the notice must contain specific information depending on whether the judgment is for or against the represented persons. For example, where the judgment is in the class members' favour, the notice must explain in plain and easily understood language that they may be entitled to individual remedies, how they claim those remedies and the consequences of failing to do so: Rule 91(3)(b).

Failure to receive a notice

6.62 The fact that a class member or represented person does not receive or fails to respond to a notice does not affect a step taken, order made or judgment given in the collective proceedings, unless the Tribunal orders otherwise: Rule 90.

Method of giving notice

6.63 The method of giving notice will vary depending on the class characteristics. In each case, the aim is to adopt a method which ensures the greatest proportion of class members receives the notice. It may be appropriate to alter the method of giving notice within the same case, depending on what is being notified. For example,

individual notices by post may be necessary where the notice concerns the making of a CPO, whereas a less intensive method – such as social media updates, or notice to a sample group within the class – may be sufficient for Tribunal orders dealing with other aspects of the proceedings. In determining the appropriate method, the Tribunal is likely to consider the practicability and expense of giving notice, as well as the relative importance of the particular notice.

6.64 At every stage at which the Tribunal considers how notice should be given, the class representative should be prepared to assist the Tribunal as to the most appropriate method.

Class records

6.65 The class representative is required to maintain a register of all class members who have opted in or out of the collective proceedings: Rule 83. The Tribunal and the defendant(s) are entitled to see the class register on request. Other persons may apply to the Tribunal to see the class register: Rule 83(2).

Case management

6.66 The general provisions dealing with case management in private actions in Rules 53 – 57 apply to collective proceedings, save that the references to the first CMC shall be read as referring to the first CMC after the Tribunal has made a CPO: Rule 74(4)(d). Further provisions on the case management of collective proceedings are set out in Rule 88.

6.67 The Tribunal has broad powers to give any directions it thinks fit for the case management of the collective proceedings (Rule 88(1)), and it is likely to use those powers actively.

Disclosure

6.68 The general provisions dealing with disclosure in Rules 60 – 65 apply to collective proceedings, save that the references to the first CMC shall be read as referring to the first CMC after the Tribunal has made a CPO: Rule 74(4)(e). The Tribunal may order disclosure to be given by any party to the collective proceedings, by the class representative to represented persons or by any represented person: Rule 89.

Stay, variation or revocation of the collective proceedings order

6.69 The Tribunal may vary or revoke a CPO, or stay or sist the collective proceedings: Rule 85(1).

6.70 When deciding whether to vary or revoke a CPO, the Tribunal will take into account all the relevant circumstances. Rule 85(2) requires the Tribunal to consider whether the claims certification criteria continue to be met, whether the class representative continues to satisfy the criteria for authorisation and whether the Tribunal has given the class representative permission to withdraw. If the class representative no longer meets the requirements, the Tribunal will consider whether a suitable alternative can be authorised: Rule 85(2)(b) and Rule 85(3)(b).

Offers of Settlement

6.71 The only parties to collective proceedings are the class representative (or representatives if there are sub-classes) and the defendants. Accordingly, any offer of

settlement must be made to one of those parties. Represented persons cannot accept a settlement offer in relation to the common issues as they are not a party to the proceedings.

6.72 The regime for formal settlement offers under Rule 45 does not apply to collective proceedings: Rule 74(3)(c). Collective proceedings are a novel procedure with unique features and it was considered that to apply a regime with automatic cost shifting consequences could potentially create conflicts between members of the class and give rise to unreasonable pressure on the class representative. However, parties will be able to make '*Calderbank*' offers "without prejudice save as to costs". The Tribunal will take such an offer into account if subsequently asked to make an order for costs. Although such an offer does not give rise to any presumption as to how the Tribunal's discretion regarding costs will be exercised, rejection of a reasonable offer that was more favourable to the offeree than the eventual judgment may lead to adverse cost consequences.

Individual settlement by the class representative in opt-in proceedings

6.73 In opt-in proceedings, if the class representative is also a class member it must notify the class and the Tribunal if it settles in whole or in part its personal claim included within the collective proceedings: Rule 86. This is because such a settlement may affect whether that person continues to satisfy the criteria for acting as a class representative. For example, settlement may give rise to a conflict of interest between the class representative and the rest of the class, particularly where only the class representative's claim has been settled. In opt-out proceedings, the only form of permissible settlement is by a collective settlement order, so if the class representative is a class member it may not reach an individual settlement: Rule 94(1).

Withdrawal by the class representative

6.74 The class representative may withdraw from acting in that capacity with the permission of the Tribunal, which will only be granted if the class representative has given appropriate notice to the class, and on conditions which the Tribunal thinks just: Rule 87.

Judgment in collective proceedings

6.75 A judgment of the Tribunal in collective proceedings is binding on all represented persons unless otherwise specified.[64] The judgment therefore binds all persons who have opted in to or not opted out of the proceedings in accordance with Rule 82, depending on whether those proceedings are opt-in or opt-out. Therefore, a UK domiciled class member who has not opted out of opt-out proceedings will be bound by the judgment, whether it is favourable or unfavourable to that class member's interests. The class member cannot subsequently bring separate proceedings in respect of the same claim. Nor can it appeal the Tribunal's judgment: an appeal can be brought only by the class representative or the defendant (see paragraph 6.91 below in relation to appeals).

6.76 Where appropriate, however, the Tribunal's judgment may expressly limit who is bound by it: Rule 91(1).

[64] Section 47B(12) of the 1998 Act.

Award of damages and costs

6.77 The Tribunal may not award exemplary damages in collective proceedings.[65] Damages awards will usually be limited to the loss suffered, including interest if appropriate.

6.78 In awarding damages in collective proceedings, the Tribunal is not required to assess how much each represented person may recover in respect of their claim.[66] Rather, the Tribunal may make an "aggregate" award of damages as defined in Rule 73(2). An aggregate award determines the amount the class as a whole is entitled to and is designed to be a practical and proportionate method of assessing damages in collective proceedings. For example, the Tribunal may calculate the damages on a class-wide basis; this could be way of a lump sum award against the defendant, or by using a formula to determine each represented person's claim without requiring individual proof. This type of award is likely to be more suitable where its calculation can be made without information from the class members, such as where the defendant's records are sufficient, or where there is a large class with largely identical individual claims.

6.79 If it is not appropriate to make an aggregate award of damages for the entire class, it may be possible to proceed to determine the entitlement of sub-classes on a group basis, amending the CPO as appropriate to authorise the appointment of class representatives for those sub-classes. If that is not possible, the Tribunal may direct that the quantification of damages proceed as individual issues: Rule 88(2)(c).

Costs

6.80 Costs may be awarded to or against the class representative in the same way as in proceedings under section 47A but they may not be awarded to or against a represented person (unless that person is the class representative) save in the following circumstances:

- if the Tribunal has approved the appointment of a class representative for a sub-class, costs associated with the determination of the common issues for that sub-class may be awarded to or against that person: Rule 98(1)(a);

- costs associated with the determination of individual issues in accordance with Rule 88(2)(c) may be awarded to or against the relevant individual represented person: Rule 98(1)(c).

There is also provision for costs in respect of any individual application made by a class member in the course of the collective proceedings to be awarded to or against that class member: Rule 98(2).

6.81 A damages-based agreement ("DBA") for the payment of legal fees is unenforceable if it relates to opt-out collective proceedings.[67] The same restriction does not apply to opt-in collective proceedings. DBAs are defined in section 58AA(3) of the Courts and Legal Services Act 1990. In essence, a DBA provides that the fees payable by the client to its legal or other representative are determined as a percentage of the damages awarded to the client.

[65] Section 47C(1) of the 1998 Act.
[66] Section 47C(2) of the 1998 Act.
[67] Section 47C(8) of the 1998 Act.

Distribution of damages

6.82 Where an aggregate award of damages has been made, the Tribunal will give directions as to how each class member or represented person's entitlement is to be calculated: Rule 92(1). Rule 92(2) gives examples of the types of directions the Tribunal may wish to make, such as specifying a formula to quantify an individual's entitlement, the provision of an interim payment or the appointment of an independent third party to determine the claims or any disputes regarding quantification. The Tribunal will expect the class representative to assist the Tribunal by proposing appropriate directions. The Tribunal may also require the apportionment to be placed before the Tribunal for approval.

6.83 If the question of the distribution of damages is to be considered at a hearing, the class representative must notify the class members that such a hearing is to take place: Rule 92(3). Any class member may then apply to the Tribunal to make submissions either in writing or orally at the hearing. Typically, the defendant will not be involved in the process of determining how the award is to be distributed among the class. Accordingly, subject to submissions from any members of the class, the determination by the Tribunal as to the entitlement of the individual class members will not follow adversarial argument. The Tribunal will be concerned to ensure that the method proposed by the class representative is fair to the interests of all class members.

6.84 In most cases, the Tribunal will order that the damages be paid to the class representative so that the representative manages the distribution to the class or the represented persons. In opt-out proceedings, the Tribunal is required to order that any damages be paid to the class representative or another person the Tribunal thinks fit: Rule 93(1).[68] In opt-in proceedings, the Tribunal may make such an order, although it has a wider discretion as regards who the damages are paid to: Rule 93(2).[69] The Tribunal may, for example, order that the damages be paid directly to the represented persons.

6.85 Where the Tribunal orders that the damages be paid to the class representative, or such other person as the Tribunal thinks fit, it must also specify a time within which individual represented persons may claim their entitlement: Rule 93(3)(a). The class representative must make it clear to the represented persons dealing with the distribution of the damages award that there is a limited time period for them to claim their entitlements in the notice of the judgment or order: Rule 91(3)(b). Where the damages are to be paid to the class representative, the Tribunal will need to be satisfied that suitable arrangements for holding the funds are in place.

6.86 The class representative is required to notify the Tribunal by a particular date of any damages which have not been claimed ("undistributed damages"); the same applies to any other person to whom the damages were paid: Rule 93(3)(b).

Undistributed damages

6.87 Undistributed damages are those damages which have not been claimed by the represented persons within the time period set by the Tribunal. The class representative is required to notify the Tribunal of the existence of any undistributed damages. There may be some delay following the expiry of the time set by the Tribunal for submission of claims before the amount of the undistributed damages

[68] Section 47C(3) of the 1998 Act.
[69] Section 47C(4) of the 1998 Act.

can be determined, for example where there are disputes as to whether a claimant falls within the class or regarding the quantification of individual claims. Once the amount has been ascertained, or largely ascertained, the Tribunal may order that the undistributed damages be used in the following ways under Rules 93(4) – (6):

- the undistributed damages may be used to cover any costs, fees or disbursements incurred by the class representative in respect of the collective proceedings; or

- the undistributed damages may be paid to the charity designated by the Lord Chancellor pursuant to section 47C(5) of the 1998 Act.

6.88 Undistributed damages cannot be returned to the defendants in collective proceedings.[70]

6.89 The default position is that undistributed damages will be paid to charity.[71] The charity currently designated[72] is the Access to Justice Foundation, whose stated aim is to facilitate access to pro-bono legal assistance for those who need it most. Where the class representative seeks an order that the undistributed damages be used instead to cover all or part of its costs, fees and disbursements, the class representative must make an application to the Tribunal. This application must specify how much is being claimed and how those costs, fees and/or disbursements were incurred (where appropriate by way of a costs schedule). Obviously, the class representative will only be able to make such a claim out of the undistributed damages insofar as it has not recovered its costs from the defendant.

6.90 The Tribunal may determine the amounts to be paid to the class representative itself, or direct that they be determined by a costs judge of the High Court, a taxing officer of the Supreme Court of Northern Ireland or the Auditor of the Court of Session: Rule 93(5). Where only part of the undistributed damages is paid to the class representative, the Tribunal will direct that the remainder is paid to the Access to Justice Foundation: Rule 93(6). Since the defendant has no interest in the amount to be paid on account of the class representative's costs, fees and disbursements, it does not have a right to be heard on this question. However, the Tribunal will give the Access to Justice Foundation permission to address it on the determination, and a copy of the application should accordingly be sent to the Foundation.[73]

Appeals in collective proceedings

6.91 Section 49 of the 1998 Act deals with appeals against Tribunal decisions in collective proceedings. Such appeals are limited to:

- points of law arising from a decision of the Tribunal as to:

  i. an award of damages or other sum (other than a decision on costs or expenses);

  ii. the grant of an injunction; or

  iii. infringement findings in stand-alone claims; and

[70] The position differs in collective settlements, where the settlement representative and the defendant may agree that any undistributed settlement sums revert back to the defendant.
[71] Sections 47C(5) – (7) of the 1998 Act.
[72] See Legal Services Act 2007 (Prescribed Charity) Order 2008, SI 2008 No. 2680.
[73] At PO Box 64162, London WC2A 9AN.

- decisions as to the amount of an award of damages or other sum.

6.92 However, there is no statutory provision for appeals against the Tribunal's decision on an application for a CPO. Therefore, any challenge to such decisions can only be brought by way of judicial review.

6.93 Appeals may only be brought by the class representative or the defendant. Class members have no right to appeal decisions made in respect of the claims included in the collective proceedings.[74]

Collective settlements

6.94 The 1998 Act makes provision for two forms of collective settlement which require the approval of the Tribunal:

- collective settlement after a CPO has been made for opt-out collective proceedings;[75]

- collective settlement where no collective proceedings have started or before a CPO has been made.[76]

These two forms of settlement are discussed in more detail below.

6.95 There is no statutory provision governing collective settlement of opt-in collective proceedings after a CPO has been made, and such a settlement does not require the Tribunal's approval. The only restriction which applies is that the class representative may not, without the permission of the Tribunal, settle the collective proceedings before the time for opting-in specified in the CPO has expired: Rule 95. This ensures that there are no "absent" class members: all represented persons are identified and the class representative is able to take instructions or consult with them before reaching a settlement. It also prevents a defendant undermining the effect of a CPO by settling the proceedings before the class of represented persons has been fully constituted.

Applying for approval of a settlement of opt-out collective proceedings (i.e. where a collective proceedings order has been made)

6.96 A collective settlement of opt-out collective proceedings will only bind the parties and the class if it has been approved by the Tribunal. The Tribunal's approval is necessary because such a collective settlement affects the interests of all class members (or represented persons), although many of those persons are unidentified and have not been involved in the proceedings in any way. The Tribunal's approval of the collective settlement is intended to ensure that the interests of all class members or represented persons are protected.

6.97 Rule 94 sets out the procedure for seeking approval of a collective settlement where a CPO has been made specifying that the proceedings are opt-out proceedings. In such a scenario, the Tribunal has already considered whether the class representative is suitable to act in that capacity and whether the claims are eligible to be included in collective proceedings. The Tribunal need not reconsider those issues. The essential question for the Tribunal's consideration is whether the terms of the settlement are

[74] Section 49(2A) of the 1998 Act.
[75] Section 49A of the 1998 Act.
[76] Section 49B of the 1998 Act.

"just and reasonable" in accordance with section 49A(5) of the 1998 Act. If the Tribunal approves a collective settlement, it will issue a "collective settlement approval order" ("CSAO").

6.98 The class representative and the settling defendant must make a joint application for a CSAO: Rule 94(3).[77] Rule 94(4) requires the application for a CSAO to contain the following information:

- *Details of the claims to be settled*

  The application should make clear whether the proposed settlement relates to all or part of the common issues which are the subject of the collective proceedings, where appropriate by reference to the CPO.

- *The terms of the proposed collective settlement*

  The application must detail the terms of the settlement, including the overall settlement sum and any related provisions as to the payment of costs, fees and disbursements. It should also set out what has been agreed in relation to any undistributed settlement funds.

- *A statement that the applicants believe that the terms of the proposed settlement are just and reasonable*

  Such a statement should be made by both the class representative and the settling defendant and must be supported by evidence. It is expected that such evidence would be served separately by the class representative and the settling defendant. The types of evidence which may be filed include a report by an independent expert (such as an economist) or an opinion by Counsel as to the merits of the settlement.

