



Department for  
Business, Energy  
& Industrial Strategy

# Post-implementation review of the Competition Appeal Tribunal (CAT) Rules 2015

and

# Government Response to the Call for Evidence

April 2022



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| <b>Title: Statutory Review of the Competition Appeal Tribunal Rules and Call for Evidence response.</b>  | <b>Post Implementation Review</b>    |
| <b>PIR No: BEIS008(PIR)-22-CCP</b>   | <b>Date: 20/04/2022</b>              |
| <b>Original IA/RPC No: BISCCP005</b>   | <b>Type of regulation: Domestic</b>  |
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| <b>Other departments or agencies:</b>  | <b>Date measure came into force:</b> |
|  | <b>01/10/2015</b>                    |
|  | <b>Recommendation: Keep</b>          |
| <b>Contact for enquiries: Alesha De Freitas, Deputy Director, Competition Policy, BEIS</b><br><a href="mailto:Alesha.DeFreitas@beis.gov.uk">Alesha.DeFreitas@beis.gov.uk</a> | <b>RPC Opinion: N/A</b>              |

## 1. What were the policy objectives of the measure?

The main policy objectives were to streamline procedures in the CAT and minimise the length and cost of CAT cases while ensuring access to recourse for affected parties.

Reducing the length and cost of CAT cases was expected to:

- Provide overall savings to businesses appealing and defending cases in the CAT
- Enable beneficial market outcomes to be brought into force quicker, which will benefit consumers and, on the whole, businesses.
- Make the CAT's administrative proceedings more efficient.
- Promote greater confidence in the regulatory appeals process and scope for recourse for business.

## 2. What evidence has informed the PIR?

A Call for Evidence (CfE) was published on 16 March 2021 to inform the review and help to answer the question of whether the 2015 rule changes have achieved the intended objectives. The Call for Evidence received responses from three law firms: Freshfields Bruckhaus Deringer LLP ("Freshfields"), Scott + Scott UK LLP, and Hausfeld in addition to the response from the Competition and Markets Authority.

The PIR covers the period from 1 October 2015 to 30 September 2020. BEIS carried out an analysis of cases heard by the CAT in the PIR period and published a summary of the data in the [Post Implementation Review Call for Evidence](#).

### **3. To what extent have the policy objectives been achieved?**

Based on the responses received, discussions with the Competition Appeal Tribunal and our own assessment, we believe that the intended objectives of the CAT Rules have largely been achieved and remain appropriate. However, we believe that further review might be helpful to decide where the Rules might benefit from updating to reflect changes in practice since their establishment.

Sign-off for Post Implementation Review: Chief economist/Head of Analysis and Minister

***I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.***

Signed:

Date: 19/04/2022

A handwritten signature in blue ink, appearing to be 'Paul Scully', written in a cursive style.

**PAUL SCULLY MP**

Minister for Small Business, Consumers & Labour Markets  
Minister for London

**Statutory Post Implementation Review of the Competition Appeal Tribunal Rules and Call for Evidence response.**

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**Further information sheet**

Please provide additional evidence in subsequent sheets, as required.

**4. What were the original assumptions?**

The original assumptions were that the CAT Rules could be improved to reduce the length and cost of decision-making in the appeals process for competition and economic regulatory issues.

**5. Were there any unintended consequences?**

No unintended consequences were identified. We had identified as a risk the possibility that a faster appeals process could reduce the cost of an appeal, encouraging a greater number of appeals and thus increase the total cost to business. However, we have no evidence to suggest this as the CAT has the power to strikeout clearly unmeritorious appeals.

**6. Has the evidence identified any opportunities for reducing the burden on business?**  
(Maximum 5 lines)

The evidence did not identify any opportunities for reducing the burden on business.

**7. How does the UK approach compare with the implementation of similar measures internationally, including how EU member states implemented EU requirements that are comparable or now form part of retained EU law, or how other countries have implemented international agreements?**

Consistent with EU and international approach.

