COMPETITION APPEAL TRIBUNAL

GUIDE TO PROCEEDINGS

OCTOBER

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CONTENTS

PAGE

GLOSSARY

"The 1998 Act"	Competition Act 1998 as amended by the 2002 Act and the 2004 Regulations
"The 2002 Act"	Enterprise Act 2002
"The 2003 Act"	Communications Act 2003
"CAA"	Civil Aviation Authority
"CC"	The Competition Commission
"CCAT"	Competition Commission Appeal Tribunals
"CFI"	The Court of First Instance of the European Communities
"CMC"	Case management conference
"CPR"	Civil Procedure Rules
"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 Commission"	The Commission of the European Communities
"The EC Competition Regulation"	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 Treaty OJ 2003 L 1/1
"ECJ"	The Court of Justice of the European Communities
"The EC Treaty"	The Treaty establishing the European Community (as amended)
"Guide to Proceedings" or "Guide" or "the Guide"	This Guide to Proceedings
"NIAER"	Northern Ireland Authority for Energy Regulation
"OFT"	Office of Fair Trading
"OFCOM"	Office of Communications
"OFGEM"	Office of Gas and Electricity Markets
"OFWAT"	Office of Water Services
"ORR"	Office of Rail Regulation

"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"	OFCOM, OFGEM, OFWAT, ORR, NIAER and the CAA
"The Rules" "The Tribunal's Rules"	The Competition Appeal Tribunal Rules 2003 (SI 2003/1372)
"The 2004 Rules"	The Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004/2068)
"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

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 President pursuant to Rule 68(2) of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (as amended by SI 2004/2068) in relation to the procedures provided for by those Rules.

Sir Christopher Bellamy
President
20 October 2005

INTRODUCTION

This Guide to Proceedings deals with the conduct of proceedings before the Tribunal commenced after 20 June 2003 in accordance with the Competition Appeal Tribunal Rules 2003, which came into force on that date[1]. The Guide has the status of a practice direction issued by the President pursuant to Rule 68(2) and has been approved by the Tribunal's members.

The Guide is intended to give practical guidance for parties and their legal representatives as to the procedures of the Tribunal in relation to all cases which it is competent to entertain. It is not a substitute for the Tribunal's rules of procedure, and may be amplified or modified by decisions of the Tribunal in individual cases.

The most up to date version of the Guide will be found on the Tribunal website: www.catribunal.org.uk which also contains the judgments, orders and other documents relating to the cases referred to in the Guide. New editions of, or supplements to, the Guide will be published from time to time on the Tribunal website.

In general, the Tribunal expects the parties and their legal representatives to work together with the Registry in ensuring that the proceedings are conducted with economy, courtesy and restraint.

In matters for which specific provision is not made by the Guide, the parties and their representatives will be expected to act reasonably and in accordance with the spirit of the Guide.

The Registry may be consulted on any points of procedure that arise, either before or during proceedings. See section 4 for details of how to contact the Registry.

Charles Dhanowa
Registrar
20 October 2005

[1] See The Competition Appeal Tribunal Rules (SI 2003/1372) as amended by The Competition Appeal Tribunal (Amendment and Communication Act Appeals) Rules 2004 (SI 2004/2068).

THE GENERAL APPROACH OF THE GUIDE

The Tribunal's functions may broadly be divided into three categories.

- First, it may hear *appeals on the merits* in respect of decisions applying the competition rules found in Articles 81 and 82 of the EC Treaty 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, the acceptance of binding commitments under the 1998 Act, and certain price control decisions under the 2003 Act.

- Thirdly, it may, in certain circumstances, determine *claims for damages or other sum 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 EC Treaty or the 1998 Act.

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

The main emphasis of the Guide is on the procedures applicable to appeals pursuant to the 1998 Act, since many aspects of those procedures apply equally to proceedings commenced in respect of the other matters for which the Tribunal has jurisdiction.

However where those other jurisdictions require or necessitate a different procedural approach, the Guide highlights the points to note.

The Guide takes a roughly chronological approach to describing the procedure before the Tribunal, starting with a description of how proceedings should be commenced, and then proceeding to consider: the initial reception and management of the case by the Tribunal; the filing of other pleadings and the intervention procedure; other case management issues; confidentiality issues; the termination of the proceedings without a hearing; the hearing; the Tribunal's decision; post-decision matters such as costs and permission to appeal: and finally issues that require separate treatment such as interim measures and price control references under the 2003 Act.

The meaning of any terms and the full form of any abbreviations not defined in the body of the text can be found in the glossary at the front of the Guide.

1. THE TRIBUNAL: BACKGROUND

1.1 The Tribunal is established under Part 2 of the 2002 Act and came into existence on 1 April 2003.

1.2 The Tribunal replaced the CCAT established under the 1998 Act.

1.3 The Tribunal is an entirely independent judicial body.

1.4 The Tribunal is supported and financed by the Competition Service, which receives grant in aid from the Department of Trade and Industry - see section 13 of the 2002 Act.

1.5 During the passage of the Competition Bill in 1997, Lord Simon of Highbury, the Minister responsible for ensuring the Bill's passage through Parliament, made the following statement on the impending regime during a debate on the Bill in the House of Lords:

> *"The new prohibition regime introduces a different approach to competition matters and calls for a different institutional arrangement. The Bill establishes a legal test for assessing whether behaviour is anti-competitive or not. The Office of Fair Trading is to be the primary enforcer of the prohibitions. It is right that under that approach, appeals against the substance of his decisions should be dealt with by more court-like arrangements…*
>
> *…The tribunal will have many of the characteristics of a court…it will be recognized as having the same importance and status as the High Court, as appeals from the tribunal will be to the Court of Appeal. I have no doubt that the European Court of Justice will see the tribunal in the same light…*
>
> *There will be a clear advantage in dealing with appeals against the director's decisions in a tribunal of high status like this one – rather than a court. The procedural rules by which the tribunal operates may be tailored to suit the nature of the matters it will typically deal with and they will be drawn up taking into account best practice from the courts and other tribunals.*
>
> *The tribunal will be a UK wide body, capable of dealing with issues relating to the whole of the UK. That will be a very distinct advantage given the nature of many competition cases."* (Hansard Column 444, 17 November 1997)

The constitution of the Tribunal

1.6 The constitution of the Tribunal is governed by Schedule 2 to the 2002 Act. The Tribunal consists of the President, the panel of chairmen and the panel of ordinary members.

1.7 The Tribunal is headed by the President who is a senior legally qualified person appointed by the Lord Chancellor and who it appears to the Lord Chancellor has appropriate experience and knowledge of competition law and practice. The current President is Sir Christopher Bellamy.

1.8 Appointments to the panel of chairmen are made by the Lord Chancellor for a period of eight years. 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). The current members of the panel of chairmen are the judges of the Chancery Division of the High Court and Marion Simmons QC.

1.9 The ordinary members are appointed for a period of eight years by the Secretary of State and come from a variety of backgrounds. Some are professionally qualified economists, lawyers or accountants, whilst others have backgrounds in business, the public service or other relevant experience. Currently there are 19 ordinary members.

1.10 Full biographical details of the President, chairmen (with the exception of the judges of the Chancery Division) and the ordinary members can be found on the Tribunal website.

1.11 All cases (apart from those purely concerned with interim measures, which may be heard by the President or a member of the panel of chairmen sitting alone) are heard by a Tribunal of three persons. Such a Tribunal is chaired by either the President or a member of the panel of chairmen. The other two members are drawn from the panel of ordinary members (which for these purposes includes the panel of chairmen). This concept of a tribunal with a membership drawn from other fields such as economics, accountancy and business as well as the legal profession continues the tradition, which commenced with the former Restrictive Practices Court and continued with the CCAT, of applying a multi-disciplinary approach to the consideration of competition issues.

1.12 Under the Rules, the President or chairmen have powers to take interlocutory decisions acting alone: see Rule 62.

The Registrar

1.13 The day to day operation of the Tribunal is managed by the Registrar. The Registrar is appointed by the Secretary of State and is the Tribunal's main point of contact for the public. The current Registrar is Charles Dhanowa.

1.14 Under Rule 4 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 4(2)). With the authorisation of the President, the Registrar may consider and dispose of a limited number of interlocutory matters in accordance with Rule 62(3). Those matters are:

- to make any order by consent, including to settle proceedings (except where Rule 57(4) applies, which concerns cases where the order may have a significant effect on competition);
- to deal with extensions or abridgements of certain case management time limits;
- to deal with requests for confidential treatment;
- to exercise the Tribunal's powers in respect of the service of documents under Rule 63.
- where directed to do so by the President or a chairman or the Tribunal, to assess costs (Rule 55(3)).

1.16 Where the Registrar exercises the powers of the Tribunal he shall not do so without affording the parties an opportunity to be heard. 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 a 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 the Tribunal, as the case may be (Rule 4(4)).

2. TYPES OF PROCEEDINGS BEFORE THE TRIBUNAL

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

- Appeals by parties or third parties against decisions, including, interim measures decisions, made under the 1998 Act by the OFT (or the other Regulators sharing concurrent jurisdiction - OFCOM, OFGEM, OFWAT, ORR, NIAER and the CAA): sections 46 and 47 of the 1998 Act

- Appeals against the decisions of the OFT under the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 as amended. It appears that the scope of these regulations is now limited to international maritime tramp vessel services.

- Applications by third parties for review of decisions by the OFT 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 as amended.

- Applications to review, as the case may be, the decisions of the OFT, CC or 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 CC 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.

- Monetary claims by persons based on infringement decisions made by the OFT under the 1998 Act or by the OFT or the EC Commission under Articles 81 and 82 of the EC Treaty, once any appeals against such decisions have been finally determined: sections 47A and 47B of the 1998 Act as amended.

- 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 and the exercise of Broadcasting Act 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.

2.2 The procedures to be followed in proceedings commenced after 20 June 2003 are set out in the **Competition Appeal Tribunal Rules 2003** ('the Rules') which may be

supplemented by practice directions issued by the President under rule 68(2). These documents and other information about the Tribunal and its judgments are available on the Tribunal website.

2.3 Unless the context requires otherwise, Parts I and V of the Rules apply to all proceedings before the Tribunal. Part II of the Rules applies to all appeals before the Tribunal and also to applications for review and monetary claims unless specific rules relating to those types of proceeding contained in Part III (proceedings under the Enterprise Act 2002) or Part IV (claims for damages) apply.

2.4 In this guide, unless the context otherwise requires references to the OFT include reference to the other Regulators competent to apply the relevant provisions of the 1998 Act, the 2002 Act and the 2003 Act.

Appeals under the Competition Act 1998

2.5 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, often 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, often referred to as 'the Chapter II prohibition').

2.6 Those provisions are enforceable by the OFT 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. Similar powers are exercisable by the Regulators responsible for the fields of communications, electricity, gas, water, railways, and air traffic services.

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

- a decision as to whether the Chapter I or the Chapter II prohibition has been infringed;
- a decision as to whether the prohibitions contained in Articles 81(1) and 82 of the EC Treaty have been infringed;
- a decision to impose a penalty under section 36 of the 1998 Act or as to the amount of such penalty;
- a decision giving directions under sections 32 or 33 of the 1998 Act with a view to bringing the infringement to an end;
- a decision cancelling a block or parallel exemption from the Chapter I prohibition;
- a decision withdrawing the benefit of a regulation of the EC Commission pursuant to Article 29(2) of the EC Competition Regulation;
- a decision relating to the release or non-release of commitments pursuant to section 31A(4)(b) of the 1998 Act; and

– a decision imposing interim measures under section 35 of the 1998 Act.

2.8 Under section 47 of the 1998 Act, as amended, a third party with a sufficient interest in a decision of the OFT falling within paragraphs (a) to (f) of section 46(3) of the 1998 Act may appeal directly to the Tribunal against that decision. Prior to 21 June 2003 it was necessary for such a third party to request the OFT to withdraw or vary the contested decision before any appeal could be brought, but that is no longer necessary: section 17 of the 2002 Act. Third parties may additionally appeal to the Tribunal against decisions of the OFT relating to the acceptance, variation, or release of binding commitments under section 31A, or the grant or refusal of interim measures by the OFT under section 35.

2.9 The Secretary of State has the power to add to the list of decisions that may be appealed pursuant to sections 46 and 47[2].

2.10 In respect of most appeals brought under sections 46 and 47 of the 1998 Act, the Tribunal's powers are widely drawn. Under Schedule 8, paragraph 3(1), of the 1998 Act the Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal. Under paragraph 3(2) the power of the Tribunal includes the power to:

– confirm or set aside the decision in question;

– remit the matter to the OFT;

– impose or revoke or vary the amount of any penalty;

– give such directions, or take such other steps, as the OFT itself could have given or taken; and

– make any other decision which the OFT could itself have made.

2.11 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 OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal: Schedule 8, paragraph 3A.

2.12 Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal to the CAT does not suspend the effect of the decision to which the appeal relates, unless the CAT orders otherwise: section 46(4).

Monetary claims under the Competition Act 1998

2.13 Under section 47A of the 1998 Act any person who has suffered loss or damage as a result of an infringement of either UK or EC competition law may bring a claim for damages or for a sum of money before the Tribunal in respect of that loss or damage.

[2] See e.g. the Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004 (SI 2004/1078), 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.

2.14 In general, claims may only be brought before the Tribunal when:

(i) a decision has been made by the EC Commission, the OFT or the Tribunal establishing that one of the relevant prohibitions has been infringed; and

(ii) any appeal from such decision has been finally determined or the time for an appeal has expired.

2.15 The infringements of competition law established by a decision of the OFT or EC Commission in respect of which a so-called 'follow on' claim for damages or loss may be made to the CAT are breaches of the Chapter I and/or Chapter II prohibitions contained in the 1998 Act and breaches of the prohibitions in Articles 81 and/or 82 of the EC Treaty.

Claims on behalf of consumers

2.16 In addition, under Section 47B of the 1998 Act a claim under Section 47A may be brought or continued by a "specified body" on behalf of individually named consumers.

2.17 Bodies may be specified in an Order made by the Secretary of State pursuant to section 47B(9) of the 1998 Act. At the date of publication of the Guide the Consumers' Association had been so specified: SI 2005/2365.

Proceedings under the Enterprise Act 2002

2.18 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

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

(i) 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

(ii) it believes that 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 CC: see sections 22 and 23.

2.20 By virtue of section 374 of the 2003 Act, Part 3 of the 2002 Act extends to media mergers, including newspaper mergers.

2.21 Special rules apply in the case of water mergers: see section 70 of the 2002 Act which amends the Water Industry Act 1991.

2.22 Once a reference has been made in respect of a completed or anticipated merger, the CC 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 CC 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: see sections 35 to 41.

