Blackstone CHAMBERS

APPEAL AND REVIEW IN THE COMPETITION APPEAL TRIBUNAL AND HIGH COURT

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A. Introduction

1. The Competition Appeal Tribunal ("CAT") is a creature of statute, established by the Enterprise Act 2002 ("EA 2002"), section 12 and Schedule 2. Its appellate and review jurisdictions over certain regulatory decisions are created and defined by legislation.

2. The High Court, on the other hand, is a Court of inherent jurisdiction. Section 31 of the Senior Courts Act 1981 provides that an application for mandatory, prohibiting or quashing orders, declarations and injunctions may be made to the High Court, but the circumstances in which the Court will grant relief, and the kind of review it is prepared to conduct, are matters for the Court's own inherent jurisdiction, governed by rules of precedent[1].

3. The intersection between the CAT's statutory appeal powers and the High Court's inherent jurisdiction, and the standards of review or appeal which apply in each forum, are matters of considerable practical importance to regulators and to the regulated. In this paper, we examine the various statutory bases of the CAT's appellate and review jurisdiction, and standards of review in the two fora. We conclude that the various different appeal and review mechanisms created by statute are unnecessarily complicated, and lead to increased costs and delay; and that the appropriate standard of scrutiny to be applied by the CAT, particularly on a merits appeal, is not entirely clear.

B. The CAT's appellate and review jurisdictions

i. Sections 46 and 47 of the Competition Act 1998

4. S.46(1) and (2) of the Competition Act 1998 ("CA 1998") provide that any party to an agreement in respect of which the OFT has made a decision, or any person in respect of whose conduct the OFT has made a decision, may appeal to the CAT *'against, or with respect to, the decision'*. Such decisions may also be made by the various sectoral regulators pursuant to the competition jurisdictions they hold concurrently with the OFT. An appealable *'decision'* for these purposes is defined by s.46(3) as any one of a number of listed competition decisions (e.g. a decision as to whether the Chapter I prohibition on agreements preventing restricting or distorting competition has been infringed, s.46(3)(a), or a decision as to the imposition of a penalty or the amount of a penalty for competition law infringements, s.46(3)(i)).

5. Persons who do not fall within s.46(1) or (2) (because they were not party to the agreement in question or it was not their conduct that was the subject of the decision) may appeal to the CAT with respect to a slightly reduced list of decisions, under

[1] See *T-Mobile v Office of Communications* [2008] EWCA Civ 1373, [2009] 1 WLR 1565, §§17-18.

s.47(1). However, such appeals are subject to a further condition of *'sufficient interest'* under s. 47(2), which is similar to the traditional requirements of standing in judicial review proceedings:

> *'(2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest.'*

6. Schedule 8 provides for two different types of review depending on the type of decision under appeal. In most cases, by paragraph 3(1) of the Schedule, the CAT *'must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal'*.

7. Paragraph 3(1) does not apply to an appeal under s.46 against, or with respect to, a decision of the kind specified in subsection (3)(g) or (h) of that section, or to an appeal under s.47(1)(b) or (c): i.e. an appeal against a decision by the OFT to release or not to release commitments given to it in the course of a competition investigation. In the case of such appeals, paragraph 3A of Schedule 8 applies, and provides that the CAT:

> *'must, by reference to the grounds of appeal set out in the notice of appeal, determine the appeal by applying the same principles as would be applied by a court on an application for judicial review.'*

ii. Sections 120 and 179 of the Enterprise Act 2002

8. S.120(1) of EA 2002 provides that:

> *'Any person aggrieved by a decision of the OFT, OFCOM, the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.'*

9. Thus the Act establishes a broad right to apply for *'review'* of many decisions taken in the context of the process of merger clearance by the Competition Commission. There is one excluded category of decision, namely a decision to impose a penalty for failure to comply with a notice to provide evidence under s.110(1) or (3) of EA 2002.

10. The right is expressly framed as a right to apply for review, not an appeal. S.120(4) provides that the CAT is to apply the judicial review standard: *'In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review'*.

11. Identical provision is made by s.179 in relation to decisions of the OFT, the appropriate Minister, the Secretary of State or the Commission in connection with a reference or possible reference under Part 4 of the Act, i.e. market investigations references.

iii. Sections 114 and 176 of the Enterprise Act 2002

12. Decisions to impose penalties for failure to comply with a notice to provide evidence under s.110(1) or (3), which are excluded from the general rights of review under ss.120 and 179, are subject to a dedicated avenue of appeal in s.114 of EA 2002. The appeal right is available to a person upon whom a penalty has been imposed and who is aggrieved by the imposition or nature of the penalty, the amount or amounts of the penalty, or the date(s) by which the penalty is required to be paid: s.114(1).

13. The Act does not specify the applicable standard of review. It simply provides, at s.114(5), that:

> *'On an application under this section, the Competition Appeal Tribunal may—*
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> *(a) quash the penalty;*
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> *(b) substitute a penalty of a different nature or of such lesser amount or amounts as the Competition Appeal Tribunal considers appropriate; or*
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> *(c) in a case falling within subsection (1)(c)* [where the appellant is aggrieved by the date(s) for payment], *substitute for the date or dates imposed by the Commission an alternative date or dates;*
>
> *if it considers it appropriate to do so.'*

14. The penalties and appeal regime under Part 2 of EA 2002 (merger references) is applied equally to Part 4 (market investigations) by s.176 of the Act.

iv. Section 192 of the Communications Act 2003

15. Under s.192(2) of the Communications Act 2003 ("CA 2003"), a *'person affected by'* a decision of a kind prescribed by s.192(1) may appeal against it to the CAT. Those decisions are:

> *'(a) a decision by OFCOM under this Part* [i.e. Part 2 of CA 2003] *or any of Parts 1 to 3 of the Wireless Telegraphy Act 2006 that is not a decision specified in Schedule 8* [very broadly, the decisions which fall within the scope of s.192(2) are decisions which relate to Ofcom's electronic communications network and spectrum management functions];
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> *(b) a decision (whether by OFCOM or another) to which effect is given by a direction, approval or consent given for the purposes of a provision of a condition set under section 45* [i.e. a condition of entitlement to provide electronic communications networks or services imposed by Ofcom];
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> *(c) a decision to which effect is given by the modification or withdrawal of such a direction, approval or consent;*
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> *(d) a decision by the Secretary of State to which effect is given by one of the following—*

(i) *a specific direction under section 5 that is not about the making of a decision specified in Schedule 8* [s.5 CA 2003 provides that the Secretary of State may for certain purposes give directions to Ofcom in relation to their network and spectrum functions];

(ii) *a restriction or condition set by regulations under section 109* [s.109 CA 2003 provides for the making of regulations by the Secretary of State setting out restrictions or conditions in the application of the "electronic communications code"];

(iii) *a direction to OFCOM under section 132* [s.132 CA 2003 empowers the Secretary of State to direct Ofcom on public health, public safety or national security grounds to suspend or restrict a provider's entitlement to provide an electronic communications network or service];

(iv) *a specific direction under section 5 of the Wireless Telegraphy Act 2006 that is not about the making of a decision specified in Schedule 8* [s.5 of the Wireless Telegraphy Act 2006 provides that the Secretary of State may issue directions to Ofcom in relation to their carrying out of their radio spectrum functions].'

