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JUDICIAL REVIEW AND THE COMPETITION APPEAL TRIBUNAL

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Introduction

1. This paper will deal with role of judicial review in the Competition Appeal Tribunal ("CAT") and the development of the CAT as a judicial review court. The following two broad issues will be examined:

    (1) the approach of the CAT where it is required by legislation to act as a judicial review court; and

    (2) whether and, if so, when the CAT should limit itself to a judicial review approach in the context of a merits appeal.

The background to the CAT

2. Traditionally, the Administrative Court and its predecessor were ill-suited to the task of resolving economic regulatory disputes. The judges lacked detailed economic expertise and the intensity of review in commercial regulatory matters was limited. For example, until the case of **Interbrew v Competition Commission and DTI** [2001] UKCLR 954 (Moses J) no judicial review for breach of the requirement of procedural fairness had succeeded in a competition case. Challenges by way of judicial review often failed as they were viewed as impermissible attacks on the merits of the decisions (see, **R (T-Mobile, Vodafone) v Competition Commission, DG of Telecommunications** [2003] EWHC 1566 Admin para. 132 *per* Moses J).

3. The procedures of JR were also ill-suited to resolution of such issues especially where facts were in dispute. Although the Administrative Court has the machinery to compel disclosure and to permit cross-examination such machinery is rarely used, and judicial review decisions tend to be taken on the basis of agreed facts or a presumption that the public authority's version of events is accurate unless manifestly inconsistent with other evidence.

4. The reform of statutory competition law and utility regulation, which began in the mid-1980's and has now been radically restructured by the Enterprise Act 2002, has created a clear institutional hierarchy for the resolution of disputes as between individuals and, more to the point, between the State, now acting almost entirely through independent regulatory authorities, and the citizen. Any system of judicial control must recognise that to a large degree both policy and the implementation of that policy are now in the hands of independent agencies, themselves responsible for publishing the criteria that they will adopt in decision-making.

5. The CAT was established *substantially* to deal with just such appeals on the merits against the decisions of economic regulatory bodies, not only of the OFT but also of the regulators in the telecommunications, electricity, gas, water, railways and air traffic services. It was created by Section 12 and Schedule 2 to the Enterprise Act 2002 ("the Enterprise Act") which came into force on 1 April 2003. It is a specialist judicial body

with cross-disciplinary expertise in law, economics, business and accountancy. But while most cases before the CAT are appeals on the merits of decisions, the Enterprise Act and the Competition Act 1998 ("the Competition Act") also give the CAT a specific role as a judicial review court.

Legislative background

6. The general principle was that the CAT, as a specialist tribunal, could hear appeals against decisions of regulatory bodies on the merits, fact and law.

7. For example, most appeals under the Competition Act "*must*" be determined "*on the merits by reference to the grounds of appeal set out in the notice of appeal*" (paragraph 3(1) of Schedule 8 of the Competition Act).

8. However, exceptionally, the CAT determines certain disputes in accordance with "*the same principles as would be applied by a court on an application for judicial review*" (see, sections 120(4) and 179(4) of the Enterprise Act, and paragraph 3A(2) of Schedule 8 to the Competition Act).

9. The Enterprise Act sets out, amongst other things, the rules relating to the review of the competition aspects of mergers and the rules relating to investigations into markets in the United Kingdom. These rules are principally enforced by the OFT and the Competition Commission.

10. Initial investigations into mergers are carried out by the OFT. If the OFT decides that a merger has resulted or may be expected to result in a substantial lessening of competition within any market in the United Kingdom or a part of it, it must make a reference to the Competition Commission. The Competition Commission then investigates the matter further and produces a report on the merger. If the Competition Commission determines that the merger has resulted or may result be expected to result in a substantial lessening of competition its report must set out what action, if any, the Competition Commission proposes to take with a view to preventing the substantial lessening of competition or to remedy or mitigate the situation. In certain circumstances, the Secretary of State may intervene and take decisions on public interest grounds.

11. In relation to market investigations, the OFT, any of the sectoral regulators (including for this purpose, the Civil Aviation Authority), and in some circumstances a Minister, may make a reference to the Competition Commission to investigate a specific market in the United Kingdom. The grounds for making a reference arise where there is a suspicion that one or more features of a market prevents, restricts or distorts competition in relation to the supply or acquisition of goods or services in the United Kingdom.