  The supporting evidence should explain how the represented persons' losses have been calculated and the amount of the settlement arrived at. It may also be appropriate for the lawyers to provide their assessment of the chances of success at trial. Where appropriate, arrangements may be made to protect the confidentiality of such supporting evidence.

- *How the settlement sums are to be paid and distributed*

  The application should explain how the defendant proposes to pay the settlement sums and how they are to be distributed. For example, the defendant and class representative may agree that the settlement sums will be paid to the class representative who will then administer the settlement pursuant to a distribution plan. Details of the distribution plan should be included with the application. The application should also explain how represented persons are to claim their entitlement, the evidence they must supply to support their claim, how the class representative proposes to manage the distribution process and how the costs of that process are to be funded.

[77] Section 49A(2) of the 1998 Act.

Where the class representative and/or defendants propose to appoint a third party to administer the distribution of the settlement sums, the application should identify that third party (or explain how it will be selected), explain its proposed role and how it will be paid. The Tribunal will consider the third party's ability, experience and resources to carry out that role and may require the third party to give evidence to the Tribunal.

- *A draft of the collective settlement approval order*

  The class representative and settling defendant must annex a draft CSAO to the application. The contents of the CSAO are discussed at paragraphs 6.132 - 6.133 below.

- *How the class representative proposes to give notice of the application*

  The Tribunal will usually require the class representative to give notice that it has applied for approval of a collective settlement. This notice ensures that class members or represented persons are given an opportunity to support or oppose the proposed settlement.

  Typically, notice will be given to the entire class or the represented persons, depending on whether it is expected that the time for opting in or out of the proceedings, as set out in the CPO, will have passed at the time the Tribunal approves the settlement. The application must explain how this notice will be given. However, the Tribunal may dispense with this notice where it thinks fit: Rule 94(6)(b).

6.99 The class representative and settling defendant (or their lawyers) must both sign the application for a CSAO. The original and five certified copies of this application and of any supporting evidence must then be filed with the Tribunal: Rule 94(5).

6.100 When the Tribunal receives an application for a CSAO, it has a broad discretion to give any directions it thinks fit: Rule 94(6). For example, the Tribunal may direct that part of the application receives confidential treatment. This may be necessary where the public availability of certain parts of the application – such as the defendant's estimate of the likely damage or legal advice as to the prospects of success – could be harmful to a party's interests, particularly if the settlement is not ultimately approved. At this stage, the Tribunal will usually fix a date for a hearing of the application and for any deadlines prior to the hearing (for example for class members to apply to make submissions).

6.101 The role of class members in the approval process and the criteria for approval of a collective settlement are discussed below.

Applying for approval of a collective settlement directly (i.e. where a collective proceedings order has <u>not</u> been made)

6.102 There are three main stages to such a "direct" settlement: (i) approval of the collective form of process; (ii) approval of the terms of the proposed settlement as just and reasonable; and (iii) administration of the settlement. The main difference between direct settlements and settlements of collective proceedings is that in a direct settlement the parties must apply for a "collective settlement order" or "CSO" prior to, or at the same time as, making an application for approval of the proposed collective settlement, i.e. a CSAO.

Applying for a collective settlement order

6.103 Rule 96 governs collective settlement orders. In summary, a CSO is analogous to a CPO and the criteria for approval are broadly the same. However, unless a potential class member objects, since it is made only for the purpose of settlement the application for a CSO will be uncontested.

6.104 Unlike an application for a CPO (which is made only by the proposed class representative), the application for a CSO must be made by the proposed settlement representative and the would-be defendant: Rule 96(1).[78] Rule 96(2) requires the application to:

- identify the proposed settlement representative;
- explain how the proposed settlement representative satisfies the requirements of Rule 96(9)-(11);
- identify the would-be defendant;
- describe the proposed settlement class;
- estimate the number of class members and explain the basis for that estimate;
- provide details of the claims to be settled by the proposed collective settlement;
- explain how the claims would meet the eligibility criteria for collective proceedings in Rule 79, if they had been brought in collective proceedings; and
- annex a draft: (i) CSO; (ii) summary of the CSO application for the Tribunal's website; and (iii) notice of the CSO.

6.105 Unless the Tribunal otherwise directs, the signed original of the CSO application (and its annexes) should be accompanied by five copies certified by the proposed settlement representative or its lawyer as conforming to the original: Rule 96(3).

Determination of the application for a collective settlement order

6.106 As these cases will normally be complex, the Tribunal will ordinarily list a hearing to consider the application for a CSO. However, in some cases, where the circumstances are relatively straightforward, it may be possible to determine the application on the papers.

6.107 Members of the proposed settlement class may apply to make submissions either in writing or orally at the hearing of the application for a CSO: Rule 96(8). Such applications should be made in writing in advance of any hearing and be copied to the other parties.

6.108 There is considerable overlap between the conditions for granting a CSO and a CPO. In summary, to make a CSO, the Tribunal must be satisfied that: (i) the proposed settlement representative meets the criteria for acting in that capacity; and (ii) the claims would be eligible to be brought in collective proceedings: Rule 96(6).[79]

[78] Section 49B(2) of the 1998 Act.
[79] Section 49B(5) of the 1998 Act.

- *Suitable settlement representative*

  The settlement representative need not be a member of the class and is not required to have his or her own claim against the would-be defendant.[80] The Tribunal will only authorise the proposed settlement representative to act in that capacity where it is satisfied that it is just and reasonable: Rule 96(9).[81] When determining whether it would be just and reasonable for the proposed settlement representative to act in that capacity, the Tribunal will consider:

  - whether the proposed representative would fairly and adequately act in the interests of the class members: Rule 96(10)(a). The fairness and adequacy test is further elaborated on in Rule 96(11), which lists the circumstances the Tribunal will take into account: (i) where the proposed settlement representative is a class member, the Tribunal will consider its suitability to manage the proceedings (Rule 96(11)(a)); (ii) where the proposed settlement representative is not a class member, the Tribunal will consider whether it is a pre-existing body and the nature and functions of that body (Rule 96(11)(b)); and (iii) any plan for the collective settlement (Rule 96(11)(c)); and

  - whether the proposed settlement representative has a material interest that is in conflict with the interests of the class members, so far as the common issues are concerned: Rule 96(10)(b).

  The Tribunal's approach to these factors is likely to be similar to the approach it would take in collective proceedings, as discussed at paragraphs 6.30 - 6.31 above.

- *Eligible claims*

  Certification for settlement purposes requires the Tribunal to be satisfied that the claims would be eligible to be included in collective proceedings, if collective proceedings were brought. The three requirements for determining eligibility for collective proceedings are set out in Rule 79(1), each of which is considered at paragraph 6.37 above. However, there will inevitably be less concern about the suitability of the collective handling of common issues when the parties are coming to the Tribunal only for the purpose of approving a settlement and not in order to pursue legal proceedings.

Collective settlement order

6.109 The CSO must authorise the settlement representative to act in that capacity and describe the class.[82] Further content requirements are set out in Rule 96(12). These requirements are broadly the same as for a CPO, save that there is no need to identify the remedy sought, the time for opting in or out of proceedings, or the part of the UK in which proceedings are to be treated as taking place.

Notice of the collective settlement order

6.110 The settlement representative must notify the class members that the Tribunal has made a CSO: Rule 96(15). This notice must be approved by the Tribunal.

[80] Section 49B(7)(a) of the 1998 Act.
[81] Section 49B(7)(b) of the 1998 Act.
[82] Section 49B(6) of the 1998 Act.

6.111 The content requirements for the notice of the CSO are set out in Rule 96(16). The purpose of the notice is to inform the class members of the proposed collective settlement in plain and easily understood language, and to explain who will be bound by the proposed settlement if it is approved by the Tribunal.

Variation or revocation of the collective settlement order

6.112 The Tribunal may vary or revoke the CSO on its own initiative or on the application of a class member or party: Rule 96(17). The Tribunal will ordinarily seek observations from the parties on the proposed variation or revocation request.

Applying for a collective settlement approval order

6.113 Once the Tribunal has made a CSO, the parties may apply for approval of the collective settlement. This application is made in much the same way as an application for settlement of collective proceedings. The settlement representative and the would-be defendant must make a joint application for a CSAO (Rule 97(1)),[83] and provide the information required by Rule 97(2).

6.114 The discussion at paragraph 6.98 above regarding an application for approval of a settlement of collective proceedings pursuant to Rule 94(4) applies equally to an application for approval of a direct collective settlement pursuant to Rule 97(2), save that:

- it is the settlement representative and would-be defendant that apply, rather than the class representative and defendant; and

- the applicants are required to explain how they propose to give notice to the settlement class, rather than to represented persons or class members.

6.115 The settlement representative and would-be defendant (or their legal representatives) must both sign the application for a CSAO. The original and five certified copies of the application and any evidence in support must be filed with the Tribunal: Rule 97(3).

6.116 Upon receipt of an application for a CSAO, the Tribunal has a broad discretion to give any directions it thinks fit: Rule 97(4). Usually, those directions will include listing a hearing to determine the application.

Role of class members in the approval process

6.117 Broadly, the class members who will be bound by the proposed settlement may participate in the approval process with the Tribunal's permission: Rules 94(7) and 97(5). Who this includes depends on whether a CPO or CSO has been issued, and whether the time for opting out of any collective proceedings has passed, as set out in the table below.

[83] Section 49B(2) of the 1998 Act.

Stage of collective proceedings or collective settlement		Who may apply to make submissions
Collective proceedings order	Time for opting out has expired	Represented persons
	Time for opting out has not expired	Class members
Collective settlement order		Any member of the proposed settlement class

6.118 Persons wishing to make submissions must apply for permission within the time period fixed by the Tribunal. If the Tribunal has not set a deadline, applications must be filed with the Tribunal before the collective settlement approval hearing. In either case, applications should be made without waiting until the end of the period allowed.

6.119 There is no set form for the request to make submissions, although the Tribunal will generally expect the application to include the following:

- the title of the settlement proceedings to which the application relates;
- the name and address of the person wishing to make submissions;
- the name and address of their legal representative if appropriate;
- an address for service in the United Kingdom;
- whether the person wishes to make submissions orally or in writing;
- a concise statement of whether the person supports or objects to the proposed settlement; and
- a succinct presentation of the reasons for making the request.

6.120 The request for permission to make submissions will be served on the other parties by the Registrar, giving them an opportunity to respond within a short time limit.

6.121 The Tribunal may permit one or more class members to make submissions, either orally or in writing and will take those submissions into account when determining whether the proposed settlement is just and reasonable: Rules 94(9)(f) and 97(7)(f).

6.122 It should be noted that class members or represented persons (as the case may be) will have an opportunity to opt out of the collective settlement after it has been approved, even if they did not opt out of any collective proceedings or did not object to the settlement terms at the approval hearing: Rules 94(10) and 97(8).

Settlement approval criteria

6.123 The Tribunal may approve a collective settlement only if it is satisfied that its terms are "just and reasonable".[84]

6.124 Unless a class member objects to the settlement, the Tribunal will not have the benefit of adversarial argument in considering whether to approve the terms proposed. However, an application for a CSAO is markedly different from the presentation to

[84] Sections 49A(5) and 49B(8) of the 1998 Act.

the Tribunal or a court of a consent order in ordinary civil proceedings. If approved, the settlement will bind all members of the defined class who do not opt out and bring to an end the (or preclude the commencement of) proceedings brought on behalf of the class, although many class members will not have given instructions to the class representative (or settlement representative) agreeing to the settlement. In these circumstances, the Tribunal will closely scrutinise the proposed collective settlement. However, the Tribunal will not require the settlement to be perfect and there is likely to be a range of reasonable settlements which could be approved by the Tribunal.

6.125 In considering whether a collective settlement is just and reasonable, the Tribunal will take into account all relevant circumstances, including the specific factors listed in Rules 94(9) and 97(7). While Rule 94(9) applies to settlements of collective proceedings and Rule 97(7) applies to direct collective settlements, the factors are broadly the same in both scenarios. These factors are as follows:

- *The amount and terms of the settlement*

  The Tribunal's consideration of the amount and terms of the settlement will include the monetary and non-monetary benefits offered by the settling defendant, as well as any related provisions as to the payment of costs, fees and disbursements. In particular, the Tribunal may consider the amount allocated to costs, fees and disbursements as a proportion of the overall settlement. Where legal costs make up a significant proportion of the settlement funds, the Tribunal will scrutinise whether this allocation is appropriate and will be alert to any potential conflict of interest between the class (or settlement) representative and its lawyers on the one hand and the class members on the other hand.

  The Tribunal will also consider carefully the terms of any waiver or release contained in the proposed settlement agreement.

- *The number or estimated number of persons likely to be entitled to a share of the settlement*

  The number of persons who may be able to claim a share of the settlement will influence the Tribunal's overall assessment of the settlement amount and terms. A settlement may incorporate a provision whereby either party has a right to cancel the settlement in the event that a specified opt-out threshold is exceeded.

  The Tribunal may also consider how class members will be required to claim their entitlement in order to ensure that the applicable conditions or procedures are not overly onerous or complicated so as to discourage or hinder legitimate claims.

- *The likelihood of judgment being obtained in collective proceedings for an amount significantly in excess of the amount of the settlement*

  When considering the likelihood of judgment being obtained in collective proceedings for more than the amount of the settlement, the Tribunal need not conduct a detailed analysis of the claims to determine what it would have awarded in damages (if anything) following a trial. Rather, the Tribunal will adopt a broad brush assessment of the position, having regard to the prospect of success and estimated quantum of damages.

- *The likely duration and costs of the collective proceedings if they proceeded to trial*

  This factor is intended to reflect the often costly and time consuming nature of legal proceedings. In light of the additional time and cost of taking a case to trial, it may be preferable to approve a settlement even though a somewhat higher damages award might be granted after trial.

- *Any opinion by an independent expert and any legal representative of the applicants*

  As well as considering the written opinion of an independent expert and/or the lawyers advising the class (or settlement) representative and the settling defendant(s), the Tribunal may require that person to attend the settlement approval hearing and be questioned in relation to their opinion (in a closed hearing if necessary). In giving their opinion to the Tribunal, experts and legal representatives are reminded of their professional duties to the Tribunal. Their role is of particular importance where a CSAO is sought for a direct collective settlement: when there are no collective proceedings, the difficulty for the Tribunal is all the greater in assessing whether the proposed terms are just and reasonable.

- *The views of any represented person / class member / settlement class member (as appropriate)*

  As the principal parties to the collective settlement approval application are agreed on the settlement, class objectors provide the closest thing to an adversarial testing of the settlement terms. Therefore, the Tribunal will consider carefully what any objectors have to say about the settlement to ensure that the class members' interests are served by the settlement. The Tribunal will not, however, infer from a lack of objectors that the settlement is likely to be just and reasonable.

- *The provisions relating to the disposition of any unclaimed balance*

  The Tribunal will consider what will happen to any unclaimed settlement sums. Unlike damages awards in collective proceedings, unclaimed sums may revert to the defendant: Rules 94(9)(g) and 97(7)(g). Reversion to the defendant will not *of itself* be considered unreasonable, but where a settlement includes provision for reversion, the Tribunal may be concerned to see whether this is conditional upon a threshold of take-up of the settlement fund. For example, a settlement that could result in substantial fees being paid to the lawyers of the class (or settlement) representative and a significant part of the settlement sums being paid back to the defendants, while future claims by class members are barred, is unlikely to be viewed as just and reasonable. A settlement may include provision for all or part of the unclaimed balance be paid to the Access to Justice Foundation, as in the case of a judgment in opt-out collective proceedings: paragraph 6.89 above.

6.126 A collective settlement does not have to be reached in respect of the entire class as defined in the CPO. However, where a defined group within the class is excluded from the terms of the settlement, the Tribunal will wish to be satisfied that the exclusion of the claims of the excluded class members is based on objective grounds that are just and reasonable. Further, in that event the Tribunal will consider whether the terms of the CPO should be varied so as to define as a sub-class the members excluded from the collective settlement and enable the collective proceedings to

continue for their benefit, possibly with the substitution of a new class representative, or whether the collective proceedings should be stayed on the terms of the settlement: see Rule 85.