16. The identification of appealable decisions under s.192 thus proceeds in two stages. First, a broad set of spectrum and network management decisions is identified. Next, there is a "carve out" of excluded decisions, for which no s.192 appeal is available; these excluded decisions are listed in Schedule 8 to the Act, and will be challengeable, if at all, only by way of judicial review in the High Court rather than by a CAT appeal.

17. The Schedule 8 decisions include decisions to bring criminal or civil proceedings, and decisions *'given effect to'* by regulations or orders under certain of Ofcom's powers to make secondary legislation. The Explanatory Notes to CA 2003 suggest at §416 that these decisions *'are either (i) decisions that do not have immediate effect on a person, but are of a legislative or quasi-legislative nature that require a further act or decision to be given effect, or (ii) decisions on matters which fall outside the scope of the Communications Directives'*. To similar effect, the Court of Appeal stated in T-Mobile v Office of Communications [2008] EWCA Civ 1373, [2009] 1 WLR 1565 at §50 that *'all the legislative powers of Ofcom to make regulations have been systematically included in Schedule 8… It is not the function of a statutory tribunal to impugn statutory instruments or regulations made pursuant to statutory powers. Challenges to these are classically matters for judicial review'*. It is doubtful, however, whether Schedule 8 really possesses such a coherent rationale. For example, a decision of the Secretary of State which is given effect by directions to Ofcom (which take the form of delegated legislation) is appealable to the CAT under s.192, so long as the directions do not themselves concern the making of a Schedule 8 decision: see s.192(1)(d)(iv). Parliament seems to have intended the CAT to "impugn statutory instruments" at least in these circumstances. There is no substitute, in the case of any particular decision, for identifying (a) pursuant to what power it is taken, (b) whether that power falls within the scope of s.192 and (c) whether the decision is excluded by any of the paragraphs of Schedule 8.

18. Where an appeal does lie to the CAT under s.192(2), the CAT decides the appeal *'on the merits and by reference to the grounds of appeal set out in the notice of appeal'*: s.195(2).

19. However, s.192 appeals are subject to the following further complication. By s.193 CA 2003 and Rule 3 of the CAT (Amendment and Communications Act Appeals) Rules 2004, where "specified price control matters" arise in an appeal, those matters must be hived off by the CAT and referred to the Competition Commission for determination. The CAT is then in the ordinary course bound to follow the Competition Commission's determination, under s.192(6). But the CAT is not bound to do so if it considers that the Commission's determination is flawed on judicial review grounds. See s.192(7):

'Subsection (6) does not apply to the extent that the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination of the Competition Commission is a determination that would fall to be set aside on such an application.'

v. Communications Act 2003, section 294 and Schedule 11

20. Under s.294 and paragraph 9(1) of Schedule 11 to the Act, a person holding a regional Channel 3 licence may appeal to the CAT against certain kinds of decisions by Ofcom relating to the licence. Paragraph 9(4) expressly limits the available grounds of appeal to particular matters relating to competition:

'(4) The only grounds on which an appeal may be brought are—

(a) that OFCOM have wrongly decided that a competition test is or is not satisfied in relation to arrangements or modifications submitted to them for approval;

(b) that a competition test is not satisfied in the case of arrangements proposed by OFCOM;

(c) that provisions contained in arrangements proposed by OFCOM for satisfying a competition test are not required for that purpose;

(d) that the requirement to satisfy a competition test should be discharged in a different manner from that in which it would be satisfied in accordance with arrangements proposed by OFCOM.'

21. Paragraph 10(2) of Schedule 11 provides that Schedule 11 appeals are to be determined by the CAT *'on the merits and by reference to the grounds of appeal set out in the notice of appeal'*.

vi. Section 317 of the Communications Act 2003

22. S.317 CA 2003 applies to Ofcom's "Broadcasting Act powers" as defined by s.317(1): broadly, Ofcom's powers in connection with Broadcasting Act licences. S.317(6) provides that *'[a] person affected by a decision by OFCOM to exercise any of their Broadcasting Act powers for a competition purpose may appeal to the Competition Appeal*

Tribunal against so much of that decision as relates to the exercise of that power for that purpose'. Sections 192(3)-(8), 195 and 196 apply to such appeals as they do to a s.192(2) appeal (see s.317(7)); accordingly, such appeals are to be determined by the CAT on the merits.

23. The position, however, is complicated by these further provisions of s.317:

> *'(2) Before exercising any of their Broadcasting Act powers for a competition purpose, OFCOM must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998 (c. 41)* [i.e. by exercising the powers they hold concurrently with the OFT under that Act].
>
> *(3) If OFCOM decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter.*
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> …
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> *(8) The jurisdiction of the Competition Appeal Tribunal on an appeal under subsection (6) excludes—*
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> *(a) whether OFCOM have complied with subsection (2); and*
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> *(b) whether any of OFCOM's Broadcasting Act powers have been exercised in contravention of subsection (3);*
>
> *and, accordingly, those decisions by OFCOM on those matters fall to be questioned only in proceedings for judicial review.'*

24. Thus, if a person wishes to challenge both Ofcom's decision to use their Broadcasting Act powers for competition purposes (rather than acting pursuant to CA 1998) and the substantive competition decision arrived at by the exercise of those powers, it is necessary for them to commence both a CAT appeal and a High Court claim for judicial review.

vii. The Mobile Roaming (European Communities) Regulations 2007

25. Regulation 14(1) of the Mobile Roaming (European Communities) Regulations 2007 ("the 2007 Regulations") provides that a person affected by a decision by Ofcom under the 2007 Regulations or under the EU Mobile Roaming Regulation, Regulation 717/2007, may appeal against it to the CAT. Such decisions include decisions by Ofcom that an operator is in breach of mobile roaming rules, and decisions taken within Ofcom's dispute resolution function under the 2007 Regulations.

