

**COMMENTS OF THE COMPETITION LAW ASSOCIATION ON THE DRAFT COMPETITION
APPEAL TRIBUNAL (AMENDMENT AND COMMUNICATIONS ACT APPEALS) RULES 2004
(ADDRESSING CERTAIN COMMUNICATIONS ACT APPEALS AND AMENDING THE
EXISTING RULES)**

1 Introduction

The Competition Law Association is the UK branch of the Ligue Internationale du Droit de la Concurrence. The CLA membership includes solicitors, barristers, in-house lawyers and academics. Below we set out a number of brief comments on the draft Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004.

2 General Comments

Under Section 192 of the Communications Act 2003, the Competition Appeal Tribunal (CAT) is the appeal body for appeals against most decisions under Part II of the Act and under the Wireless Telegraphy Acts 1949 and 1998. The Competition Appeals Tribunal Rules 2003 (SI 2003/1372) already govern proceedings before the CAT in general. The CLA agrees that there is a need for the Secretary of State to make amending rules under Section 15 of the Enterprise Act 2002 and Sections 192 and 193 of, and paragraph 23 of Schedule 18 to, the Communications Act 2003 to cover appeals concerning price control matters. In particular, the CLA accepts that there is a need to deal with the following three areas.

- (a) To deal with a particular class of appeals which may be made under the Communications Act, namely appeals raising issues concerned with price control matters which should be referred to the Competition Commission for determination (Rule 3 dealing with the scope of price control matters which are to be referred to the Competition Commission by the CAT; Rule 5 which provides that the Commission must complete their determination of price control matters within 4 months subject to directions from the CAT; and Rule 6 which makes provision to facilitate the conversion of appeals under Section 1F of the Wireless Telegraphy Act 1949 and Section 46B of the Telecommunications Act 1984 into appeals under Section 192 of the Communications Act 2003),
- (b) To deal with the handling of Wireless Telegraphy and Telecommunications Appeals which were brought before the Appeals provisions of the Communications Act 2003 came into force (Rule 4, which provides that price control appeals may be made to the CAT up to 2 months after the Rules come into force even though they may otherwise be out of time),
- (c) To make a number of minor corrections or additions to the existing rules (Rule 2 which introduces the Schedule). Paragraph 1 of the Schedule enables the CAT to publish what would have been its decision in an appeal which is withdrawn. Paragraphs 2-6 make minor amendments correcting errors in the Competition Appeal Tribunal Rules 2003.

3. Specific Issues

3.1 Specification of matters to be referred to the Competition Commission

Rule 3 in providing that there is specified every price control matter falling within subsection (10) of Section 193 of the Communications Act where there is a dispute relating to the matters listed in Rule 3(1)(a) to (c) is comprehensive. However, it might be appropriate to add at the end of paragraph (c) after "set" "and for what duration".

3 2 Time for determination by Competition Commission of Price Control Matters

It is appropriate to specify a time period within which the referred matters are to be determined and 4 months is more appropriate than the previous 6 months. It is sensible also to allow the CAT to direct both longer and shorter periods (Rule 5)

3 3 Transitional provisions for appeals relating to Price Control

There is clearly an unsatisfactory situation arising from the timing of the present rules and their failure to coincide with the substantive appeal provisions Section 193 of the Communications Act. However, there seems to be little more that can be done to increase legal certainty for potential appellants beyond the provisions in Rule 4 (and Rule 3(7)). The Rule 4 for transitional provision which allows appeals relating to price control, or in which a specified price control matter arises, to be made within 2 months of the Rules coming into force even if they would otherwise be out of time raises the question of the treatment of such an appeal which is made before the Rules come into force. It is recommended that there should be further legal analysis of the Rule 3(7) provision permitting reference of a price control matter where the appeal is made before the Rules come into force provided the CAT has not delivered its decision. Such a retro-active power of referral could impact on individual rights which should be safeguarded under the Human Rights Act 1998 and the European Convention on Human Rights. However, there does not appear to be any obvious solution other than that which may be adopted on a case by case basis

3 4 CAT decision publication in an appeal which is withdrawn

If Paragraph 1 of the Schedule is intended to permit the CAT to adopt, and publish, a substantive decision in an appeal which is withdrawn, the CLA recommends that further in depth consultation take place. There is no urgency for this provision to be included in the present Rules. (If the intention is to allow the CAT to adopt a substantive decision without hearing the parties on the issues concerned, clear questions of public policy and the right to a fair hearing would arise and require debate)

4 Conclusion

The CLA appreciates the opportunity to comment on the draft Rules. If the DTI would find it helpful to discuss any of the above comments with us, we should be happy to do so and request that you contact Mark Clough (Ashurst, +44 207 859 1652, mark.clough@ashurst.com) or Geraldine Tickle (Martineau Johnson, +44 121 678 1529, geraldine.tickle@martjohn.com) in the first instance.

2 April 2004