6.127 The Tribunal will wish to be satisfied that the class (or settlement) representative and its lawyers had sufficient information in order to assess the reasonableness of the settlement to the class members. Accordingly, it may be relevant to ascertain whether and to what extent the class (or settlement) representative has received disclosure from the settling defendant(s), either voluntarily as part of the negotiations or in the course of the collective proceedings.

6.128 The applicants should have regard to these factors when applying for a CSAO, as should any class member making submissions in relation to the proposed collective settlement.

6.129 In most cases, the application for a CSAO will be heard by the full Tribunal panel (being the case management tribunal where the application follows the making of a CPO: paragraph 6.7 above). In the event that the Tribunal does not approve the settlement and the claims proceed to trial, the trial will be heard by a differently constituted panel.

Collective settlement with one or more, but not all, defendants

6.130 The class (or settlement) representative may reach a collective partial settlement, i.e. agree terms with only one, or several, of a larger number of defendants (or would-be defendants), and that collective partial settlement may be the subject of an application for a CSAO.

6.131 If the defendants are subject to joint and several liability, for example where they were participants in a cartel, achieving such a partial settlement may present difficulties if the settling defendant(s) are concerned about their potential liability to the non-settling defendant(s) in subsequent contribution proceedings. In those circumstances, the Tribunal may consider incorporating in the approval order a barring provision that prevents the non-settling defendant(s) from claiming contribution from the settling defendant(s), on the basis that if it were subsequently determined that there was such a right of contribution, the class (or settlement) representative will be limited to recover from the non-settling defendant(s) only damages for which those defendants would be proportionally liable.[85] If the settling parties apply for such a provision to be included in the Tribunal's order, the Tribunal will permit any non-settling defendant (or potential defendant) to make submissions as to whether an order on those terms should be made.

Collective settlement approval order

6.132 The only formal requirement for the CSAO is that it must specify the time and manner by which a represented person or class member, as the case may be, must opt out (for UK-domiciled persons) or opt in (for non-UK-domiciled persons): Rules 94(10) and 97(8).

6.133 The CSAO will also typically contain the following:

[85] Cf the approach of the Canadian courts: *Osmun v Cadbury Adams Canada, Inc* [2010] OJ No. 1877, (2010) 5 CPC (7th) 341 (Ont. SCJ); appeal dismissed, [2010] OJ No. 5304, (2010) 5 CPC (7th) 368 (Ont CA).

- the collective settlement agreement as an annex or schedule to the order;

- a statement that the settlement agreement is just and reasonable, and that it is therefore approved pursuant to either section 49A(5) or 49B(8) of the 1998 Act; and

- a statement that any other action commenced in the Tribunal by a UK-domiciled class member who has not opted out of the collective settlement (or collective proceedings) or a non-UK-domiciled class member who has opted in to the collective settlement is dismissed.

6.134 As mentioned above, the class representative and settling defendant are required to annex a draft CSAO to their application for approval of the collective settlement.

Tribunal concerns about the proposed collective settlement

6.135 If the Tribunal is not satisfied that the proposed collective settlement is just and reasonable, it will refuse to make a CSAO and issue a reasoned decision in writing rejecting the application.

6.136 Following the Tribunal's rejection of the approval application, the applicants may :

- apply for approval of a revised collective settlement;

- if the collective settlement was applied for in collective proceedings, those proceedings will continue;

- if the collective settlement was applied for directly, the settlement representative may initiate collective proceedings and apply for a CPO.

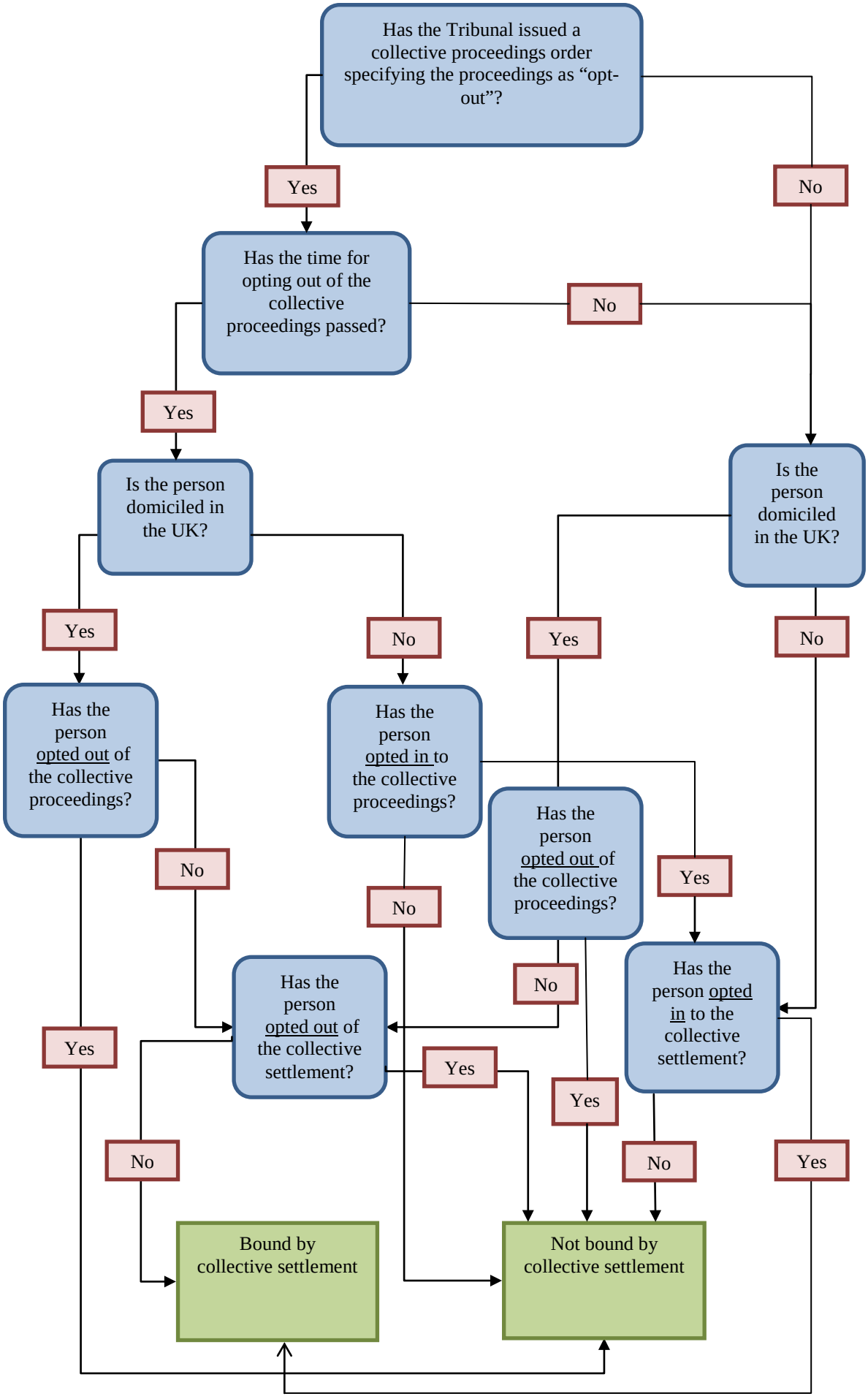
6.137 If the Tribunal rejects the proposed collective settlement, the application for a CSAO or the terms of the proposed settlement cannot be relied on at the trial of the collective proceedings (Rule 94(15)) or the trial of the claims that are the subject of the proposed collective settlement in direct settlements (Rule 97(12)), unless all parties to the CSAO application agree in writing.

6.138 Where the Tribunal has concerns about the proposed collective settlement, but considers that those concerns could be alleviated by certain modifications to the settlement terms, it may suggest changes to the applicants. If the class (or settlement) representative and settling defendant agree to make the suggested changes, the Tribunal may permit the approval application to be amended and fix another approval hearing. The revised application and new hearing date may then have to be notified to the relevant class members so that they have an opportunity to make submissions on the revised agreement.

Who is bound by the collective settlement approval order?

6.139 Broadly speaking, the CSAO binds all UK-domiciled class members who have not opted out. Class members who are not domiciled in the UK must actively opt in to the collective settlement.

6.140 Rules 94(11)-(12) set out who is bound by the collective settlement where there is a CPO; Rule 97(9) sets out who is bound where there is a CSO. These Rules are reflected in the following diagram:


Has the Tribunal issued a collective proceedings order specifying the proceedings as "opt-out"?
Yes
No
Has the time for opting out of the collective proceedings passed?
No
Yes
Is the person domiciled in the UK?
Is the person domiciled in the UK?
Yes
No
Yes
No
Has the person opted out of the collective proceedings?
Has the person opted in to the collective proceedings?
Has the person opted out of the collective proceedings?
No
Yes
No
Has the person opted out of the collective settlement?
Has the person opted in to the collective settlement?
Yes
Yes
Yes
No
No
Yes
Bound by collective settlement
Not bound by collective settlement

Notice of the collective settlement approval order

6.141 The class (or settlement) representative must give notice of the terms of the settlement and its approval, pursuant to Rule 94(13) where there is a CPO, or Rule 97(10) where there is a CSO. In either case, the form of the notice, and the manner in which it will be given, must be approved by the Tribunal. This notice is particularly important as it informs the represented persons or class members (as appropriate) that they may be entitled to recover and how to go about doing so, or how to opt out of the settlement if they do not wish to be bound. Therefore, the Tribunal will closely scrutinise the drafting of the notice and the way in which it will be disseminated to ensure that it will be received and understood by as many persons who are entitled to claim as possible.

6.142 In most cases, it will be appropriate for the parties to file a draft notice of the collective settlement at the same time as filing their application for a CSAO. Alternatively, the Tribunal may direct the parties to file a draft notice after it has approved the collective settlement and the notice will be the subject of a separate Tribunal order.

6.143 There are no formal content requirements for the notice of the settlement approval, although such notices should typically:

- describe the settlement terms in plain and easily understood language;
- annex or otherwise incorporate the CSAO;
- explain who may be entitled to claim from the settlement;
- identify the deadline for opting out of or in to the collective settlement and the consequences of doing so; and
- state the steps that must be taken to claim any entitlement, including any relevant deadline for doing so, and explain how such claims will be determined.

6.144 The table below sets out who the notice must be given to, although the Tribunal may also require other persons to be notified:

<table>
<tr><th colspan="2">Stage of proceedings / settlement</th><th>Who must be notified of the collective settlement approval?</th></tr>
<tr><td rowspan="2">Collective proceedings order</td><td>Time for opting out has expired</td><td>Represented persons (Rule 94(13))</td></tr>
<tr><td>Time for opting out has not expired</td><td>Class members (Rule 94(13))</td></tr>
<tr><td colspan="2">Collective settlement order</td><td>Class members (Rule 97(10))</td></tr>
</table>

Opting in to or opting out of a collective settlement

6.145 UK-domiciled class members and represented persons may opt out of the collective settlement. Non UK-domiciled class members and represented persons must opt in to the settlement, even if they previously opted in to the collective proceedings to which the settlement relates. However, the right to opt in or out is limited in time.

6.146 The procedure for opting in or out, including the deadline for doing so, will be specified in the CSAO and the notice of that approval order.

Continuation of proceedings in respect of persons omitted from the collective settlement

6.147 Where collective proceedings are settled, but one or more class members or represented persons are omitted from the collective settlement, the Tribunal may permit the proceedings to continue as one or more claims between different parties: Rule 94(14). For example, this may occur where a class member opts out of the collective settlement, or where the collective settlement only relates to a sub-class.

6.148 Where the Tribunal permits the proceedings to continue, it has the power to take various steps including ordering the addition, removal or substitution of parties or that the collective proceedings claim form be amended: Rule 94(14). The Tribunal would invite submissions from the persons who opted out, along with the defendants, before deciding what order to make.

SECTION 7: CASE MANAGEMENT

Introduction

7.1 Proceedings before the Tribunal are characterised by active case management with a view to ensuring cases are dealt with justly and at proportionate cost.[86]

7.2 Rule 4(5) states that active case management includes:

- encouraging the parties to co-operate with each other in the conduct of the proceedings;
- identification of and concentration on the main issues as early as possible;
- fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;
- planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and
- ensuring that the main hearing is conducted within defined time limits.

7.3 It is a fundamental feature of the Rules that they require the parties (together with their representatives and experts) to co-operate with the Tribunal in its task of ensuring cases are dealt with justly and at proportionate cost through the use of active case management: Rule 4(7).

7.4 The Rules provide the Tribunal with powers to give a wide range of case management directions, but the procedure adopted will depend on the circumstances of each case in light of, for example, the urgency of the matter, the issues arising out of the pleadings and the submissions of the parties.

7.5 The first CMC is viewed by the Tribunal as a particularly important part of the active case management regime; its main purpose is to set a timetable to an oral hearing and to fix a date for that hearing (see, more generally, Rules 20(3) and 54(3)).

7.6 In many cases, the Tribunal will proceed from the first CMC to the main hearing of the case, possibly giving further written directions in that regard. In other cases it will be convenient to proceed either to a further CMC or a pre-hearing review envisaged by Rules 20(1) and 54(4).

7.7 Other case management steps which may be taken, depending on the specific circumstances of the case, include:

- the arrangement of a site visit[87] and/or inspection, if this is considered to be beneficial for the Tribunal's understanding of the issues in the proceedings; and

[86] Rule 4(1); see Rule 4(2) for what is meant by dealing with a case justly and at proportionate cost.
[87] This occurred, for example, in *BT v Director General of Telecommunications (RBS backhaul circuits)* [2004] CAT 8 at [75]; *Albion Water (Dŵr Cymru/Shotton Paper) v WSRA* (Case 1046/2/4/04) and *Albion Water (Thames Water / Bath House) v DGWS* (Case 1042/2/4/04).

- the making of a request to the CJEU for a preliminary ruling pursuant to Article 267 TFEU: see Rule 109.[88]

7.8 Matters that typically may be dealt with at a preliminary stage (i.e. prior to the hearing of the main issues in the case)[89] are:

- objections to the jurisdiction of the Tribunal (see for example: *T-Mobile v OFCOM* [2008] CAT 15);

- objections to the admissibility of the appeal (see for example: *BetterCare v DGFT* [2001] CAT 6 and [2002] CAT 6; *Freeserve v DGT* [2002] CAT 8; *Claymore Dairies and Arla Foods v DGFT* [2003] CAT 3; *Aquavitae v DGWS* [2003] CAT 17; *Cityhook v OFT* [2007] CAT 18; *Independent Media v OFCOM* [2007] CAT 29; and note in particular *Pernod Ricard v OFT* [2003] CAT 19 and [2004] CAT 10);

- strike out applications (see for example: *Allsports v OFT* [2004] CAT 1; *Albion Water (Thames Water / Bath House) v DGWS* [2005] CAT 23; *Floe Telecom v OFCOM* [2005] CAT 35; *VIP Communications v OFCOM* [2009] CAT 28; *Stagecoach v CC* [2010] CAT 1 and, in the context of claims for damages, *Emerson Electric & Ors v Morgan Crucible* [2007] CAT 30 and *Enron v English Welsh & Scottish Railway* [2009] CAT 7);

- amendments to pleadings (see for example: *Floe Telecom v OFCOM* [2004] CAT 7; *Rapture v OFCOM* [2007] CAT 34 and *BT v OFCOM* [2007] CAT 35); in the context of applications for review of merger decisions see *Federation of Wholesale Distributors v OFT* [2004] CAT 11 at [30] and *Co-operative Group v OFT* [2007] CAT 24 at [95]-[98]);

- applications for disclosure (see for example: *Aquavitae v DGWS* [2003] CAT 4 and [2003] CAT 17 at [219]; *Argos and Littlewoods v OFT* [2004] CAT 5; *Claymore v OFT (recovery and inspection)* [2004] CAT 16; *Albion Water v WSRA* [2008] CAT 3; *British Sky Broadcasting v CC & the Secretary of State* [2008] CAT 7); and *Carphone Warehouse Group v OFCOM (Local Loop Unbundling)* [2009] CAT 37);

- further and better particulars (*Brannigan v OFT* [2006] CAT 28 at [98]);

- filing of further evidence,[90] as occurred in *Claymore v OFT* (see the Order of 27 March 2003) and *Rapture v OFCOM* [2007] CAT 34. Filing further evidence may also be a feature of the respondent's defence in a merger case (see, for example *UniChem v OFT* [2005] CAT 8 and *Co-operative Group v OFT* [2007] CAT 24).