26. By regulation 15(2), the CAT is to determine regulation 14 appeals *'on the merits and by reference to the grounds of appeal set out in the notice of appeal'*.

C. CAT or High Court? Challenges for challengers, headaches for regulators

27. As we have set out above, the scope of the CAT's appellate and review jurisdictions is the subject of various complex statutory provisions. This complexity can cause significant problems for regulators and those who wish to challenge their decisions.

28. First, it may in some circumstances be a nice question of statutory construction whether or not a particular decision falls within the CAT's jurisdiction. Thus in *T-Mobile v Office of Communications* [2008] EWCA Civ 1373, [2009] 1 WLR 1565 the appellants unsuccessfully argued that on an ordinary domestic construction of s.192 and Schedule 8 CA 2003, the CAT did have jurisdiction over a decision by Ofcom concerning the timing of an auction for spectrum licences, because the decision as to when the auction should take place was not, unlike the auction rules themselves, *'given effect to'* by regulations. The question whether a particular appeal raises a "specified price control matter" to be referred to the Competition Commission is to be the subject of a preliminary issue to be determined by the CAT in the case of *BT v Ofcom* later this month.

29. Secondly, it may be that the relevant jurisdictional rules appear to require concurrent appeals in the CAT and other fora. It has been noted above that one such scenario may be an appeal under s.317 CA 2003, if a licence-holder wishes to challenge both Ofcom's decision to use its Broadcasting Act powers for competition purposes and its substantive competition decision. Alternatively, it may be that the Secretary of State or Ofcom make a composite decision parts of which are appealable under s.192 CA 2003, but other parts of which are excluded from the CAT's jurisdiction by Schedule 8 to that Act and can therefore be challenged only by judicial review.

30. Most striking of all, the statutory scheme under ss.192 and 193 of CA 2003 envisages that a single decision taken by Ofcom may result in a full merits appeal to the CAT; the identification of "specified price control matters" forming part of that appeal; the determination of the non-price control matters by the CAT; concurrently with this process, the reference by the CAT of the price control matters to the Competition Commission for determination; and a final review of the Competition Commission's determination by the CAT on judicial review grounds. Such a system represents a remarkable legislative choice for Parliament to have made in a field where the public interest might be thought to favour legal and regulatory certainty and the efficient and cost-effective resolution of appeals. Quite apart from the obvious scope for delay and satellite litigation that it presents, it is almost bound to lead to situations in which the CAT and the Competition Commission are simultaneously faced with the need to resolve similar and overlapping issues arising in the same appeal.

31. The complexity surrounding the scope of the CAT's jurisdiction has the potential to produce extraordinary and unsatisfactory results. It may very well be the case that the different decisions within a composite overall decision are mutually interdependent – and yet the legislation appears to require that they be considered by different judicial bodies. Not only this, but the procedures for the CAT and High Court differ significantly: for example, appeals to the CAT must be commenced within two months of the date of notification or publication of the decision[2], whereas

[2] Competition Appeal Tribunal Rules 2003, rule 8(1).

High Court judicial review claims must be made promptly and in any event not later than three months after grounds to make the claim first arose[3]. Moreover, while the CAT may be tasked with determining part of the challenge *'on the merits'*, the High Court on a judicial review claim traditionally treats the merits as forbidden territory and will ordinarily restrict itself to limited grounds for judicial review (see further below). Different parts of the same composite decision may thus be determined not only by different judicial bodies but by reference to divergent standards of review.

32. In such a case an "appellant" will have no choice but to commence both a CAT appeal and judicial review proceedings. The great challenge then will be to ensure that the two sets of proceedings progress sensibly in tandem. It may be possible to arrange sensible and practical workarounds, particularly because several of the High Court Chancery Division judges appointed to sit as CAT Chairmen have public law experience, and could (subject to the co-operation of the Courts and listing staff!) hear both the judicial review claim in their capacity as High Court judges and the CAT appeal in their capacity as CAT Chairmen. There are other possibilities for creativity: for example, it might be suggested that the judicial review Court should appoint the CAT lay members as specialist assessors pursuant to s.70(1) of the Senior Courts Act 1981[4] and CPR r.35.15. The High Court cannot however be expected to be particularly receptive towards such a suggestion[5].

33. Even where a litigant does not face the problem of "split" jurisdiction, it is likely to be prudent in all but the clearest cases not only to commence proceedings in the forum (be it CAT or High Court) which appears to be appropriate but to commence protective proceedings in the other forum too. This is because the legislation defining the CAT's jurisdiction is far from easy, and even if the regulator's view as to the appropriate forum is obtained in advance (which is sensible) a regulator cannot "waive" any jurisdictional objection or prevent the CAT from taking a jurisdictional point of its own motion.

34. Problems where appeals and challenges are commenced in both the CAT and the High Court may also arise because the test for the grant of interim relief in the CAT (under Rule 61 of the CAT Rules) and the High Court has traditionally been different. The CAT, following the approach of the General Court of the EU

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3 CPR r.54.5(1).

4 *'In any cause or matter before the High Court the court may, if it thinks it expedient to do so, call in the aid of one or more assessors specially qualified, and hear and dispose of the cause or matter wholly or partially with their assistance.'*

5 The Courts have though shown some limited willingness to contemplate the notion of "CAT-friendly" judicial review. In *T-Mobile v Office of Communications* [2008] EWCA Civ 1373, [2009] 1 WLR 1565 the appellants argued that the CAT was required to accept over jurisdiction over their appeals because they had a directly effective EC law right to a merits appeal, under Article 4 of Directive 2002/21/EC, and judicial review in the Administrative Court could just not do the necessary, CAT-style job. The Court of Appeal rejected all the appellants' arguments; but then, in a suggestion that sat slightly strangely with its conclusion that the Administrative Court was perfectly adequate, stated that the proceedings should continue *'preferably with a Chancery judge sitting in the Administrative Court, that judge being, if possible the President of the CAT, Barling J'* (§52). The proceedings took a still stranger turn when the Administrative Court transferred them of its own motion to the Chancery Division.

(previously the CFI), has required a party seeking interim relief to demonstrate that, if such relief is not granted, they will suffer serious and irreparable harm, a test not satisfied by mere financial loss unless the future of the undertaking is jeopardised. The High Court, by contrast, has preferred a more flexible, modified *American Cyanamid* approach, balancing the relative injustice that would arise from the grant or refusal of interim relief, taking account of the public interest. This particular inconsistency is unlikely to persist, however. The CAT President, Barling J, indicated in the course of the recent interim relief hearing in the case of *Sky v Ofcom* that he was minded to adopt an approach analogous to that used by the High Court in judicial review cases, rather than the approach previously adopted by the CAT in the cases of *Napp*[6] and *Genzyme*[7]. Sky's application was in the event resolved by consent, so no judgment was given, but the President made his thinking on this question fairly clear.

