



Neutral citation [2018] CAT 8

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1279/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

26 March 2018

Before:

ANDREW LENON Q.C.
(Chairman)
PROFESSOR JOHN BEATH O.B.E.
EAMONN DORAN

Sitting as a Tribunal in England and Wales

BETWEEN:

PING EUROPE LIMITED

Appellant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 15 January 2018

RULING (APPLICATION TO EXCLUDE EVIDENCE)

APPEARANCES

Mr Robert O'Donoghue QC and Mr Tom Pascoe (instructed by K&L Gates LLP) appeared on behalf of the Appellant.

Ms Marie Demetriou QC and Mr Rob Williams (instructed by the CMA Legal) appeared on behalf of the Respondent.

A. INTRODUCTION

1. On 24 August 2017, the Competition and Markets Authority (the “CMA”) issued a decision entitled “*Online sales ban in the golf equipment sector*” addressed to Ping Europe Limited (“Ping”) (the “Decision”). In the Decision the CMA found that Ping, a manufacturer of golf clubs, golf accessories and clothing, had infringed the prohibition in section 2(1) of the Competition Act 1998 (the “1998 Act”) and Article 101 of the Treaty on the Functioning of the European Union by prohibiting its retailers from selling Ping golf clubs online. The Decision directed Ping to bring the alleged infringements to an end and imposed a fine of £1.45 million.
2. Ping has appealed the Decision pursuant to section 46 of the 1998 Act. In its Notice of Appeal (“NoA”) Ping argues that its Dynamic Face-To-Face Custom Fitting (a process used to assist the consumer in deciding which golf club best suits his/her individual requirements by recording his/her static measurements and then observing his/her swing and testing different clubs and combinations) is the best way to optimise its products and enhance consumer choice and quality. According to Ping, Dynamic Face-To-Face Custom Fitting simply cannot be carried out over the internet.
3. Ping has sought to rely on evidence in support of its appeal which was not placed before the CMA during its investigation. The new evidence relates to a part of the case referred to as “alternative measures” – that is, whether there are alternative and less restrictive measures which could achieve Ping’s aim of the promotion of custom fitting. This forms part of the legal question of whether the restriction of competition created by Ping’s online sales ban is objectively justified and/or a lawful ancillary restraint. Paragraph 16 of the NoA identified the material that Ping relied upon in support of its appeal as follows:

“This appeal is accompanied by the following factual and expert evidence, all of which support Ping’s case:

 - (a) Four statements from a cross-section of Ping’s retailers [...] whose evidence was relied upon by the CMA in the Decision. These statements provide strong support for Ping’s Internet Policy, and the proposition that

the CMA's alternative measures would be less effective at maximising Ping Custom Fitting rates.

- (b) A witness statement of Mr John Clark, the Managing Director of Ping;
 - (c) A witness statement of Dr Paul Wood, the Vice President of Engineering at Ping Inc;
 - (d) An expert report of Mr Derek Holt, an economist, which sets out the effect of Ping's Internet Policy on inter- and intra-brand competition, and addresses the consequences of allowing online sales on consumers and retailers; and
 - (e) An expert report of Professor Chris Brady, the Director of the Centre for Sports Business at the University of Salford, Manchester, describing the impact that allowing online sales would have on Ping's brand image."
4. A case management conference ("CMC") took place on 4 December 2017. In its submissions in advance of the CMC, the CMA indicated that it objected to the admission of the new evidence and that it intended to apply for an order excluding the new evidence filed by Ping. The CMA confirmed its position at the CMC.
5. Following the CMC, the Tribunal made an order giving various case management directions. The CMA filed its application to exclude the new evidence (the "Application") on 11 December 2017. In support of its Application, the CMA relied on the witness statement of Mr Simon Polito, the Chair of the Case Decision Group ("CDG") in this case, and a witness statement of Ms Sue Aspinall, the Project Director. Ping filed its response to the Application on 5 January 2018. Ping relied on a witness statement of Mr Steven Hardy, a solicitor with Burton & Dyson who acted for Ping during the CMA investigation. The CMA filed a second witness statement of Sue Aspinall on 10 January 2018. The Application was heard on 15 January 2018. At the conclusion of the hearing, the Tribunal informed the parties of its decision that Ping's evidence should be admitted for reasons to be given in a reserved judgment. This judgment records the reasons for that decision.
6. The evidence that the CMA seeks to exclude is set out in Annex A of its Application. It consists of all excerpts of Ping's witness statements and expert reports relating to the alternative measures.