12. Against this background any challenge to the following decisions may by made on judicial review grounds only, namely those:

(1) of the relevant regulatory body or the Competition Commission in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation (section 120(1) and (4) of the Enterprise Act);

(2) of the relevant regulatory body or the Competition Commission in connection with a reference or possible reference for a market investigation (section 179(4) of the Enterprise Act); and

(3) of the OFT concerning the acceptance, release, non-release or variation of commitments required by it in the course of an investigation for breach of the competition rules (sections 46(3)(g) and (h) and 47(1)(b) and (c) and paragraph 3A(2) of Schedule 8 to the Competition Act).

There is no express reason supplied in the Competition or Enterprise Act for these judicial review exceptions but it is very likely to be a result of the fact that the decisions where only review on judicial review principles is permitted are closer to pure administrative matters where the regulatory bodies enjoy a greater discretion than in relation to other decisions within their sphere of competence.

13. As to the first two, they have this special feature: the decision-maker has to form a view as to what may be expected to happen in the future when determining whether to regulate or otherwise seek to control lawful commercial behaviour. The conclusions depend a great deal on the judgment of the decision-maker, as well as on the ascertainment of the correct principles to be applied in the collection of evidence, its analysis and its treatment. But regulatory autonomy has been established to such a degree, through the Government's effective withdrawal from decision-making, that there has to be some system of accountability to the courts.

14. The role to be played by the CAT on a judicial review reference from the OFT or Competition Commission is different from the role it is expected to play in an appeal from OFT or a utility regulator exercising powers under the Competition Act. Its specialist status as a tribunal does not mean that it can depart from those standard principles of judicial review.

15. There are three main principles of judicial review particularly relevant in this area. The first is that the agency or regulator must proceed upon a correct interpretation of the statute or other legal instrument, which could well be an EC Directive. The second is that the decision on the facts falls within the bounds of reasonable judgment. The third is that the decision has been reached by procedurally fair means. All the principles of judicial review are, however, potentially in play: for example the recently established independent ground of "*mistake of fact*" (**R v Secretary of State for the Home Department** [2004] QB 1044).

16. Of course, such matters applicable in a judicial review context (in particular, legitimate expectations and non-discrimination) may be and often are raised in the full merits appeals before the CAT. Judicial review principles are not applicable only to judicial review: but judicial review may not trespass outside those principles.

17. Other, earlier, principles are also of particular relevance. In *Education Secretary v Tameside BC* [1977] AC 1014 the question was whether the Secretary of State was "satisfied". At p. 1047, Lord Wilberforce pointed out that

> "*If a judgment requires, before it can be made, the existence of some facts, the, 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.*"

As for the Secretary of State, so for the OFT.

18. Tribunals such as the CAT should be sure that when applying principles of judicial review it does not substitute its own judgment, in whole or in part for that of the OFT, Competition Commission or Government, save where it is clear that there has been such error as to take the decision outside the bounds of reasonable judgment. But since the regulators and the Commission are obliged to give reasons for their decisions, they are compelled to expose themselves to scrutiny of a disaffected person, and potential challenge before the CAT.

19. The CAT may dismiss such reviews or appeals or quash the whole or part of the decision to which they relate. Where the CAT quashes the whole or part of that decision, it may remit the matter back to the regulator with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal.

20. In relation to appeals under section 120(4) and 179(4) of the Enterprise Act "*Any person aggrieved by the decision*" (sections 120(1) and 179(1)) may apply for such a review.

21. As **De Smith** (4th ed) notes this is a *"long standing favorite"* description in legislation of those entitled to challenge the validity of or appeal against administrative acts, but *"judicial protestation against the continued use of this vague expression have gone unheeded"* (para 2-051).

22. Appeals under section 46 Competition Act are made by parties to the agreements in question, in respect of which the OFT or sectoral regulator has made a decision: or by any person in respect of whose conduct such a decision has been made by such regulator. Appeals under section 47 of that Act are made by third parties (or those representing them) with a "*sufficient interest*" in the decision (s. 47(2)) – the traditional judicial review phrase – except in relation to imposition of a penalty. *"Sufficient interest"* has been so widely defined in the Administrative Court as to make it almost redundant – busy bodies and meddlers alone are excluded and reliance by a respondent on a standing point is the last refuse of the forensic failure. The CAT may well apply this instrument of control more rigidly.