35. The complexity surrounding the CAT's jurisdiction does not only cause problems for those who seek to challenge regulatory decisions. It can, in some circumstances, cause real difficulties for regulators and play into the hands of those who seek to challenge or obstruct their decisions. Where there is dispute about the appropriate forum for an appeal, or how to manage two sets of concurrent proceedings, contested hearings (and even appeals) of preliminary and case management issues may inevitably delay the eventual determination of the proceedings. In cases where delay operates to the appellant's advantage (as where interim relief has been granted), the appellant becomes highly incentivised to argue every such jurisdictional or procedural point – points which by their nature are often likely to be impossible for the regulator to concede.

36. Regrettably, neither the CAT nor the High Court have always been able to show the flexibility and speed necessary to prevent such delay: the fact that over a year was taken up in the *T Mobile v Ofcom* case in the determination (on an expedited basis) of the preliminary question of whether the CAT or the High Court had jurisdiction is an indication of the size of the problem.

D. The intensity of judicial review

i. The traditional scope of judicial review

37. The classic statement of the grounds for judicial review is that of Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374, 410D: *'one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety"'*. To these must be added, in a case where EC law or human rights are in play, (dis)proportionality.

38. It is well-established that the level of scrutiny to which the Courts will subject an administrative decision depends upon the particular circumstances. See e.g. *R*

6 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (interim relief)* [2001] CAT 1.

7 *Genzyme Ltd v OFT* [2003] CAT 8.

(Mahmood) v Home Secretary [2001] 1 WLR 840 at §18: the *'intensity of review in a public law case will depend on the subject matter in hand'*. Thus in certain human rights cases, even before the enactment of the Human Rights Act 1998 and the consequent introduction of a proportionality test in judicial review, the Courts themselves developed a test of "heightened scrutiny": see *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554

39. The decided cases were however always clear on the outer limits of judicial review. Judicial review is not a review of the merits of a decision – not even where a proportionality test is involved: see e.g. *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, §30 per Lord Bingham[8].

40. This limit to judicial review has been forcefully restated in two recent cases. In *R (Corner House Research and another) v Director of the Serious Fraud Office* [2009] 1 AC 756, the Director of the SFO had discontinued an inquiry into corruption in BAe following a threat from the Saudi government to withhold national security co-operation. The Divisional Court issued a stinging rebuke to the Director, holding that he had *'failed to appreciate that protection of the rule of law demanded that he should not yield to the threat'* and ignored the principle that *'submission to a threat is lawful only when it is demonstrated to a court that there was no alternative course open to the decision-maker'*. The House of Lords, however, held that the "principle" identified by the Divisional Court was an unhelpful distraction. The proper approach was to apply the ordinary rules of judicial review, in which the merits of the decision are firmly off-limits (§41):

'The issue in these proceedings is not whether his decision was right or wrong, nor whether the Divisional Court or the House agrees with it, but whether it was a decision which the Director was lawfully entitled to make. Such an approach involves no affront to the rule of law, to which the principles of judicial review give effect'.

41. So too in its *Merger Action Group* decision[9], dismissing a "judicial review"-style challenge under s.120 EA 2002 against the Secretary of State's decision not to refer a merger between Lloyds TSB and HBoS to the Competition Commission, the CAT held (§§59-60) that:

'The grounds on which an administrative act or decision can be called into question by judicial review are well established i.e. the traditional grounds of illegality, irrationality and procedural impropriety …

the exercise of judicial review should be contrasted with an appeal "on the merits", a standard which the tribunal is required to apply in appeals under the provisions of the Competition Act

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[8] There were isolated instances of the Court suggesting that a *'full merits review'* was permissible in a judicial review. So it did in *R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419 and *R (JB) v Haddock* [2006] EWCA Civ 961, [2006] HRLR 40, both cases of forced medical treatment, where there is a significant overlap between the judicial review claim and the availability of a claim in tort.

[9] *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 36.

1998 and Communications Act 2003. In an appeal on the merits, the tribunal is entitled to substitute its own views for those of the decision maker. In contrast, judicial review proceedings are solely concerned with the lawfulness of a decision and not its correctness'.

ii. The same approach to judicial review in the CAT and High Court?

42. As was the case in *Merger Action Group*, there are a number of kinds of statutory review or appeal which require the CAT to apply "judicial review" standards in distinction to a review of the merits: see Part B above. In its early days, the CAT was attracted by the idea that the flexibility of judicial review was such that judicial review in the CAT might look rather different from judicial review in the Administrative Court; thus in *IBA Health Ltd v OFT* [2003] CAT 27 at §220 the CAT held that:

'Parliament has created the Tribunal as a specialised tribunal. That is in contrast to the more normal situation where a non-specialised court is called upon to review the decision of a specialised decision maker. For that reason we are unpersuaded that there is necessarily a direct "readover" to section 120 [of EA 2002] *from cases such as Cellcom, Interbrew, T-Mobile, and the Rail Regulator* [all High Court cases on the appropriate standard of review of regulatory decisions]'.

43. On appeal, however, Carnwath LJ made it clear (with a didacticism permitted only to the higher appellate Courts) that the same judicial review principles, established by the High Court authorities, were applicable in the CAT[10]:

'The tribunal was required to apply the principles which would be applied "by a court on an application for judicial review" (section 120(4)). On its face, this seems a clear indication that, notwithstanding the tribunal's specialised composition, the review was not to take the form of an appeal on the merits, but was limited by the ordinary principles applied in the Administrative Court.

The tribunal expressed their difficulty in interpreting this duty (para 217). In these circumstances, they might have found help in the leading textbooks on the subject. The case law on the principles of judicial review, even at the appellate levels, is now so voluminous, and the subject matter so diverse, that the assistance of an authoritative guide (such as de Smith or Wade, to name only two of many) should in my view be regarded as indispensable when considering the application of those principles to a new statutory regime.'