7. The Tribunal’s power to control the admission of new evidence is set out in Rule 21 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Tribunal Rules”), which provides (insofar as is relevant):

“(1) The Tribunal may give directions as to—

...

(b) the issues on which it requires evidence, and the admission or exclusion from the proceedings of particular evidence;

(c) the nature of the evidence which it requires to decide those issues;

...

(2) In deciding whether to admit or exclude evidence, the Tribunal shall have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following factors—

(a) the statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal;

(b) whether or not the substance of the evidence was available to the respondent before the disputed decision was taken;

(c) where the substance of 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;

(d) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded;

(e) whether the evidence is necessary for the Tribunal to determine the case.”

B. FACTUAL BACKGROUND

8. On 15 August 2016, the CMA issued Ping with a Statement of Objections (“SO”). The SO did not address whether the online sales ban was objectively justified. In its written submissions provided in response to the SO dated 5 September 2016, Ping argued that the online sales ban is *“intimately bound up in PING’s legitimate Custom Fitting policy, and so is objectively justified.”*
9. This issue was the subject of discussion at an oral hearing on 18 October 2016. The CMA asked Ping whether alternatives to an outright ban on internet selling would be equally effective at achieving its goal of ensuring every

customer has a custom fitting. Ping said that there are no alternative, less restrictive ways of promoting custom-fitting. Ping wrote to the CMA on this subject in a letter dated 7 December 2016. Ping stated that no specific alternative measures had been put to Ping in the SO and that the alternatives the CMA suggests would be equally effective and proportionate must each be fully particularised. Ping requested that “*details of these alternative alleged theories*” be put to Ping in writing.

10. In a letter dated 14 February 2017, the CMA wrote to Ping explaining that the evidential burden of demonstrating objective justification lay with Ping but the CMA wished to explore the question of alternative measures further. The letter attached an 18 page paper headed “*Objective justification*” which “*sets out the CDG’s initial views on possible less restrictive alternative measures on the online sales ban*” (the “Alternative Measures Paper” or “AMP”). The AMP considered whether the ban was necessary to promote custom fitting and/or to prevent free riding. Ping was asked to respond by 5pm on 7 March 2017 and was offered the chance to attend a meeting to discuss those issues. Ping responded on the same day and said that it could not meet the CMA’s deadline because the AMP raised new and significant points and Ping’s Counsel was unavailable in February and March. Ping stated that it would respond to the AMP by 28 April 2017.
11. The CMA wrote to Ping on 16 February 2017 noting that the usual time period for responding to an SO is 8-12 weeks, yet Ping was suggesting that it required 10 weeks to respond to a paper relating to one aspect of the CMA’s case. The CMA asked Ping to provide further information in connection with its request for an extension. In particular, the CMA asked Ping to outline the specific reasons why the extension was required (for example, the anticipated non-availability dates for key individuals responsible for preparing written submissions).
12. Ping replied on 21 February 2017 stating that it had taken the CMA four months to prepare the AMP since the hearing in October 2016, and that Ping’s extension request is reasonable. Ping did not respond the CMA’s specific request concerning the availability dates of its key individuals but stated that

any response to the AMP would involve a mixture of commercial evidence and opinion together with factual and legal analysis, that these issues were intrinsically linked and that *“it is the availability of Ping’s relevant staff and Counsel to prepare, consider and draft the response which will take time.”*

13. The CMA wrote back on 24 February 2017 offering an extension of three weeks until 28 March 2017. It indicated that Ping could refer its decision to the CMA’s procedural officer for review if it so wished. Ping replied on 3 March 2017 stating that the extension was welcome but fell short of the timescale required; Ping would endeavour to respond to the AMP as soon as practicable but anticipated that it would not meet the revised deadline.
14. The CMA wrote to Ping on 8 March 2017 noting that there had been no challenge to the deadline of 28 March 2017 and that the CMA expected to receive representations by that deadline. It stated that in the absence of a response, the CMA *“may decide to proceed with the case on the basis of the evidence available”* and *“may issue a draft penalty statement to Ping.”* The CMA did not hear from Ping on 28 March 2017 when the deadline it had set expired. On 30 March 2017, the CDG met to discuss (and ultimately approve) the draft penalty statement (“DPS”) which had been prepared separately in advance by the case team.
15. On 31 March 2017, the CMA issued Ping with a DPS. In its letter accompanying the DPS, the CMA stated: *“In principle, the Case Decision Group (CDG) will not consider further representations at this stage on whether an infringement has been committed, other than in exceptional circumstances such as where a party is able to demonstrate that it was unable to provide the information/evidence before the issue of the DPS.”* The CMA nevertheless noted that in this case, Ping had not responded to the AMP and if Ping did submit a response, the CDG *“will consider at that time the extent to which it is appropriate to take account of the evidence or views in Ping’s response, before taking a final decision...”*
16. Ping replied to this part of the letter on 25 April 2017. It said that the CMA’s letter *“shows clear prejudgment of the issues that it is supposed to be*