[88] Making such a reference was considered in *The Number v OFCOM* [2008] CAT 33 at [159]-[173] and was subsequently made by the Court of Appeal: *BT v The Number* [2009] EWCA Civ 1360.

[89] Due to considerations of expediency, the Tribunal may direct that certain matters that may be considered preliminary in nature be rolled-up with the substantive hearing (see, for example, *Merger Action Group*, Transcript of CMC, 3 December 2008).

[90] Note that under Rule 19(3) the Tribunal may of its own initiative make enquiries of the parties, for example, see *Aberdeen Journals v DGFT* [2003] CAT 11 (where the Tribunal requested certain information) and *Napp v DGFT* [2002] CAT 1 (where the Tribunal required the production of internal strategy documents). See also Rule 53(3) in relation to claims for damages.

- admissibility of evidence (*BT v OFCOM* [2015] CAT 6); and

- timetable, hearing dates and timing of skeleton arguments.

Case management conferences: planning the case

Timing of the first CMC

7.9 The timing of the first CMC will depend on the nature of the proceedings. In relation to appeals, Rule 20(2) provides that a CMC will be held as soon as practicable after the filing of an appeal, whether or not the time for service of the defence has expired. The Tribunal generally aims to summon the parties or their representatives to the first CMC **approximately four weeks after the appeal has been filed**. Very often the defence will not have been served at that point and the timing of the service of the defence will probably be one of matters to be dealt with at the CMC. It will depend on the circumstances of the case whether the Tribunal maintains the default setting of six weeks from service of the notice of appeal on the respondent or whether a longer time will be set.

7.10 In claims for damages under section 47A of the 1998 Act, the first CMC will normally be scheduled to take place **after the defence and reply have been filed**.

7.11 In collective actions pursuant to section 47B of the 1998 Act, the first CMC will usually take place **as soon as practicable** (before service of the defence); see paragraph 6.25 above and Rule 76(3).

7.12 In relation to an application for review pursuant to section 120 of the 2002 Act, the first CMC **may take place at a very early point in the proceedings**, perhaps within a few days of the filing of the application, depending on the urgency of the matter.

7.13 It is important to note that, in the case of appeals and applications for review, the date of the first CMC will be set according to the needs of the case and the Tribunal's diary. No account will be taken of the availability of the parties' legal representatives. There will be more flexibility in this regard for claims for damages, but again the needs of the case and the Tribunal's diary will be paramount.

7.14 Under Rule 20(4) the Tribunal may authorise a member of the Tribunal's panel of Chairmen to carry out on its behalf a CMC, pre-hearing review or any other preparatory measure relating to the organisation or disposal of the proceedings.

The agenda for the first CMC

7.15 About seven to ten days before the date fixed for the first CMC, the Tribunal will normally send the parties and any proposed interveners an agenda setting out the principal issues which it wishes to address. Matters that commonly feature in the agenda include:

- applications for permission to intervene; see Section 4 (The intervention procedure) for further detail;

- preliminary issues, for example in respect of jurisdiction or the admissibility of the proceedings;

- disclosure of documents: Rule 19(2)(p) and Rule 20(3)(b); in respect of claims for damages: Rule 53(2)(b) and Rule 54(3)(e);

- whether the proceedings should be consolidated or heard together with other proceedings: Rule 17; Rule 51;

- the treatment of confidential information, including the establishment of a confidentiality ring: Rule 19(2)(k) and Rule 20(3)(f) and, in respect of claims for damages Rule 53(2)(h) and Rule 54(3)(c);

- admissibility of evidence: Rule 19(2)(f) and Rule 20(3)(e);

- preliminary identification of the main issues in the case and of the evidence likely to be relevant (particularly whether any witnesses are likely to be called);

- clarification of the forms of order sought by the parties, their arguments of fact and law and the points at issue between them;

- the timetable for the case, including the date for service of the defence (if not already served) and (if applicable) the statement(s) of intervention and any further pleadings, and the date and estimated length of the main hearing;

- any other issue regarding the preparation of the proceedings which can be conveniently and fairly disposed of;

- to determine the question of forum: Rule 18; and

- any further issues raised or directions sought by the parties: this provides the parties with an opportunity to make requests to the Tribunal in respect of a matters not raised previously.

Written submissions in advance of the first CMC

7.16 The agenda will normally state a date and time by which any written submissions of the parties (and proposed interveners) should be submitted to the Tribunal. Provided they are brief, the Tribunal has found that such written submissions are useful in outlining the positions of the parties on matters mentioned in the agenda in advance of the CMC. Any written submissions must be copied to the other parties and to any proposed interveners.

7.17 Parties are encouraged to reach agreement on procedural issues and to indicate in their written submissions the extent of any agreement and the matters which remain in dispute, so that the CMC can be conducted as efficiently as possible. If there is agreement amongst the parties it may be possible to dispense with the need to hold the CMC, and the Tribunal can proceed to make an order embodying agreed directions.

7.18 The parties may also be asked to indicate in advance their availability for the main hearing so that this can be factored into the Tribunal's deliberations regarding the appropriate timetable for the proceedings.

Procedure at and following the CMC

7.19 The etiquette at the first CMC and at all other CMCs is similar to that at the hearing: see paragraphs 7.95 - 7.102 (Conduct of the hearing) below.

7.20 The first CMC and all following hearings will be held in public except where confidential matters are considered.

7.21 A transcript of the CMC will be made by the Tribunal's shorthand writer, and copies sent to the parties shortly after the CMC so that any transcription errors and inaccuracies, for example in relation to document references and authorities, can be identified and corrected. Generally transcripts are not proof-read or corrected for accuracy down to the finest detail because they are merely working tools for use by the Tribunal in considering the case and preparing its decision or directions. In due course, a copy of the transcript will be placed on the Tribunal's website.

7.22 Any directions made by the Tribunal will be incorporated in an order drawn up by the Registrar. If the directions are relatively straightforward the order will be signed by the President, Chairman, or Registrar and stamped by the Registry before being sent to the parties. In cases involving more complex directions, the Tribunal may ask the parties to submit a draft order, if possible in terms that are agreed.

7.23 Once finalised, a copy of the order will be placed on the Tribunal website.

7.24 Sometimes the Tribunal will wish to give a ruling or short judgment on a particular aspect of the proceedings and that too will be placed on the Tribunal website.

Subsequent case management conferences / preliminary hearings

7.25 In so far as not already dealt with at the first CMC, any subsequent CMC and/or pre-hearing review will deal primarily with the organisation of the hearing of the case, including: any outstanding matters concerning witnesses, expert evidence or disclosure of documents (see Rule 19(2)(d) to (j) and (l), Rules 21 to 22 and equivalent rules in relation to claims for damages). If there is any question of a decision being remitted to the respondent prior to the main hearing (Rule 19(2)(o))[91] or of the Tribunal being invited to deal with any preliminary points of law, or of a possible reference to the CJEU under Article 267 TFEU (Rule 109), those matters will also be addressed. If there is a substantial issue to be addressed (for example a strike out application or an application to contest the jurisdiction), the CMC will assume the character of a hearing with skeleton arguments being filed in advance.

Forum

7.26 Rule 18 provides that the Tribunal may, after taking into account the observations of the parties, at any time determine whether its proceedings are to be treated as proceedings in England and Wales, in Scotland or in Northern Ireland.[92]

7.27 Under Rule 9(4)(c), a notice of appeal/application must contain observations on the question in which part of the United Kingdom the proceedings are to be treated as

[91] For example, see *Argos and Littlewoods v OFT* [2003] CAT 16 and *Albion Water v WSRA* [2008] CAT 31.

[92] See *Aberdeen Journals v DGFT* [2001] CAT 5, *BetterCare v DGFT* [2001] CAT 6 and *Merger Action Group v Secretary of State* [2008] CAT 34.

taking place pursuant to Rule 18. The respondent is required to include observations on this question in the defence: Rule 15(3)(a).

7.28 Rule 30(3)(c) states that the claim form in proceedings pursuant to section 47A of the 1998 Act should contain observations on the forum of the proceedings. The equivalent provision in respect of collective proceedings is Rule 75(3)(j). The defendant is required to include observations on this question in the defence: Rule 35(1)(b).

7.29 The matter of forum, if in dispute, is likely to be considered at an early stage in the proceedings, possibly at the first CMC. In determining the forum, the Tribunal may have regard to all matters that appear relevant, including where a party to the proceedings is usually resident or has its head office or place of business as well as other factors enumerated in Rule 18(3).

7.30 The determination of forum may affect certain procedural issues arising in the proceedings before the Tribunal and costs, and will determine whether any subsequent appeal from the Tribunal's decision lies, under section 49 of the 1998 Act and section 196 of the 2003 Act, to the Court of Appeal in England and Wales, to the Court of Session in Scotland or to the Court of Appeal in Northern Ireland.

7.31 It should be noted that the question of forum does not necessarily determine where the Tribunal will physically sit for the purpose of CMCs, pre-hearing reviews or hearings. Regardless of whether the forum for proceedings is England and Wales, Scotland or Northern Ireland, the Tribunal may hold meetings, CMCs, pre-hearing reviews or hearings or give directions in any location that it considers appropriate having regard to the just, expeditious and economical conduct of the proceedings.[93]

Consolidation

7.32 Rules 17 and 51 provide that two or more proceedings which challenge the same decision or which involve the same or similar issues may be consolidated, either at the request of a party or on the Tribunal's own initiative. Before making an order consolidating proceedings, the Tribunal will invite the parties to the proceedings to submit observations.

Confidentiality

General principles

7.33 The general restrictions on disclosure of information contained in Part 9 of the 2002 Act do not apply to the Tribunal: section 237(5) of the 2002 Act. However, the importance placed on protecting confidential information is apparent from the powers conferred on the Tribunal to protect such information, as regards documents: under Rule 101; hearings: Rule 99; and the Tribunal's decisions: paragraphs 1(2) and (3) of Schedule 4 to the 2002 Act.

7.34 Since documents filed with the Tribunal are not available for public inspection, in practice requests for confidential treatment mainly relate to the possible disclosure of confidential information to third parties in the context of the intervention procedure, in case management conferences or hearings, and in the decision of the Tribunal.

[93] See *Merger Action Group v Secretary of State* [2008] CAT 34 at [1].

7.35 In broad terms, confidential information is information the disclosure of which would be contrary to the public interest; commercial information the disclosure of which could significantly harm the legitimate business interest of the undertaking to which it relates; or information relating to the private affairs of an individual the disclosure of which could significantly harm his or her interests: paragraph 1(2) of Schedule 4 to the 2002 Act.

7.36 In the event of a dispute, the Tribunal will decide whether information should be treated as confidential after hearing the parties and taking into account the matters set out in paragraph 1(2) of Schedule 4 to the 2002 Act: Rule 101(2).

7.37 As envisaged by Rule 101(3), the need for disclosure in the interest of fairness, on the one hand, and legitimate claims to the confidentiality of commercially sensitive information, on the other, may be accommodated by way of disclosure of the information into a confidentiality ring established pursuant to an order of the Tribunal. Under the terms of such an order, the confidential information will only be disclosed to named individuals forming "the ring" who have given appropriate protective undertakings in the form prescribed by the order.

7.38 Individuals admitted to the ring will normally be the parties' named legal representatives and possibly other external advisers or experts such as accountants and economists: see *Claymore Dairies v OFT* [2003] CAT 12 and the Order of the Tribunal of 9 June 2003 in those proceedings; *Genzyme v OFT* – see the transcript of 27 May 2004; Order of the Tribunal of 31 March 2008 in *British Sky Broadcasting v CC & the Secretary of State*; *National Grid v GEMA* – see the transcript of 23 May 2008. It may sometimes be necessary to add employees of the parties, such as in-house counsel, to the confidentiality ring subject to them giving suitable undertakings; these may be more onerous than those given by individuals external to the parties (see the Order of 8 October 2008 in *National Grid v GEMA*; cf. the Ruling in *Carphone Warehouse v OFCOM (Local Loop Unbundling)* [2009] CAT 37).

7.39 The Tribunal will sit in private for any part of a public hearing where it is satisfied that it will be considering confidential information: Rule 99.

7.40 If confidential information is included in the Tribunal's decision, the Tribunal will take into account the extent to which its disclosure is necessary for the purpose of explaining the reasons for its decision: paragraph 1(3) of Schedule 4 to the 2002 Act.

7.41 Parties should bear in mind that the question of confidentiality will be considered by the Tribunal not only with regard to their own interests but also with regard to the wider public interest, given that Tribunal hearings should normally be held in public, and rulings and judgments are to be publicly available. The Tribunal will therefore be alert to reject excessive claims to confidentiality, even if they are agreed between the parties.

7.42 For cases considering the principles relating to confidentiality and, where relevant, countervailing considerations of transparency and fairness of the proceedings before the Tribunal see: *Genzyme v OFT* [2003] CAT 7; *Aberdeen Journals v DGFT* [2003] CAT 14; *Umbro v OFT* [2003] CAT 26 and [2003] CAT 29; *Argos and Littlewoods v OFT* [2004] CAT 5; *Pernod-Ricard v OFT* [2004] CAT 10 (with regard to without prejudice communications and disclosure of the OFT Rule 14 notice to third parties); *Makers v OFT* [2006] CAT 13; *Albion Water v WSRA* [2008] CAT 3; *Unichem v OFT* [2005] CAT 3 and *British Sky Broadcasting v CC & the Secretary of State* [2008] CAT 7 (in the context of merger review proceedings); and *Carphone*

Warehouse v OFCOM (Local Loop Unbundling) [2009] CAT 37 (in the context of an appeal under the 2003 Act). See also paragraphs 7.117 - 7.120 below, concerning the Tribunal's decisions.

Practical guidelines for making a request for confidential treatment

7.43 Under Rule 101(1) requests for confidential treatment of any document or part of a document filed in proceedings must be made in writing indicating the relevant words, figures or passages over which confidentiality is claimed, supported in each case by reasons.

7.44 **Parties should pay close attention to the following guidelines when making a request for confidential treatment of information.**

7.45 If at all possible, requests for confidential treatment should be made at the time when the document containing the confidential information is filed. It is important for the Tribunal to see at the earliest point what is claimed to be confidential and what information is not regarded as confidential.

7.46 When making the request, each document containing information in respect of which confidential treatment is sought must be marked up as follows: (i) square brackets must be inserted around the confidential information; (ii) the information itself must be highlighted in yellow or some other prominent colour (that does not obscure the information underneath it); and (iii) each page of the document must include the header 'CONTAINS CONFIDENTIAL INFORMATION'.

7.47 A schedule listing the information in respect of which confidential treatment is requested and the reasons for the request in each instance must also be provided to the Tribunal. The schedule should contain two columns: the first giving the relevant page and paragraph reference (a line number should be added if there are a number of pieces of confidential information in one paragraph in the document concerned); and the second setting out the reasons for requesting confidential treatment.

For example:

Document title	
Location in document	**Reason for requesting confidential treatment**
Page 15, paragraph 4.2	The deleted material relates to ABC Limited's key customers and confidential costs and prices The information is in the nature of a business secret

Non-confidential versions

7.48 If so directed by the Registrar, the person requesting confidential treatment must provide a non-confidential version of the relevant document: Rule 101(1).

7.49 It may be necessary to file and serve a non-confidential version of a document containing information in respect of which confidentiality has been requested, for example for the use of interveners or persons involved in the proceedings who have not been admitted to the confidentiality ring. The Registry may be consulted on how

many copies of this non-confidential version of the document should be filed for the use of the Tribunal.

7.50 The non-confidential version should be prepared in such a way that the person reading the document is able to see how much material has been redacted and so that the paragraph numbering is unaffected. An indication of the nature of the information which has been redacted should be provided – for example "[customer name excised]". Each page of the document must include the header 'CONFIDENTIAL INFORMATION REDACTED'.