2.23 Although the OFT and the CC are the principal decision-makers 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 CC where the OFT 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 CC must then determine whether those features do in fact prevent, restrict, or distort competition in 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 OFT, the Secretary of State or the CC 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. There is no defined 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 (sections 120(4) and 179(4)).

2.27 Under sections 120(5) (mergers) and 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 Under the 2002 Act appeals may also be brought by a person against the imposition of a penalty or the amount of a penalty imposed for failure to comply with a notice issued by the CC requiring the production of documents or information or the attendance of witnesses in a merger or market investigation (sections 114 and 176(1)(f)). A decision of the CC to refuse an application to vary a decision imposing a penalty by specifying a different date by which the penalty or portions of it are to be paid, is also appealable (see section 114(1)).

Appeals under the Communications Act 2003

2.28 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[3]. A significant number of the obligations imposed by those measures on the United Kingdom are implemented by the provisions of Part 2 of the 2003 Act.

2.29 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.

2.30 Part 2 of the 2003 Act also confers power on OFCOM relating to the use of the radio spectrum under the Wireless Telegraphy Acts.

2.31 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.

2.32 A person affected by any such decision may appeal: 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 by OFCOM using powers under the Broadcasting Act 1990 for a competition purpose: section 317.

The Tribunal's decision

2.35 The Tribunal must decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal (section 195(2)) and in accordance with the Tribunal's Rules.

2.36 The Tribunal's decision must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal, and the Tribunal shall then remit the decision under appeal to the decision maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision (section 195(3) and (4)).

2.37 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)).

[3] 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").

Price control matters

2.38 If an appeal raises a price control matter as specified in the Tribunal's Rules (see Rule 3 of the 2004 Rules), the Tribunal must, before reaching its decision, refer the matter to the CC for determination in accordance with the Tribunal's Rules and any direction of the Tribunal (section 193). Subject to the Tribunal's direction, the CC shall then determine the price control matter within four months (Rule 5 of the 2004 Rules). In its final decision the Tribunal must follow the CC's determination concerning the price control matter unless that determination would fall to be set aside applying the principles applicable on a claim for judicial review (section 193(7)).

Appeals under the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001

2.39 The 2001 Regulations provide for the OFT directly to enforce Articles 81 and 82 of the Treaty where it appears to the OFT that the United Kingdom might have a duty to rule on whether there has been an infringement of these provisions. It is understood that the practical scope of these provisions is now limited to agreements and conduct in the United Kingdom concerning international maritime tramp vessel services.

2.40 The powers and procedures of the OFT under the 2001 Regulations are modelled on the 1998 Act.

2.41 Regulations 25 to 28 create an appeals regime in respect of certain decisions of the OFT which essentially mirrors that of the 1998 Act and under which the Tribunal has similar functions and powers.

3. THE GENERAL APPROACH OF THE RULES

3.1 The Rules are based on the same general philosophy as the CPR and pursue the same overriding objective of enabling the Tribunal to deal with cases justly, 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.

3.2 To achieve this objective in the particular context of the 1998 Act, the Rules are modelled partly on the CPR and partly on the Rules of Procedure of the Court of First Instance of the European Communities (CFI), which deal with appeals in competition cases arising under Articles 81 and 82 of the Treaty. A central feature of both the CPR and the Rules of Procedure of the CFI is case management by the court.

3.3 However, it should be borne in mind that the Tribunal's Rules are different in various respects. Parties should not assume that the CPR or the Rules of Procedure of the CFI apply to a particular procedural issue.

3.4 The five main principles of the Rules are as follows.

(i) 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.

(ii) Active case management

The proceedings will be actively case managed by the Tribunal, the objective being to identify and concentrate on the main issues at as early a stage as possible, to avoid undue prolixity or delay, and to ensure that evidence is presented in an efficient manner.

(iii) Strict timetables

The Tribunal will indicate, as early as possible, a target date for the main hearing. The main stages of the case, and the internal planning of the Tribunal's work, will be geared to meeting this timetable. **In general the Tribunal will aim to complete straightforward cases in within nine months.** This target will continue to be reviewed in the light of experience. In urgent cases, and where appropriate, the Tribunal will pursue an expedited procedure. Where this happens, the Tribunal will give case management directions as appropriate.

(iv) 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 may permit the oral examination of witnesses. As regards expert evidence, the Tribunal will expect the parties to make every effort to narrow the points at issue, and to reach agreement where possible.

(v) Short and structured oral hearings

The structure of the main oral hearings of the Tribunal will be planned in advance, in consultation with the parties, with a view to avoiding lengthy oral argument. Since the written arguments of the parties will have already been fully set out, and since the main issues will have been identified prior to the main oral hearing, this hearing will normally be conducted within short defined time limits, in accordance with established practice in the CFI.

4. GENERAL INFORMATION

How to contact the Tribunal

4.1 The Registry is open from 9.30am to 5.00pm and can be contacted as follows:

4.2 *By post:*

Victoria House
Bloomsbury Place
London
WC1A 2EB

4.3 *In person:*

A map showing the location of the Tribunal's headquarters can be found on the Tribunal's website.

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 hand deliver documents to the Registry you should enter Victoria House by the entrance located on the eastern side of Bloomsbury Square.

There is a short flight of stairs leading from the entrance up to the reception level. There is a lift on the left side of the entrance hall which can also be taken up to the reception level.

At the reception level you will need to obtain a visitor's pass and then take the northern lifts, by the clock, up to the second floor where there will be signs directing you to the appropriate hearing room or the Tribunal's reception point. If you ask the Victoria House reception to telephone the Registry, a member of the Registry staff will usually come down to reception to meet you and guide you up to the Tribunal's own reception area if that is necessary.

Section 15 of this Guide dealing with hearings contains further considerations to bear in mind when coming to Victoria House to attend a hearing.

4.4 *By telephone:*

+44 (0)20 7979 7979

4.5 *By fax:*

+44 (0)20 7979 7978

4.6 *E-mail:*

At the present time the Tribunal does not, as a matter of routine, enter into correspondence by e-mail with parties or members of the public in relation to the conduct of cases.

The reason for this is not a lack or fear of information technology on the part of the Tribunal but because communications via traditional paper based channels can be tracked, collated and recorded properly as part of the case file.

This is particularly appropriate with regard to those documents where the time of receipt by the Tribunal is an important aspect of their validity, such as pleadings and other documents ordered by the Tribunal to be filed by a particular time.

Moreover it is well known that e-mailed correspondence can degenerate into informality. This is inappropriate for communications with the Tribunal which should always take the form of properly drafted correspondence.

Nevertheless it will sometimes be necessary to correspond by e-mail where, for example, time is of the essence or it is necessary to send or receive a particular document as an electronic attachment. In such cases either:

– The Registry will itself initiate contact with the relevant persons by e-mail; or

– The Tribunal will specify in particular circumstances that the parties are to use e-mail in submitting documents to the Registry and will provide them with an electronic address to which the documents should be sent.

Unsolicited e-mail will not be acted upon or included as part of the Tribunal's file.

4.7 *Website:*

Queries of a brief and general nature may also be made via the Tribunal website: www.catribunal.org.uk. If the query relates to a particular case or potential proceedings then it is more appropriate to write to or telephone the Registry.

4.8 *Seeking guidance from the Registry*

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 should be borne in mind that it is ultimately the responsibility of the parties and their representatives to ensure that they have complied with the requirements of the Rules, most importantly, in respect of the time for filing documents in the proceedings.

5. LEGAL REPRESENTATION

5.1 Under Rule 7, 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 his behalf'.

5.2 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.

5.3 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 Code of Conduct of the Bar.

5.4 Rule 7 does not preclude a litigant from acting in person, but a body corporate would require the formal permission of the Tribunal under Rule 7(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.

5.5 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 Bar pro bono schemes. Details of pro bono schemes can be found on the following websites:

www.probonouk.net (general information site), www.probonogroup.org.uk (Solicitors Pro Bono Group) and www.barprobono.org.uk/ (Bar Pro Bono Unit).

5.6 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.

5.7 The Tribunal will consider each case on its merits when deciding whether to exercise its power under Rule 7(b) to admit a person other than a qualified lawyer to represent a party. 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.

5.8 Any change in a party's legal representation should also be notified to the Registry as soon as possible.

6. COMMENCING PROCEEDINGS: FILING AN APPEAL OR APPLICATION FOR REVIEW[4]

A. FILING AN APPEAL UNDER THE 1998 OR 2003 ACTS

6.1 The filing of an appeal under the 1998 Act or the 2003 Act is governed by Rule 8 of the Rules. Under Rule 8(1) an appeal must be filed by sending a **notice of appeal** to the Registrar **so that it is received not later than two months** after the date upon which the appellant was notified of the disputed decision[5]. **Appellants are, however, urged to lodge appeals as early as possible and in any event not to wait until the last possible moment.**

Calculation of time for making the appeal

6.2 The calculation of the time within which a notice of appeal may be filed is determined by the provisions of Rule 63 (documents etc) and Rule 64 (time).

6.3 The combined effect of Rule 64(1) and (2) is that the last day for filing a notice of appeal under the 1998 Act or the 2003 Act is normally the day which falls on the same date in the month which occurs two months after the date on which the appellant was notified of the disputed decision. Thus, if the appellant was notified of the decision on 10 June, the last date for filing an appeal is 10 August. Time is not suspended during legal vacations.

6.4 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 the latter month. Thus for a decision notified on 31 July, the last day for filing the notice of appeal is

[4] The word appeal applies where the jurisdiction of the Tribunal extends to the merits, in which event the party appealing is designated the "appellant". In cases where the jurisdiction of the Tribunal is that of "review" rather than "appeal," e.g. in merger and market investigation cases, the person seeking the review is designated as "the applicant". Where this guide refers to "appeal," the comment made will often apply equally to applications for a review unless the context indicates otherwise..

[5] As to what may constitute notification see *Federation of Wholesale Distributors v OFT* [2004] CAT 11 at [22], although this case concerned notification of a merger decision.

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).

6.5 The effect of Rule 64(3) is that if the last day for filing an appeal is not a 'business day' as defined by Rule 63(7) – ie if the last day falls on a Saturday, Sunday or Bank Holiday – time expires on the next business day. Thus for a decision 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 is Tuesday 31 May, ie the next 'business day' after 28 May.

6.6 In accordance with Rule 63(6), the latest time for physically delivering a notice of appeal to the Registry is 5 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 63(5)(b).

Service of the notice of appeal

6.7 Under Rule 8(2) the notice of appeal which commences the appeal must be served on the Registrar of the Tribunal, and not on the respondent. Pursuant to Rule 63 there are at present two methods of serving the notice of appeal on the Registrar:

- by physically delivering the notice of appeal to the Registry of the Tribunal at the Tribunal address for service which is Victoria House, Bloomsbury Place, London WC1A 2EB (as notified on the Tribunal website); or

- by sending the application by first class post to that address.

6.8 For practical reasons, **service of the notice of appeal by fax or other electronic means has not at present been authorised by the Tribunal** pursuant to Rule 63(1)(d). The service of the appeal through a document exchange is not at present available, but may be introduced if there is sufficient demand.

Personal service

6.9 A document which is physically served on the Registrar at Victoria House may be deposited in the Registry between 9.30 am and 5 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, with a member of the Registry's staff who will take physical delivery of the document (see section 4 of this Guide on how to contact the Tribunal).

6.10 A notice of appeal **must be served by 5 pm** if it is to be treated as served on that day. **Otherwise, it is treated as being served on the next business day (Rule 63(6))[6].**

6.11 Documents delivered after 5 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 5pm.

[6] This applies equally to any document to be filed at the Registry.

Service by post

6.12 A document that is sent to Victoria House by first class post is treated as if it had been received on the **second** day after it was posted: Rule 63(5)(b). Appellants relying on postal service are advised to use recorded delivery or at the least to obtain a certificate of posting.

6.13 The rules as to service of documents follow those of the CPR (see eg CPR, Rule 6.7). Suppose a decision is notified on 10 June, and the last day for filing the appeal is therefore 10 August, a Friday. The effect of the above Rules is illustrated by the following examples:

- the notice of appeal is sent 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 August 11: the appeal is out of time;
- the notice of appeal is delivered to the Registry at 4.30 pm on 10 August: the appeal is in time;
- the notice of appeal is 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 August 13.

Restricted power to extend time for appealing

6.14 Under Rule 8(2), the Tribunal may not extend the two-month time limit for appealing 'unless satisfied that the circumstances are exceptional'. The possibilities of obtaining an extension of the time limit for appealing are thus **extremely limited.** (The comparable rule in the Rules of Procedure of the CFI, which is to be found in Article 42 of the Statute (EC) of the Court of Justice, requires the party concerned to prove the existence of unforeseen circumstances or of force majeure: see *Hasbro v DGFT* [2003] CAT 1).

6.15 **Parties are strongly advised to keep in touch with the Registry while the appeal is in the course of preparation and not to leave filing the appeal to the last minute. The earlier the appeal is filed, the earlier the Tribunal can get down to work.**

The contents of the notice of appeal

6.16 The contents of the notice of appeal, as required by Rule 8, paragraphs (3) to (6), may be divided into the formal requirements and the substantive requirements.

Formal requirements

6.17 Each notice of appeal must indicate under which provision of the Act the appeal is brought (Schedule 8, paragraph 2(2)(a) of the 1998 Act). Under Rule 8 (3), it must be signed and dated by the appellant, or on his behalf by his duly authorised officer or by his legal representative, and must contain:

- the appellant's name and address
- the name and address of his legal representative, if any

- an address for service in the United Kingdom;
- the name and address of the respondent.

6.18 Under Rule 18, the Tribunal may at any time determine whether its proceedings are to be treated, for the purposes of any subsequent appeal from its decision in those proceedings or any other matter connected with those proceedings, as proceedings in England and Wales, in Scotland or in Northern Ireland: see *Aberdeen Journals v DGFT* [2001] CAT 5, *Bettercare v DGFT* [2001] CAT 6; and *Claymore v OFT* [2003] CAT 3, decided under the previous version of this rule. This determination may affect not only certain procedural issues arising in the proceedings before the Tribunal and costs, but also determines, in effect, whether any subsequent appeal from the Tribunal's decision lies, under section 49 of the 1998 Act, to the Court of Appeal, to the Court of Session or to the Court of Appeal in Northern Ireland. How particular proceedings should be treated and where it is desired to pursue an appeal are initially matters for the parties, and the Tribunal is unlikely to intervene unless requested to do so in the event of a dispute. It should be noted that the question of which jurisdiction the appeal comes under does not necessarily determine where the Tribunal will physically sit for the purpose of case conferences, pre-hearing reviews, or hearings.

Substantive requirements

6.19 In accordance with Rule 8(4), the notice of appeal should contain not only the grounds relied on for the appeal, but a succinct presentation of each of the arguments supporting those grounds. The document initiating the appeal to the Tribunal should already 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 the appeal.