considering with an open mind". Ping said that it intended to lodge a response to the AMP, but "...given the CMA's apparent predetermination of the issue, Ping can no longer see any purpose in doing so. Being candid, Ping no longer feels that it can receive a fair hearing before the CMA." Ping copied its letter to the CMA's procedural officer.

17. There followed on 26 April 2017 a telephone conversation between Ms Aspinall of the CMA and Ping's lawyers in which Ms Aspinall said the CMA had made no decision, retained an open mind and still wished to receive Ping's response. An email exchange to the same effect took place on 27 April 2017. In a letter to the CMA dated 3 May 2017, Ping repeated its allegation of prejudgment and that "*the suggestion that the CMA would take into account Ping's representations on the liability issues after it had already proposed a penalty is not credible.*"
18. The CMA wrote to Ping on 9 May 2017, stating that it had acted reasonably and that the issue of the DPS was not indicative of prejudgment.
19. Ping replied on 16 May 2017, stating that the AMP was a significant new development in the proceedings and for all intents and purposes a new case. Ping explained that the CMA's original deadline of 7 March 2017 was unreasonable and that the "*proceedings have been characterised by needlessly aggressive and unrealistic deadlines on the CMA's part.*" Ping stated that on 14 February 2017 it had immediately begun to work diligently on a response with a view to responding on 28 April 2017. It said that on 31 March 2017 it had immediately stopped work because of the prejudgment of which it complained. Ping strongly refuted any suggestion that it was "*gaming the system*". Of the DPS, Ping said "*it was as if a judge said half way through a criminal trial that he was thinking of imposing a penalty of X years but that he nonetheless had an open mind.*"
20. On 25 May 2017, the CMA wrote to Ping repeating that it still had an open mind and said that it would accept a response to the AMP by 9 June 2017. Ping subsequently confirmed on 1 June 2017 that it would not provide such a response.

21. The CMA's Decision was issued on 24 August 2017.

C. THE PARTIES' POSITIONS

(1) The CMA

22. In summary, the CMA objects to the admission of the new evidence on the following basis:

- (a) Ping was specifically asked to provide the CMA with evidence on the alternative measures during the course of the investigation.
- (b) Ping made a deliberate decision not to provide that evidence to the CMA. It took that approach even though it bears the evidential burden of establishing objective justification and proportionality.
- (c) There was no sufficient basis for Ping's refusal to submit the evidence to the CMA. The reasons advanced by Ping are inadequate and do not stand up to scrutiny.
- (d) The effect of Ping's refusal was to prevent the CMA from investigating matters in accordance with the statutory scheme, and to create a situation where the CMA's decision is said to be "wrong" on the basis of points which Ping refused to put to the CMA during its investigation.

(2) Ping

23. Ping submits that the CMA's Application is without merit and should be dismissed for the following reasons, in summary:

- (a) The Tribunal's case-law and 2015 Guide to Proceedings ("the Guide"): give rise to a very strong presumption that a party accused of infringing the 1998 Act, and facing a penalty of a criminal nature, is entitled to adduce new evidence in an appeal. This is consistent with its rights of defence under Article 6 of the European Convention on

Human Rights and Article 49 of the EU Charter of Fundamental Rights.

- (b) The CMA is seeking to exclude the entirety of Ping's evidence on the most important part of its Decision. That would have severe consequences for Ping's appeal and would also deprive the Tribunal of any factual or expert evidence on the CMA's alternative measures.
- (c) By contrast, the CMA suffers no prejudice if it is required to respond to Ping's evidence on alternative measures.
- (d) The CMA is wrong to suggest that Ping has "gamed" the system by deliberately withholding evidence during the investigation. On the contrary, it was the CMA which failed to Ping a reasonable opportunity to submit evidence on alternative measures.