44. The Court of Appeal has continued resolutely to resist any suggestion that judicial review should be different in the CAT. In *British Sky Broadcasting v Competition Commission* [2010] EWCA Civ 2, counsel for the appellant (the Hon. Michael Beloff Q.C.) sought to argue, rather ambitiously considering the Court's *IBA Health* judgment, that as a *'hyper-competent specialised tribunal'* the CAT was bound to apply a greater intensity of review than the court itself would apply in a comparable situation. The Court of Appeal simply rejected this submission as *'fly*[ing] *in the face of s.120(4)* [EA 2002]'.

10 See [2004] EWCA Civ 142, [2004] 4 All ER1103, §§88-89 per Carnwath LJ.

45. Thus, as a matter of law, judicial review in the CAT and judicial review in the High Court are exactly the same. In practice, however, it is inevitable that the CAT's approach to the application of judicial review principles will be to some extent informed by its expertise and its experience as an appellate tribunal conducting merits appeals. The CAT is likely to delve deeper into a regulator's reasoning and to have a better appreciation of any defects in it than an Administrative Court judge to whom merits are anathema and who may have little or no experience of complex regulatory disputes. Moreover, in matters which have the flavour of procedure rather than of principle – for example in considering whether to allow cross-examination of witnesses – the CAT may be inclined to follow its general practice (considered below at paragraph 67) rather than following an Administrative Court judge's extremely limited use of cross-examination. The CAT can thus be expected to remain the preferred forum of those who challenge regulators, even in cases where the challenge is limited to judicial review grounds.

iii. Intensity of judicial review of regulatory decisions

46. The Courts in judicial review cases have, by and large, treated the decisions of expert regulators with a certain amount of latitude (which those seeking to uphold the decisions would doubtless describe as due respect, those seeking to overturn them as undue deference).

47. There is a convenient summary of the principles applicable in a irrationality challenge, drawn from a number of the leading cases[11], in the relatively recent case of *R (Fraser) v National Institute for Health and Clinical Excellence* [2009] EWHC 452 (Admin) at §47 per Simon J:

> *'i) When a decision is made by a public body in good faith, following a proper procedure and applying conscientious consideration, a claimant must show more than that a mistake has occurred. It must be shown that the decision was one that could not reasonably have been reached on the material or was otherwise irrational, see Lord Templeman in R v. Independent Television Commission, ex.p TSW Broadcasting Ltd [1996] JR 185, cited in the Western Riverside case at §52.*
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> *ii) Facts which have been found by a body charged with making decisions based on their findings of fact are not readily susceptible to challenge. The principle was expressed by Lord Brightman in Puhlhofer v. Hillingdon LBC [1984] AC 484 at 515E.*
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> *iii) Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely. The principle of proper weight being attached to the decision-maker's conclusion is echoed in an observation of Lightman J in R v. Director*

[11] *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 759, *R (London and Continental Stations and Property Ltd) v. The Rail Regulator* [2003] EWHC 2607 (Admin), *R (Khatun and others) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 and R *(Western Riverside Waste Authority) v Wandsworth BC* [2005] EWHC 536 (Admin), [2005] Env LR 41.

General of Telecommunications, ex p Cellcom [1999] ECC 314 at §26, referred to in the Rail Regulator case at §29,

"The court must be astute to avoid the danger of substituting its views for the decision makers and of contradicting … a conscientious decision maker acting in good faith and with knowledge of the facts."

There is an important distinction to be drawn between the question of whether something is a material consideration and the weight which should be given. The latter is a matter for the decision maker, subject to questions of Wednesbury irrationality; and, providing the decision-maker has taken into account, the fact that it has given it no weight is not a ground for review, see the observations of Lord Hoffman in the Tesco case at 780F-H and 784C and Laws LJ in Khatun at §34-35.

iv) The Court should be wary of invitations to engage in detailed analysis of the phraseology used and drawing fine distinctions between different parts of what may be long and complex reasoning[12]. This is to say little more than that a Court of Review is, in this context, concerned with rationality, rather forming its own view on part of the material available to the decision-maker.'

48. *R v. Director General of Telecommunications, ex p Cellcom* [1999] ECC 314, cited in *Fraser*, is especially helpful for those seeking to uphold regulatory decisions. §26 of the judgment makes particularly frequent appearances in regulators' skeleton arguments:

'Where the Act has conferred the decision-making function on the Director, it is for him, and him alone, to consider the economic arguments, weigh the compelling considerations and arrive at a judgment … If (as I have stated) the court should be very slow to impugn decisions of fact made by an expert and experienced decision-maker, it must surely be even slower to impugn his educated prophesies and predictions for the future.'[13]

49. Similar latitude is encountered in proportionality challenges. Thus in *Tesco plc v Competition Commission* [2009] CAT 6 the Court made the following observations

[12] See further in this regard *R v MMC ex parte National House Building Council* [1993] ECC 388 per Auld J, cited by the CAT in *Tesco plc v Competition Commission* [2009] CAT 6 and followed in *BAA Limited v Competition Commission* [2009] CAT 35: *'…the Court in the exercise of this jurisdiction, as in its exercise in other contexts, must take care not to subject the [Commission's] Report to fine textual or legal analysis as if it were a statute or other legal document.'*

[13] It is almost customary for challengers to rely in response to the latter part of this *Cellcom* citation upon Case C-12/03 *Commission of the European Communities v Tetra Laval BV* at §42: *'A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available which makes it possible to understand the causes – or of current events, but rather a prediction of events which are more or less likely to occur in the future...'* The CAT's own preferred view of *Tetra Laval* appears to be that *'because the likelihood of error is greater in a prospective analysis, the prospective analysis must be proportionately more rigorous to account for this possibility'* (*Hutchison 3G (UK) Ltd v Office of Communications* [2005] CAT 39, §33).

about the application of the principles of proportionality[14] in regulatory cases:

'138. The first thing to note is that the application of these principles is not an exact science: many questions of judgment and appraisal are likely to arise at each stage of the Commission's consideration of these matters. This is perhaps most obviously the case when it comes to the balancing exercise between the (achievable) aims of the proposed measure on the one side, and any adverse effects it may produce on the other side. In resolving these questions the Commission clearly has a wide margin of appreciation, with the exercise of which a court will be very slow to interfere in an application for judicial review.

139. That margin of appreciation extends to the methodology which the Commission decides to use in order to investigate and estimate the various factors which fall to be considered in a proportionality analysis (and indeed in its determination of the statutory questions of comprehensiveness, reasonableness and practicability)…'

50. However, judicial review's latitude to the decisions of regulators can be overstated, and often is: see e.g. *Unichem v OFT* [2005] CAT 8, [2005] 2 All ER 440 at §§170ff. The authorities establish that if a judgment requires a factual foundation, it is appropriate and necessary for the judicial review court to examine – before the higher-level question arises as to the soundness of the judgment – the soundness of its factual foundation:

'If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge' (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1047 per Lord Wilberforce).