6.20 In this respect, the role of the notice of appeal is essentially the same as the role of the application in appeals to the CFI from decisions of the EC Commission under Articles 81 and 82 of the EC Treaty. The two-month period allowed under the 1998 Act for appealing to the Tribunal is significantly more generous than the period allowed for appeals to some other appellate tribunals or to the Court of Appeal, precisely so as to give the appellant sufficient time to prepare a detailed written argument, and to assemble any evidence not already presented during the procedure before the OFT.

6.21 Two important consequences flow from this approach. The first is that appellants are expected to develop all the grounds of appeal relied on, together with any supporting documents, in the initial notice, and not to add wholly new grounds of appeal in the course of the proceedings. Rule 11(3) provides that the Tribunal may not give permission to amend the notice of appeal to add a new ground of appeal unless (i) the new ground is based on matters of law or fact which have come to light since the appeal was made; (ii) it was not practicable to include the new ground in the original notice of appeal; or (iii) the circumstances are exceptional. (See paragraph 11.11 below) and see *Floe Telecom v OFCOM* [2004] CAT 7.

6.22 The second consequence of this approach is that 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. (See paragraph 15.30 below.)

The structure of the notice of appeal

6.23 There is no set format for the presentation of the notice of appeal. Rule 8(4) requires the notice of appeal to contain: a concise statement of the facts; under which statutory provision the appeal is brought; each of the main grounds for contesting the decision; a succinct presentation of the arguments supporting each ground; the relief sought; and a schedule listing the documents annexed. The notice should contain a table of contents and a short summary, at the beginning, of the grounds of appeal (see paragraph 10.1 below). Each paragraph should be numbered.

The facts

6.24 It will normally be appropriate first to set out the factual context in which the appeal arises, with a brief mention of the course of events leading to the decision. 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 OFT are contested by the appellant, and upon what grounds.** Similarly any new evidence relied on should be clearly identified. It will normally be useful to include a chronology and a list of the persons involved.

The principal grounds

6.25 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 wrongly identified the relevant market; that the decision is insufficiently reasoned; that the penalty 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 his discretion, should be specifically stated (Schedule 8, paragraph 2(2)(b) and (c), of the 1998 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 various grounds overlap, it is sufficient to refer back to the arguments already developed.

6.26 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.

6.27 In *Floe Telecom v OFCOM* [2004] CAT 7 at [34] to [43] the Tribunal indicated that in appeals against infringement decisions an appellant is not limited to points that have been raised in the administrative procedure: see also *Napp v DGFT (preliminary issue)* [2001] CAT at [76]. However, as to the position in relation to appeals to the Tribunal by complainants concerning rejections of their complaints see: *Freeserve v DGT* [2003] CAT 5 at [116]; and *Albion Water v DGWS* [2003] CAT 23.

Citation of authorities

6.28 Regard should be had to the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001. The obligation on practitioners to comply with the Practice Direction was stressed by the Court of Appeal in *Napp v DGFT* [2002] UKCLR 726.

6.29 The Tribunal has adopted the procedure followed by the High Court and Court of Appeal of reporting all cases by reference to a neutral citation (see *Practice Direction Court of Appeal (Civil Division) – Judgments: Form and Citation* [2001] 1 WLR 194 and *Practice Direction (Judgments: Neutral Citations* [2002] 1 WLR 346).

6.30 A unique number is given to each approved judgment or ruling issued by the Tribunal. The reason for adopting this procedure is to facilitate searching for judgments on the internet, in particular on the Tribunal website, in recognition of the fact that searching for cases electronically is now an established practice used by most parties which come before the Tribunal and other interested persons, both nationally and internationally.

6.31 The unique form of numbering, described below, will correspond to each individual judgment, regardless of where it is otherwise officially published, and will be recognised universally.

6.32 Judgments are numbered in the following way:

[2005] CAT 1, 2, 3 etc.
[2006] CAT 1, 2, 3 etc.

For example, under this scheme, paragraph 49 in Case 1005/1/1/01 *Aberdeen Journals v DGFT*, the fourth numbered judgment issued by the Tribunal in 2002, should be cited as follows: [2002] CAT 4 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 judgment.

6.33 Once the judgment is reported, the neutral citation will appear in front of the familiar citation from the United Kingdom Competition Law Reports series. Thus, for example, *Napp v DGFT* [2001] CAT 1 at [10], [2001] CompAR 1.

6.34 In all future versions of the judgment the paragraph numbering must follow the paragraph numbering of the original approved judgment.

6.35 If it is desired to cite more than one paragraph of a judgment each numbered paragraph should be enclosed with a square bracket. Thus *Napp v DGFT* [2001] CAT 1 at [10]- [11].

6.36 The neutral citation for each of the judgments issued by the Tribunal can be found in the judgments section of the Tribunal website.

The documents to be annexed

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

6.38 It is essential that every notice of appeal includes a schedule listing the documents annexed in a numbered sequence (see Rule 8(4)(e)). Under Rule 8(6) the documents

to be annexed to the appeal include the contested decision (which should normally be at annex I to the notice of appeal), and 'so far as practicable, a copy of every document on which the appellant relies, including the written statements of all witnesses of fact, or expert witnesses, if any'.

6.39 The documents to be considered include: (i) 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 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.** Extracts from voluminous documents are acceptable provided that the extract is not taken out of context. Files of documents should be presented in a user-friendly way, if necessary after prior consultation with the Registry.

6.40 It will normally be necessary to annex all documents pertaining to the establishment or evaluation of primary facts, for example, copies of the agreement(s) in issue, and all documents identified in the contested decision as evidence of the facts relied on by the OFT. It will generally be convenient to provide a self-contained numbered bundle containing the documents of this kind relied on in the decision, and any exculpatory documents relied on by the appellant, arranged **in chronological order with the oldest document on top of the first bundle**. In some cases, such bundles will already have been prepared for the purposes of the procedure before the OFT. The formal documents relating to the procedure before the relevant regulator (for example, the OFT's statement of objections and the appellant's response to that notice) should also be annexed to the notice of appeal if they are relevant to an issue that arises on the appeal.

6.41 As regards witness statements on issues of primary fact (eg as to whether a particular agreement or conduct took place or not) statements by witnesses on whose evidence the appellant will rely should be furnished, wherever possible, with the notice of appeal. The Tribunal will require an explanation if this is not done, particularly if the factual issues in question have already been raised in the procedure before the OFT.

6.42 Similarly, any experts' reports or other documents relied on relating to market and similar issues (eg market surveys, consumer research, trade statistics, price studies etc) or to technical questions, should also be annexed to the application. The Tribunal may request certain documents and any underlying calculations (eg spreadsheets) to be supplied on disk.

6.43 All relevant annexes should be filed with the notice of appeal.

6.44 **Having regard to the timetable for the determination of the appeal, and the very limited possibilities of introducing new issues, the Tribunal may be obliged to exclude from consideration material which could reasonably have been included with the notice of appeal, but which was not.**

Confidential treatment

6.45 The notice of appeal may be accompanied by a request for the confidential treatment of any document or part of a document: **see Rule 53 and section 13 of this guide which deals with the procedure to be followed with regard to such a request.**

The relief sought

6.46 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 – should 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 OFT could itself have given or taken' or 'to make any other decision which the OFT could itself have made' (see Schedule 8, paragraphs 3(2)(d) and (e) of the 1998 Act), this should normally be made clear in the body of the application and an appropriate claim included under the relief sought.

6.47 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, these should be requested in the notice of appeal (see Rule 8(4)(d)). **The early identification of case management issues will facilitate the first case conference which will normally be held not later than four weeks after the appeal has been filed** (see section 8 of this guide).

The length and format of the notice of appeal

6.48 The facilities of modern technology and the understandable desire of parties' representatives to leave no stone unturned may lead to pleadings being longer than is necessary or useful. In general, a notice of appeal which is too long or badly organised is likely to be counterproductive, especially if it contains repetition, irrelevance or padding. From the appellant's point of view, a closely-argued document of (say) 20 pages is more likely to be persuasive than a rambling document of 150 pages saying much the same thing.

6.49 While parties are entitled to express themselves as they wish, appellants and their legal representatives are requested to make a conscious effort to express themselves concisely and to reduce the length of pleadings whenever possible. In general, in a case of no particular difficulty or complexity a short notice of appeal will suffice and a maximum of 20 to 30 pages should not normally be exceeded. Even in complex and difficult cases, a notice of appeal above the range of 50 to 75 pages should be regarded as exceptional.

6.50 Under Rule 9 the Tribunal has power to give directions for putting a notice of appeal in order if it considers that the application 'is unduly prolix or lacking in clarity', and to defer service of the notice of appeal on the respondent until this has been done. The exercise of this power may be appropriate in cases where the notice of appeal is excessively long or confused.

6.51 The notice of appeal should be typed or printed on both sides of A4 paper, and also be capable of being supplied on disk or as an email attachment (subject to considerations of confidentiality) if the Registrar so requests. The notice of appeal[7] and any annexed documents should be placed in simple two-hole ring binders that are clearly labelled on the spine. Other forms of binder, for example four-hole ring binders or flexi binders, should not be used.

[7] The notice of appeal should not be sent as a loose document with the files but should be put inside a file – either of its own or in a file with some or all of the annexes.

Copies

6.52 Rule 8(7) requires the appellant to furnish the Tribunal with the signed original and ten certified copies of the notice of appeal and its annexes. Copies should be double-sided.

B. APPLYING FOR A REVIEW AND OTHER PROCEEDINGS PURSUANT TO THE 2002 ACT

Applications for review: content of applications

6.53 Rules 25 and 28(1) indicate that Rule 8 is to apply to applications for review save as otherwise provided in Part III of the Rules and subject to any necessary alteration of terminology to transpose requirements relating to appeals to requirements relating to applications.

6.54 This means that the requirements mentioned in sub-paragraphs (3), (4), (5), (6) and (7) of Rule 8 (and dealt with above) with regard to the form and content of a notice of appeal apply equally to applications for review. Applications for review should follow a similar form, as regards both structure and documents to be annexed, bearing in mind, however that these are review rather than appeal proceedings.

Time for filing an application for a review under section 120 (mergers)

6.55 There is an important difference between appeals under the 1998 or 2003 Acts and applications for review under section 120 of the 2002 Act of a merger decision under Part 3 – Mergers. That difference concerns the time for filing the application.

6.56 An application for a review under section 120 of the 2002 Act must be made by sending a notice of application to the Registrar **so that it is received not later than four weeks** after the date upon which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier (rule 26). See *Federation of Wholesale Distributors v OFT* [2004] CAT 11 where the Tribunal indicated that for the purposes of Rule 26 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).

6.57 The Tribunal will normally regard applications for reviews of decisions relating to mergers as meriting a high degree of urgency. As a result it is quite likely that the parties will be expected to assemble and present their respective cases within demanding timescales. 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 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 furnish their contact details to the Registry. Where possible, the applicant should serve the application upon the respondent authority and the interested parties at the same time as filing the application with the Registry. Paragraphs 7.8 to 7.12 below deal in more detail with how the Tribunal and the Registry will handle this type of application and how the procedure may be abridged in order to ensure the application is considered on an expedited basis.

Time for filing an application for a review under section 179 (market investigations)

6.58 In contrast to applications for review pursuant to section 120, applications for a review pursuant to section 179 of the 2002 Act of a market investigation decision under Part 4 must be filed within the same timescale as that applicable to appeals under the 1998 and 2003 Acts.

6.59 An application for review under section 179 must therefore be made by sending a notice of application to the Registrar **so that it is received not later than two months** after the date upon which the applicant was notified of the disputed decision, or the date of publication of the decision, whichever is the earlier (Rule 27).

Supplementary provisions concerning reviews

6.60 The Tribunal's power to reject an appeal under Rule 10 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 28(4).

Appeals under sections 114 or 176(1)(f) of the 2002 Act against a penalty imposed for failure to comply with a notice issued by the Competition Commission in relation to the production of documents and information or the attendance of witnesses

6.61 The effect of Rule 25 is to ensure that the requirements mentioned in sub-paragraphs (3), (4), (5), (6) and (7) of Rule 8 (and dealt with above) with regard to the form and content of the notice of appeal will apply to appeals against a penalty made under sections 114 or 176(1)(f) of the 2002 Act.

Time for filing an appeal against a penalty

6.62 The time for filing an appeal under sections 114 or 176(1)(f) of the 2002 Act is governed by rule 29.

6.63 An appeal against a penalty under sections 114 or 176(1)(f) 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 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 appeal against a decision on an application under section 112(3), the day on which the person concerned was notified of the decision.

C. CLAIMS FOR DAMAGES UNDER SECTION 47A AND SECTION 47B OF THE 1998 ACT

General points

6.64 Section 47A of the 1998 Act provides for the possibility of claims for damages or other sum of money to be made in the Tribunal by persons who have suffered loss or damage as a result of the infringement of the Chapter I or II prohibitions or of Articles 81 or 82 of the Treaty.

6.65 Section 47B of the Act also provides for a claim under Section 47A to be begun or continued by a specified body on behalf of a group of individually named consumers.

6.66 To be able to bring a claim in the Tribunal for such loss or damage, the infringement must already have been established by decision of the OFT, European Commission or Tribunal, as the case may be: see s 47A(5)(a).

6.67 The rules applicable to claims for damages under sections 47A and 47B of the 1998 Act are principally those set out in Part IV of the Rules. However Parts I and V of the Rules also apply to claims for damages. Under Part II of the Rules the Tribunal's case management powers in Rules 17 to 24 are applicable to claims for damages: see Rule 30.

Time for filing a claim for damages

6.68 A claim for damages or other monetary claim may be made within a period of two years beginning with the "relevant date". Under Rule 31(2) the "relevant date" is the later of either:

(a) the end of the period specified in section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made; or

(b) the date on which the cause of action accrued.

6.69 The period in (a) is the date on which an infringement has been established by decision of the OFT or EC Commission. However the period is extended if the decision may still be the subject of an appeal (for instance an appeal to the Tribunal in the case of decisions of the OFT, to the Court of Appeal or the Court of Session in the case of Tribunal decisions, or an application to the CFI or ECJ in the case of decisions of the EC Commission).

6.70 Only once any appeal process is at an end, including the expiry of the time for seeking permission to appeal further, does the time period for making a claim commence.

6.71 As an illustration, suppose that the OFT issues a decision finding an infringement of Article 81 of the Treaty and of the Chapter I prohibition on 1 January 2006. If there is no appeal against that decision, time commences on the date of expiry of the time for appealing (1 March 2006, assuming it is a business day). Suppose, however, that an appeal is made to the Tribunal from the OFT's decision, and that the Tribunal dismisses the appeal on 1 January 2007. The appellant does not seek permission to appeal further. In those circumstances, the two-year period commences on the date of expiry of the time period for seeking permission to appeal to the Court of Appeal,

namely 1 February 2007, which is one month from notification of the Tribunal's decision (see Rule 58(1)(b)).