D. RULE 21(2)

The Tribunal's power to admit or exclude new evidence

- 24. Rule 21(2), like its predecessor rules in the Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) and the Competition Appeal Tribunal Rules 2000 (S.I. 2000, No. 261), confers on the Tribunal an unfettered discretion to admit or exclude new evidence on an appeal. Unlike the predecessor rules, Rule 21(2) enumerates, on a non-exclusive basis, factors that the Tribunal is required to take into account. These are set out at paragraph 7 above.
- 25. There was an issue between the parties as to the extent to which Rule 21(2) constituted a materially different framework to the framework under the earlier rules for the admission of new evidence on appeal.
- 26. The CMA submitted that the rule was changed in order to address the concern that new evidence is deliberately withheld during the administrative process and then relied on at the appeal stage and that Rule 21(2) requires a much

closer focus on the adequacy of an appellant's reasons for not having placed the evidence before the CMA.

27. Ping submitted that this overstated the difference between Rule 21(2) and the predecessor rules. It referred to a number of authorities decided by reference to the earlier rules for the proposition that, in appeals under the 1998 Act, appellants are generally entitled to rely on new evidence. In *Napp v DGFT (Preliminary issue)* [2001] CAT 3, the Tribunal held, at paragraph 76:

“...we note that the appellant is not limited to placing before this Tribunal the evidence he has placed before the Director but may expand, enlarge upon or indeed abandon that evidence and present a new case. Since there is no right to test the evidence of witnesses before the Director, it is at this judicial stage of the proceedings that the applicant may apply to test by cross-examination the evidence of all relevant witnesses against him.”

28. Also, in the Tribunal's later decision in *Napp v DGFT* [2002] CAT 1, the Tribunal stated, at paragraph 117:

“If and when a matter moves to the judicial stage before this Tribunal, what was previously an administrative procedure, in which the Director combines the rôles of “prosecutor” and “decision maker”, becomes a judicial proceeding. There is, at that stage, no inhibition on the applicant attacking the Decision on any ground he chooses, including new evidence, whether or not that ground or evidence was put before the Director. The Tribunal, for its part, is not limited to the traditional rôle of judicial review but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case “on the merits” and may, if necessary and appropriate, “make any other decision which the Director could have made”: paragraph 3(2)(e)...”

29. The admissibility of new evidence was also addressed more recently by the Tribunal in *Tesco v OFT* [2012] CAT 31, where the Tribunal said, at paragraph 124:

“The following points emerge from the Tribunal's case law as regards adducing new evidence:

- (a) an appellant may challenge a decision on any ground it so wishes and may do so on the basis of evidence that was not available to the OFT when it took the decision: *Case 1001/1/1/01 Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1, paragraph 117;
- (b) the OFT should normally be prepared to defend an impugned decision on the basis of the material before it when it took that decision: *Napp* [2001] CAT 3, paragraph 77;

- (c) it is not the task of an appellant, nor of the Tribunal, to supplement the evidence relied on by the OFT: *Case 1121/1/1/09 Durkan Holdings Ltd & Ors v Office of Fair Trading* [2011] CAT 6, paragraph 110;
 - (d) there is a rebuttable presumption against permitting the OFT to advance a new case or to rely on new evidence that could properly have been made available, or relied upon, during the investigation: *Napp* [2001] CAT 3, paragraph 77;
 - (e) the above presumption is justified by the fact that an appeal is brought against the decision as taken and the Tribunal's task is to review, on the merits, that decision, not a subsequently enhanced or re-cast version of the decision; it also ensures that the procedural requirements of the administrative procedure are respected: *Napp* [2001] CAT 3, paragraph 77;
 - (f) the presumption is rebuttable to account for circumstances where, for example, an appellant makes a new allegation or produces new evidence, such that the OFT is permitted to adduce rebuttal evidence on appeal (as opposed to adducing evidence that was necessary to prove the infringement found in a decision); and
 - (g) the Tribunal must be vigilant to ensure the fairness of the appeal process. The procedures of this Tribunal are designed to deal with cases justly, in close harmony with the overriding objective in civil litigation under rule 1.1 of the Civil Procedure Rules 1998."
30. Ping submitted that *Tesco* establishes that an appellant may challenge a decision "*on the basis of evidence that was not available to the [authority] when it took its decision*" (paragraph 124(a)) and that, where it chooses to do so, the authority is entitled to adduce additional evidence in response (paragraph 124(f)). According to Ping, the latter principle is significant because it removes any disadvantage to the regulator in admitting new evidence at the appeal stage.
31. In our judgment, Rule 21(2) represents a modification of the Tribunal's approach to the admission or exclusion new evidence on appeal to the extent that it specifically requires the Tribunal, at paragraph (c), to focus on, amongst other things, the reason why the evidence was not placed before the regulator before the disputed decision was taken, which is not a factor highlighted in the pre-2015 case law. It is implicit in the wording of the Rule that the absence of a valid reason for placing the new evidence before the regulator may be a factor weighing against the admission of the evidence on appeal. That said, it is clear that when drawing up the 2015 Rules, the Government decided not to