Thus, even where a statute authorises a public body to act on the basis of a belief, administrative law requires that the belief be *'reasonable and objectively justified by relevant facts'*: *IBA Healthcare Ltd v OFT* [2004] ICR 1364 at §45, per Sir Andrew Morritt V-C, citing *Tameside*.

51. These principles were applied fairly recently in a CAT decision, *British Sky Broadcasting Group Plc v Competition Commission* [2008] CAT 25 at §§56, 66, where the Tribunal also cited with approval a related statement of principle (challenge for "no evidence") in *Wade & Forsyth* (judgment at §54):

'…the limit of ... indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is

[14] The CAT summarised these principles as follows at §137: *'the measure: (1) must be effective to achieve the legitimate aim in question (appropriate), (2) must be no more onerous than is required to achieve that aim (necessary), (3) must be the least onerous, if there is a choice of equally effective measures, and (4) in any event must not produce adverse effects which are disproportionate to the aim pursued.'*

disposed to intervene.

"No evidence" does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on the evidence. This "no evidence" principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires.'

52. Thus there can be *'no doubt that the court is entitled to inquire whether there was adequate material to support* [the regulator's] *conclusion'*: IBA Health at §93, per Carnwath LJ. Such a question, in distinction to an issue of *'policy or political judgment'*, is *'wholly suitable for evaluation by a court'*: §101, per Carnwath LJ. As summarised by the CAT in Unichem at §174, ordinary judicial review principles allow a court *'to determine whether the* [regulator's] *conclusions are adequately supported by evidence, that the facts have been properly found, that all material factual considerations have been taken into account, and that material facts have not been omitted'*.

53. One very significant qualification to judicial review's scope for challenging the factual assessments of a regulator must be noted: the judicial review Court will not, as a general rule, decide disputed factual issues. In E v SSHD [2004] EWCA Civ 49, [2004] QB 1044 the Court of Appeal held that in order to overturn a decision for "error of fact" (a fairness-based ground of review), the claimant had to show:

'(i) an erroneous impression created by a mistake as to, or ignorance of, a relevant fact (the availability of reliable evidence to support her case); (ii) the fact was "established", in the sense that, if attention had been drawn to the point, the correct position could have been shown by objective and uncontentious evidence; (iii) the claimant could not fairly be held responsible for the error; (iv) although there was no duty on the Board itself, or the police, to do the claimant's work of proving her case, all the participants had a shared interest in co-operating to achieve the correct result; (v) the mistaken impression played a material part in the reasoning' (§63, underline emphasis supplied).

54. This limitation to judicial review for error of fact has been emphasised both outside the regulatory context (e.g. R (FD (Zimbabwe)) v SSHD [2007] EWCA Civ 1220 at §22: *'The evident controversy about the factual position in the present case takes it outside the scope of the principle'*) and within it (e.g. Unichem at §177: *'Nor is the Tribunal able, in the context of a review, to resolve disputed issues of fact'*).

55. The standard of review in rationality and proportionality challenges to regulatory decisions may thus be summarised as follows. The Court (or CAT) will be very slow to interfere with the policy judgments of regulators or their expert evaluations of the factual basis for a decision. The Court will overturn even a policy judgment if it is not supported by an adequate factual foundation; but the Court will not decide what the facts are if these are a matter of dispute – the regulator's view of the facts will stand so long as it is not irrational.

56. Of course, a judicial review challenge against a regulator may also be advanced on grounds of illegality or procedural impropriety. In the former case, whether the regulator has acted lawfully will be a question to be determined by reference to the particular regulatory regime. For an example of the latter, see BAA v Competition

Commission [2009] CAT 35, where the CAT overturned a decision of the Competition Commission on grounds of the apparent bias of one of its members. The concept of "latitude" is unlikely to be applicable in such cases, except perhaps in illegality challenges where the Court may respect the way in which a regulator has chosen to balance its competing statutory duties.

iv. Pressure at the boundaries

57. Those who wish to challenge regulatory decisions will often – if they are restricted to challenge on judicial review grounds – strain against judicial review's boundaries and seek to secure an intensity of review that is as rigorous as possible.

58. An example is *Hutchison 3G UK Ltd v Office of Communications* [2009] CAT 11, a price control dispute in which judicial review standards were applicable under s.193(7) CA 2003. The intervening mobile operators all relied on the European law context of the dispute as requiring a "tighter" degree of review than usual, relying in particular upon the judgment of Laws J in *R v MAFF ex parte First City Trading* [1997] 1 CMLR 250. The CAT expressed its doubts, but held that in any event *'this is not a case where the considerations are so finely balanced that it would make any difference to the final result which strand of case law we followed'* (§23). In another case, *R (Mabanaft) v Secretary of State for Energy and Climate Change* [2009] EWCA Civ 224, the Court of Appeal did accept (as appeared to be common ground between the parties) that *'the principles of judicial review laid down by Community law... are in general stricter than the test of Wednesbury unreasonableness used in domestic law'* (Arden LJ at §30). However, this was not of significance in the result, because as the Court observed a decision-maker has a considerable measure of discretionary judgment under Community law principles also.

59. Much more radical is the potential impact of directly effective EC law appeal rights. *T-Mobile v Office of Communications* [2008] EWCA Civ 1373, [2009] 1 WLR 1565 concerned Article 4 of Directive 2002/21/EC, which provides as follows (emphasis supplied):

*'**Right of appeal***

1. Member states shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member states shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of article 234 of the Treaty.'

60. As noted above, the appellants in the *T-Mobile* case contended that judicial review could not accommodate the requirement of Article 4(1) that the merits of the case be duly taken into account; they were entitled, they argued, to a full merits review which the Administrative Court could not deliver. The Court of Appeal dismissed the appeals on the principal ground that:

'there can be no doubt that just as judicial review was adapted because the Human Rights Act 1998 so required, so it can and must be adapted to comply with EU law and in particular article 4 of the Directive' (§29, per Jacob LJ).

