



## COMPETITION APPEAL TRIBUNAL

### CONSULTATION ON CONFLICTS RULE

#### (1) **Introduction**

1. This document outlines the scope, objectives, and key considerations of a potential change to the working practices of the Competition Appeal Tribunal (CAT), namely the approach it adopts to the selection of ordinary members and Chairs. The CAT does not itself appoint ordinary members and Chairs: the former are appointed by the Secretary of State for Business and Trade, and the latter by the Lord Chancellor (or are nominated from time to time from the High court of England and Wales, Court of Session, or High Court in Northern Ireland). The purpose of this consultation is therefore to inform the future recruitment of members or deployment of judges via processes conducted under the aegis of the appointing and nominating authorities.
2. Under the current approach (the **CAT conflict rule**) it is generally a condition of the appointment of ordinary members and Chairs of the CAT (or the nomination of Deputy High Court Judges to sit as Chairs of the CAT) that they do not engage in any activities concerning competition cases in the UK or advise on cases concerning sectoral regulation that could come before the Tribunal. This generally includes participation in a firm or practice which carries out such work, but does not ordinarily include purely academic research, teaching or writing (subject to guidance from the CAT if those activities affect its work). Accordingly, members are required to relinquish their appointment if they wish to advise clients, whether in the private or public sectors, in those fields or to work at a firm or in a practice which is engaged in so advising clients.
3. The CAT is consulting on whether, and to what extent, that approach should be modified. This document summaries the issues and poses several questions. We are keen to hear from as many firms and individuals as possible, whether solicitors, barristers, economists, accountants or others interested in the work of

the Tribunal. We also wish to hear from regulatory agencies affected by the work of the Tribunal i.e. the Competition and Markets Authority (**CMA**), Office of Communications (**Ofcom**), etc. You are invited to submit your responses, **no later than Friday 28<sup>th</sup> November 2025**, to the following address [info@catribunal.org.uk](mailto:info@catribunal.org.uk). All responses will be treated confidentially. The Tribunal will, however, publish a summary of the responses on its website.

**(2) The purpose of the rule**

4. The CAT conflict rule was put in place to avoid the possibility of apparent bias – i.e. that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased. This might arise where an ordinary member or Chair (or their firm) has, or had, a professional engagement supporting or opposing a party to a case to which they have been assigned. It may also be the case where the individual's position in the CAT is thought to gain some advantage for their (or their firm's) clients, even where those clients are not currently parties before the Tribunal in a case to which the individual has been assigned.
5. Relying on the prudential principle, the CAT has taken a very cautious approach in seeking to reduce the likelihood of apparent bias. The CAT is also mindful of the fact that its cases can require involvement by the Chair and ordinary members of a period of several years, thereby increasing the possibility of conflicts where (for example) new clients are taken on by a firm to which the CAT Chair or ordinary member belongs.
6. The CAT conflict rule is, however, much broader than is strictly required to avoid actual conflicts in the sense adopted by the professional codes of practice of solicitors, barristers or accountants, and by the usual practices of economists.
  - (a) **Solicitors.** The SRA adopts the position that a conflict arises where a solicitor's or firm's duties to act in the best interest of two or more separate clients clash, or where their personal interests clash with a client's. Where no legal conflict arises, firms may decline to act where the instructions would be contrary to the business interests of

an established client or of the law firm. These situations are regarded as commercial conflicts and are business decisions for the firm rather than being regulatory issues.

- (b) **Barristers.** The Bar Standards Board code of conduct adopts a similar approach, but conflicts are assessed at an individual barrister level rather than at the level of chambers. It is therefore permissible for barristers from the same chambers to represent clients with opposing interests in the same case. This frequently occurs in cases before the CAT. It is necessary for chambers to put in place internal procedures to prevent confidential information being disclosed to opposing counsel.
- (c) **Accountants** are subject to similar rules to those of solicitors. For example, the Institute of Chartered Accountants defines a conflict as arising where when a professional's own interests or the interests of his or her client conflict with the professional's obligation to act in the interests of another client.
- (d) **Economists** are not subject to any supervisory authority or code of conduct. However, it appears that the typical approach is that instructions are not generally accepted where this would lead to experts from the same firm testifying against each other in the same case. However, a firm may be prepared to act for multiple claimants or multiple defendants in the same case where suitable information walls are put in place between experts. As above, commercial conflicts are treated as a business decision.

### (3) **The rule may be broader than is required**

- 7. All CAT members remain subject to their professional obligations to maintain the confidentiality of previous client matters, and the CAT will strive to avoid any bias or the appearance of bias in respect of individual cases. Conflict checks are therefore carried out prior to the assignment of ordinary members and Chairs to cases. This ensures that ordinary members and Chairs are not assigned to

cases where they may have prior involvement with the parties and serves the interests of the Tribunal and the individual as well as the administration of justice.

8. The isolation of the Chair or ordinary member from new and conflicting client relationships is of course easier to apply where the Chair or member has no continuing practice in the fields of competition law and sectoral regulation which form the subject matter of cases before the CAT. However, it is possible that the CAT conflict rule is applied too broadly than is necessary to achieve its objectives. For example:
  - (a) Where the Chair or ordinary member is a barrister, no conflict would normally arise if other barristers in their chambers were to accept instructions on behalf of a client involved in the case to which the Chair or ordinary member had been assigned. It is also standard practice for chambers to put in place effective information walls to prevent the improper dissemination of confidential information. In such circumstances there may be no significant risk of apparent bias arising.
  - (b) Where the Chair or member has a single-person practice as a solicitor, accountant or economist, they would be able to decline any conflicting instructions.
  - (c) This is also the case where the Chair or member has only a part-time association with a consultancy, such as an academic economist associated with a consultancy firm which calls upon their services from time to time for expert opinions. It is to be noted, however, that the appointment of part-time solicitors (such as consultants to a firm or partners on a path to retirement) may have to be examined on an individual basis, particularly if they remain on their firm's information and client data systems.
  - (d) The CAT conflict rule normally prevents not only practice in the field of (in particular) competition law, but also generally precludes a

situation where the Chair or ordinary member is employed by a firm which practises in that field. That may be regarded as unnecessarily restrictive, where the Chair or ordinary member is not part of any team which carries out a competition law practice, and where the firm has effective information walls in place between its various practice teams.