6.72 The period in Rule 31(2)(a) is likely to cover the majority of cases. The period in Rule 31(2)(b) takes into account that in some cases there may be some delay between the relevant decision establishing an infringement and the occurrence of the damage, in which case time only starts to run from the date on which the loss occurred.

6.73 Section 47A(5)(b) of the 1998 Act and Rule 31(3) permit the Tribunal to grant permission for a claim for damages to be initiated before the relevant period for an appeal against the decision has expired. It may be appropriate in some cases to permit the claim to be commenced in order that preliminary matters can be dealt with. Permission in such cases can only be granted once any proposed defendant has been given the opportunity to submit observations on the request for permission: Rule 31(3).

Commencing a claim for damages under section 47A or 47B of the 1998 Act

6.74 A claim for damages under section 47A or 47B of the 1998 Act should be made by way of a claim form (Rule 32). The contents of the claim form are set out in Rule 32 (in relation to claims brought by individual persons). Rule 33 sets out further requirements in relation to claims brought by a specified body on behalf of consumers. The requirements may be divided into formal requirements and substantive requirements.

6.75 The provisions of this Guide dealing with the presentation of an appeal under the 1998 Act apply to claims for damages unless the context requires otherwise (see paragraph 6.23 above). For service of the claim form see paragraph 7.16 below.

Formal requirements of the claim form

6.76 A claim form must be verified by a statement of truth and signed and dated by the claimant[8], or, on his behalf, by his duly authorised officer or by his legal representative and must contain:

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

6.77 In addition a claim form in proceedings brought under Section 47B should:

- contain the name and address of the specified body;
- contain a concise statement of the object or activities of that body;
- contain the names and addresses of the persons that the body seeks to represent;

[8] Pursuant to rule 30 in respect of proceedings before the Tribunal in Scotland references to 'claimant' and 'defendant' shall be read respectively as 'pursuer' and 'defender.'

- be accompanied by a document or documents, giving consent to the specified body by each of the individuals listed in the claim form to act on his behalf; and

- contain an indication of whether each individual listed in connection with the claim is a "consumer" for the purposes of Section 47B of the 1998 Act.

Substantive requirements of the claim form

6.78 The claim form should contain a concise statement of the relevant facts, identifying any relevant findings in the decision on the basis of which the claim for damages is being made; a concise statement of any contentions of law which are relied on; a statement of the amount claimed in damages, supported with evidence of losses incurred and of any calculations which have been undertaken to arrive at the claimed amount; and any matters that may from time to time be specified by practice direction (Rule 32(3)).

6.79 Annexed to the claim form should be a copy of the decision on the basis of which the claim for damages is being made and, as far as practicable, a copy of all essential documents on which the claimant relies (Rule 32(4)).

6.80 Unless the Tribunal otherwise directs, the signed original of the claim form should be accompanied by ten copies certified by the claimant or his legal representative as conforming to the original (Rule 32(5)).

The structure of the claim form

6.81 Whilst there is no set structure for the presentation of the claim form, it is vital that the Tribunal is able fully to understand the claim from the moment of its receipt.

6.82 It will normally be appropriate first to set out the background to the decision on which the claim is based. Parties should be careful to identify concisely the facts **found in the decision** that are alleged have caused loss to the claimant.

6.83 Having identified the facts on which the claim is based the claim form should identify in a concise manner 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 various 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, contained in a document annexed to the claim form.

6.84 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

6.85 The claimant is required to annex to the claim form a copy of the decision on the basis of which the claim for damages is being made and all essential documents that he relies on (see Rule 32(4)). **Documents of only a peripheral nature should not be annexed**.

6.86 The claimant is not required to annex the statements of any witnesses he proposes to rely on. However, the claimant should in the claim form identify the nature of the

evidence that he proposes to adduce and, where possible, should include at the least the identity of the witness, or witnesses, concerned.

7. THE INITIAL PROCEDURE AFTER THE PROCEEDINGS ARE FILED

Checking the appeal or application

7.1 Once the appeal (or application) has been filed, it will be checked in the Registry to ensure that the various formal requirements of the Rules have been complied with. Documents that do not constitute appeals or applications, or which are out of time, will not be registered.

7.2 Where a notice of appeal or application does not comply with one of the formal requirements of Rule 8, or is materially incomplete, or is unduly prolix or lacking in clarity, the Tribunal may give directions for putting the document in order (Rule 9(1)) and may defer service on the respondent until this has been done (Rule 9(2)). Failure to comply with such a direction may lead to the appeal or application being rejected under Rule 10(1) (d).

Acknowledgement and notification

7.3 Assuming the notice of appeal or application to be in order, the Registrar will, as soon as possible: (i) send an acknowledgement of receipt to the appellant; and (ii) send the notice of appeal or application to the respondent.

Getting the case underway: constitution of the Tribunal and other matters

7.4 At the same time, the President will constitute the Tribunal to hear the matter and the Registrar will write to the parties informing them of which Tribunal members will hear the case.

Setting the date of the first case management conference

7.5 The Registrar's letter indicating the constitution of the Tribunal will usually indicate the date of the first CMC. In the case of appeals under the 1998 and 2003 Acts, 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. It should be noted that once set, the date of the first CMC will seldom be changed. For further information with regard to the first CMC see section 8 of this guide.

Correspondence on the case

7.6 The Registrar's letter will also set out the usual principle on which correspondence in respect of the proceedings will be conducted, namely that all correspondence to or from the Tribunal will 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.

Summary of proceedings

7.7 A summary of the proceedings will be published on the Tribunal website in accordance with Rule 15 to publicise the fact that an appeal or application has been received and to invite those who consider that they have a sufficient interest in the proceedings to seek permission to intervene (see paragraph 10.1 below).

Special points regarding applications for review under s 120 of the 2002 Act (mergers)

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

7.9 The first CMC in an application for review of decisions pursuant to section 120 of the 2002 Act is likely to take place well within the first four weeks after the application is lodged. The precise timing of that conference will be dependent on the urgency of the application[9] but it is not inconceivable that it could be held within a few days of the application being filed. The Tribunal Registry will liaise closely with the parties on such matters. If the urgency so requires, the Tribunal may dispense with the CMC altogether and proceed directly to a substantive hearing (subject to directions contained in the President's order – see below).

7.10 It has become the practice for the President, in urgent cases, to make an order as soon as the application is filed setting out whatever abridgment of the timetable is deemed necessary in the circumstances.

7.11 It is likely that the President's order will abridge the time for submitting a request for permission to intervene. As an illustration, in the case of *Unichem v OFT* [2005] CAT 8 the normal period of three weeks was abridged to one week. In cases where interested parties have already become known to the Tribunal, and it is appropriate to do so, the President's order may grant permission to intervene.

7.12 In appropriate cases the President's order may also set a timetable for the preparatory steps leading up to the hearing – including the lodging of skeleton arguments to stand as pleadings in the matter.

Review under s 179 of the 2003 Act (market investigations)

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

Special points regarding appeals under s 114 and 176(1)(f) of the 2002 Act

7.14 In the case of appeals pursuant to ss 114 and 176(1)(f) of the 2002 Act, the Registrar will not publish a summary of the appeal. Interventions are not permitted (Rule 29(3)).

[9] The notice of application should explain whether, and why, the matter is urgent.

Claims for damages under the 1998 Act: initial procedure after the claim form is filed

7.15 Once the claim form has been filed a similar process to that followed by the Tribunal in the case of appeals under the 1998 Act will be followed with regard to checking the claim form, sending acknowledgment of its receipt to the claimant and writing to notify the constitution of the Tribunal.

Service of the claim form

7.16 The Registrar will effect service on the defendant, if domiciled in the Tribunal's jurisdiction, by sending to the defendant a copy of the claim form together with a form of acknowledgement of service (see Rule 36(1)). Pursuant to Rule 36(2), within 7 days of receipt of the claim form the defendant must return the acknowledgement of service form to the Registrar duly completed.

7.17 If one or more defendants are domiciled outside the Tribunal's jurisdiction this may mean that the permission of the Tribunal may need to be sought for service. Such permission is not however necessary in relation to defendants domiciled in areas covered by a requirement of European Community law or a European Convention on jurisdiction.

Service of the claim form outside the jurisdiction

7.18 Where the Tribunal has reason to believe that one or more defendants are domiciled outside the Tribunal's jurisdiction it will issue directions to the claimant under Rule 63(3) with regard to service. In general those directions will follow the methodology of the CPR regarding service outside the jurisdiction. Usually the claimant will be directed to:

- Serve the claim form on the defendant by any method permissible by Part 6 of the CPR

- At the same time serve the defendant with:

  - the Tribunal's form of acknowledgement of service (this form, bearing the Tribunal's stamp, will be provided to the claimant for this purpose – usually at the time the Registrar writes to notify the claimant of the constitution of the Tribunal); and

  - a copy of the Tribunal's order embodying the directions to the claimant for service.

7.19 The directions to the claimant will also indicate that the periods for acknowledging service and filing a defence which are set out in Rule 36 shall be varied so as to accord with the periods applicable under the provisions of Part 6 of the CPR, and that the claimant must draw the attention of the defendant to that fact.

7.20 The Tribunal will also direct the claimant to notify the Tribunal of:

- the method by which service has been effected on the defendant outside the jurisdiction;

- the date of deemed service; and

- the dates for acknowledging service and filing the defence.

7.21 Finally where service out of the jurisdiction takes place pursuant to a European Community law requirement or European Convention on jurisdiction (and therefore does not require the permission of the Tribunal), the Tribunal deems it good practice for claimants to follow Rule 6.19(3) of the CPR and state (either in the claim form or in an accompanying letter) the grounds on which the claimant is entitled to serve the claim form out of the Tribunal's jurisdiction. See paragraph 6B PD.2 of Practice Direction B to Part 6 of the CPR for a form of words which can be adapted for such a statement.

The first case management conference in claims for damages

7.22 In the case of a claim for damages the first CMC will, unlike the position in relation to appeals under the 1998 Act, not generally take place until after the receipt of the defence.

8. THE FIRST CASE MANAGEMENT CONFERENCE: PLANNING THE CASE

Part of a process of active case management

8.1 Proceedings before the Tribunal are characterised by active case management under Rules 19 to 24 with a view to ensuring the just, expeditious and economical conduct of proceedings. The first CMC is viewed by the Tribunal as a particularly important part of this approach.

Purpose

8.2 At the first CMC the Tribunal will generally be concerned:

- to establish what are the relevant procedural and substantive issues arising in the case based upon:
  - The Tribunal's pre-reading of the notice of appeal or application for review;
  - The defendant foreshadowing (either in written or oral submissions prepared for or made at the first CMC) issues that are likely to arise in the defence; and
  - Any submissions made by the parties prior to or at the first CMC;
- to lay down a timetable for the proceedings down to the main oral hearing wherever possible.

Timing

8.3 The Tribunal will generally aim to summon the parties or their representatives to the first CMC **approximately four weeks after the appeal has been lodged**. Bearing in mind that the parties' respective positions will be generally apparent from the notice of appeal and the contested decision, such a meeting is likely to be appropriate whether or not the defence has been served by that date.

8.4 Note though that in claims for damages under the 1998 Act, the first CMC will normally be scheduled to take place **after** the defence has been filed.

The agenda

8.5 About 7 to 10 days before the date fixed for the first CMC, the Tribunal will normally send the parties an agenda setting out the principal issues which it wishes to canvass at the first CMC. Matters that routinely feature in the agenda include:

- whether there are, or are likely to be, any applications for permission to intervene – see section 10 of this Guide for further detail with regard to the intervention procedure;
- Whether any preliminary issues arise, for example, in respect of jurisdiction or the admissibility of the proceedings, for example, see *Bettercare v DGFT* [2001] CAT 6;
- whether disclosure of documents will be necessary;
- whether the appeal should be consolidated or heard together with other appeals (Rule 17);
- any issues regarding the confidential treatment of any part of the notice of appeal (see section 13 of this Guide);
- a 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);
- the timetable for the case, including the date for service of the defence (if not already served) and (if applicable) the statement of intervention, 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;
- if necessary to determine the issue, the question of forum – both in respect of: the jurisdictional issue (whether the proceedings are to be treated as proceedings in England and Wales, Scotland or in Northern Ireland); and the physical location of the proceedings or any part of them. See Rule 18 and *Aberdeen Journals v DGFT* [2001] CAT 5*; BetterCare v DGFT* [2001] CAT 6 and *Claymore v DGFT* [2003] CAT 3 (decided under the previous version of this rule). With regard to the physical location of the proceedings see section 15 of this Guide; and
- any further issues raised or directions sought by the parties.

8.6 The last point mentioned above is an opportunity for the parties to make any request to the Tribunal in respect of a matter that has not already been mentioned by or with the Tribunal in the CMC agenda or in previous correspondence.

8.7 The agenda will normally state a time by which any written submissions the parties may wish to make in advance of the first CMC should be submitted to the Tribunal. Provided they are brief, the Tribunal has found that such written submissions are

useful in sketching out the positions of the parties on matters mentioned in the agenda in advance of the CMC. Furthermore the written submissions form useful speaking notes for the parties or their representatives at the CMC.

8.8 If a party does wish to put in written submissions they should at the same time be copied to the other parties.

8.9 The subject of case management and what it entails both in relation to the first CMC and all other CMCs is dealt with in further detail at section 11 of this Guide.

Procedure at and following the CMC

8.10 The etiquette at the first CMC and at all other CMCs is similar to that at the hearing: see paragraphs 15.27 and 15.28 below. Advocates are requested to stand when addressing the Tribunal at a CMC.

8.11 The first CMC and all following CMCs will be held in public except where confidential matters are considered.[10] A transcript of the CMC will be made by the Tribunal's shorthand writer and copies sent to the parties after the CMC. Shortly thereafter the transcript will be placed on the Tribunal's website. It should be noted that 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. The transcript is placed on the website so that readers may see how matters were conducted.

8.12 Any directions made by the Tribunal will be embodied in an order drawn up by the Registrar. If the directions are relatively straightforward the order will be signed by the President, Tribunal Chairman, or Registrar and stamped by the Registry before being sent to the parties.

8.13 In cases involving more complex directions a draft may be sent to the parties for their comments on the form (but not the substance) of the order.

8.14 Once finalised a copy of the order will be placed on the Tribunal website.

8.15 Sometimes the Tribunal will wish to make a ruling or short judgment on some aspect of the proceedings and that too will be placed on the Tribunal website.