61. Accordingly, even in judicial review proceedings in the High Court, a telecommunications operator with Article 4 rights is entitled to have *'the merits of the case … duly taken into account'* and the High Court must adapt its standard of review and its procedures so far as necessary to achieve this. Quite what is necessary to achieve this remains open for argument. Jacob LJ suggested at §31 that *'what is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision'*. However, given the principal basis for the Court's decision this and other ancillary observations of Jacob LJ are strictly *obiter* and not of binding force as precedent; indeed, the House of Lords dismissed a petition for leave to appeal against Jacob LJ's observations for this very reason. Jacob LJ must surely be right that Article 4 does not require the appeal body to act as *'a fully equipped duplicate regulatory body waiting in the wings just for appeals'* (§31), but the manner in which the Court (or CAT) is required to form its own assessment of the merits in Article 4 cases is likely to be hotly disputed in future.

E. Merits appeals in the CAT

62. The CAT has emphasised that in an appeal under s.192 CA 2003, it must determine the appeal on the merits, considering not only whether the decision under challenge is properly reasoned, but whether it is the right decision:

'this is an appeal on the merits and the Tribunal is not concerned solely with whether the [decision] is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts the point made by H3G in their Reply on the SMP and Appropriate Remedy issues that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner. The question for the Tribunal is not whether the decision to impose a price control was within the range of reasonable responses but whether the decision was the right one'

(*Hutchison 3G v Ofcom* [2008] CAT 11 at §164).

63. It is not the case, however, that the CAT will substitute its own view for a tenable view of the regulator properly made on a sound factual foundation. Where a number of competing, legitimate views are possible, the Court may be slow to interfere. See *T-Mobile (UK) Ltd and others v Ofcom* [2008] CAT 12, §82:

'It is ... common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination.

There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.'

64. The CAT has sought to reconcile these different perspectives in *Vodafone & others v Ofcom* [2008] CAT 22 at §46-47, emphasising that in any s.192 appeal it will adopt the standard of *'profound and rigorous scrutiny'*:

'As noted by the Tribunal on numerous occasions ... the way in which the Tribunal exercises its jurisdiction is likely to be affected by the particular circumstances under consideration ... the Tribunal may, depending on particular circumstances, be slower to overturn certain decisions where, as here, there may be a number of different approaches which OFCOM could reasonably adopt. There may be a variety of entirely legitimate reasons why the amendment of the current system of number portability in the UK is a desirable aim in pursuance of OFCOM's statutory duties (for example, conflicts of interest between different operators may prevent united action without regulatory intervention)... However it is still incumbent on OFCOM, in light of their obligations under section 3 of the CA 2003, to conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny that the Tribunal will apply on an appeal on the merits under section 192 of the CA 2003...

... The essential question for the Tribunal is whether OFCOM equipped itself with a sufficiently cogent and accurate set of inputs to enable it to perform a reliable and soundly based CBA [cost-benefit analysis]... *It is the duty of a responsible regulator to ensure that the important decisions it takes, with potentially wide ranging impact on industry, should be sufficiently convincing to withstand industry, public and judicial scrutiny.'*

65. Likewise in merits appeals under s.46 of CA 1998, the CAT has underlined the fact that it has a full merits jurisdiction, and is entitled to form its own view of the appropriate decision, but will only substitute its view for that of the decision maker in appropriate circumstances:

'whether it is an infringement or a non-infringement decision, the Tribunal has, in principle, jurisdiction to hear an appeal on the merits, that is to say to decide whether the Director has made an error of fact or law, or an error of appraisal or of procedure, or whether the matter has been sufficiently investigated.

However, the way in which the Tribunal exercises its jurisdiction is, in our view, likely to be affected by the particular circumstances. As the Tribunal said in its judgment on admissibility in Bettercare … [i.e. *Bettercare v Director General of Fair Trading* [2002] CAT 6] *at [96],*

"Nonetheless, in our view this Tribunal is essentially an appellate tribunal, not a tribunal of first instance. In complainants' appeals (as distinct, for example, from appeals against penalties) it seems to us that the primary task of the Tribunal will usually be to decide whether, on the material put before him by the complainant, the Director was correct in arriving at the conclusion that he did. If it turns out, in the course of the appeal, that the Director was insufficiently informed, in our view the appropriate course will usually be for the Tribunal to remit, rather than to attempt to investigate the merits for the first time"'

(*Freeserve v Director General of Telecommunications* [2003] CAT 5, §§110-§111);

'The Tribunal has jurisdiction under paragraph 3(2)(e) of Schedule 8 to the Act to reach its own decision in respect of a matter forming part of the decision under appeal….

We are conscious, however, that in determining the lawfulness of an access price, there may be a number of different approaches which a regulator, exercising its concurrent powers with the OFT, could reasonably adopt in arriving at its decision. There may well be no single "right price"… To that extent, the Tribunal will, whilst still carrying out an assessment of the merits of the case, give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would also have been reasonable and which might have resulted in a resolution more favourable to its case'

(*Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31, §§70, 72).

66. The CAT's approach in a merits appeal is thus sensitive to the circumstances. Some issues involve a relatively sharp-edged factual assessment where the CAT may well substitute its own view for that of the regulator. Where, however, the decision under challenge is a multi-faceted policy decision, the CAT is more likely to allow the legitimate judgment of the regulator to stand, unless it can be shown that there is some error in the basis for that judgment.

67. Clearly, however, and in stark contrast with a judicial review or the ordinary approach of an appellate court, the CAT is willing in merits appeals to determine disputes of primary fact. Its willingness to do so is particularly evident in its approach towards cross-examination. Although the CAT is understandably resistant to *'prolonged cross-examination sessions that last for days and days and days'* (*Argos Ltd v Littlewoods* [2003] CAT 10, p9 line 22), and will not allow cross-examination where unnecessary, it has made it clear that disputes of primary fact require cross-examination, and that (in general) if a party to a s.192 appeal wishes to challenge the factual evidence of a witness, it should cross-examine him[15]. See e.g. *Hutchison 3G (UK) Ltd v Ofcom* [2008] CAT 11 at §56: *'None of these witnesses was cross examined and accordingly their evidence was unchallenged so far as it related to primary factual matters'* (see likewise §41). A similar approach is taken in CA 1998 appeals, where, the CAT has even suggested that a merits appeal *'provides ... a right to call and cross-examine witnesses'* (*VIP Communications Ltd v Ofcom* [2007] CAT 3 at §43 (emphasis supplied); see too *Napp v Director General of Fair Trading (No. 3)* [2001] CAT 3 at §76-78.