take up Sir John Mummery’s recommendation of a significantly more restrictive approach to the admission of evidence of appeal akin to the approach in *Ladd v Marshall* [1954] 1 WLR 1489. We therefore accept Ping’s submission that an appellant will generally be permitted to adduce new evidence on an appeal in line with the principles set out in *Napp v DGFT (Preliminary issue)* [2001] CAT 3, *Napp v DGFT* [2002] CAT 1 and *Tesco v OFT* [2012] CAT 3.

32. We now turn to the factors listed in Rule 21(2).

(a) The statutory provision under which the appeal is brought and the applicable standard of review

33. Both parties referred to the commentary in the Guide concerning the admission of new evidence on appeals under the 1998 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.”

34. It is common ground that, as Ping’s appeal against an infringement decision under the 1998 Act, which is of a criminal nature, and as the standard of review on the appeal is on the merits, Ping would normally be allowed to present a new case supported by new evidence.

(b) Whether or not the substance of the evidence was available to the respondent before the disputed decision was taken

35. The Guide states that 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. Therefore if the substance of the new evidence which Ping now seeks to adduce was available to the CMA in this

sense before it issued its Decision on 24 August 2017, that would be a factor in favour of the admission of that evidence on appeal.

36. Ping submits that the evidence which it seeks to adduce was available to the CMA in the relevant sense in that there was nothing to prevent the CMA from sending section 26 notices to retailers or inviting them to informal interviews to obtain information about the feasibility and effectiveness of its proposed alternative measures.
37. In our judgment, the disputed evidence which Ping seeks to adduce was not available to the CMA. The evidence in question consists of evidence from other market participants, from its own executives and an expert in response to the alternative measures proposed by the CMA. The evidence did not exist at the time of the Decision. The fact that CMA could have used its powers to carry out a roving inquiry across the golf equipment industry does not mean that that evidence of the market participants was available to the CMA. The CMA did not know what the reaction of those other market participants would be to the proposed alternative measures. The evidence of Ms Aspinall was that, in the absence of a response from Ping setting out why its objectives could not be achieved with alternative measures the CMA did not consider it even necessary or productive to use its power to market test a set of measures on which Ping had declined to comment.
38. As far as the evidence from Ping itself and its expert witness is concerned, addressing a matter quintessentially within Ping's own knowledge, i.e. the question of whether Ping could have run its business in a different way, it is not, in our view, realistic to suggest that this evidence was available to the CMA, in circumstances where the CMA repeatedly asked Ping to comment on its AMP and Ping declined to do so.

(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.**

39. The CMA submitted that it is inherent in the statutory framework for investigations under Chapter III of the 1998 Act that all matters relevant to the CMA's decision should, to the extent possible, be addressed in that decision and that the efficacy of the system would be undermined if the CMA were not provided with relevant evidence at the investigative stage. It would be particularly compromised if an appellant took a deliberate tactical decision to hold back matter during the investigative stage in order to deploy it on appeal.

40. This submission is supported by the commentary on Rule 21(2)(c) in the Guide:

“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. 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.”

41. The CMA's case is that the sequence of events set out at paragraphs 8 – 21 above show that Ping's decision not to submit evidence was tactically motivated – in other words that Ping did not expect to persuade the CMA of the merits of its position and so took the view that it would be better served adducing the evidence for the first time on appeal. The CMA submits in the alternative that the Tribunal does not need to conclude that Ping's decision not to adduce evidence was tactically motivated in order to grant the CMA's application and that it would be sufficient to conclude, looking at the matter objectively, that Ping did not have any adequate or sufficient reason for withholding salient evidence which it could and should have provided to the CMA during the course of the investigation.