9. THE DEFENCE

Impact of the first CMC

9.1 It should be noted that 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 that CMC the Tribunal may have taken the opportunity to

[10] It should be noted that although Rule 20(3) states that a CMC shall be held in private unless the Tribunal otherwise directs, the President in *Umbro v OFT* [2003] CAT 30 stated that the transcript of the CMC will be placed on the Tribunal's website. Since that statement the practice of the Tribunal has been to hold all CMCs in public unless confidential information has to be considered.

establish in rough terms what will be the areas covered by the defence and other questions concerning the defence which are touched on below.

Form of the defence

9.2 The form of the defence will vary with the nature of the case. In general, the respondent's position in fact and law will have already been set out in the decision and the documents referred to therein, and there may be little need to elaborate on that position in the defence. If, for example, the notice of appeal consists largely of arguments already dealt with in the decision, it is sufficient to make brief references to the passages in the decision which deal with the arguments advanced rather than rehearsing the contents of the decision all over again.

9.3 For examples of circumstances in which the Tribunal allowed or did not allow the introduction of new material (not previously dealt with in the decision) by the respondent see *Napp v DGFT* [2001] CAT 3 ; *Aberdeen Journals v DGFT* [2002] CAT 4; and *Argos and Littlewoods v OFT* [2003] CAT 10 and [2003] CAT 16.

9.4 The formal requirements applicable to the defence (see rule 14(2)) are broadly similar to those applicable to the notice of appeal. The requirements with regard to citation of authorities, mentioned at paragraphs 6.28 to 6.36 above, apply equally to the defence.

9.5 Rule 14(5) requires the respondent to annex to the defence a copy of every document upon which the respondent relies. However, where a large number of documents have already been annexed to the notice of appeal, it may well be more convenient for common working bundles to be prepared and agreed between the parties rather than duplicating documents that are already in the Tribunal's file. The practical application of rule 14(5) as regards documents may be one of the matters to be discussed at the first case management conference, before the defence is served.

9.6 Rule 14(5) further requires the respondent to annex to the defence 'the written statements of all witnesses of fact, and where practicable expert witnesses, if any'. In so far as the respondent's case depends on findings of primary fact – eg 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 determination of the appeal, that such evidence is annexed to the defence.

9.7 Both the question of witness statements and the question of expert evidence may have also been discussed at the first CMC before service of the defence, in order to determine how best to proceed.

Filing and serving the defence in appeals under the 1998 and 2003 Acts

9.8 Under Rule 14, the respondent must send the defence, together with ten copies certified as conforming to the original, to the Registrar so that it is received 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.

9.9 In principle the Tribunal will treat requests for further time in which 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; and *Freeserve v DGT* [2002] CAT 9.

9.10 The defence, when received at the Registry, is served on the appellant by the Registrar unless the Tribunal otherwise directs. It is often the case that the Tribunal does so direct in the order made at the first CMC. The rubric that is used in the order is that the defendant should "file and serve" the defence. This is a shorthand way of stipulating that the defendant is responsible for both filing the defence with the Registrar and simultaneously serving copies on the other parties.

9.11 The "file and serve" formula is used not only in relation to service of the defence but also service of any other type of document during the proceedings, for example other pleadings or skeleton arguments.

9.12 It should be noted that it is not inconceivable in certain cases for the Tribunal to enquire at the first CMC whether it is possible for the defence to be served **before** the time calculated in accordance with Rule 14.

Time for filing a defence to an application for a review under section 120 (mergers)

9.13 The respondent to an application for a review under section 120 must send its defence to the Registrar so that it is received within four weeks of the date on which the respondent received a copy of the notice of application (rule 28(3) read with rule 14(1)), unless the Tribunal directs otherwise.

9.14 In practice, the Tribunal will contact the parties with a view to ascertaining the urgency of the proceedings. In particularly urgent cases, the Tribunal will be prepared to abridge the time limit for filing the defence, or indeed order that any respondent's skeleton argument stand as the defence (see Order of the President of 24 November 2003 in *IBA Health v OFT* and the Order of the Tribunal of 31 January 2005 in *Unichem v OFT*.

Time for filing a defence to an application for a review under section 179 (market investigations)

9.15 The respondent to an application for a review under section 179 must send its defence to the Registrar so that it is received within 6 weeks of the date upon which the respondent received a copy of the notice of application (Rule 25, read with Rule 14(1)).

Defence against an appeal against a penalty imposed under sections 114 or 176(1)(f)

9.16 The respondent shall send to the Registrar a defence so that it is received within 3 weeks of the date on which it received a copy of the notice of appeal (rule 28(2), read with rule 14(1)). The reason for this shorter period is that in most cases the CC 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.

Claims for damages: the defence

9.17 Under Rule 36(2) the defendant must send to the Registrar an acknowledgment of service of the claim form within 7 days. Under Rule 37, within 28 days of receipt of the copy of the claim form from the Registrar, the defendant shall send to the Registrar 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. The defence should contain the same level of detail required in respect of the claim form and annex essential documents relied on. Unless the context requires otherwise the guidance given above applies equally to the preparation and presentation of the defence.

9.18 The contents of the defence must be verified by a statement of truth.

9.19 Note that where the defendant is domiciled outside the jurisdiction the Tribunal will, as set out above, vary the time limit for acknowledging service and filing a defence. See paragraph 7.19 above for further guidance.

Additional claims

9.20 A defendant may make a counterclaim against a claimant or a claim against any other person without the Tribunal's permission if he includes it with his defence, or, with the Tribunal's permission, at any other time (Rule 38).

10. THE INTERVENTION PROCEDURE

Publication of a summary of the proceedings

10.1 Pursuant to Rule 15, 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 giving the information referred to in Rule 15 (2) ('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 (see paragraph 6.23 above). The appellant should therefore avoid including confidential information in that summary of grounds.

Requesting permission to intervene

10.2 Persons wishing to intervene in the proceedings and who have 'sufficient interest in the outcome' have 3 weeks from the date of publication of the notice or such other period as directed by the President in which to make a request to the Tribunal for permission to intervene: rule 15(2)(f). The period within which such a request must be made will also be set out in the summary published pursuant to rule 15.

10.3 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 the Order of the President of 20 January 2005 in *Unichem v OFT*.

10.4 Parties who wish to intervene should do so at the earliest moment **without waiting until the end of the period allowed.** The earlier an intervention is made, the more possibility the intervener will have of participating in the development of the case (particularly the first CMC which is the key planning stage in the Tribunal's procedure and generally takes place around four weeks after the notice of appeal is lodged) and the more efficiently the Tribunal will be able to carry out its case management functions.

10.5 On the other hand, persons should not apply to intervene unless they have a sufficient interest in the outcome of the particular case before the Tribunal. Similarly 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.

10.6 The request for permission to intervene must contain the formal information set out in Rule 16(4) but otherwise need be in no set form. A letter to the Registrar will suffice. The request to intervene must however show a 'sufficient interest' by means of '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 whether the intervention is made in support of any other party, and should include the reasons for making the request (Rule 16(5)(b) and (c)). The request to intervene should be as concise as possible.

10.7 The request to intervene will be served on the other parties by the Registrar and their observations invited within a fairly short time limit (Rule 16(3)) – usually a day or two. At this stage the main issue is whether the potential intervener has 'a sufficient interest' and whether there are any problems as regards confidentiality.

Allowing the intervention

10.8 With regard to the criterion of sufficient interest see: *BT v DGT (O_2's intervention)* [2003] CAT 20*; Umbro and others v OFT (Sportsworld's intervention)* [2003] CAT 25*; Floe Telecom v OFCOM (Intervention)* [2004] CAT 2*; Albion Water v DGWS* [2004] CAT 19*;* and *Umbro and others v OFT (Sportsworlds' intervention on costs)* [2005] CAT 26. 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.

10.9 If the Tribunal grants the application to intervene (Rule 16(6)), the Registrar will serve (the non-confidential versions of) the notice of appeal and the defence on the intervener, and the Tribunal will give consequential directions with regard to the further conduct of the intervention (Rule 16(7)).

10.10 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. In particular, the procedure as regards the interveners will need to be co-ordinated with the procedure to which the principal parties are subject.

10.11 Since the proceedings are primarily between the appellant and the respondent against whose decision the appeal is filed, the role of the intervener is by its nature an ancillary one[11]. Moreover, there is the possibility that the arguments put forward by the intervener will, in practice, largely duplicate the arguments already advanced by the principal parties. Since a full exchange of further pleadings between the

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

intervener(s) and the principal parties will inevitably delay the final determination of the appeal, the Tribunal will normally wish to be satisfied that such an exchange is justified by the circumstances of the case – see for example the position of the Bedfordshire Care Group in *BetterCare v DGFT* [2001] CAT 6; and that of NJ Associates in *BT v OFCOM (CPS Save Activity)* [2004] CAT 23 at [138]. In some circumstances it may be more efficient for the intervener to make its case in skeleton arguments prepared for the hearing rather than in a statement of intervention. Where appropriate, the Tribunal will give directions as to the scope of the intervention (see e.g. Ruling of the Tribunal in *Albion Water v DGWS* [2004] CAT 19).

10.12 If the Tribunal deems it appropriate for the intervener to file a statement of intervention, that document should comply with the requirements of rule 16(9) and also observe the guidance set out at paragraphs 6.23 to 6.51 above.

Intervention in applications for review

10.13 The intervention procedure in applications for review is similar to that in appeals save that in applications under s 120 of the 2002 Act the President may, if the matter is urgent, direct that any request to intervene be made earlier than within three weeks of publication of the notice (rule 25 read with rule 15(2)(f)), 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 the Order of the President of 20 January 2005 in *Unichem v OFT*).

Intervention in appeals against penalties under the 2002 Act and damages actions

10.14 Rules 15 and 16 (intervention procedure) do not apply to appeals against penalties under sections 114 or 176(1)(f) of the 2002 Act; nor do they apply to claims for damages brought under Part IV of the Rules (but see rule 35 in respect of addition of parties).

11. OTHER CASE MANAGEMENT AND PREPARATORY ISSUES

The aim – to prepare for the hearing

11.1 The object of the procedure following the defence and any interventions is to enable the case to proceed to a hearing as soon as possible.

11.2 Under Rule 20(5) 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 (see, for example, the Order of 9 December 2004 in *BCL Old Co v Aventis*).

11.3 The Rules envisage that the Tribunal may give a wide range of directions under Rule 19 but the procedure adopted will depend in part on the outcome of the first CMC, and in part on the contents of the defence itself.

11.4 In some cases, matters may already be sufficiently far advanced for the Tribunal to proceed from the first CMC to the main hearing of the case, possibly giving written

directions in that regard. In other cases it will be convenient to proceed either to a further CMC or (more formally) to a pre-hearing review envisaged by Rule 20.

11.5 Other steps which may be taken, depending on the specific circumstances of the case, include:

- the arrangement of a site visit[12] and/or inspection, if this is considered to be beneficial for the Tribunal's understanding of the issues in the proceedings; and

- the making of a request to the ECJ for a preliminary ruling pursuant to Article 234 EC (or the equivalent provision contained in the Treaty establishing the European Atomic Energy Community) (see Rule 60).

11.6 As to this latter possibility, parties should highlight at as early a stage as possible any question of EC law which in their opinion should be the subject of such a preliminary ruling, giving reasons for that opinion. If the Tribunal considers it necessary to make request to the ECJ to make a preliminary ruling on a question of EC law, it will ordinarily stay proceedings pending receipt of that ruling.

11.7 Typical matters that may be dealt with at the preliminary stage are:

- objections to the admissibility of the appeal (see eg *BetterCare v DGFT* [2001] CAT 6 and [2002] CAT 6; *Freeserve v DGT* [2002] CAT 8; *Claymore Dairies v DGFT* [2003] CAT 3; and *Aquavitae v DGWS* [2003] CAT 17; and note in particular *Pernod Ricard v OFT* [2003] CAT 19 and [2004] CAT 10);

- whether the pleadings have remained within the four corners of the decision (see eg *Napp v DGFT* [2001] CAT 3; *Aberdeen Journals v DGFT* [2002] CAT 4; *Argos and Littlewoods v OFT* [2003] CAT 10; and *Albion Water (Bath House) v DGWS* [2005] CAT 23);

- amendments to pleadings (see eg *Floe Telecom v OFCOM* [2004] CAT 7); in the context of applications for review of merger decisions see *Federation of Wholesale Distributors v OFT* [2004] CAT 11 at [30];

- strike out applications (see eg *Allsports v OFT* [2004] CAT 1 and *Albion Water (Bath House) v DGWS* [2005] CAT 23);

- applications for disclosure (see eg *Aquavitae v DGWS* [2003] CAT 4 and [2003] CAT 17 at [219]; *Argos and Littlewoods v OFT* [2004] CAT 5; and *Claymore v OFT (recovery and inspection)* [2004] CAT 16);

- further and better particulars;

- filing of further evidence[13], as occurred in *Claymore v OFT* (see the Order of 27 March 2003), and may be a feature of the respondent's defence in merger cases – e.g. *UniChem v OFT* [2005] CAT 8.

- timetable, hearing dates and timing of skeleton arguments.

[12] This occurred, for example, in *BT v OFCOM (RBS backhaul circuits)* [2004] CAT 8 at [75]; *Albion Water (Dŵr Cymru/Shotton Paper) v DGWS* (Case 1046/2/4/04) and *Albion Water (Bath House) v DGWS* (Case 1042/2/4/04).

[13] 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).

11.8 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 remaining matters concerning witnesses, expert evidence or disclosure of documents (see eg Rule 19(2)(d) to (g), (k) and (l), and Rules 22 to 23). If there is any question of a decision being referred back to the respondent prior to the main hearing (Rule 19(2)(j))[14] or of the Tribunal being invited to deal with any preliminary points of law, or of a possible reference to the ECJ under Article 234 of the EC Treaty (see Rule 60), those matters will also be addressed. A timetable for the hearing will also be set (Rule 21).

Pleadings

Further pleadings after the defence

11.9 Rule 19(2)(b) provides that the Tribunal may give directions that the parties file a reply to the defence or other additional pleadings – see for example, the Order of 21 April 2004 in *Albion Water (Dŵr Cymru/ Shotton Paper) v DGWS*. Note that to the extent possible, the guidance given at paragraphs 6.23 to 6.51 above should be observed in relation to such additional pleadings.

11.10 Unlike the procedure in the CFI in cases under Articles 81 and 82 of the EC Treaty, the filing of a reply and a rejoinder is not automatic. Given that a further round of written pleadings will add substantially to the duration of the case, the Tribunal may be reluctant to order such further pleadings unless they are really necessary.