68. There has been little consideration in the CAT's case-law of the Court of Appeal's own approach to determining appeals. In ordinary civil appeals, CPR r.52.11 provides that appeals *'will be limited to a review of the decision of the lower court'* unless a practice direction makes different provision or the court considers that it would be in the interests of justice to hold a *'rehearing'*. Pursuant to paragraph 9 of PD52 that

[15] This attitude towards cross-examination can be problematic, particularly since general disclosure is not the norm in the CAT and witnesses must be challenged without the benefit of the full (or any) documentary record.

the Court is to hold a rehearing if the appeal is from the decision of a body which did not hold a hearing to come to its decision. The nature of, and overlap between, reviews and rehearings has been the subject of careful consideration by the Court of Appeal. See e.g. *Dupont de Nemours v Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 per May LJ, which merits extensive quotation:

'94. As the terms of rule 52.11(1) make clear, subject to exceptions, every appeal is limited to a review of the decision of the lower court. A review here is not to be equated with judicial review. It is closely akin to, although not conceptually identical with, the scope of an appeal to the Court of Appeal under the former RSC. The review will engage the merits of the appeal. It will accord appropriate respect to the decision of the lower court. Appropriate respect will be tempered by the nature of the lower court and its decision making process. There will also be a spectrum of appropriate respect depending on the nature of the decision of the lower court which is challenged. At one end of the spectrum will be decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum will be multi-factorial decisions often dependent on inferences and an analysis of documentary material…

95… The principles on which the appeal court will admit fresh evidence under this provision are now well understood and do not require elaboration here. They may be found, for instance, in the judgment of Hale LJ in Hertfordshire Investments Ltd v Bubb [2000] 1 WLR 2318 , 2325 d — h. Rule 52.11(2) also applies to appeals by way of rehearing under rule 52.11(1)(b) , so that decisions on fresh evidence do not depend on whether the appeal is by way of review or rehearing.

96. Submissions to the effect that an appeal hearing should be a rehearing are often motivated by the belief that only thus can sufficient reconsideration be given to elements of the decision of the lower court. In my judgment, this is largely unnecessary given the scope of a hearing by way of review under rule 52.11(1)… The scope of an appeal by way of review, such as I have described, in my view means that the scope of a rehearing under rule 52.11(1)(b) will normally approximate to that of a rehearing "in the fullest sense of the word" such as Brooke LJ referred to in Tanfern's case [2000] 1 WLR 1311, para 31. On such a rehearing the court will hear the case again. It will if necessary hear evidence again and may well admit fresh evidence. It will reach a fresh decision unconstrained by the decision of the lower court, although it will give to the decision of the lower court the weight that it deserves. The circumstances in which an appeal court hearing an appeal from within the court system will decide to hold such a rehearing will be rare, not least because the appeal court has power under rule 52.10(2)(c) to order a new trial or hearing before the lower court. Circumstances in which the hearing of an appeal will be a rehearing are described in paragraph 9 of the Practice Direction supplementing Part 52. This refers to some statutory appeals where the decision appealed from is that of a person who did not hold a hearing or where the procedure did not provide for the consideration of evidence. In some such instances, it might be argued that the appeal would in effect be the first hearing by a judicial process, and that a full rehearing was necessary to comply with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms - but see Runa Begum v Tower Hamlets London Borough Council [2003] 2 AC 430. This apart, it will be rare for the court to consider that the interests of justice require a rehearing in the fullest sense of the word. All other appeals to which rule 52.11 applies will be limited to a review capable of extending in an appropriate case to the extent which I have described…

97. This analysis is, in my view, consonant with the judgment of Clarke LJ in Assicurazioni

Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577 and the cases to which he refers under the heading "Approach of the Court of Appeal" in paras 6–23. There is the possible gloss – which is of terminology, not of substance - that the attribution of the label "rehearing" is not, other than exceptionally, necessary to enable the court upon a hearing by way of review to make the evaluative judgments necessary to determine whether the decision under appeal was or was not wrong. If, as Clarke LJ indicates in para 23 of his judgment, it may occasionally be technically necessary to hold a rehearing to enable the court to consider interfering with the exercise of a discretion, rule 52.11(1)(b) gives the court power to do so. But the court will not normally interfere with the exercise of a discretion unless the decision of the lower court was reached on wrong principles or was otherwise plainly wrong. And this can be done on a hearing by way of review.

98 Thus, in so far as "rehearing" in rule 52.11(1)(b) may have something of a range of meaning, at the lesser end of the range it merges with that of "review". At this margin, attributing one label or the other is a semantic exercise which does not answer such questions of substance as arise in any appeal.'

69. In relation to the concept of a "rehearing", see further *R (Perrett) v Secretary of State for Communities and Local Government* at §24:

'A "rehearing" is, however, a broad concept which in other contexts can involve a much more limited exercise... For example, in EI Dupont de Nemours, at paras 87-90, May LJ referred to rehearings on appeal under the former RSC Orders 55 and 59 , which "were well understood not to extend to rehearings in the fullest sense of the word": the court did not hear the case again from the start, but reviewed the decision under appeal giving it the respect appropriate to the nature of the court or tribunal, the subject matter and, importantly, the nature of those parts of the decision-making process which were challenged. Thus it does not follow from the use of the word "rehearing" that the Secretary of State is required to hear the enforcement notice appeal de novo and reach an entirely fresh decision. What a rehearing requires depends on the context.'

70. It is surprising that a case such as *Dupont* never seems to have made an appearance in CAT decisions. It is particularly surprising given the tensions that run through everything the CAT does in its appellate merits function. How should the CAT reconcile its willingness to make findings of primary fact with its title of "Appeal Tribunal", and its disclaimer elsewhere of the role of tribunal of first instance (cf. e.g. *Freeserve* citing *Bettercare*, above at paragraph 65)? More generally, should the CAT simply be reviewing for material errors in the regulator's decision (which Jacob LJ considered enough for the purposes of Article 4 of Directive 2002/21/EC; see above at paragraph 61), or should it form its own view of the merits after the fullest kind of hearing? It is certainly arguable that the CAT's current approach is often too intrusive, and goes beyond what is necessary for determining appeals "on the merits"; but for the time being at least, there is no indication that the CAT is likely to become any more deferential to regulatory decisions that come before it on merits appeals.

F. Conclusion

71. The appropriate standards of scrutiny in regulatory judicial reviews and in CAT merits appeals have been extensively litigated. The arguments can be expected to

continue, not least because the appropriate standard of review is subject to the nature of the decision and the particular circumstances of the case, and because those who make and those who challenge regulatory decisions have strong incentives to adopt conflicting positions. There are also important issues of principle – particularly, the requirements of Article 4 of Directive 2002/21/EC – which remain to be resolved, and added to the mix are difficulties with the statutory provisions which frame the CAT's jurisdiction. The recipe for interesting argument, and for litigation, is rich indeed.