Evidence

7.51 The Tribunal may control the evidence in particular cases by giving directions as to the issues on which it requires evidence; the nature of the evidence which it requires to decide those issues; the admission or exclusion of evidence from the proceedings; permission to provide expert evidence; and the way in which the evidence is to be placed before the Tribunal. The Tribunal may also give directions as to the provision by parties of statements of agreed matters: Rule 21 and Rule 55.

Witnesses

7.52 In respect of appeals and applications for review, Rule 21(3) provides that unless the Tribunal directs otherwise, no witness of fact or expert will be heard unless the relevant witness statement or expert report has been submitted in advance of the hearing and in accordance with any directions of the Tribunal. The Tribunal may dispense with the need to call a witness to give oral evidence if a witness statement has been submitted.

7.53 Where a party has filed a witness statement of one of its witnesses and neither the Tribunal nor any other party requires that witness to give oral evidence, that witness statement should be treated as evidence as if the witness had been called and confirmed the statement on oath. The Tribunal is entitled to rely on that statement as to its factual content if the Tribunal considers that it is material to the issues in the case. The other parties are entitled to make submissions to the Tribunal to the effect that the evidence is inadmissible or irrelevant without challenging the truth of the statement. Further, insofar as the witness statement contains inferences and submissions, these, too, can be contested by another party without cross-examining the witness in question.

7.54 If a party intends to submit to the Tribunal that something stated by another party's witness is not true, the Tribunal can only decide whether to accept that submission if the witness has had an opportunity in the witness box to respond to the allegation, unless the witness is deceased or too ill to give evidence. A party seeking to challenge anything in the statement of a witness put forward by another party must therefore give reasonable notice to that other party that it intends to contest that statement or identified passages in that statement. If the party putting forward the witness does not call the witness to give oral evidence, the Tribunal will determine, after hearing submissions from the parties, what weight, if any, should be given to the statement. A very significant factor for this determination is the reason why the witness is not available for cross-examination, either in person or by video-link. Normally, where a witness whose evidence is contested is in the United Kingdom, the Tribunal would expect him or her to attend the hearing.

7.55 Witnesses may be required to give evidence on oath or affirmation or, if in writing, by way of affidavit: Rule 21(4). The Tribunal may limit the cross-examination of witnesses in any way it deems appropriate: Rule 21(7).

7.56 Equivalent provisions in respect of claims under sections 47A and 47B of the 1998 Act can be found in Rule 55.

Witness statements

7.57 The function of a witness statement is to set out in writing the evidence in chief of the maker of the statement. Accordingly witness statements should, so far as possible, be expressed in the witnesses' own words.

7.58 Witness statements should be as concise as the circumstances of the case allow. They should be written in consecutively numbered paragraphs. They should present the evidence of the witness in an orderly and readily comprehensible manner. They must be signed by the witness and contain a statement that he or she believes that the facts set out in the statement are true. They must indicate which of the statements made are made from the witness's own knowledge and which are made on knowledge and belief, giving the source of the information or basis for the belief.

7.59 Lawyers should not allow the costs of the preparation of witness statements to be unnecessarily increased by over-elaboration of the statements. Any unnecessary elaboration will be borne in mind when the Tribunal comes to exercise its discretion as to costs.

7.60 Witness statements must contain the truth, the whole truth and nothing but the truth on the issues covered. Great care must be taken in the preparation of witness statements. No pressure of any kind should be placed on a witness to give other than a true and complete account of his or her evidence. It is improper to serve a witness statement which is known to be false or which the maker does not in all respects actually believe to be true. In addition, a professional adviser may be under an obligation to check where practicable the truth of facts stated in a witness statement if he or she is put on enquiry as to their truth. If a party discovers that a witness statement which has been served on its behalf is incorrect, that party must inform the Tribunal and the other parties immediately. Any correction to the witness statement should normally come from the witness (in the form of a supplementary witness statement) or, at the very least, one of the party's legal advisers should confirm in writing to the Tribunal (by means of a further witness statement) that they have raised the point with the witness and satisfied themselves that the witness has agreed to the change being made.

7.61 As regards witnesses of fact, a witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the case files, to set out quotations from such documents or to engage in matters of argument.[94]

7.62 If the witness statement refers to documents, their location in the case files should be clearly indicated or alternatively the documents should be exhibited to the witness statement.

[94] See, for example, comments of the Chairman (Lord Carlile) in the transcript of the hearing on 4 December 2009 (page 27, lines 19 to 23) with regard to a witness statement in *Sports Direct v. CC.*

7.63 Parties must be alert to the possibility that the process of preparing witness statements, relevant documents and other material may lead to new issues of fact or law being identified. This may particularly be the case in appeals where the evidence in the witness statement covers areas which were not explored by the respondent in the decision under challenge and which did not form part of the respondent's reasoning; see *JJB Sports and Allsports v OFT* [2004] CAT 17.

7.64 Where a party intends to call a witness for examination or cross-examination at a particular hearing, it should take all possible steps to secure the attendance of that witness in person. However, the Tribunal may be prepared to hear evidence from that witness by means of video-conferencing equipment or facilities: Rule 21(5). Where the parties intend to call a witness in this way, they should contact the Registrar well in advance of the hearing to allow appropriate arrangements to be made.

Expert evidence

7.65 As regards expert evidence, the Tribunal will take into account the principles and procedures envisaged by Part 35 of the CPR, notably that expert evidence should be restricted to that which is reasonably required to resolve the proceedings.[95] It is for the party seeking to call expert evidence to satisfy the Tribunal that expert evidence is properly admissible and relevant to the issues which the Tribunal has to decide and would be helpful to the Tribunal in reaching a conclusion on those issues.

7.66 It may sometimes be appropriate to organise, prior to or during the hearing, a structured discussion, in the presence of the Tribunal, between the parties and their experts in an endeavour to focus on the main points of dispute – see for example *Genzyme v OFT* [2005] CAT 32 and the transcript of the hearing on 13 October 2004. Informal statements by experts may sometimes be permitted: see *Claymore v OFT* [2005] CAT 30 and the transcript of the final hearing on 14 January 2005. Other procedures, including putting written questions to the experts, directing "without prejudice" discussions between experts, the appointment of a single joint expert or of the Tribunal's own expert, can equally be envisaged.

7.67 As under Part 35 of the CPR, it is the duty of the expert to help the Tribunal on matters within his or her expertise: that duty overrides any obligation to the person from whom the expert has received instructions or by whom he or she is paid: see *Aberdeen Journals v OFT* [2003] CAT 11 at [288]. Expert evidence presented to the Tribunal should be, and should be seen to be, the independent product of the expert uninfluenced by the pressures of the proceedings. An expert witness should never assume the role of an advocate and should not omit to consider material facts which could detract from the expert's concluded opinion.[96] Where necessary, the expert must make it clear if a particular question or issue falls outside his or her expertise. The Tribunal considered the admissibility of expert evidence in *Enron v English Welsh & Scottish Railway* [2009] CAT 36 at [74]-[80].

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[95] For observations on the use of expert evidence see: *Napp v DGFT* [2002] CAT 1 at [254]; *Aberdeen Journals v DGFT* [2003] CAT 11 at [288]; see also *Leeds City Council v Watkins* [2003] UKCLR 467 at [88]; *Hendry v WPBSA* [2002] UKCLR 5; and *Chester City Council v Arriva* [2007] UKCLR 1582 at [141]-[149].

[96] As to the proper bounds of expert evidence, see: *Hutchison 3G v OFCOM* [2008] CAT 11 at [174]-[175]; and *Bookmakers Afternoon Greyhound Services v Amalgamated Racing* [2008] EWHC 1978 (Ch) at [287]-[288].

7.68 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received his or her instructions. An expert's report should, in particular, set out the material facts, and the substance of all material instructions on the basis of which it was written. The expert should make it clear which, if any, of the facts stated are within his or her own direct knowledge. If a stated assumption is, in the opinion of the expert witness, unreasonable or unlikely that should be stated clearly. If an expert's opinion is not properly researched because the expert considers that insufficient data is available, this must be stated in the report with an indication that the opinion is no more than a provisional one. An expert's report should contain, at the end:

- a statement that the expert understands his or her duty to the Tribunal as set out in paragraph 7.67 of this Guide and has complied with that duty; and

- a statement that the expert believes that the facts stated in the report are true, and that the opinions expressed are correct.

7.69 If the expert wishes, at any stage, to ask the Tribunal for directions, this should be mentioned to the Registrar who will raise the matter with the Tribunal.

7.70 In proceedings for review under section 120 or section 179 of the 2002 Act, if the applicant wishes to rely on expert evidence that was not before the maker of the decision under challenge, it must serve with its application for review an application to adduce that evidence: see paragraph 7.78 below.

New evidence in appeals and applications for review

7.71 In appeals or applications for review of a decision taken by the CMA or a Regulator (both referred to as "Regulator" in the paragraphs below), it is expected that much of the factual material relied on by the appellant/applicant will have been before the Regulator at the administrative stage.

7.72 The Rules require each pleaded case, be it the notice of appeal/application or statement of intervention, to include a statement identifying the evidence annexed to the pleading the substance of which, so far as that party is aware, was not before the maker of the disputed decision at the time the decision was taken: Rule 9(4)(h) and Rule 16(8)(d). Similarly, the respondent for its part is required to include with its defence a statement identifying any evidence annexed to the defence the substance of which was neither referred to in the decision nor disclosed to the appellant before the decision was made: Rule 15(3)(f).

7.73 The Rules refer to "the substance" to reflect the fact that matters are often put forward at the administrative stage less formally, for example in correspondence or at meetings. The requirement to identify evidence as "new" therefore does not apply where the substantive material was placed before the Regulator although it was not in the form of a witness statement or expert report that is produced for the purpose of the proceedings in the Tribunal.

7.74 The qualification in these Rules "so far as [it] is aware" recognises the fact that a party may not always know all the material that was before the decision-maker, for example a Regulator may have obtained information from third parties or another addressee of the decision that was not disclosed to the appellant; if the appellant is a third party appealing pursuant to section 47 of the 1998 Act it may not know what information was before the Regulator save as disclosed in the decision document

itself; similarly, an intervener may not have taken part in the administrative stage at all.

7.75 There is no prohibition on the introduction of new evidence on an appeal, but the Tribunal has power under Rule 21 to rule that evidence should not be admitted. "Evidence" here refers to documentary evidence as well as witness and expert evidence. However, different rules apply as regards expert evidence on an application for review: admission of such evidence requires the prior permission of the Tribunal: see paragraph 7.70 above.

7.76 It is in the interests of all parties and the efficient conduct of the proceedings that objections to the admissibility of evidence are raised as early as practicable. Although the Tribunal may exclude or limit evidence on the basis of relevance or proportionality, it will not normally exclude evidence of its own motion simply because it is new evidence which was not before the Regulator if none of the other parties objects: indeed, the Tribunal generally will not know if the evidence is new. As noted above, the Rules therefore require each pleaded case to include a statement identifying new evidence. The purpose of this is to enable early objection to the admission of evidence to be made. The Rules are party neutral: a respondent Regulator may choose to object to evidence adduced by an appellant or an intervener (Rule 15(3)(c)); an appellant may choose to object to evidence adduced by the Regulator or an intervener supporting the Regulator. Where the Tribunal grants a third party permission to intervene, it may give directions for the submission by the principal parties of objections to the admission of evidence put forward by the intervener: Rule 16(7).

7.77 The failure to identify evidence as being "new" does not of itself render the evidence inadmissible. However, if a party does not make a timely objection to evidence that has been identified, that will be relevant to the Tribunal's exercise of its discretion over admission of that evidence if an objection is raised only later in the proceedings. Equally, if a party has failed to identify a part of its evidence as "new", that may serve to justify another party raising an objection to the admission of that evidence later than would otherwise have been the case.

7.78 Objections to the admission of evidence will normally be considered at a CMC: Rule 20(3)(e). The Tribunal has a broad discretion over the admission of evidence, according to the justice of the case and proportionality. The Tribunal will consider all the circumstances, including the criteria set out in Rule 21(2):

(a) "*the statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal"*

The considerations may be very different on an appeal by an appellant who has been subjected to a penalty from those applicable on an appeal against a dispute determination by OFCOM under the 2003 Act.

- *An appeal against an infringement decision under the 1998 Act.* The Tribunal will have regard to the fact that an infringement decision is of a criminal nature for the purpose of Article 6 of the European Convention on Human Rights and that the appeal constitutes the first judicial consideration of the allegations made against the appellant. An appellant in such proceedings therefore is in general allowed to present a new case supported by new evidence. The Regulator by contrast will generally be expected to defend an infringement decision on the basis of the material before it when the decision was taken and not by elaboration or extension of its evidence. See: *Napp v*

DGFT [2001] CAT 3, and [2002] CAT 1 at [114]-[126]; *Aberdeen Journals v DGFT* [2002] CAT 4; *Argos and Littlewoods v OFT* [2003] CAT 10; and *MasterCard UK Members Forum v OFT* [2006] CAT 14. An appellant challenging a non-infringement decision on the grounds that the decision was incorrect or insufficient on an issue of fact or appraisal may also seek to rely on evidence that was not necessarily before the decision-maker: see *Freeserve.com plc v DGFT* [2003] CAT 5 at [114]-[116].

- *An appeal against a decision or determination under the 2003 Act.* By contrast, such a decision or determination does not concern a matter of a criminal nature. In general, addressees of such decisions have extensive opportunity to submit comments during the administrative stage, often including on a draft decision or determination. In those circumstances, if objection is taken the party seeking to rely on the evidence will be expected to explain why it was not put forward to OFCOM: see (c) below. In some cases, it may be appropriate for the Tribunal to hear evidence in verification or amplification of matters placed before OFCOM.

- *An application for review.* Such an application raises different considerations altogether. In an application under sections 120 or 179 of the 2002 Act, or any other proceedings by way of review, the Tribunal will apply the same principles as apply on a judicial review in the Administrative Court. Accordingly, evidence is generally limited to that which is required to show what material was before the decision-maker, to demonstrate a jurisdictional or procedural error or to show misconduct by the decision-maker: see *R v Secretary of State for the Environment, ex p. Powis* [1981] 1 WLR 584. The Regulator may respond to such evidence and seek to clarify its decision, but it will not normally be appropriate for it to supplement its reasoning: see *Tesco v CC* [2009] CAT 6 at [125]. If the applicant wishes to rely on expert evidence that was not before the Regulator, it must apply to the Tribunal for permission. That application should attach either the expert report which the party seeks to put forward or a detailed explanation of the nature of the expert evidence that it wishes to adduce: Rule 27. The Tribunal is unlikely to admit new expert evidence in a judicial review save in exceptional cases: see *BAA v Competition Commission* [2012] CAT 3 at [80].

(b) *"whether or not the substance of the evidence was available to the respondent before the decision was taken"*

For the reference to the "substance of the evidence", see paragraph 7.73 above. The concept of availability means that either the respondent had possession of the evidence or it was aware of that evidence and could reasonably have obtained it. The criterion refers to availability to the respondent: it will apply where an appellant relies on evidence which it had not placed before the Regulator before the disputed decision was taken; and where the Regulator relies on evidence in resisting an appeal which it had not referred to in its disputed decision;

(c) *"where 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"*

The party seeking to put the evidence forward will be expected to explain why that material was not put forward in the administrative stage. For example, the evidence may concern events since the decision was taken; or it

may address a point which only emerged in the decision and was not apparent to the party seeking to adduce the evidence during the administrative proceedings. The approach in the Tribunal does not correspond to the principle in *Ladd v Marshall* ([1954] 1WLR 1489) that applies in the Court of Appeal to new evidence on an appeal from a decision of a judicial tribunal following a trial.[97] However, the Tribunal will wish to avoid any gaming of the system where a party holds back material evidence during the administrative stage in order to deploy it only on appeal.