42. CMA makes the following points in support of its case as to Ping's motivation in not responding to the proposed alternative measures at the investigative stage:

- (1) Ping's position was premised on its view that the evidential burden of proof in relation to alternative measures lay with the CMA and not Ping, which the CMA submits was incorrect. The CMA nevertheless assumed the burden of preparing the AMP, at Ping's request. Ping then refused to respond to it
- (2) Ping's six week deadline for responding to the AMP was not unreasonable. In any event, Ping had the right to challenge that deadline before the CMA's procedural officer but did not take up that right and just ignored the deadline.
- (3) It was in the circumstances reasonable for the CMA to issue the DPS whilst leaving the door open to Ping to respond to the AMP. The witness evidence of Ms Aspinall and Mr Polito clearly shows that the CMA maintained an open mind throughout its investigation and the DPS was issued simply to progress the investigation. Indeed, the issuing of provisional penalties or remedies statement in the context of an ongoing consideration of substantive issues in an infringement investigation is consistent with the CMA's practice in merger and market investigations.
- (4) The CMA's decision to proceed in this way did not remotely justify the extreme and unreasonable contention advanced by Ping that the CMA had prejudged its final decision. In issuing the DPS, the CMA explicitly told Ping that it had not reached a final decision on infringement. The matter was at worst a procedural disagreement which ought to have been capable of sensible resolution had Ping made any effort to engage. It is noteworthy that Ping's allegation of bias has not translated into a pleaded case of bias in its Notice of Appeal.

- (5) Ping has chosen to maintain privilege over the advice it would have received concerning the allegation of bias which is now said to have been the basis for its decision to withhold evidence. Without disclosure of that legal advice, the Tribunal cannot draw any positive inference that Ping's legal advice supported what it is now saying about the reason for its withholding of evidence.

43. In response, Ping submits as follows.

- (1) The CMA failed to provide Ping with a proper opportunity to respond to its AMP. The CMA had ruminated on the issue of alternative measures since at least 18 October 2016. It then asked Ping to respond to the AMP in just three weeks. Ping immediately and thereafter consistently told the CMA it would need until the end of April 2017 to respond. The CMA's offer of an extension of only three weeks fell far short of the time required by Ping. Rather than giving Ping the time it required, the CMA issued the DPS. This was a precipitous, unnecessary and unprecedented step.
- (2) Ping refutes the CMA's allegation that it has "*gamed*" the system by deliberately withholding evidence during the investigation. In his witness statement, Mr Hardy explains that Ping decided not to respond to the AMP because it reached the view, after the issuing of the CPS, that there was no purpose in doing so as the CMA had prejudged the alternative measures issue against Ping. There are no grounds for the Tribunal to go behind that statement. There was a breakdown in trust between Ping and the CMA. This explanation is supported by the contemporaneous evidence and is not an *ex post facto* excuse. Moreover, Ping will not have gained anything by withholding relevant evidence during the investigation as the CMA is entitled to produce its own evidence to rebut any new evidence adduced by Ping. Ping did not appeal to the procedural officer, although she was kept informed of what was going on, because Ping had lost faith in the CMA as an institution.

- (3) In response to Mr Polito’s evidence that he maintained an open mind throughout the investigation, it is difficult to suggest that an institution which has issued a DPS at a time when it knew the defendant was responding to a substantive part of the case can have an open mind. But the question is not whether individual members of the CDG retained a subjectively open mind but whether a “*fair-minded and informed observer*” would have considered that there was a “*real possibility*” that the CMA had closed its mind when it issued the DPS: see *Porter v Magill* [2002] 2 AC 357. In Ping’s submission, a fair-minded observer would have reached that conclusion.
44. In our view, there was no valid justification for Ping’s decision not to respond to the AMP. The six week period allowed by the CMA for a response should have been sufficient and, in any event, Ping’s complaint that it was not sufficient carries little weight in view of its failure to appeal to the procedural officer.
45. On the critical question of Ping’s motivation in failing to respond to the AMP, we accept the evidence of Mr Hardy that this was the result of a feeling on Ping’s part that the CMA had prejudged the issue of AMP rather than the result of a tactical decision to obtain an advantage at the judicial stage. The fact that Ping is claiming privilege over the legal advice which it received at the time does not constitute a basis for questioning the veracity of Mr Hardy’s statement. A breakdown in trust on the part of Ping is, however, an unsatisfactory reason for Ping’s disengagement from the process. A fair-minded observer would not, in our view, have concluded that the CMA, by issuing the DPS, had prejudged the alternative measures issue and it was rash and misguided of Ping to have concluded that there was no point in responding to the AMP.