9. It is nevertheless also necessary to consider whether, even for ordinary members or Chairs in the situations set out above, where there may be no professional conflict in the strict sense, their clients might gain an unfair advantage as a result of their membership of the CAT. Even where no unfair advantage actually arises, it may be necessary to take into account the *perception* of unfairness.
10. One possible source of advantage might accrue through the attendance of CAT members or Chairs at training events, where general issues of CAT practice and policy are discussed. An advantage might also arise where an ordinary Member or Chair is able to craft submissions on behalf of their clients based on an unpublished judgment in a CAT case to which they are assigned. There may also be a risk of a perception that an ordinary member or Chair who is a current practitioner might procure some advantage for a client in one matter by reason of the decision(s) in another case to which they are assigned.
11. Set against those potential concerns, we note that the scope for any unfair advantage is rather limited by the facts that: timely explanations and analysis of CAT judgments are broadly available; transcripts of all hearings are available without charge; the CAT policies and practices are transparently discussed by the President and CAT Chairs at conferences and within the CAT user group (minutes of the meetings of which are on the CAT website); non-confidential versions of court documents, such as pleadings, skeleton arguments, witness statements and expert reports, can be obtained by third parties pursuant to §9.66 of the CAT Guide to Proceedings; and panel members are strongly encouraged not to discuss confidential matters with other members in order to avoid cross-panel conflict “contamination”.

12. Given the breadth of the CAT's various jurisdictions, it would also be possible to ensure that practising professionals are only assigned to cases outside their particular specialism. For example, a competition solicitor or barrister could be assigned only to cases concerning subsidy control or football governance.

**(4) The practice in other tribunals and courts**

13. Other tribunals, including those whose fee-paid members are appointed by the JAC (such as the First Tier Tribunal and the Upper Tribunal), do not maintain a similar conflict rule. Membership of those tribunals is therefore open to a wide range of individuals who have current specialised expertise in the subject matter of the appeal. Of course, judges in those tribunals must recuse themselves where there is or may be apparent bias within the immediate context of the case – see for example *Circleplane v HMRC* [2025] UKUT 254 (TCC), and (more generally) the observations of Lord Bingham in *Davidson v Scottish Ministers* [2004] UKHL 34 at §19.
14. Deputy High Court judges who are barristers are also expected to continue practising during their tenure, even within the practice area covered by the division to which they have been assigned, without concerns arising that this will necessarily lead to the danger of apparent bias. The position of Deputy High Court Judges who are practising solicitors is the same. Cases to which Deputy High Court Judges are assigned may (like CAT cases) run over the course of several years, involving multiple hearings.
15. Thus, many other tribunals adopt a far less conservative approach than the CAT. This may be due in part to the characteristics of the CAT's caseload. As already noted, many cases continue for many years, with numerous applications and hearings along the way. These characteristics are not unique to the CAT, but might make it less practicable to guard against conflicts or the perception of conflicts arising in the absence of the CAT's current rule than may be the case for some other tribunals or courts.

**(5) The impact of the rule**

16. The operation of the CAT conflict rule results in membership of the CAT, whether as a Chair or an ordinary member, being unavailable to a broad constituency of specialist practising economists, accountants, barristers and solicitors even where no actual conflict arises. The CAT is therefore unable to benefit from the collective experience of individuals who are engaged full time or part time in the practice of competition law or (in the case of solicitors or economists) who are members of, or consultants to, a firm or practice that offers competition law advice, whether or not they are competition practitioners themselves. Also prevented are academic competition economists who are contracted from time to time by a consultancy firm to provide expert testimony.
17. There may also be a diversity concern, in that the effect of the rule is that competition specialists are not able to sit as a fee-paid CAT Chair or ordinary member until they are retired from private practice.

**(6) Key questions for consideration**

- A. Is it desirable to relax the CAT conflict rule in order to recruit a wider pool of specialists as (i) Chairs, (ii) ordinary members, or (iii) both?**
- B. If the CAT conflict rule were to be relaxed, do you believe that any measures need to be put into place in order to diminish the likelihood of apparent bias? If so, what?**
- C. Do you believe that the nature of litigation before the CAT has any bearing on how or whether the CAT conflict rule should be relaxed?**
- D. Should any relaxation of the CAT conflict rule be applied in different ways to (a) barristers practising in competition law, (b) solicitors practising in competition law, (c) economists practising in competition economics, (d) accountants practising in forensic accountancy in competition cases, or (e) a combination of these groups, and – if so – which?**
- E. For these purposes, would you distinguish between individual practitioners and those working in multi-client firms?**
- F. If you would distinguish between individual practitioners and those working in firms, do you consider a problem to arise where the**

**practitioner is working in a non-competition field, but where a different team in their firm has a competition law practice?**

- G. For these purposes would you distinguish between individuals with a UK competition practice and those with a non-UK one?**
- H. Do you have any other comments on the desirability or nature of any change to the CAT conflict rule?**

**3 November 2025**