# Introduction

1. This document provides an overview of the Post Implementation Review (PIR) of the Competition Appeals Tribunal (CAT) Rules 2015.
2. The CAT is a specialist judicial body with cross-disciplinary expertise in law, economics, business, and accountancy which hears and decides cases involving competition or economic regulatory issues.
3. The CAT was created by Section 12 and Schedule 2 to the Enterprise Act 2002<sup>1</sup> and came into force in April 2003. Its principal functions are to hear and decide appeals of decisions taken by the Competition and Markets Authority (CMA) and economic regulators concerning infringement of UK and EU competition law<sup>2</sup>. It also considers judicial reviews relating to merger and market investigations, as well as private damages claims relating to competition law. Its jurisdiction extends to the whole of the United Kingdom.
4. The competition regime exists to ensure competition and markets works well for consumers and business. Independent regulators and competition authorities are an essential element of this regime. However, where decisions have been delegated to independent experts outside of direct ministerial control, firms need to have a mechanism for challenging regulatory decisions in order to correct regulatory mistakes and ensure regulators are operating in a reasonable and consistent way. Appeals are thus central to ensuring proper accountability of these bodies and well-functioning markets.
5. The CAT plays a key role in this appeals process. Its rules impact on the cost-effectiveness and proportionality of the system, both in relation to taxpayers and the parties to any appeal or action themselves.
6. The CAT's Rules of Procedure were reviewed by Sir John Mummery in 2014 and the CAT Rules 2015 were introduced with the objective of striking the appropriate balance between providing proper accountability for regulatory decisions, while at the same time minimising unnecessary costs and delays. The Competition Appeal Tribunal Rules 2015 Statutory Instrument 2015/1648 (CAT Rules 2015)<sup>3</sup> revoked and replaced the CAT Rules 2003 (SI 2003/1372)<sup>4</sup>.

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2002/40/schedule/2>

<sup>2</sup> The CAT is currently in a transitional period and able to hear cases involving Articles 101 and 102 of the TFEU that flow from decisions taken prior to Brexit but will not always be able to. After the litigation period ends (usually six years after the infringement occurs), the CAT's jurisdiction will be founded entirely on domestic competition law (ss.2 and 18 CA98 which are the UK equivalent provisions for Articles 101 and 102 TFEU). Since the CAT's jurisdiction will not extend to the application of Articles 101 and 102, it follows that it will not be able to make references to the ECJ on points of interpretation of those provisions

<sup>3</sup> <https://www.legislation.gov.uk/uksi/2015/1648/contents/made>

<sup>4</sup> <https://www.legislation.gov.uk/uksi/2003/1372/contents/made>

## **Statutory Post Implementation Review of the Competition Appeal Tribunal Rules and Call for Evidence response.**

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7. Under the CAT Rules 2015, the Secretary of State is required to carry out a review of the Rules (at intervals not exceeding five years)<sup>5</sup>, set out the conclusions of the review in a report and publish the report.<sup>6</sup> The review was delayed due to the Coronavirus pandemic.
8. The report must:
  - set out the objectives intended to be achieved by the regulatory system established by the CAT Rules 2015;
  - assess the extent to which those objectives are achieved; and
  - assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.<sup>7</sup>
9. The objectives of the rules are:
  - to minimise unnecessary costs and delays while balancing proper accountability for decisions;
  - to ensure effective case management; and
  - to provide a framework for the CAT's extended jurisdiction in private actions related to infringements of competition law, as set out in the Consumer Rights Act 2015.
10. A Call for Evidence (CfE) was published on 16 March 2021 to inform the review and help to answer the question of whether the 2015 rule changes have achieved the intended objectives.
11. The Review covered the period from 1 October 2015 to 30 September 2020 and CfE closed on the 10 May 2021.