- (d) **the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded.**
46. The Guide states, by reference to this factor, that 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.
47. According to the CMA, admission of Ping's new evidence will cause it substantial prejudice. It submits that it will have been deprived of an opportunity to use its statutory investigative powers to obtain evidence on the issue of alternative measures. In her witness statement, Ms Aspinall explains that, had Ping put in further evidence, the CMA would have reviewed that material and identified questions or issues to raise with Ping, probably at an oral hearing. It would have considered, by means of voluntary or compulsory interviews, obtaining further evidence from third parties, such as Ping Account Holders who operated transactional websites and sold Ping's competitors golf clubs online. Asking a retailer to participate in a voluntary interview as a part of a fact-finding inquiry is different from inviting a retailer to attend an interview to take a proof of evidence for use in litigation. The CMA would be in a position to obtain evidence from a larger number of retailers and therefore of greater breadth in the context of an investigation. The CMA would then have assessed the totality of the material and considered whether it affected its decision to pursue the case and/or whether any further steps should be taken. It would have taken all of this material into account in drafting and preparing its decision which would then provide a consideration of the full range of issues raised and a different basis on which to defend the appeal. Ping's approach has bypassed all these necessary and appropriate steps.
48. The CMA submits that the position in an investigation is therefore very different from *inter partes* litigation in which the CMA and Ping are the only parties to the proceedings, and the CMA has the status of respondent. As a party to litigation, the CMA does not have the same ability to gather evidence across an industry to assess whether the views submitted are robust and representative.

49. The CMA acknowledges that denying Ping the opportunity to rely on evidence would place Ping at a disadvantage in pursuing its appeal. However, the responsibility for that prejudice lies with Ping itself. Furthermore, the prejudice is mitigated because, notwithstanding that the burden lay with Ping, the CMA took on the task of considering the alternative measures in the AMP and in the Decision. Even if the new evidence were excluded, Ping would be able to mount a vigorous challenge to the finding on proportionality on the basis of submissions and by way of challenge to the evidence discussed in the decision.
50. Ping submits that it would suffer significant and irremediable prejudice if the evidence is excluded. The Decision poses an existential risk to Ping's business model and if the CMA's Application is successful, Ping's arguments on alternative measures will go entirely unanswered.
51. Ping argues that the CMA will in contrast suffer no prejudice if it is required to respond to Ping's evidence on alternative measures. In response to the argument that the CMA will be deprived of the opportunity to use its statutory powers to obtain evidence:
- (1) The CMA will always suffer this prejudice yet the Tribunal Rules and Guide make clear that in the case of an appeal under the 1998 Act new evidence may generally be admitted. As envisaged in *Tesco*, the CMA may produce responsive evidence to deal with any new points in the appellant's evidence.
 - (2) The CMA's complaint is that it will be forced to fight the appeal on a level playing field with Ping, i.e. with the same evidential facilities. That is an extremely weak form of prejudice.
 - (3) Ping put the CMA on notice of the fact that it did not consider that the proposed alternative measures would be feasible or effective from as early as 7 December 2016 i.e. even before it issued the AMP.

- (4) The CMA could and should have obtained the disputed evidence itself, by sending section 26 notices to retailers or inviting them to attend informal interviews, during its investigation but it chose not to do so.
 - (5) The evidence was available to the CMA during the investigation.
 - (6) The CMA did in fact approach a whole series of retailers to obtain evidence in support of its decision.
 - (7) Even if the CMA has been deprived of an opportunity to use its information gathering powers, it would have been required to obtain witness statements from retailers and/or expert reports in any event.
52. We accept that the CMA has suffered some prejudice from the admission of new evidence from Ping to the extent that it has had to answer this evidence without the benefit of its statutory powers to obtain evidence under compulsion from third parties or the ability to obtain evidence from volunteers as part of a fact finding exercise. The fact that the CMA did not obtain that responsive evidence at the investigative stage is primarily attributable to Ping's failure to respond to the AMP. This may well have caused practical problems resulting in the CMA incurring greater costs in this appeal than it would otherwise have done, but the CMA did not contend that it was unable to respond substantively to the evidence that Ping adduced. Indeed, following the Tribunal's announcement at the hearing that Ping's evidence would not be excluded, the CMA went on to adduce witness statements from four third parties together with its defence on 26 January 2018. This supports our view that the prejudice suffered by the CMA is not particularly serious in substantive terms.
53. The prejudice that would be caused to Ping by the exclusion of the evidence on which it seeks to rely would be far more significant. Ping would plainly be handicapped if it had to respond to the CMA's case on alternative measures without any evidence in support. The fact that this situation would, according to the CMA, have arisen because of Ping's decision not to respond to the AMP does not detract from the prejudice that would be suffered by Ping.