(d) "*the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded"*

The degree of prejudice whether in costs, delay or otherwise that may result from the decision is always relevant but is not in itself determinative. Where evidence was identified as "new" in accordance with the Rules but is objected to only very late, exclusion of the evidence at that stage could in itself prejudice the party that had been relying on it.

(e) "*whether the evidence is necessary for the Tribunal to determine the case*"

This goes directly to the fundamental considerations of justice and proportionality. The Tribunal is always more likely to exclude challenged evidence if it is of only doubtful relevance or unlikely to make a material difference.

Summoning of witnesses

7.79 The Tribunal may, at the request of a party (in respect of appeals or applications for review) or on its own initiative, issue a summons requiring a person to attend as a witness at a time and place specified and to answer questions or produce documents or materials relevant to the proceedings. The requirements for the summoning of witnesses are set out in Rules 22 and 56: they must be given at least seven days' notice and are entitled to be reimbursed in the same way as witnesses who attend in proceedings before the Senior Courts of England and Wales and their equivalents in Scotland and Northern Ireland. The Tribunal may make the summoning of a witness conditional on the deposit with the Registrar of a sum sufficient to cover the cost of the summons and the reimbursement of the witness.

Hearings

7.80 Although this section primarily deals with the main hearing, most of the comments are equally applicable to other hearings before the Tribunal, unless the context otherwise requires.

Location

7.81 Usually the main hearing will take place at the Tribunal's premises at Victoria House in London.

7.82 Where the Tribunal has determined under Rule 18(1) that the proceedings are proceedings in Scotland, the main hearing will usually take place in one of the central courts in Edinburgh, unless, in the interests of extreme expediency, it is necessary to

[97] See *BT v OFCOM* [2011] EWCA Civ 245.

hold the main hearing in London (see, for example, *Merger Action Group v Secretary of State* [2008] CAT 34 at [1]). CMCs and other interlocutory hearings are usually held in London.

7.83 Similarly, where the Tribunal has determined that the proceedings are proceedings in Northern Ireland the main hearing will generally take place in Belfast (see, for example, *BetterCare v DGFT*).

7.84 However, the Tribunal may hold hearings in any part of the United Kingdom when it considers it appropriate to do so having regard to the just, expeditious and economical conduct of the proceedings: Rule 18(2).[98]

7.85 Notice of all hearings is given to the parties and published on the Tribunal's website.

Listing the hearing

7.86 The Tribunal will endeavour to list the main hearing as early in the course of the proceedings as possible, in accordance with the timetable for the case. Usually the first CMC is the point in the procedure at which the path to the hearing will be mapped out and timetabled.

Skeleton arguments

7.87 It is the usual practice of the Tribunal to direct that skeleton arguments are filed in preparation for a hearing.

7.88 A skeleton argument is not intended to be a substitute for oral argument but rather to assist in identifying those points which are, and those which are not, in issue and the nature of the argument in relation to the points that are in issue.

7.89 Every skeleton argument should:

- identify concisely:
  - the nature of the case generally and the background facts insofar as they are relevant to the matter before the Tribunal;
  - the propositions of law relied on with references to the relevant authorities (observing the guidance on the citation of authorities at paragraphs 9.57 - 9.62 below);
  - the submissions of fact to be made with reference to the evidence;
- be as brief as the nature of the issues allows – **it should not normally exceed 20 pages of double spaced A4 paper** (in point 12 font) and in many cases should be much shorter than this; and
- be set out in numbered paragraphs and state the name of the advocate(s) who prepared it.

7.90 These requirements also apply to any written summaries (or "speaking notes") of opening speeches and closing speeches handed up to the Tribunal at the hearing.

[98] For example, the claim for damages in *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Ltd* was heard at the Civil Justice Centre in Cardiff.

Hearing bundles

7.91 In many cases, at least in the opening stages, the Tribunal will try to work with the pleadings and other documents in the form in which they have been filed with the Tribunal.

7.92 However, in particularly voluminous cases and matters where it may be important to see documents in a particular order, the Tribunal may direct one or more of the parties to prepare a set of documents drawn from the various files and assembled according to the Tribunal's requirements. The Registry will liaise closely with the parties on the detail of how this is to be done.

7.93 In particularly heavy cases it will be necessary for the parties to work with the Tribunal in devising a solution, possibly involving information technology, to ensure the material is accessible and clearly presented.

7.94 Unsolicited bundles sent to the Tribunal without any prior explanation will normally be returned: see *Napp v DGFT* [2002] CAT 1 at [76].

Conduct of the hearing

7.95 The hearing will take place in public, under the direction of the President or Chairman (Rule 99), except for any part of the proceedings where the Tribunal is considering confidential information (see paragraph 7.33 et seq.); in that event, the Tribunal may determine who is entitled to attend (that part of) the hearing: Rule 99(2).

7.96 Hearings will usually take place during normal court hours (10:30am to 4:30pm) although they may start earlier or run later depending on the demands of the timetable.

7.97 Hearings will be conducted in such a manner as to ensure the just, expeditious and economical handling of proceedings.

7.98 Lawyers appearing for the parties are not required to be robed. The President, Chairman and individual members should be addressed as 'Sir' or 'Madam' as the case may be.

7.99 Any person addressing the Tribunal and should stand and remember to push the button on their microphone before speaking. After speaking, they should remember to turn their microphone off as there is a risk that any private conversation they may have will be heard by others in the courtroom.

7.100 If the hearing involves witnesses or expert evidence, any necessary examination or cross-examination, on oath, should normally take place after brief opening statements by the parties.

7.101 **Those attending the hearing should ensure that mobile phones and wireless devices are switched off or set to silent during the hearing.** This is both as a courtesy to the Tribunal and other parties and to minimise interference with transcription equipment.

7.102 Where documents are handed up during a hearing sufficient copies should be made available for the members of the Tribunal, the Registrar, the Référendaire and the transcript writer. Six copies should normally suffice.

Time limits at the hearing

7.103 Since the parties will already have set out their case in full in the pleadings and skeleton arguments, oral submissions before the Tribunal can normally be kept short, within time limits set by the Tribunal, and structured so as to focus on the main points of the written argument.

7.104 Main hearings will generally be conducted in accordance with a timetable: Rule 19(2)(a) and Rule 53(2)(a). The Tribunal will usually invite the parties to agree a timetable and a running order for submissions in advance of the hearing. All hearings are "fixed length": i.e. they may not run on beyond the final fixed date.

References to the CJEU

7.105 Rule 109 provides that the Tribunal make a reference to the CJEU of its own initiative at any stage in the proceedings or on application by a party before or at the oral hearing.

7.106 Parties should highlight at as early a stage as possible any question of European law which, in their opinion, should be the subject of such a reference, giving reasons for that opinion.

7.107 If the Tribunal considers it necessary to make a reference to the CJEU for a preliminary ruling on a question of European law, it will likely stay proceedings pending receipt of that ruling.

Consent orders

7.108 The parties may invite the Tribunal to make a consent order in accordance with Rule 106. A request for a consent order should be made by sending the Registrar a draft consent order accompanied by a statement signed by all of the parties to the proceedings, or their legal advisers, requesting that an order be made in the form of the draft.

7.109 Where a proposed consent order may have a significant effect on competition, the Tribunal may require the parties to file a consent order impact statement dealing with the matters set out in Rule 106(3). If the Tribunal requires a consent order impact statement to be filed, it will also direct the Registrar to publish a notice of the application for a consent order on the Tribunal website or in such other manner as the Tribunal shall direct: Rule 106(2)(b).

Power to strike out

7.110 Rule 11(1) gives the Tribunal the power, after giving the parties an opportunity to be heard, to reject an appeal, or any part of it, if it considers that the Tribunal has no jurisdiction to hear or determine the appeal; it discloses no valid ground of appeal; the appellant does not have a sufficient interest in the decision that is being challenged; the appellant is a vexatious litigant within the meaning of Rule 11(1)(d); or the appellant fails to comply with any rule, practice direction, order or direction of the Tribunal.

7.111 These provisions (apart from Rules 11(1)(c)-(d)) also apply to the defence: Rule 14(7).

7.112 A request to the Tribunal to reject a pleading on the ground that it discloses no valid ground of appeal or defence, or that the appellant is a vexatious litigant, should not be made unless there are clear grounds. For cases considering the application of this rule see: *Brannigan v OFT* [2006] CAT 28; the Order of the Tribunal of 18 September 2007 in *Bracken Bay v OFCOM*; *VIP Communications v OFCOM* [2009] CAT 28; and *Stagecoach v CC* [2010] CAT 1.

7.113 In the event that a party does not comply with a Tribunal direction, the Tribunal may, instead of rejecting the pleading in question, order that the party in question be debarred from taking any further part in the proceedings without the permission of the Tribunal: Rule 23.

7.114 By virtue of Rule 3, the Tribunal's power under Rule 11 to strike out also applies to applications for a review under the 2002 Act. Rule 26(3) provides in such cases that the power includes a power to strike out an application for review if it considers that the applicant is not a person aggrieved by the decision being challenged.

7.115 For the power to strike out a claim under section 47A or 47B of the 1998 Act, see Rule 41 (and Rule 74) and Section 5 of the Guide.

Compliance with directions

7.116 If a party fails to comply with a direction of the Tribunal, the Tribunal may, if it considers that the justice of the case so requires, order that the requirements of the direction be waived, the failure be remedied, or the relevant party be prohibited from taking further part in the proceedings without the Tribunal's permission and may make an appropriate costs order against that party. In any event, the party who is in default will be given an opportunity to make submissions as to why the Tribunal should not make such an order: Rule 23 (Rules 57 and 74 in respect of claims under section 47A or 47B of the 1998 Act).

The Tribunal's decision

7.117 As a matter of practice, decisions of the Tribunal are referred to as "judgments" where the decision deals with the substantive issues in the case; where predominantly procedural or ancillary issues such as disclosure, costs, or permission to appeal are involved, the Tribunal's decisions may also be referred to as "rulings", "decisions" or "reasoned orders".

7.118 There are two ways in which a decision of the Tribunal may be delivered: (i) by handing down in public on a date fixed in advance for that purpose; and (ii) by publication on the Tribunal's website: Rule 103(1)(a)-(b).

7.119 The hearing at which the judgment is handed down will usually, unless the Tribunal directs otherwise, take place in London, even if the main hearing took place elsewhere. Notice of the handing down is given to the parties and published on the Tribunal's website.

7.120 Each party will receive a copy of the document recording the decision: Rule 103(2). The decision shall be treated as having been notified on the date on which a copy of the document recording it is sent to the parties: Rule 103(3).

Confidentiality considerations

7.121 As already noted, pursuant to the requirements of paragraph 1(2) of Schedule 4 to the 2002 Act the Tribunal will, in preparing its judgment, have regard to the need for excluding so far as practicable:

- information the disclosure of which would in its opinion be contrary to the public interest;

- commercial information the disclosure of which would or might in its opinion significantly harm the legitimate business interests of the undertaking to which it relates;

- information relating to the private affairs of an individual the disclosure of which would or might, in its opinion, significantly harm his or her interests.

7.122 Such information will have already formed the subject matter of a request for confidential treatment made to the Tribunal pursuant to Rule 101. See paragraph 7.33 et seq. with regard to confidentiality generally in proceedings before the Tribunal.

7.123 Paragraph 1(3) of Schedule 4 to the 2002 Act states that the Tribunal shall also have regard to the extent to which any disclosure of such information is necessary for the purpose of explaining the reasons for the decision. This may result in information which was accorded confidential treatment during the proceedings (either in a passive sense, because this was uncontested by the parties, or because the Tribunal had ruled on the matter during the proceedings) being subsequently disclosed in the Tribunal's judgment: see for example *Aberdeen Journals v OFT* [2003] CAT 14. However, prior to or immediately upon handing down, the Tribunal will consult the parties with regard to the treatment in the judgment of information in respect of which confidentiality has been requested, or which otherwise raises confidentiality concerns.

7.124 Where applicable, a non-confidential version of the judgment will be prepared. In such circumstances the judgment will contain a statement that excisions in the judgment relate to confidential information protected by paragraph 1 of Schedule 4 to the 2002 Act; see, for example *Hutchison 3G v OFCOM* [2008] CAT 11 at [43].

Draft judgments issued under embargo

7.125 In certain circumstances, the Tribunal **may** supply the judgment in draft to the parties' legal representatives a short time in advance of the handing down hearing under the terms of an embargo.

7.126 Provision of the judgment in draft unapproved form is **not** an entitlement. The terms of the embargo can vary according to the circumstances. The Tribunal takes very seriously compliance with the terms of an embargo. It may require evidence of compliance on the part of the parties and their legal representatives.

7.127 The primary purpose of an embargo arrangement is to enable the parties' legal representatives to assist in identifying any confidentiality issues and correcting any misprints, inadvertent errors of fact or ambiguities of expression contained in the draft judgment.

7.128 An embargo arrangement is not intended to assist the parties for any collateral purpose, such as the preparation of press releases. On occasion it appears that parties have issued press releases (formulated on the basis of the embargoed draft judgment),

precipitately, even whilst the handing down hearing was still in progress. This can give rise to a perception of unfairness as between parties. Furthermore, it is difficult for the Registry to deal with queries about the judgment before it has been placed on the Tribunal website, which usually occurs shortly after the handing down hearing. Therefore it is both prudent and courteous to wait until the handing down hearing has been concluded before making any public announcement.

7.129 The Tribunal will not make any public comment on its decision outside the handing down hearing. Media representatives wishing to know more about the background to the judgment and its effect should contact the parties or their representatives.

Issues dealt with on handing down

7.130 On the occasion of the handing down the Tribunal may wish to deal with such issues as costs or permission to appeal, or may wish to adjourn such issues to a later date, to be dealt with either in writing or orally. If the Tribunal intends to deal with such issues on handing down the judgment, it will usually inform the parties in advance. Otherwise, the parties may assume that the handing down hearing will be purely formal in nature, with the President or Chairman sitting alone for the purpose of handing down the Tribunal's decision, or with the Registrar conducting the hearing. It is not normally necessary for the parties or their representatives to attend a formal handing down of this nature.

Publication

7.131 The judgment will be published on the Tribunal website shortly after the hearing at which it is handed down, subject to supervening technical issues, or unresolved issues of confidentiality. The Tribunal website contains a section where the text of all the judgments, rulings and decisions of the Tribunal can be found, subject to excisions for confidentiality. An unofficial summary prepared by the Tribunal Registry will also be available on the Tribunal website, although the parties should note that by its very nature the summary is intended to be a very brief overview of the Tribunal's decision.

SECTION 8: AFTER THE TRIBUNAL'S DECISION

Costs

8.1 Rule 104(2), which covers all proceedings before the Tribunal, provides that the Tribunal has discretion, at any stage of the proceedings, to make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings. In the normal course, costs orders are made shortly after the delivery of the decision.

8.2 'Costs' means costs and expenses recoverable in civil proceedings before the Senior Courts of England and Wales, the Court of Session in Scotland or the Court of Judicature of Northern Ireland. It also includes payments in respect of the representation of a party to proceedings under section 47A or 47B of the 1998 Act, where the representation by a legal representative was provided free of charge.

8.3 The Tribunal will encourage the parties to agree costs, but if no agreement can be reached the Tribunal may either assess the sum to be paid pursuant to any costs order itself, or direct that it be assessed by the President, a Chairman or the Registrar, or that it be dealt with by way of the detailed assessment of a costs officer of the Senior Courts of England and Wales or a taxing officer of the Court of Judicature of Northern Ireland or by the Auditor of the Court of Session, as appropriate: Rule 104(5).

8.4 Rule 104(4) sets out the factors that the Tribunal may take into account in making a costs order, including: the conduct of all the parties; any schedule of incurred or estimated costs filed by the parties; whether a party has succeeded in part of its case, even if that party was not wholly successful; whether costs were proportionately and reasonably incurred; and whether costs are proportionate and reasonable in amount.

8.5 A costs order may also include directions to a party to pay to the Tribunal an appropriate sum in reimbursement of any costs incurred by the Tribunal in connection with the summoning or citation of witnesses or the instruction of experts on the Tribunal's behalf: Rule 104(6).