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<sup>5</sup> Rule 120(4) of SI 2015/1648

<sup>6</sup> Rule 120(1) of SI 2015/1648

<sup>7</sup> Rule 120(2) of SI 2015/1648



# Summary of Responses to Call for Evidence

12. We received four responses to the CfE from:

- the CMA;
- Freshfields Bruckhaus Deringer LLP (Freshfields);
- Scott + Scott UK LLP; and
- Hausfeld.

Freshfields, Scott + Scott and Hausfeld are law firms and members of the CAT User Group.

13. The CfE asked two questions:

- Question 1: To what extent have the objectives intended to be achieved by the regulatory system established by the 2015 Rules been achieved?
- Question 2: Do those objectives remain appropriate and, if so, to what extent could they be achieved with a system that imposes less regulation?

14. The responses were generally in agreement that the intended objectives had been achieved by the CAT Rules 2015. None of the respondents commented on the extent to which the objectives could be achieved with a system that imposes less regulation.

15. The responses cover a variety of issues including:

- the length of pleadings,
- witness evidence,
- estimates of damages, undistributed damages,
- expert evidence, cost capping,
- transfers from the High Court,
- the ability for the President or individual Chairmen to act alone,
- carriage disputes and action by class representatives.

16. The CMA considered “that the 2015 reforms have led to improvements in the efficiency of the CAT’s processes’ and that the ‘amendments represented a significant development towards a streamlined framework, by recognising the need to balance proper accountability for decisions with minimising costs and lengthy proceedings”.

17. Freshfields said that “the objectives intended to be achieved by the regulatory system established by the Rules have generally been achieved, and that those objectives broadly remain appropriate”.

## Statutory Post Implementation Review of the Competition Appeal Tribunal Rules and Call for Evidence response.

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18. Scott + Scott said, 'We have found the Tribunal to be efficient, modern and user-friendly'.
19. All respondents felt that the CAT Rules 2015 could benefit from targeted reforms or updating to reflect changes in practice since their establishment.
20. The CMA considers that there is scope for targeted reform to the CAT's procedures in order to achieve greater efficiency and better equip the CAT to deal with increased pressures it is facing. The CMA identified, as examples, witness evidence/written evidence, the continuation of changes made during the Covid 19 pandemic and the introduction of a fast-track procedure for certain appeals.
21. Freshfields also expressed that "the CAT's existing powers and jurisdiction are broadly fit for purpose, subject to certain specific areas where there are, or may be, gaps in the CAT's existing powers and jurisdiction that they consider should be filled". However Freshfields also feel that the CAT Rules require updates and amendments to reflect issues that have arisen since their introduction. Freshfields outlined various changes to specific rules covering areas such as claims under section 47A of the 1998 Act (rules 29-72), as well as various adjustments to General and Supplementary rule.
22. Other than the CMA, the respondents focussed mainly on rules and procedures around private actions although all requested that some of the changes introduced as a result of the Coronavirus pandemic be maintained. In particular, they would like to retain the ability to file documents electronically and hold some hearings remotely.
23. Freshfields suggested that the CAT should have the power to grant declaratory relief, that is, a legally binding statement from a court on the application of competition law to a set of facts. This could be a valuable remedy to settle disputes relating to competition law which we have included as a proposal in the consumer and competition consultation document.
24. The CMA proposed that fast-track procedures, currently available for claims filed pursuant to section 47A of the Competition Act 1998, could be introduced for certain cases under the Competition Act 1998 and the Enterprise Act 2002.
25. Freshfields, Hausfeld and Scott + Scott also made a number of suggestions proposing changes to the Rules and to the CAT Guide to Proceedings 2015 (the "Guide") which sets out the conduct of proceedings before the Tribunal according to the Rules.
26. Hausfeld proposed increased consistency between the Guide, the Rules, and the Civil Procedure Rules<sup>8</sup> and Freshfields suggested that the Rules should be amended to give the CAT the express power to update and reissue the Guide from time to time as it considers appropriate, including in light of any amendments to the CAT Rules following a review by the Secretary of State.