(e) **whether the evidence is necessary for the Tribunal to determine the case**

54. The Guide states as follows with reference to this factor:

“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.”

55. The CMA submits that Ping’s new evidence is not necessary to determine the case since the CMA was given no choice but to reach a final decision on the matter without the evidence on which Ping now relies. It cannot be an overriding consideration in applying Rule 22(2) that the evidence goes to matters of substance because, if it were, the policy changes which underpinned the rule changes in 2015 would be marginalised.

56. Ping submits that the new evidence is necessary for the Tribunal in that it responds to one of the central issues in the case. Without it, it would be impossible for the Tribunal properly to evaluate CMA’s case on alternative measures.

57. Ping also refers to Rule 21 of the Tribunal Rules which allows the Tribunal to direct *the issues on which it requires evidence*” and *“the nature of the evidence which it requires to decide those issues”*. In *British Telecommunications Plc v Ofcom* [2011] EWCA Civ 245 (which concerned an appeal against an Ofcom decision under the Communications Act 2003) Toulson LJ noted the unusual scope of the equivalent predecessor rule (Rule 22) (Paragraph 21):

“It is unusual for an appellate body to be given express power to dictate what evidence it requires to decide the issues. On its natural reading, this rule entitles the CAT to require the provision of evidence which was not before Ofcom, if it considers that it needs such evidence in order properly to decide the issues.”

58. We agree with Ping that the new evidence is necessary in that it is relevant to a central issue, Ping needs it in order to advance its factual case concerning the alternative measures proposed by the CMA and without it the Decision might be allowed to stand even though, in the light of the new evidence, the Decision

was wrong. This would be inconsistent with the governing principle set out in Rule 4 of the Tribunal Rules of dealing with cases “*justly*”, in particular by “*ensuring that the parties are on an equal footing.*”

59. The fact that the CMA reached its decision on alternative measures without input from Ping does not render the additional evidence unnecessary for the purposes of the appeal.

E. CONCLUSION

60. In deciding whether to admit or exclude the new evidence, the Tribunal is required by Rule 21(2) to have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the listed factors.
61. The task for the Tribunal in this case is essentially to reach a view as to the justice and proportionality of admitting or excluding the evidence, taking into account, on the one hand, the applicable statutory provision and standard of review, the prejudice to Ping were the new evidence to be excluded, and the necessity of the new evidence to the Tribunal’s determination. These are all factors in favour of admission. On the other hand, it must take into account the unsatisfactory reason for Ping’s failure to respond to the AMP at the investigative stage, namely its misguided feeling that the CMA had prejudged the issue of alternative measures so that there was no point in responding. This is a factor against admission.
62. Had we found that the reason for Ping’s failure to respond to the AMP was a deliberate decision to gain a tactical advantage on the appeal by withholding evidence that should have been produced at the investigative stage, we might well have excluded the evidence, on the basis that exclusion was a just and proportionate response to a deliberate attempt to undermine the CMA’s investigative procedures. We have, however, found that Ping did not intend to undermine the CMA’s investigative procedures. It seems to us that the inadequacy of Ping’s reason for failing to respond properly to the AMP at the investigative stage, though a significant factor against admission of the new

evidence, does not outweigh the other factors in favour of admission. We therefore conclude that it would be just and proportionate to admit the new evidence.

63. We would add that the Tribunal may in due course wish to take into account the circumstances in which the new evidence came to be adduced, as set out in this unanimous ruling, when dealing with liability for the costs of Ping's appeal.

Andrew Lenon Q.C.
Chairman

Professor John Beath
O.B.E

Eamonn Doran

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 26 March 2018