8.6 The following cases provide a useful overview of the Tribunal's approach to costs applications in different contexts; note, however, that these decisions were made under the 2003 Rules: *Tesco v Competition Commission* [2009] CAT 26; *Stagecoach v Competition Commission* [2010] CAT 20; *Skyscanner Ltd v CMA* [2014] CAT 19; and *Federation of Independent Practitioner Organisations v CMA* [2015] CAT 10. Costs orders of the Tribunal were considered by the Court of Appeal in *Quarmby Construction Co Limited v OFT* [2012] EWCA Civ 1552.

8.7 Costs in respect of proceedings under the 2003 Act, again under the 2003 Rules, were considered, for example, in: *BT v OFCOM* (CPS save activity) [2005] CAT 21; *The Number (UK) Ltd v OFCOM* [2009] CAT 5; *T-Mobile (UK) Ltd v OFCOM* [2009] CAT 8; *Sky and others v OFCOM (Pay TV)* [2013] CAT 9; and *BT and others v OFCOM (Ethernet Determinations)* [2014] CAT 20.

8.8 For the cost implications of Rule 45 Offers and specific rules relating to costs in the context of collective proceedings, see Sections 5 and 6 of this Guide.

8.9 The Tribunal considered costs in relation to interim relief applications in: *Genzyme v OFT* [2003] CAT 9; and *VIP v OFCOM* [2007] CAT 19.

Interveners' costs

8.10 The general position is that interveners are neither liable for other parties' costs, nor able to recover their own costs: see, for example, *Ryanair Holding plc v Competition Commission* [2012] CAT 29 at [7]. However, the matter remains in the discretion of the Tribunal and that approach may be departed from in appropriate circumstances: *National Grid v GEMA* [2009] CAT 24. For an example of a case where an intervener recovered part of its costs see: *Independent Media Support v OFCOM* [2008] CAT 27. For an example of a case where an intervener was ordered to pay another party's costs see: *BT v OFCOM* (*Ethernet Determinations*) [2014] CAT 20; note, however, that this concerned an appeal in the context of OFCOM's dispute resolution role under the 2003 Act.

Interest

8.11 Rule 105(1) provides that if the Tribunal imposes, confirms or varies any penalty under Part 1 of the 1998 Act, the Tribunal may, in addition, order that interest is to be payable on the amount of any such penalty from such date, not being a date earlier than the date of the notice of appeal, and at such rate as the Tribunal considers appropriate.

8.12 Unless the Tribunal otherwise directs, the rate of interest shall not exceed the rate specified in any order made under section 44 of the Administration of Justice Act 1970. Such interest is to form part of the penalty and be recoverable as a civil debt in addition to the amount recoverable under section 36 of the 1998 Act.

8.13 The Tribunal considers that appeals under the 1998 Act should not be brought merely to delay payment: an undertaking upon which a penalty has been imposed in respect of an infringement of the 1998 Act and which obtains the automatic suspension of the obligation to pay the penalty by appealing to the Tribunal, should not obtain any benefit from the delay inherent in the appeal process.

8.14 The rate of interest should therefore reflect the benefit derived by the appellant from the suspension of the obligation to pay the penalty. The normal measure of that benefit will represent the cost saved by the appellant in not borrowing the amount of the penalty during the appeal period, and the Tribunal will calculate interest by reference to borrowing rather than deposit rates. The Tribunal will apply the rate at which appellants in general can borrow money and will not look at the special position of a particular appellant. The rate of interest which the Tribunal will normally apply is the Bank of England base rate plus 1%, although that presumption can be displaced in an appropriate case where evidence is adduced showing that such a rate would be unfair to one party or the other.

8.15 For cases where the Tribunal has considered the issue of interest see: *Napp v DGFT* [2002] CAT 3; *Aberdeen Journals v DGFT* [2003] CAT 13; *Apex Asphalt and Paving Co. Ltd v OFT* [2005] CAT 11; *Richard W. Price v OFT* [2005] CAT 12; *Genzyme v OFT*, Order of the Tribunal of 29 September 2005; and *National Grid v GEMA* [2009] CAT 14.

8.16 Rule 105(3) provides that if the Tribunal makes an award of damages following a claim under section 47A or 47B of the 1998 Act, it may include in any sum awarded interest on all or any part of the damages in respect of which the award is made. For examples see: *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19; and *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6.

Enforcement of decisions

8.17 A decision of the Tribunal containing a direction or ordering the payment of damages or costs or expenses is enforceable in accordance with Part 1 of Schedule 4 to the 2002 Act.

8.18 Slightly different arrangements apply in respect of England and Wales and Scotland but essentially the process involves the registration of the decision with the High Court in England and Wales or, in the case of proceedings in Scotland, recording the decision in the Books of Council and Session. In Northern Ireland it will be necessary to seek the leave of the High Court.

8.19 Once registered or recorded or once leave is granted, the decision may be enforced using the procedures available in the relevant court.

8.20 In relation to the enforcement of a Tribunal direction, the enforcement procedure can be initiated by the Registrar or a party to the proceedings. In the case of an award of damages or costs or expenses the enforcement procedure will be initiated by the person in whose favour the award was made. In the case of collective proceedings, enforcement can be carried out by the class representative.

8.21 Where a person fails to comply with an injunction granted by the Tribunal in proceedings in England and Wales or Northern Ireland under section 47A or 47B of the 1998 Act, the Tribunal may certify the matter to the High Court which will then carry out its own inquiry before making any necessary contempt order.[99] For more information concerning injunctions, see Section 5 of this Guide.

Appeals from the Tribunal

8.22 An appeal lies from the Tribunal to the appropriate court:[100]

- on a point of law arising from a decision on an appeal from a Regulator under section 46 or 47 of the 1998 Act (concerning the Chapter I or Chapter II prohibitions or Articles 101 or 102 TFEU: see paragraph 2.13 above);

- from a decision as to the amount of a penalty imposed in respect of such an infringement of the Chapter I or Chapter II prohibition or Articles 101 or 102 TFEU;

- on a point of law arising from a decision under section 47A of the 1998 Act or in collective proceedings (a) as to the award of damages or other sum (other than costs or expenses, or (b) as to the grant of an injunction;

- from a decision under section 47A of the 1998 Act or in collective proceedings as the amount of an award of damages or other sum (other than costs or expenses);

[99] See paragraph 1A of Schedule 4 to the 2002 Act, Rule 70 and paragraph 5.138 above.
[100] In relation to proceedings under the 1998 Act, see section 49 of that Act. In relation to review proceedings under the 2002 Act, see sections 120(6) to (8) and sections 179(6) to (8) of that Act. In relation to appeals against penalties under sections 114 or 176(1)(f) of the 2002 Act, see sub-sections 114(10) to (12) and section 176(1)(f) of that Act. In relation to proceedings under the 2003 Act, see section 196 of that Act.

- on a point of law arising from a decision on appeal or review under the 2002 Act;

- on a point of law arising from a decision on appeal or review under any other statute.

8.23 Any appeal requires the permission of either the Tribunal or the appropriate court. The appropriate court means the Court of Appeal in England and Wales or in the case of proceedings in Scotland the Court of Session, or in the case of proceedings in Northern Ireland the Court of Appeal of Northern Ireland.

8.24 A request to the Tribunal for permission to appeal from a decision of the Tribunal must be made in writing and sent to the Registrar, within **three weeks** of the notification of that decision: Rule 107(1).

8.25 The written request must be signed and dated by the party making the request, or its representative, and must set out:

- the name and address of the party and of any representative of the party;

- the Tribunal decision to which the request relates;

- the grounds on which the party intends to rely in its appeal; and

- whether the party requests a hearing of its request and any special circumstances relied on.

8.26 On receipt of a request for permission to appeal, the Tribunal may invite observations from the other parties to the proceedings. The application may be decided without a hearing, unless there are special circumstances which mean that a hearing would be desirable: Rule 108(1). The Tribunal will give its decision in writing and notify the parties: Rule 108(2).

8.27 Where permission to appeal is sought on a point of law, it is important that the parties seeking permission identify where in the criticised judgment the error of law was made and why the Tribunal's approach is erroneous; see *Napp v DGFT* [2002] EWCA Civ 796; *T-Mobile & Ors v OFCOM* [2008] CAT 17 and *National Grid v GEMA* [2009] CAT 21. The Court of Appeal in *Napp* noted in particular (per Buxton LJ) that an applicant should:

– identify in precise terms the rule of law said to have been infringed;

– demonstrate where in the jurisprudence (of the EU or UK courts or otherwise) that rule is to be found, by specific reference to the authorities; and

– demonstrate briefly from the Tribunal's judgment the nature of the error, by reference to the Tribunal's handling of the issue in question.

8.28 In considering whether to grant permission to appeal to the Court of Appeal in England and Wales, the Tribunal applies the test in CPR Rule 52.3(6). Permission to appeal may only be granted where: (a) the Tribunal considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason why the appeal should be heard; see for example *Hutchison 3G and BT v OFCOM* [2009] CAT 17.

8.29 Unless the Court of Appeal or the Tribunal orders otherwise, an appeal shall not operate as a stay of any order or decision of the Tribunal: CPR Rule 52.7.

8.30 For examples of decisions on permission to appeal see:

Napp v DGFT [2002] CAT 5
Argos and Littlewoods v OFT [2005] CAT 16
JJB Sports v OFT [2005] CAT 27
Floe Telecom v OFCOM [2005] CAT 28
Tesco v CC [2009] CAT 13
Enron v English Welsh & Scottish Railway [2010] CAT 4
BT and another v OFCOM [2011] CAT 39
Quarmby and another v OFT [2011] CAT 43
TalkTalk v OFCOM [2012] CAT 8
BT v OFCOM [2013] CAT 2
Ryanair Holdings plc v CMA [2014] CAT 6
Federation of Independent Practitioner Organisations v CMA [2015] CAT 11
Ryanair Holdings plc v CMA [2015] CAT 15

Renewed applications for permission to appeal

8.31 The procedures for appeal vary depending on the appellate court. In relation to proceedings in England and Wales, where the Tribunal refuses permission to appeal, a party may file a further application for permission directly with the Court of Appeal within **14 days** after the date of receipt of the Tribunal's decision on permission: paragraph 8.1(2)(b) of CPR Practice Direction 52D - Statutory appeals and appeals subject to special provision.

8.32 Parties are requested to inform the Registrar when they apply to an appellate court for permission to appeal a decision of the Tribunal and when any application for permission to appeal is refused or granted by the appellate court. The relevant appellate court case reference and case name should also be communicated to the Registrar.

SECTION 9: GENERAL INFORMATION

The Tribunal website

9.1 The address of the Tribunal website is: www.catribunal.org.uk, or such other location as may be notified from time to time in such manner as the President may direct: Rule 7.

9.2 The website contains general information about the Tribunal and the current status of cases. It also has a diary of future hearings and a searchable database containing all the judgments of the Tribunal. It should be the first port of call for those with general queries about the role and functions of the Tribunal or those wanting to know the current position on cases and the dates of forthcoming hearings.

The Tribunal's contact details

9.3 Contact details for the Tribunal are as follows:

Personal delivery/post:

The Registrar
The Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London
WC1A 2EB

Telephone: +44 (0)20 7979 7979

Fax: +44 (0)20 7979 7978

Email: registry@catribunal.org.uk

Sending documents to the Tribunal: protocol

9.4 The following protocol should be strictly observed when sending documents to the Tribunal.

General requirements

9.5 Any documents required under the Rules to be sent to the Registrar for filing should be sent to the address stated in paragraph 9.3, which is the Tribunal's address for service for the purposes of these Rules: see Rules 111(1) and (10) and Rule 6.

9.6 Any document required to be filed under the Rules as a signed original document and accompanied by a specified number of copies of that document **must** be filed by personal delivery or by post. The use of fax or email for filing these documents is not permissible and no authorisation has been given by the Tribunal pursuant to Rule 111(1)(d). The table below summarises the documents falling within this category.

Rule(s)	Document	Requirement
Appeals and applications[101]		
Rule 9(7)	*Notice of appeal*	The signed original of the notice of appeal shall be accompanied by **ten copies** of the notice of appeal and its annexes certified by the appellant or its legal representative as conforming to the original
Rule 15(6)	*Defence*	The signed original of the defence shall be accompanied by **ten copies** of the defence and its annexes certified by the respondent or its legal representative as conforming to the original
Claims made under section 47A of the 1998 Act		
Rule 30(6)	*Claim form*	Unless the Tribunal otherwise directs, the signed original of the claim form shall be accompanied by **five copies** of the form and its annexes certified by the claimant or its legal representative as conforming to the original
Rule 35(4)	*Defence*	Unless the Tribunal otherwise directs, the signed original of the defence shall be accompanied by **five copies** of the form and its annexes certified by the defendant or its legal representative as conforming to the original
Collective proceedings and collective settlements		
Rule 75(6)	*Collective proceedings claim form*	Unless the Tribunal otherwise directs, the signed original of the collective proceedings claim form shall be accompanied by **five copies** of the form and its annexes certified by the proposed class representative or its legal representative as conforming to the original
Rule 96(3)	*Collective settlement order*	Unless the Tribunal otherwise directs, the signed original of the application for a collective settlement approval order shall be accompanied by **five copies** of the application and its annexes certified by the proposed settlement representative or its legal representative as conforming to the original
Rules 94(5) and 97(3)	*Collective settlement approval order*	Unless the Tribunal otherwise directs, the signed original of the application for a collective settlement approval order shall be accompanied by **five copies** of the application and its annexes certified by the class representative or its legal representative as conforming to the original

9.7 Any other document (for example, correspondence on the case, submissions for case management conferences, skeleton arguments, etc.) may (unless the Tribunal otherwise directs) be sent to the Tribunal by fax or email as an alternative to personal

[101] Rules 9(7) and 15(6) apply to both appeals and applications brought under the 2002 Act: see Rule 3(b) and Part 3 of the Rules.

delivery or post: see the more detailed requirements with regard to electronic communications set out below. However, pleadings not referred to in the above table, such as statements of intervention, replies, expert reports or witness statements, should still be personally filed or sent by post if they are large documents with annexes.

9.8 If a document sent to the Tribunal by electronic means turns out to be voluminous, the party sending the document may be required to provide the Tribunal with hard copies.

9.9 The Tribunal may at any time request that the parties provide any pleading or other document previously submitted in hard copy, in electronic form.

9.10 It is often the case that the Tribunal directs parties to *"file and serve"* pleadings. This is a shorthand way of stipulating that the relevant party is responsible for both filing the relevant pleading or other documents, for example skeleton arguments, with the Registrar and simultaneously serving copies on the other parties.

9.11 Bundles for hearings (including bundles of authorities) will usually be the subject of specific directions given by the Tribunal in the circumstances of the particular case.

Personal delivery

9.12 A document which is delivered in person at Victoria House may be deposited in the Registry between **10.00 am and 5.00 pm Monday to Friday**. During those hours, documents should **not** be left at the reception desk on the ground floor of Victoria House. On arrival at the entrance to Victoria House in Bloomsbury Square contact should be made, via the central reception on the ground floor of Victoria House, with a member of the Registry's staff who will take delivery of the document.

9.13 Documents delivered after 5.00 pm may be received by a member of the Registry staff, if the Registry is manned at the time of delivery. Parties should be aware that there is no guarantee that this will be the case. Documents should **not** be left at the main Victoria House reception if it has not been possible to contact the Registry after 5.00 pm.

9.14 The person delivering the document will be given a receipt by the Registry indicating the date and time of receipt.

Electronic communications

9.15 Generally, email is only a suitable means of communicating with the Tribunal if:

- the material being transmitted does not exceed a reasonable volume; if it does, the sender may be asked to provide hard copies in accordance with paragraph 9.8 above; and

- the sender considers that email is a secure enough method of communication given the sensitivity of the information that is being communicated.

9.16 The Tribunal does not guarantee the confidentiality of any information communicated to or from the parties by electronic means (which for this purpose includes fax). Nor does it guarantee the availability of its electronic communications systems, which may, from time to time be unavailable because of routine maintenance or other

technical issues. This should be taken into account when using email or fax for time-critical communications.