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<sup>8</sup> Civil Procedure Rules 1998; provide a new code of civil procedure for the civil courts.  
<https://www.legislation.gov.uk/uksi/1998/3132/contents/made>

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27. Freshfields suggested that the Guide could further clarify the role of individual issues in collective proceedings as well as amendments to reflect points from the Supreme Court judgment in *Merricks*<sup>9</sup> relating to the practicalities of the certification stage
28. The feedback from respondents suggests the Tribunal rules and Guide to Proceedings might benefit from further detailed review to consider whether updates and amendments to reflect the changes made during the course of the pandemic that users of the Tribunal have found useful, as well as reflecting issues arising in practice from developments since their introduction, might be beneficial.
29. For more details regarding the responses and proposed changes flagged please see <https://www.gov.uk/government/consultations/post-implementation-review-of-the-competition-appeal-tribunal-rules-2015-call-for-evidence>.

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<sup>9</sup> <https://www.supremecourt.uk/cases/uksc-2019-0118.html>

## Evidence base

30. We published a CfE on 16 March 2021 to gather views from expert stakeholders. The CfE was published on the gov.uk webpage with parties having the opportunity to respond through email or Citizens Space.
31. We sought views from all those with an interest in the application of the CAT Rules 2015. This included but was not restricted to those who have been or were likely to be parties in proceedings before the CAT (for example, the CMA, Ofcom and other sector regulators, public and private enterprises, and individuals), legal representatives (for example barristers and solicitors practising in the areas of competition, public law and commercial litigation), trade associations, consumer bodies and experts in legal procedure.
32. As this is a specialist area of law, we did not hold formal stakeholder workshops but did email those we believed may have an interest and offered to meet any interested parties on request.
33. The Review questions set out in the Statutory Instrument (The Competition Appeal Tribunal Rules 2015 SI 1648/2015) and in the CfE (see paragraph 13) did not provide a basis for quantitative analysis. Most respondents focused on areas where they felt the CAT Rules 2015 could be improved in future and did answer the Review questions in great detail.
34. The CfE included data collected by BEIS from a combination of case-level data from published case updates, and the CAT's published annual reports. It consisted of (i) basic contextual information on the CAT's activity, such as number of cases registered at the CAT, number of judgments handed down and number of case management conferences held, and (ii) data relating more specifically to the Rule changes such as the number of times the fast-track procedure has been used. The data cover the period October 2010-October 2020. This includes the period October 2010-October 2015 as a baseline for considering the impact of the rule changes against (the 5-year period before the rules were introduced), as well as the review period October 2015-September 2020 (when the rule changes were in place).
35. BEIS analysed the data collected however case numbers and case duration in themselves do not help answer the Review questions but were to provide context on CAT cases for consultation respondents.

## Government Decision

36. We believe that the overall positive response to the CAT Rules 2015 suggests that the intended objectives have largely been achieved and remain appropriate.
37. However, the respondents made several suggestions (see <https://www.gov.uk/government/consultations/post-implementation-review-of-the-competition-appeal-tribunal-rules-2015-call-for-evidence>) which we believe require further scrutiny. Competition law appeals and the CAT Rules are a specialist area requiring further consideration.
38. Additionally, the Government is considering wider reforms to consumer and competition law and it would be sensible to consider how those reforms fit alongside changes to the CAT Rules.
39. The Government has now published its response to the RCCP consultation and in this outlined its intention to proceed with the proposal to extend the Competition Appeal Tribunal's jurisdiction to grant declaratory relief. Government remains of the view that empowering the Competition Appeal Tribunal to grant declaratory relief would avoid the need for parties to formulate their competition law claims as damages claims, or applications for an injunction, when what would be most helpful is a declaration of how the law applies to the facts of the case
40. The Government has decided to carry out a further technical review of the CAT Rules, working with the Tribunal and other interested parties, to encompass updating and improvement of case management procedures including in the context of private actions and with a view to enhancing the Tribunal's ability to conduct proceedings by electronic means.

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