Amendment of pleadings

11.11 Rule 11 provides that a notice of appeal can be amended only with the permission of the Tribunal. Since the form of the notice of appeal is not that of a traditional pleading, such as a statement of case in High Court litigation, but rather a narrative presentation of factual and legal argument, the concept of 'amendment', as traditionally applied to civil proceedings, cannot be directly transposed to proceedings before the Tribunal. Thus it will not normally be necessary to apply formally to 'amend' simply to put into different words the written submissions made in support of a ground of appeal which is already set out in the notice of appeal. Permission to amend will however be necessary where the appellant seeks to raise a new ground of appeal that lies outside the four corners of the original appeal. In that event, the conditions of Rule 11(3) apply to the exercise of the Tribunal's discretion to permit the amendment – which will only be possible where the new ground:

(a) is based on matters of law or fact which have come to light since the appeal was made; or

(b) it was not practicable to include the new ground in the notice of appeal; or

(c) the circumstances are exceptional.

11.12 In this regard see *Floe Telecom v OFCOM* [2004] CAT 7 at [7] where the Tribunal stated that this approach should, in general, be adhered to as regards the notice of appeal, "not least so that the respondent authority may properly plead in its defence to the notice of appeal and that the Tribunal itself may at an early stage begin to read

[14] For example, see *Argos and Littlewoods v OFT* [2003] CAT 16.

into the case, the basic framework of which is set by the notice of appeal and defence." A skeleton argument should remain within the scope of the notice of appeal: *Albion Water (Bath House) v DGWS* [2005] CAT 23. See also: *Albion Water (Bath House) v DGWS* [2004] CAT 21.

11.13 In relation to applications for review of merger decisions see also *Federation of Wholesale Distributors v OFT* [2004] CAT 11 at [30] where the Tribunal stated that "…in merger cases it is likely to be the case that the Tribunal will be slow to give permission to amend under Rule 11(3)."

11.14 A party who wishes to raise a new ground of appeal or develop an existing ground of appeal in a manner which could not reasonably have been foreseen should seek directions from the Tribunal as soon as possible.

Claims for damages: Amendment

11.15 A claim form may only be amended with the written consent of all the parties or with the permission of the Tribunal (Rule 34).

Power to reject

11.16 Under Rule 10(1) the Tribunal has power, after hearing the parties, to reject an appeal, or any part of one, if it discloses no valid ground of appeal, if the appellant is a vexatious litigant within the meaning of Rule 10(1)(c), or if the appellant fails to comply with a direction of the Tribunal, including a direction requiring that a defective notice of appeal be put in order under Rule 9(1). Similar provisions, apart from Rules 10(1)(b) and (c), apply to the defence (see Rule 14(7)). 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 clearly justified.

11.17 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 (see Rule 24).

Claims for damages: power to reject

11.18 Under Rule 40 the Tribunal has the power to reject a claim for damages in whole or in part at any stage of the proceedings on a number of grounds, namely where it considers that there are no reasonable grounds for making the claim (Rule 40(1)(a); that in a claim under section 47B of the 1998 Act the body bringing the proceedings is not entitled to do so or that an individual on whose behalf the proceedings are brought is not a consumer for the purposes of that section (Rule 40(1)(b)); that the claimant is a vexatious litigant within the meaning of Rule 40(1)(c); or that the claimant fails to comply with any rule, direction, practice direction or order of the Tribunal (Rule 40(1)(d)).

Procedural matters specifically concerning claims for damages

Case management

11.19 Rule 44 (1) provides that in determining claims for damages the Tribunal shall actively exercise the Tribunal's powers set out in rules 17 (consolidation), 18 (forum), 19 (directions), 20 (case management conferences), 21 (timetable for oral hearings), 22 (evidence), 23 (witnesses) and 24 (failure to comply with directions) with a view to ensuring that the case is dealt with justly. "Justly" is defined in Rule 44(2) in similar terms to the "overriding objective" set out in Part 1 of the CPR. The use of alternative dispute resolution will be encouraged if appropriate (rule 44(3)).

The addition of parties

11.20 See *BCL Old Co v Aventis* [2005] CAT 1 where the Tribunal concluded that, under Rule 35, new parties may be added to the proceedings even after the limitation period set out in Rule 31 has expired. However the Tribunal's discretion in this regard would only be exercised where there was good reason to do so.

Summary judgment

11.21 Under Rule 41 the Tribunal has the power to give summary judgment on a claim for damages or reject in whole or in part a claim or defence in such a claim if it considers that either the claimant of defendant has no real prospect of succeeding on (part of) their claim or defence (as the case may be) and that there is no other compelling reason why the case or issue should be disposed of at a substantive hearing (Rule 41(1).

11.22 The grounds for summary judgment in rule 41 are drafted in the same terms as the corresponding rule contained in CPR Part 24.

11.23 Unlike the power to reject, the power to give summary judgment in a claim for damages may not be exercised before the filing of the defence (Rule 41(2)).

Security for costs

11.24 A defendant to a claim for damages may, by request under Rule 45(1), seek security for his costs of the proceedings. That request should be supported by written evidence setting out the basis on which security for his costs is sought (Rule 45(2)). The defendant's written evidence should address the question of why it would be just for the Tribunal to make an order for security for costs and establish that one or more of the factors contained in Rule 45(5)(a) to (g) applies. Those conditions are all essentially matters which might make it difficult for the defendant to recover any costs to which he might be held entitled following a successful defence of the claim. The provisions of Rule 45 broadly follow those contained in Part 25 of the CPR.

11.25 The circumstances to which the Tribunal will have regard when considering whether it is just to order security for costs include: (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, and in particular whether any impecuniosity can be attributed to the defendant's infringement; (d) the likely outcome of the proceedings and the relative strengths of the parties' cases; (e) any admissions, open offers etc by the defendant, save that the defendant should not be prejudiced in seeking security because it has

attempted to resolve the matter by recourse to alternative dispute resolution; and (f) the provisions contained in rule 55 as to orders for costs: see *BCL Old Co v Aventis* [2005] CAT 2, at [27].

Interim payments

11.26 Under Rule 46 the Tribunal may order a defendant to make an interim payment of damages. An interim payment is a payment on account of any damages which the Tribunal may hold the defendant liable to pay. The Tribunal must be satisfied that the defendant against whom the order is sought has admitted his liability to pay and 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 46(4)). The Tribunal must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment (Rule 46(5)).

11.27 A request for an order for an interim payment of damages may not be made before the time for the filing of the defence has expired (Rule 46(2)). A claimant may make more than one request for an order for an interim payment (Rule 46(3)). The request 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 request (Rule 46(6)).

11.28 On receiving a request for an interim payment the Registrar shall send a copy to all the other parties to the proceedings and shall inform them of the date by which they may submit written or oral observations to the Tribunal (Rule 46(7)).

Transfer of claims from the Tribunal

11.29 If at any stage of the proceedings the Tribunal considers, whether at the request 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 for damages (other than a claim included in proceedings under section 47B of the 1998 Act) be transferred to the High Court or a county court in England and Wales or Northern Ireland or to the Court of Session or a sheriff court in Scotland (Rule 48).

11.30 Where the Tribunal makes an order transferring proceedings to another court it shall notify the parties in writing of the transfer and shall send to the other court a notice of the transfer containing the name of the case accompanied by the Tribunal's case file.

Transfer of claims to the Tribunal

11.31 Under Rule 49 a claim which may be made under section 47A of the 1998 Act may be transferred to the Tribunal from any court in accordance with rules of court or any practice direction[15].

11.32 Within 7 days of the order of the court transferring the claim, the claimant must send to the Registrar the documents specified in Rule 49(2). Those documents are a certified copy of the order of the court transferring the claim to the Tribunal, any pleadings and documents in support of the claim filed with the court in which the claim was begun and any directions sought for the further progress of the claim.

[15] For transfers from the High Court in England and Wales see CPR Part 30, PD 8.1 to 8.8. For Scotland see Chapter 32A of the Rules of the Court of Session and Chapter 42 of the Ordinary Cause Rules.

11.33 Following receipt of the documents relating to the claim a CMC will be held as soon as practicable in accordance with Rule 20 (see sections 8 and 11 of this Guide).

12. EVIDENCE

General

12.1 Strict rules of evidence do not apply before the Tribunal. The Tribunal will "be guided by overall considerations of fairness, rather than technical rules of evidence" (*Argos and Littlewoods v OFT* [2003] CAT 16 at [105]. See also *Claymore v OFT* [2003] CAT 18 and *Aberdeen Journals v OFT* [2003] 11 at [126] to [134]).

Witness statements

12.2 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.

12.3 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 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.

12.4 Solicitors and counsel 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.

12.5 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 that has been served on its behalf is incorrect, that party must inform the Tribunal and the other parties immediately.

12.6 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.

12.7 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.

Expert evidence

12.8 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[16]. It may be appropriate to organise, prior to, or at some stage 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 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, discussions between experts, the appointment of a single joint expert, or of the Tribunal's own expert, can equally be envisaged.

12.9 The Tribunal considers that, as under Part 35 of the CPR, it is the duty of the expert to help the Tribunal on matters within his expertise: that duty overrides any obligation to the person from whom he has received instructions or by whom he is paid. 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. Where necessary, the expert must make it clear if a particular question or issue falls outside his expertise.

12.10 An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received his 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 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. The report should contain, at the end:

- a statement that the expert understands his duty to the Tribunal and has complied with that duty; and

- a statement that the expert believes that the facts stated in the report are true, and his belief that the opinions expressed are correct.

12.11 If the expert wishes, at any stage, to ask the Tribunal for directions then this should be mentioned to the Registrar who will raise the matter with the Tribunal.

[16] 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]; and *Hendry v WPBSA* [2002] UKCLR 5.

Preparation of bundles

Bundles of documents for use in a CMC or the hearing

12.12 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.

12.13 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.

12.14 Unsolicited bundles sent to the Tribunal without any prior explanation will be returned: see *Napp v DGFT* [2002] CAT 1 at [76].

12.15 In submitting documents to the Tribunal at any stage of the proceedings it should always be borne in mind that they will need to be in sturdy files that are able to withstand movement to and from the courtroom. The files should also be capable of being stood up properly on a bookshelf as well as labelled properly to allow for easy identification. This means the label or description on the spine of the file should be capable of being read at a distance; that the front cover of the file should be labelled; and that there should be a label (indicating the file name and contents) on the front inside cover of the file positioned in the bottom left hand corner.

13. CONFIDENTIALITY

Principles

13.1 Rule 53 provides that if a person wishes to request confidential treatment for any document or part of a document filed in the proceedings he must do so preferably in the document in question but in any event in writing within 14 days of sending the document to the Registrar, indicating the relevant words, figures or passages over which confidentiality is claimed, together with his reasons for doing so.

13.2 If the Registrar so requests, the appellant must provide a non-confidential version of the relevant document.

13.3 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 interests (see paragraph 1(2) of Schedule 4 to the 2002 Act).

13.4 Whether particular information is to be regarded as confidential is a matter for the Tribunal to decide in the circumstances of the individual case.

13.5 Even if the information is confidential, the Tribunal must, when drafting its judgment, take into account the extent to which disclosure is necessary for the purpose of explaining the reasons for its decision (paragraph 1(3) of Schedule 4 to the 2002 Act).

13.6 Apart from paragraph 1 of Schedule 4 to the 2002 Act, the general restrictions on disclosure of information contained in Part 9 of the 2002 Act do not apply to the Tribunal: see section 237(5). However, the importance placed on protecting the confidentiality of information obtained during the course of proceedings is apparent from the powers conferred on the Tribunal to protect such information at hearings (rule 50), in relation to interveners (rule 16(8)) and in its decisions under paragraphs 1(2) and (3) of Schedule 4 to the 2002 Act. For cases considering the principles relating to confidentiality and, where relevant, countervailing considerations of transparency and fairness 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); and *Unichem v OFT* [2005] CAT 3 (in the context of merger review proceedings).

13.7 Confidential treatment cannot be accorded to an appellant (or applicant or claimant) vis-à-vis a respondent, because otherwise, the Tribunal would not be able to rely on any matters which had not been the subject of disclosure between the principal parties.

13.8 Certain notices about the proceedings published by the Registrar under rules 12 (withdrawals), 15 (publication of summary of appeal) or 57 (consent orders) should not ordinarily contain any confidential information. Similarly the pleadings filed in the Registry are not themselves generally open to public inspection. In practice a request for confidential treatment is therefore mainly relevant to the possible disclosure of confidential information to third parties, either in the context of the intervention procedure or during the hearings of the Tribunal.

13.9 As regards intervening parties, the Tribunal will not grant permission to intervene without hearing the principal parties (Rule 16(3)) so there is, at that stage, an opportunity to make representations regarding confidentiality. It is, however, important that any issue of confidentiality is resolved, if possible, before that stage is reached. Information considered to be confidential must therefore be signalled as early as possible, and at the latest 14 days after the filing of the notice of appeal or application or other relevant document: Rule 53. In the event of a dispute, the Tribunal (or the Registrar acting pursuant to authorisation granted by the President under Rule 62(3)) will decide on the confidentiality or otherwise of the information by way of a reasoned order or decision. If the Tribunal accepts the confidentiality claimed, a non-confidential version of the relevant document will be supplied to any interveners. Paragraph 1(2) of Schedule 4 to the 2002 Act applies to the Tribunal when making orders or directions in respect of interveners (Rule 16(8)).

13.10 The need for disclosure in the interests of fairness, on the one hand, and a legitimate claim to the confidentiality of (commercially) sensitive information, on the other, may in appropriate circumstances be accommodated where, with the consent of the parties, and with appropriate protective orders or undertakings, disclosure is made solely within a "confidentiality ring" normally comprising the parties' named legal representatives and, possibly, other external advisers or experts such as accountants and economists rather than to the parties themselves. See *Claymore Dairies v OFT* [2003] CAT 12 and the Order of the Tribunal of 9 June 2003 in those proceedings; and *Genzyme v OFT* – see the transcript of 27 May 2004.

13.11 As regards hearings, the Tribunal will sit in private for any part of a public hearing where it is satisfied that it will be considering confidential information, in accordance

with Rule 50. Similarly, the Tribunal will, if it thinks it appropriate in the circumstances, exclude such confidential information from any publicly available version of its final judgment, after hearing the principal parties.

Practical guidelines for making a request for confidential treatment

13.12 Issues of confidentiality regularly arise before the Tribunal. Accordingly, parties should pay close attention to the following guidance when making a request for confidential treatment of information. The guidance proceeds on the basis that the party making the request is the appellant in appeals under the 1998 Act. Although situations may be equally envisaged in which it is the respondent or intervener which wishes to make a request – and also in review proceedings under the 2002 Act and possibly some claims for damages.

Documents prepared by an appellant or respondent intended for the use of interveners and witnesses

13.13 The party requesting confidential treatment should prepare the requisite number of sets of the relevant documents bearing a marking in the form set out in paragraph 13.15 below in the particular places in the documents where there has been an excision in respect of material for which confidentiality is claimed.