9.17 If a party or their legal representative initiates email correspondence with the Tribunal then they will be taken as giving their consent for the Tribunal to contact them by email.

9.18 Emails concerning cases before the Tribunal must **always** be addressed to: registry@catribunal.org.uk.

9.19 Occasionally, it may be convenient for a party to communicate via email directly with a member of the Tribunal's staff. This may only be done if that member of staff has agreed and any emails sent to that person are also copied to the registry email address. If this requirement is not observed there is a danger that emails sent to an individual member of staff may not end up on the Tribunal file and the information contained in them may be overlooked. Avoiding errors of this type is the sole responsibility of the sender.

9.20 Correspondence on the case from legal representatives and businesses intended for consideration by the Tribunal, the President, a Chairman, or the Registrar **must** always be in the form of a letter attached to the email as a pdf attachment ("the pdf letter"). It should not be in the form of an informal message in the body of an email. This is required in order to observe the traditional formal dialogue between courts and legal representatives and to allow the Tribunal to maintain an orderly file. The Tribunal will only allow some latitude in respect of this requirement to litigants in person.

9.21 The subject line of the email **must** start with the word "Case" then state the first four digits from the case number and short form case name and indicate the subject (for example 'Observations by [Party] on permission application') in enough detail for the recipient immediately to apprehend the purpose of the email. Examples of this approach would be:

- Case 1732: Telco v OFCOM: CMC submissions
- Case 1827: B Ltd v A Plc: Disclosure directions
- Case 1953: Victoria Plc v CMA: Expert's report

9.22 Any email sent to the Tribunal must be a fresh message and not one that is tacked onto a stream of previous messages. If the sender wishes to refer to an email received from another party then that should be included, either as part of the pdf letter or as an attachment.

9.23 The body of the email must indicate the number of attachments and contain a brief description of each attachment. It should also set out the name, address, telephone number and email address of the sender as well as the name of the party for whom the sender is acting.

9.24 If other parties are copied in to the email, the email should set out the names and email addresses of the copy recipients in the body of the email in a way that makes their identities and contact details immediately apparent. Using a cryptic list of addresses in the "cc" box will not be acceptable.

9.25 Attachments must generally be in one of the following formats: Microsoft Word (.doc or .docx) or Adobe Acrobat (.pdf). If there is a need to use another format the sender

should liaise with the Registry to see whether the Tribunal would be able to receive it in that format.

9.26 Any failure to adhere to these guidelines may result in an email being rejected by the Registry.

Sending documents to the Tribunal: timing considerations

9.27 There are important considerations arising out of the provisions of Rule 111 (concerning the service of documents) which parties should bear in mind when filing at or sending documents to the Tribunal.

9.28 A document delivered personally to the Tribunal or sent by fax or email **must be received the Registry before 5.00 pm** if it is to be treated as having been filed or sent on that day: Rule 111.

9.29 A document that is sent to the Tribunal by first class post will be treated as if it had been received on the **second** day after it was posted: Rule 111(4)(b).

9.30 If the Tribunal receives a document by personal delivery, fax or email **at or after 5.00 pm** on a business day, or it receives a document by post on a **Saturday, Sunday or Bank Holiday,** that document will be treated as having been being filed or sent on the **next business day:** Rule 111(4) and Rule 111(5).

9.31 "Business day" means any day except Saturday, Sunday or a Bank Holiday and "Bank Holiday" includes Christmas Day and Good Friday: Rule 111(6).

9.32 **It is crucial to take account of these requirements when filing a notice of appeal/application or claim form as failure to file on a particular day may prove fatal if, as a result, a limitation period has expired.**

9.33 Those sending their notice of appeal/application or claim form by post are also advised to use recorded delivery or, at the least, to obtain a certificate of posting.[102]

Examples

9.34 Therefore if a decision is notified on 10 June, and the last day for filing the appeal is 10 August, a Friday, the effect of the above Rules is illustrated by the following examples:

- the notice of appeal is sent to the Registrar by first class post on 8 August: the appeal is in time, 10 August being the second day after posting;

- the notice of appeal is sent by first class post on 9 August and arrives on Saturday, 11 August: the appeal is out of time, and is to be treated as served on Monday 13 August;

- the notice of appeal is personally delivered to the Registry at 4.30 pm on 10 August: the appeal is in time;

- the notice of appeal is personally delivered to the Registry at 5.15 pm on 10 August: the appeal is out of time, and is to be treated as served on Monday 13 August.

[102] See *Fish Holdings Limited v OFT* [2009] CAT 34 at [18]-[19].

Electronic signatures

9.35 Where any of the Rules requires a document to be signed, the Tribunal will generally be content that the requirement is satisfied by a signature printed by computer or other mechanical or electronic means provided it is accompanied by a statement that this has been done with the consent of the person whose signature is reproduced.

Representation

9.36 Under Rule 8, a party may be represented before the Tribunal by a qualified lawyer having rights of audience before a court in the United Kingdom, or 'by any other person allowed by the Tribunal to appear on behalf of the party'.

9.37 Parties may thus be represented before the Tribunal by barristers, advocates or solicitors qualified in the United Kingdom, whether in private practice or employed lawyers, or by certain lawyers qualified to practice in other Member States of the EU, if the lawyer concerned has a right of audience before a court in the United Kingdom. The question whether the lawyer concerned has such a right of audience will be determined by the relevant statutory provisions, including the Courts and Legal Services Act 1990, as amended by the Access to Justice Act 1999, and the rules governing the profession in question.

9.38 Legal representatives must be in a position to establish both their status and their authority to act for the client, if so requested by the Registrar. Barristers in employment should ensure that they are entitled to exercise rights of audience under the applicable professional regulations and code of conduct.

9.39 Rule 8 does not preclude a litigant from acting in person, but a body corporate would require the formal permission of the Tribunal under Rule 8(b) if it wished to be represented by someone other than a qualified lawyer having rights of audience before a court in the United Kingdom.

9.40 The Tribunal is sympathetic to small businesses that wish to pursue a case before the Tribunal but lack the means to obtain legal representation. In certain cases free legal advice and representation may be available from solicitor members of the Solicitors Pro Bono Group or from barrister members of the Bar Pro Bono Unit or other pro bono schemes. Details of pro bono schemes can be found on the following websites: www.probonogroup.org.uk/competition (provides initial free advice on competition law issues in suitable cases), www.lawworks.org.uk (Solicitors Pro Bono Group) and www.barprobono.org.uk (Bar Pro Bono Unit).

9.41 Advice from a barrister without the intervention of a solicitor may be available to businesses and individuals through the licensed and public access schemes, details of which can also be found on the Bar Council website: www.barcouncil.org.uk.

9.42 The Tribunal will consider each case on its merits when deciding whether to exercise its power under Rule 8(b) to admit a person other than a qualified lawyer to represent a party: see *Emerson Electric & Ors v Morgan Crucible*, Transcript, 13 March 2007, page 39, lines 1-20. Any person who wishes to commence proceedings without being represented by a qualified lawyer having rights of audience before a court in the United Kingdom should inform the Registry of their intentions as soon as possible.

9.43 Any change in a party's legal representation should also be notified to the Registry as soon as possible: Rule 8(2). The notification must state the party's new address for

service. It must also be served on every other party to the proceedings and, where relevant, the former legal representative: Rule 8(3).

Visiting the Tribunal at Victoria House

9.44 A map showing the Tribunal's location can be found on the Tribunal's website.

9.45 Please note that the entrance in Bloomsbury Place is not the public entrance to the Tribunal. If you are visiting the Tribunal to attend a hearing or personally deliver documents for a hearing or for filing you should enter Victoria House by the entrance located on the eastern side of Bloomsbury Square.

9.46 There is a short flight of stairs leading from the Bloomsbury Square entrance up to the Victoria House reception; there is also a lift on the left side of the entrance hall which can be used for taking hearing documents up to the reception level. If you ask the Victoria House reception staff to telephone the Tribunal Registry, a member of the Registry staff will usually be able to come to meet you and guide you to the Tribunal's own reception area if that is necessary. Otherwise, take the northern lifts, by the clock, up to the second floor where there will be signs directing you to the Tribunal's reception area and court rooms. If you are bringing documents to file at the Registry, you will be given a receipt indicating the date and time on which the Registry received the documents.

Facilities at Victoria House

9.47 There are two courtrooms at Victoria House. Court 1 is a large room capable of seating 48 at desks with 20 to 40 additional seats in the "public gallery". Court 2 is about half the size of Court 1. Both courts have some portable shelving that can be used to accommodate documents. In addition there is enough space in between the desks to position files in cardboard shelving boxes of the type commonly used in courts. It is not possible for the parties' legal representatives to bring their own document carousels into the courtrooms, unless this has been agreed and arranged with the Registry in advance.

9.48 Both courts are equipped with microphones which are operated by pressing the red button. The parties' legal representatives should try to ensure, when addressing the Tribunal, that the microphone is operational (a red light will appear at the top of the microphone) as otherwise the transcript writers may be unable to hear the speaker. The courts and associated public areas have a wireless system for access to the internet. The Tribunal does not guarantee its availability or its security for transmitting or receiving confidential information.

9.49 There are also facilities for simultaneous transcription services (in substitution for the Tribunal's usual arrangements with regard to transcripts – see paragraph 9.55 below) and the visual display of material. If these facilities are required this should be mentioned well in advance to the Registrar so that appropriate arrangements can be made without disruption to the other arrangements for the hearing. The parties will be expected to make the necessary arrangements with the service provider and to bear the costs amongst themselves. Close liaison will be needed with the Registry in order to ensure that all the technical requirements of such a service are anticipated and dealt with. The Tribunal will expect the parties when making their arrangements to make adequate provision for the members of the Tribunal and the Tribunal staff involved in the hearing to access and use the contracted transcription service.

9.50 Each court has three modestly sized consultation rooms nearby which will ordinarily be made available, on a first come first served basis, for the use of the principal parties and, where possible, the interveners. The consultation rooms will be available one hour before the commencement of the hearing and half an hour after the hearing on each day of the hearing. They may also be used over the lunch hour when usually the courtroom will be locked. Use of the consultation rooms is a privilege and not an entitlement. A room may be withdrawn from use if circumstances require it. Ordinarily, consultation rooms will be limited to one room for each party. The parties should bear this in mind when determining the number of persons attending the hearing on their behalf.

9.51 In the foyer outside each courtroom are coin operated coffee and tea facilities and water points, although **no food or drink (other than water) may be taken into the courtrooms**. The lavatories are in the lift lobby area.

Arrangements for hearings at Victoria House

9.52 One hour before the commencement of the hearing, a member of the Registry will be present at the Tribunal's reception point outside the court room. Those attending will be asked to sign a register and will then be provided with a one-day visitor pass, which should be returned when leaving at the end of the day. For hearings listed for more than one day a new pass will be issued each day.

9.53 The consultation rooms will be available one hour before the commencement of the hearing and the half an hour after the hearing on each day of the hearing, and may also be used over the lunch hour.

9.54 The parties and their representatives are solely responsible for transporting documents to and from the relevant courtroom and arranging these for use by counsel.

9.55 Unless the parties have made their own arrangements (see paragraph 9.49 above), a transcript of the hearing will be made by the Tribunal's shorthand writer. Copies will be sent to the parties shortly after the hearing so that any transcription errors and inaccuracies, for example in relation to document references and authorities, can be identified and corrected. Generally this is not a same-day service. If a same-day service is necessary the parties may be requested to pay any extra costs incurred. Transcripts are not proof-read or corrected for accuracy down to the finest detail because they are merely working tools for use by the Tribunal in considering the case and preparing its decision or directions. In due course, a copy of the transcript will be placed on the Tribunal's website.

Files and labelling

9.56 In submitting documents to the Tribunal at any stage of the proceedings, they need to be in sturdy files that are able to withstand being taken to and from the courtroom. The files should also be capable of being stood up properly on a bookshelf and should be labelled properly to allow for easy identification. The label on the spine of the file should be legible from a distance, and the front cover of the file should be labelled. There should be a label (indicating the file number and contents) on the front inside cover of the file positioned in the top left hand corner. If files provided for the use of the Tribunal do not meet these requirements, they may be returned to the party providing them for them to be put in order.

Citation of authorities

9.57 Regard should be had to the *Practice Direction (Citation of Authorities)* [2012] 1 WLR 780 which governs the citation of authorities in the Senior Courts of England and Wales. Those requirements should be observed by the legal representatives in proceedings before the Tribunal.

9.58 The Tribunal reports all cases by reference to a neutral citation: the neutral citation allocated to each judgment, ruling and reasoned order issued by the Tribunal is a unique number that can be used to search for the relevant decision electronically, including on the Tribunal website.

9.59 Tribunal judgments and rulings are numbered in the following way:

[2014] CAT 1, 2, 3 etc.
[2015] CAT 1, 2, 3 etc.

9.60 For example, under this scheme, paragraph 49 in *Ryanair Holdings plc v CMA*, the fourteenth numbered judgment issued by the Tribunal in 2015, should be cited as follows: [2015] CAT 14 at [49]. The neutral citation will be the official number attributed to the judgment by the Tribunal and will always be used on at least one occasion when the judgment is cited in a later Tribunal decision.

9.61 In all future references to the judgment the paragraph numbering must follow the paragraph numbering of the original. To cite successive paragraphs of a judgment, the following format should be used: *Ryanair Holdings plc v CMA* [2015] CAT 14 at [10]-[11].

9.62 The neutral citation for each of the judgments issued by the Tribunal can be found in the judgments section of the Tribunal website. It is also included on the first page of the decision.

Public access to correspondence and pleadings

Correspondence

9.63 Generally, correspondence between the Tribunal and the parties to the proceedings is treated as private. The Tribunal generally does not disclose such correspondence to non-parties.

9.64 As well as protecting from disclosure any commercially sensitive information contained in the correspondence, this approach contributes to a constructive and cooperative approach to proceedings before the Tribunal, which is of the utmost importance to the effective functioning of the Tribunal's active case management procedures, whereby the Tribunal and the parties work together in the swift and efficient preparation of the proceedings.

Pleadings and other documents referred to during public hearings

9.65 For this purpose, "pleading" includes a notice of appeal, application, claim form, defence, statement of intervention and any reply/rejoinder.

9.66 Where a pleading, skeleton argument, witness statement or expert report is referred to or quoted in open court, the party who produced that document or for whom that document was produced, should be prepared to make a non-confidential version of

that document available to a non-party upon request. The non-party should approach the party in question directly to seek access to the relevant document. In the event that access is refused, the non-party may make a formal application to the Tribunal.

9.67 The Tribunal's website provides a thorough and searchable record of proceedings before it (see paragraphs 9.1 - 9.2 above). This includes: (i) a summary of the notice of appeal, application or claim; (ii) the transcript of any case management conferences and hearings; (iii) copies of orders and rulings; (iv) the decision(s) of the Tribunal; and (v) to the extent available, information relating to any appeals. The page for each case includes a case status which is updated regularly. This provides a much fuller public record of proceedings before the Tribunal, than is generally available in relation to cases pending before other tribunals and courts.

Clerical mistakes and accidental slips and omissions

9.68 Rule 114(3) provides that clerical mistakes, including those arising from an accidental slip or omission, in directions, orders or decisions may be corrected by sending a notification (or a copy of the amended document) to each party and making the necessary amendment to any information published on the Tribunal website.

9.69 Parties are requested to bring any such mistakes to the Tribunal's attention without delay.

Seeking guidance from the Registry

9.70 A list of answers to "Frequently asked questions" is available on the Tribunal website: www.catribunal.org.uk. If a query relates to a particular case or potential proceedings, the Registry may be contacted by telephone, letter or via email.

9.71 Whilst the Registry is always prepared to answer queries of a general nature and provide guidance on the practice and procedure of the Tribunal, it is the responsibility of the parties and their representatives to ensure that they have complied with the requirements of relevant legislation, the Rules and any directions of the Tribunal.

Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London
WC1A 2EB

Telephone 020 7979 7979
Fax 020 7979 7978
www.catribunal.org.uk
registry@catribunal.org.uk