13.14 The rest of the layout of the page should not be altered, so that it is possible to tell how much material has been excised from that page and so that the pagination and, if relevant, paragraph numbering of the relevant document and/or file is unaffected.

13.15 Where possible an indication of the nature of the information which has been excised should be provided – for example "[customer name excised]". In the limited circumstances where an indication of the nature of the information cannot be provided, the generic marking "[confidential details omitted]" may be used.

13.16 Opposite each excision the word "CONFIDENTIAL" should be written in the margin of the document.

13.17 The Registry should then be consulted on how many copies of this "non-confidential" set of the documents should be filed with the Registrar, for the Tribunal's own records and the use of witnesses at the hearing. If an intervener has been admitted to the proceedings it will depend on the circumstances of the particular case as to whether the Registrar will require additional copies of the non-confidential set of the documents in order to pass them on to the intervener or whether the Tribunal has directed the party supplying the non-confidential set of documents to serve them directly on the intervener.

13.18 A master set of the non-confidential version of the documents should be retained by the party providing that version in case further copies are required to serve on other interveners (if there is more than one).

Documents intended for the use of the Tribunal

13.19 Where possible, early consideration should be given to issues of confidentiality and this is a standard item on the Tribunal's agenda for the first CMC. Where an intervener is admitted to the proceedings before or at the first CMC it is normally possible to address the handling of any confidentiality issues arising in respect of the notice of appeal, as regards the intervener, at the first CMC. Likewise, as the first

CMC will generally take place before the defence is filed and served, if the respondent considers that there is likely to be material in the defence which is confidential as against the intervener then this should be raised by the respondent at the earliest opportunity, and in any event at the CMC, in order that the Tribunal can obtain a preliminary understanding of the extent of any claims for confidentiality and give appropriate directions for preparation and service of non-confidential versions on the intervener, where appropriate.

13.20 Likewise, where a party has applied to intervene in the proceedings and attends the first CMC any potential issues of confidentiality for the intervener should be raised at that stage in order that appropriate directions can be given for the service of non-confidential versions of the statement of intervention.

13.21 Whilst it is preferable that issues of confidentiality are dealt with at the first CMC (so that their effect on the timetable of the case can be minimised), a similar approach to that outlined above will be taken by the Tribunal should such issues arise at a later stage in the proceedings.

13.22 In every case it is important that the Tribunal knows (for the reasons set out below) what material has been excised from the non-confidential version of any pleading. Therefore the directions that the Tribunal will normally give in relation to confidentiality will require the party claiming confidential treatment to file with the Registrar a number of sets (to be specified by the Registrar in the particular circumstances) of the relevant bundles and pleadings for which a claim for confidentiality is made. The relevant pages should be marked in the same way as set out in paragraphs 13.15 and 13.16 above, **but this time the confidential information should be left in between the square brackets**. This is for the obvious reason that the Tribunal needs to see the information for which confidentiality is being claimed so that it is in a position to rule on its status at some future point in the proceedings.

13.23 If the parties give the earliest possible consideration to the likelihood of making a claim for confidential material only in exceptional cases should it become necessary to update any files already lodged with the Tribunal. If it does become necessary, such updating must be conducted by the relevant party's legal representatives (or the party themselves if unrepresented) and at the relevant party's own risk. In no circumstances will the Tribunal or its staff be responsible for any updating exercise that may exceptionally be required or for verification of the contents of any particular file placed by a party before the Tribunal.

Documents intended for the use of the respondent

13.24 The respondent will already have been served with a copy set of the original documents filed with the Registrar. No confidentiality claim can be made as against the respondent, but the respondent will need to know what information is regarded as confidential by the other party so that care can be taken not to make any explicit disclosure when referring to that information at hearings or in written submissions which may be seen by interveners.

13.25 Therefore at the same time as filing the bundles for use by the Tribunal (referred to in paragraph 13.22 above) with the Registrar, a copy set in the same form should be sent to the respondent.

The schedule of excisions made on grounds of confidentiality

13.26 In all cases the party in question should prepare a schedule which summarises the excisions that have been made as part of the request for confidential treatment. The Schedule should contain three columns: the first giving the relevant page or paragraph reference where the excision has been made; the second giving a generalised description of the information that has been excised; and the third column setting out the grounds for making the excision.

For example:

Page/Paragraph Number	**Description of excised information**	**Grounds for excision**
Paragraph 4.2	The deleted material relates to ABC Limited's key customers and confidential costs and pricings	The information is in the nature of a business secret

13.27 The schedule should be filed with the Registrar (together with a number of copies to be specified by the Registrar according to the particular circumstances of the case) and a copy served on each of the other parties to the case.

13.28 Parties should at all times resist the temptation to make blanket requests for confidentiality in respect of a whole document or file. Such requests are unlikely to be entertained by the Tribunal at the outset.

14. TERMINATING PROCEEDINGS WITHOUT A HEARING

Withdrawal of appeal

14.1 An appeal may be withdrawn only with the permission of the Tribunal or, if the case has not proceeded to a hearing, with the permission of the President, in accordance with Rule 12. For example, see *Hasbro v DGFT* [2003] CAT 2 (decided under the previous version of Rule 12); the Order of the Tribunal dated 27 July 2004 in *Powerbond Adhesives Limited v OFT*; the Order of the Tribunal dated 11 July 2005 in *Aqua Resources v DGWS*. The Tribunal may still publish any decision it would have made had the appeal not been withdrawn: Rule 12(2)(c). No fresh appeal may be brought by that appellant in relation to the decision which was the subject of the appeal withdrawn.

Consent orders

14.2 The parties may also invite the Tribunal to make a consent order in accordance with Rule 57. In the latter case, where a proposed consent order may have a significant effect on competition, the Tribunal must invite comments from third parties under Rule 57, paragraphs (4) to (9).

14.3 It should be noted that one of the purposes of the case management conference or pre-hearing review is to facilitate the settlement of the proceedings (Rule 20(4)(e)).

14.4 In relation to consent orders see Napp [2001] CAT 1 (in the context of interim relief proceedings); the Order of the Tribunal dated 30 July 2004 in *Association of British Insurers v OFT* (made in the light of the respondent's decision not to contest the notice of appeal)*; Pernod Ricard v OFT* [2005] CAT 9 and the Order of the Tribunal dated 8 April 2005; and the Order of the Tribunal dated 19 May 2005 in *Double Quick Supplyline v OFT*.

Termination of claims for damages without a hearing

Withdrawal of claim

14.5 A claimant may only withdraw his claim with the consent of the defendant or with the permission of the President or, if the case has proceeded to a hearing, the Tribunal (Rule 42(1)). Where a claim is withdrawn the Tribunal may make any consequential order it thinks fit and no further claim may be brought by the claimant in respect of the same subject matter (Rule 42(2)).

Offers and payments to settle

14.6 Under Rules 43(1) to (9) once a claim for damages has been commenced a defendant may make a "payment to settle" the claim either in whole or in part by serving a notice of such a payment on the claimant and on the Registrar. The detailed procedure is set out in Rule 43.

14.7 Under Rule 43(10) any party may make an offer to settle at any time and by any other means. This is an offer which does not comply with the requirements of Rules 43(1) to (9) but may nevertheless be taken into account by the Tribunal in considering the question of costs under Rule 55 if the claimant does not accept an amount offered by the defendant and ultimately recovers less than that amount, or, conversely, the defendant does not agree to an offer to settle put forward by the claimant and ultimately is required to pay more than that amount.

15. THE HEARING

15.1 Although this section primarily deals with the main hearing, most of the comments are equally applicable to other hearings before the Tribunal, unless the content otherwise requires.

Location

15.2 Usually the main hearing will take place at the Tribunal's headquarters at Victoria House in London (see section 4 of this Guide for details of the location of Victoria House).

15.3 Where the Tribunal has determined under Rule 18(1) that the proceedings are proceedings in Scotland the main hearing will generally take place in one of the central courts in Edinburgh. However, CMCs and other interlocutory hearings are usually held in London.

15.4 Similarly where the Tribunal has determined that the proceedings are proceedings in Northern Ireland the main hearing will generally take place in Belfast.

15.5 However, the Tribunal will be prepared to hold hearings in any part of the United Kingdom when it is appropriate to do so (see Rule 18(2)), particularly when the facts of the case relate mainly to a particular locality or region.

15.6 Notice of the main hearing is given to the parties and published on the Tribunal's website. Notice is also given in the Daily Cause List of the Royal Courts of Justice or the relevant Scottish or Northern Irish Lists.

Timing

15.7 The Tribunal will endeavour to fix a date for 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. **Parties should note that it will seldom be possible to accommodate requests to change the date fixed for the main hearing.**

15.8 That said, it is not the wish of the Tribunal that individuals, whether parties or their representatives, suffer undue personal stress going beyond the normal demands of professional life. If this is likely to be an issue no one should fear broaching such concerns with the Registrar in the first instance who may discuss with the President or Tribunal Chairman what course should be taken in the circumstances.

Arriving for a hearing at Victoria House

15.9 Victoria House should be entered by the entrance on the eastern side of Bloomsbury Square. Any documents required for the hearing should be brought through that entrance. There is a lift that can assist in transporting heavy documents from the ground floor to the building reception level.

15.10 There have been instances when voluminous documentation has been sent by courier to the Tribunal with the implicit expectation that the Registry staff will convey it to the courtroom. Parties should note that this practice is unacceptable. All documentation should be accompanied by someone who knows exactly where that documentation should be taken. The parties and their representatives are solely responsible for transporting documents to and from the courtroom.

15.11 One hour before the time fixed for the hearing, a member of the Registry will come down to the building reception point and issue visitors passes for the Tribunal. Everyone will be asked to sign a register for use in case of fire or other emergency necessitating an evacuation of the building.

15.12 After "signing in" the lift should then be taken to the second floor where there will be signs directing the way to the relevant courtroom.

Facilities at Victoria House

15.13 There are two courtrooms at Victoria House. Court 1 is a large room capable of seating 48 at desks with 20 to 40 in the "public gallery". Court 2 is about half the size of Court 1. Both courts have a large amount of 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 feasible for the parties' legal representatives to import their own document carousels and similar structures into the courtrooms.

15.14 Both courts are equipped with microphones and voice amplification equipment. In addition both courts are equipped with television cameras, the use of which is currently under consideration by the Tribunal.

15.15 There are also facilities for simultaneous transcription services[17] (in substitution for the Tribunal's usual arrangements with regard to transcripts – see paragraph 8.11 above) 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 hearing.

15.16 Each court has three consultation rooms which are available 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 one 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. It should be noted that use of the consultation rooms is a privilege and not an entitlement. A room may be withdrawn from use if the circumstances require it.

15.17 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.

Skeleton arguments

15.18 It is the usual practice of the Tribunal to direct that skeleton arguments are filed in preparation for a hearing.

15.19 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 that are not, in issue and the nature of the argument in relation to those points which are in issue.

15.20 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 paragraph 6.28 above);
  - 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 and in many cases should be much shorter than this;
- be in numbered paragraphs and state the name of the advocate who prepared it;

[17] 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.

– avoid arguing the case at length; and

– avoid formality and make use of abbreviations where possible.

15.21 All skeleton arguments prepared for the main hearing will be placed upon the Tribunal website in advance of the hearing and should be provided in electronic form to the Registry. It is therefore important to ensure that they do not contain any confidential information. If it is necessary to make reference to confidential details, this should be done in a separate annex to the skeleton argument.

15.22 These requirements also apply to written summaries of opening speeches and closing speeches at the hearing.

Conduct of the hearing

15.23 The hearing of the appeal will take place in public, under the direction of the President or Chairman (Rule 51), except for any part of the proceedings where the Tribunal is considering confidential information (see section 13 of this Guide).

15.24 If the hearing involves witnesses or expert evidence, any necessary examination or cross-examination, on oath as necessary, should normally take place at the outset of the hearing, after brief opening statements by the parties.

15.25 The Tribunal will seek to avoid formality in proceedings. Hearings will be conducted in such a manner as to ensure the just, expeditious and economical handling of proceedings: Rule 51(2).

15.26 Hearings will normally take place during normal court hours.

15.27 Legal representatives are not required to be robed. The President and individual members should be addressed as 'Sir' or 'Madam' as the case may be.

15.28 Legal representatives should stand to address the Tribunal 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 danger any private conversation they may have may be heard by others in the courtroom.

Time limits at the hearing

15.29 In accordance with the practice of the CFI, main hearings will generally be structured in accordance with a timetable: Rule 21.

15.30 As far as legal submissions are concerned, the Tribunal will usually follow, with any necessary modifications, the procedure in hearings before the CFI in competition cases. In a straightforward case this normally allows the principal parties a fixed time, ideally up to one hour each, to focus on the principal written submissions already made, after which the Tribunal will ask its own questions. This questioning may last for some time. After that, the parties each have an opportunity to present their concluding remarks. In heavier cases the principal parties may be allocated longer, for example, half a day to a day. Interveners are expected to complete their oral submissions within much shorter timescales.

15.31 This approach may, however, need some adaptation in particular cases – for example, where oral evidence is necessary. In cases where an appeal is being made against the imposition of a penalty and where the facts are in dispute the procedure that has evolved to date is that the respondent authority calls its witnesses for cross examination followed by the witnesses of the appellants. The appellants then make the first closing submissions which are followed by the closing submissions of the respondent authority and the proceedings conclude with any submissions which the appellants may wish to make in reply to those of the respondent. Whether this pattern is appropriate in the circumstances of a particular case should be discussed with the Tribunal in a preceding CMC or pre-hearing review.

15.32 Hearings in straightforward cases not involving the examination of witnesses are unlikely to last more than one day. Even in heavier cases, the Tribunal hearings will rarely last longer than two, or at the most, three days unless extensive witness evidence is involved.

16. THE TRIBUNAL'S DECISION

16.1 The decision of the Tribunal is delivered in public by way of a judgment[18] containing the reasoning of the Tribunal based upon the evidence submitted and submissions made during the written and oral phases of the proceedings (Rule 54).

16.2 The hearing at which the judgment is handed down will, unless the Tribunal directs otherwise, take place in London, even if the final hearing took place outside London. Notice of the handing down is given to the parties and published on the Tribunal's website. Notice also appears in the Daily Cause List of the Royal Courts of Justice and where appropriate in the Scottish or Northern Irish lists, as the case may be.

Confidentiality considerations

16.3 As already noted, pursuant to the requirements of paragraph 1(2) of Schedule 4 of 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 interests.

16.4 Generally such information will have already formed the subject matter of a request for confidential treatment made to the Tribunal pursuant to Rule 53 (see section 13 with regard to confidentiality generally in proceedings before the Tribunal).

[18] In practice, a number of different expressions is used in relation to Tribunal decisions: they are referred to as "judgments" where the decision deals in detail with the substantive issues in the case; and at some other times as "rulings" or "decisions" where predominantly procedural or ancillary issues such as costs are involved.

16.5 It should however be noted that 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.

16.6 This might result in information which was accorded confidentiality during the proceedings (either 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.

16.7 However, prior to handing down the Tribunal will consult the parties with regard to the treatment in the judgment of information raising confidentiality concerns.

16.8 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 Schedule 4, paragraph 1 to the 2002 Act.

Draft judgments issued under embargo

16.9 In certain circumstances, for example, where it is necessary to consider the handling of information raising confidentiality concerns, 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.

16.10 This arrangement is not an entitlement. Whether it is done is entirely at the behest of the Tribunal, as are the terms on which it is carried out. 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.

16.11 The primary purpose of this embargo arrangement is to enable the parties' legal representatives to draw to the Tribunal's attention confidentiality issues or any obvious typographical errors or slips.

16.12 The 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 by one party over another. 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 immediately 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.

16.13 It should further be noted that 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 impact should contact the parties or their representatives.

Issues dealt with on handing down

16.14 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.

Publication

16.15 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 in which the full text of all the judgments, rulings and decisions of the Tribunal can be seen, subject to excisions for confidentiality. In addition, the Tribunal's judgments are currently collected and published in bound volumes as the Competition Appeal Reports by Jordan Publishing Ltd and may also be available in other sets of commercially produced law reports.

17. COSTS

Overview

17.1 Unlike the position in some other tribunals, where the losing party is not required to pay the costs of the winning party except in exceptional circumstances, Rule 55(2) provides that the Tribunal may, at its discretion, at any stage of the proceedings 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. There is no specific rule that costs should follow the event, but 'in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings' (Rule 55(2)).

17.2 'Costs' means costs and expenses recoverable in civil proceedings before the Supreme Court in England and Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland.
The Tribunal may either assess the costs itself or refer the matter to an officer of the relevant court dealing with assessment of costs.

17.3 Given the specific nature of its jurisdiction, the Tribunal will need to determine, in individual decisions, the principles on which the discretion as to costs is to be exercised, the principal question being whether, and if so to what extent and in what circumstances, costs should be awarded.

17.4 Cases where the Tribunal has considered issues relating to costs in appeal proceedings include:

Institute of Independent Insurance Brokers and ABTA v DGFT [2002] CAT 2
Napp v DGFT [2002] CAT 3
Hasbro v DGFT [2003] CAT 2 (costs on withdrawal of appeal)
Freeserve v DGT [2003] CAT 6
Genzyme v OFT [2003] CAT 9 (costs in respect of interim relief proceedings)
Aberdeen Journals v OFT [2003] CAT 21 (costs of intervener)
Aquavitae v DGWS [2003] CAT 23

Floe Telecom v OFCOM [2004] CAT 22 (in respect of costs awarded for one stage of the proceedings)
Apex Asphalt v OFT [2005] CAT 11
Argos and Littlewoods v OFT [2005] CAT 15
JJB Sports v OFT [2005] CAT 26

17.5 Costs in respect of applications for review of merger decisions pursuant to the 2002 Act has been considered in:

IBA v OFT [2004] CAT 6
Federation of Wholesale Distributors v OFT [2004] CAT 11
Unichem v OFT [2005] CAT 31

17.6 Costs in respect of proceedings under the 2003 Act has been considered in:

BT v DGT (RBS backhaul) [2005] CAT 20
BT v OFCOM (CPS save activity) [2005] CAT 21

Interim payment

17.7 The Tribunal may order an interim payment towards costs pending detailed assessment of costs.

Assessment of costs

17.8 The Tribunal will encourage the parties to agree the amount of costs but failing agreement the Tribunal will either itself assess the sum to be paid or take one of the other courses envisaged by Rule 55.

Costs and expenses in proceedings in Scotland or Northern Ireland

17.9 When the Tribunal is sitting as a Tribunal in Scotland or Northern Ireland, the costs or expenses recoverable are those which are recoverable in the relevant jurisdiction and will be assessed in accordance with the procedure applicable in that jurisdiction.

18. INTEREST

18.1 Rule 56 of the Tribunal Rules 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 upon which the application was made in accordance with rule 8, and at such rate as the Tribunal considers appropriate.

18.2 Unless the Tribunal otherwise directs, the rate of interest shall not exceed the rate specified in any Order made pursuant to section 44 of the Administration of Justice Act 1970.

18.3 Such interest is to form part of the penalty and be recoverable as a civil debt in addition to the amount recoverable under section 37 of the 1998 Act.

18.4 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 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.

18.5 The rate of interest should therefore reflect the benefit derived by the appellant from the suspension of the obligation to make the penalty payment. 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 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.

18.6 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
Richard W. Price v OFT [2005] CAT 12
Genzyme v OFT – see Order of the Tribunal of 29 September 2005

19. PERMISSION TO APPEAL

19.1 An appeal lies from the Tribunal to the appropriate court on a point of law or, in cases involving penalties, as to the amount of the penalty, with either the permission of the Tribunal or the appropriate court.

19.2 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.[19]

19.3 A request to the Tribunal for permission to appeal from a decision of the Tribunal may be made orally at any hearing at which the decision is delivered by the Tribunal or in writing to the Registrar within one month of notification of that decision: see rule 58(1).

19.4 Where the request is made in writing, that request 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

[19] 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 sections 114(10) to (12) and sections 176(1)(f) of that Act.
In relation to proceedings under the 2003 Act see section 196 of that Act.

– The grounds on which the party intends to rely in his appeal; and

– Whether the party requests a hearing of his request and any special circumstances relied on.

19.5 In complex cases the Tribunal's view is that an oral request for permission to appeal is not a sensible manner in which to proceed, at least in the absence of a written outline in advance of the grounds of appeal on which the party seeking permission to appeal intends to rely. Oral requests made in such cases without giving the other party or parties to the proceedings notice of the grounds of appeal are unlikely to be dealt with by the Tribunal at the time, notably if a party resisting such a request is not reasonably in a position to make submissions in reply at the hearing (see *JJB Sports v OFT* [2005] CAT 27).

19.6 The Tribunal's decision on the question of permission to appeal must be made in accordance with rule 59 which provides that:

– Where the request is made orally the Tribunal shall give its decision either orally or in writing, stating its reasons (rule 59(1))

– Where the request is made in writing, the Tribunal shall decide whether to grant permission on consideration of the party's request and, unless it considers that special circumstances render a hearing desirable, in the absence of the parties (rule 59(2))

– The Tribunal's decision on a written request for permission to appeal together with the reasons for that decision shall be recorded in writing and notified to the parties (rule 59(3))

19.7 Where permission to appeal is sought on a point of law it is important that the parties seeking permission to appeal should isolate within the criticised judgment what is an issue of law, and what is merely a determination of a matter of fact or judgment: see *Napp v DGFT* [2002] UKCLR 726. The Court of Appeal noted in particular that an applicant should:

– Identify in precise terms the rule of law said to have been infringed;

– Demonstrate where in the jurisprudence (of the Community or UK courts or otherwise) that rule is to be found, by specific reference to the authorities;

– Demonstrate briefly from the Tribunal's judgment the nature of the error, by reference to the Tribunal's handling of the issue in question.

19.8 See for example, the Tribunal's decisions on permission to appeal in:

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

19.9 Parties should note that the relevant rules governing appeals to the appropriate appellate court will be governed by the rules of procedure of that court.

20. INTERIM ORDERS AND MEASURES

20.1 The Tribunal has adjudicated on requests for interim relief in *Napp v DGFT* [2001] CAT 1; and *Genzyme v OFT* [2003] CAT 8. Agreed orders were made in *Albion Water v DGWS* (see the Order made on 2 June 2005 and mentioned in [2005] CAT 19*)* and *Burgess v OFT* (see the Order made on 6 July 2005 in case 1037/2/1/04(IR)). Note that the refusal of the OFT or a Regulator to adopt interim measures is, under the 1998 Act[20], itself a matter that can be appealed to the Tribunal, as occurred in *Burgess* and *Albion Water*.

20.2 The powers of the Tribunal (or, as the case may be, the President) to make interim orders or take other interim measures, and the procedures to be followed, are set out in Rule 61. The Tribunal has stated that this jurisdiction must remain flexible, ready to be adapted to the particular circumstances of the case where the interests of justice so require.

20.3 In *Napp v DGFT* [2001] CAT 1 the Tribunal confirmed that there was no reason why an application for interim relief could not be made before the substantive appeal was lodged. However the Tribunal would normally require from the applicant a firm indication of the date on which the appeal would be lodged as well as an undertaking to pursue the appeal with due expedition.

20.4 Once an appeal against the imposition or amount of a penalty under the 1998 Act is filed, the recovery of any penalty imposed by the relevant respondent authority is deferred until after the determination of an appeal (see Sections 37(1) and 46(4) of the Act). Otherwise, the making of an appeal does not suspend the effect of the decision to which the appeal relates (see Section 46(4)).

20.5 In these circumstances, the Tribunal's powers to grant interim relief are likely to be relevant to cases where the relevant respondent has given a direction with a view to bringing to an end an infringement of Chapter I or Chapter II under Section 32 or 33 of the Act, or has made directions under Section 35, or has refused to make such directions – see section 47(1)(e) of the 1998 Act.

20.6 In accordance with Rule 61(2) if the Tribunal considers that it is necessary as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of person, or protecting the public interest, it may give such directions as it considers appropriate for that purpose.

20.7 In accordance with Rule 61(3), the Tribunal shall exercise its power under rule 61 taking into account all the relevant circumstances, including the urgency of the matter, the effect on the party making the request if the interim order is not made, and the effect on competition if the order is made. As regards the likely effect on competition and third parties, the Tribunal is entitled to take into account the protection of the interests of competing undertakings where such interests cannot be separated from the maintenance of an effective competitive structure. In *Napp v DGFT* [2001] CAT 1 the Tribunal has stated that the relevant circumstances include the question of whether the applicant has any prospect of success in the main appeal. The principal purpose of interim relief is to preserve the integrity of the appeal and in particular to ensure that so far as possible, taking into account the other interest involved, the applicant does not suffer serious and irreparable damage pending the hearing of an appeal which may yet succeed. As a general rule, however, financial

[20] See section 47(1)(e).

loss which cannot be compensated in the event of a successful appeal does not constitute serious and irreparable damage unless the survival of the undertaking is in question.

20.8 In *Genzyme v OFT* [2003] CAT 8 the Tribunal indicated that its approach may involve asking the questions:

(i) Are the arguments raised by the applicant as to the merits of its substantive appeal, at least prima facie, not entirely ungrounded, in the sense that the applicant's arguments cannot be dismissed at the interim stage of the procedure without a more detailed examination?

(ii) Is urgency established?

(iii) Is the applicant likely to suffer serious and irreparable damage if interim relief is not granted?

(iv) What is the likely effect on competition or relevant third party interests, of the grant or refusal of interim relief?

(v) What is the balance of interests of heads (iii) and (iv)?

20.9 As to merits, it may be necessary in some cases to go some way into the merits in order properly to appraise the situation before the Tribunal: for example to weigh "all relevant circumstances". If necessary the Tribunal is entitled to make a prima facie assessment of the strength or weakness of the applicant's case on the merits, although it may be undesirable, and in most cases impracticable, for the Tribunal hearing an application for interim relief to go into the merits of the case any further than is strictly necessary for dealing with the application for interim relief in a way that does not pre-judge the main appeal. The Tribunal's provisional view is that the test to be applied is whether the appeal is not manifestly unfounded: see *Napp v DGFT* [2001] CAT 1.

20.10 The requirements for a request for interim relief are set out in Rule 61(6). This request, when received, will be served on the other parties (or, if an appeal/application has not been brought, on the decision-maker) by the Registrar and a date fixed for response: Rule 61(7). The Tribunal may at the same time fix a date for a hearing of the request for interim relief and give any necessary directions under Rule 61(8). If the urgency of the case so requires, these formalities may be dispensed with: Rule 61(11).

20.11 Rules 61(6)(e), 61(7) and 61(11) contemplate the possibility of a request for interim relief being made before a notice of appeal is lodged under Rule 8. This possibility does not, however, relieve the appellant or his legal representatives from the duty to give full and frank disclosure of all relevant matters, including the nature of the case to be advanced on the main appeal, the circumstances giving rise to urgency and the reasons for requesting interim relief. Any interim orders made may be subject to such conditions as the Tribunal thinks fit which may include for example a firm indication from the applicant as to the date at which the appeal will be lodged as well as an undertaking to pursue the appeal with all due expedition.

20.12 The Tribunal considered costs in relation to interim relief applications in *Genzyme v OFT* [2003] CAT 9.

21. PRICE CONTROL REFERENCES UNDER THE 2003 ACT

21.1 There are specific arrangements in the 2004 Tribunal Rules for the reference of certain "price control matters" to the CC for determination. These arrangements apply in the field of electronic communications, principally in relation to network access.

21.2 If an appeal under s 192 of the 2003 Act relates in whole or in part to a price control matter, that matter must be referred by the Tribunal to the CC: section 193(1). Under Article 3(1) of the 2004 Tribunal Rules, a "price control matter" is a matter relating to the imposition of any form of price control by way of an SMP (significant market power) condition imposed by OFCOM under ss 87(9), 91 or 93(3) of the 2003 Act which is disputed 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).

21.3 Any of the parties to an appeal under s 192 of the 2003 Act may include within their pleadings (in the case of an intervener, within the request for permission to intervene) a statement indicating the extent to which (i) the appeal relates to price control or (ii) a price control matter arises in the appeal (a 'price control statement'). The defence and/or request for permission to intervene may include a statement rebutting a price control statement. See Article 3(2) to (4) of the 2004 Rules.

21.4 The Tribunal is under a duty to refer to the CC every matter which it decides is a price control matter. It may make such a decision either upon considering any price control statement, referred to above, or during the course of the appeal: Article 3(5).

21.5 The reference may be made by the Tribunal at any time prior to delivery of its decision on the substance of the appeal: Article 3(6).

21.6 Subject to any directions by the Tribunal to the contrary, the CC must determine the matter within four months of receipt of the reference. The Tribunal may give directions, either of its own motion or upon the application of the CC or any party, as to the procedure which the CC must follow in making its determination: Article 5 of the 2004 Tribunal Rules.

21.7 Once the CC has determined the issues raised in the reference, the Tribunal must, when deciding the appeal on the merits under s 195 of the 2003 Act, decide the price control matter raised in the appeal in accordance with the determination made by the CC: section 193(6) of the 2003 Act. The one exception is where the CC's determination would fall to be set aside on an application for judicial review: in such circumstances the Tribunal is not obliged to determine the price control matter in accordance with the CC's determination: section 193(7) of the 2003 Act.

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