The development of the CAT as a judicial review court

23. The CAT has had mixed success as a judicial review court. The difficulties which it has experienced are likely to derive from the fact that it is a specialist tribunal accustomed to dealing with merits appeals. The CAT has bristled under the restraints imposed by judicial review principles and has attempted to take a more interventionist approach than that normally adopted in the Administrative Court – recognising, it may be, that the new agencies can take decisions of major economic significance without being answerable to any effective extent to the legislature, or even the Government. If the CAT does not control, it may be argued that these agencies are in a real sense uncontrollable.

(1) The IBA case

24. In the well-known case of **Office of Fair Trading and others v IBA Health Ltd**. [2004] EWCA Civ 142, the OFT succeeded in overturning in the Court of Appeal a decision of the CAT which upheld a complaint under section 120(1) of the Enterprise Act.

25. The **IBA** case turned on the correct test to be applied under section 33(1) of the Enterprise Act as to when the OFT is obliged to refer a merger to the Competition Commission for further investigation which he had refused to do. The Court of Appeal's rejection of the CAT's "*two-part*" test for section 33(1) need not concern us here. I will focus on the part of the OFT's appeal which related to an alleged failure on the part of the CAT properly to apply the principles of judicial review.

26. The OFT's concern was based on the CAT's evident difficulty in applying judicial review principles. The CAT said expressly (at para. 217) of its judgment ([2003] CAT 27) that it "*did not find it entirely easy to interpret the duty imposed on us [under section 120(4) of the Enterprise Act]*".

27. The OFT pointed to the following statement at para. 220 of the CAT's judgment to indicate that the CAT did not view itself as bound to apply judicial review principles in the same way as the Administrative Court:

> "*A particular feature of the context of section 120 is that Parliament has created the Tribunal as a specialized 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 from cases such as* Cellcom, Interbrew, T-Mobile, *and* the Rail Regulator *that have been cited to us.*"

28. The Court of Appeal held (at para. 53 *per Sir Andrew Morritt V-C*) that "*if and in so far as CAT did not apply the ordinary principles of judicial review as would be applied by a court whether on the ground that CAT is a specialist tribunal or otherwise then they failed to observe the mandatory requirements of s.120(4)*". The Court of Appeal, notwithstanding some powerful evidence to the contrary, decided that the CAT did not fall into this error,

giving them the benefit of a presumption of regularity, and declining to construe a judgment as if it were a statute.

29. The OFT's appeal was based on the following two alleged errors: (1) reversal of the burden of proof; and (2) failure to apply the **Wednesbury** test of reasonableness. The Court of Appeal held that the CAT had correctly (despite some loose language) applied the rule that the legal onus or burden of proof on an application for judicial review rests on the applicant throughout. The CAT had referred repeatedly to the OFT having to demonstrate certain matters before the section 120 application could be dismissed. It appeared but, perhaps charitably, was not held that the CAT had shifted the burden from the applicant to the defendant (the OFT).

30. In relation to the **Wednesbury** test, it appeared that the CAT had sought to interpret unreasonableness in the ordinary and natural meaning of the word. The Vice-Chancellor held (at para. 61) that

> "*plainly unreasonableness in the ordinary and natural meaning of the word is different from Wednesbury unreasonableness. If CAT was seeking to apply the former meaning as the test of Wednesbury unreasonableness they were wrong to do so*".

31. The Vice-Chancellor once again forgave the CAT its linguistic infelicities and held that a fair reading of the CAT judgment did not lead to that conclusion.

32. Carnwath LJ, however, was not convinced (at para. 90):

> "*the CAT was right to observe that its approach should reflect the "specific context" in which it had been created as a specialised tribunal (para. 224); but it was wrong to suggest that this permitted it to discard established case-law relating to "reasonableness" in administrative law, in favour of the "ordinary and natural meaning" of that word" (para. 225).*

33. Carnwath LJ (at paras 89-99) referred the CAT to the leading text books on the subject of judicial review. Carnwath LJ discussed the "*spectrum of review*" where a low intensity of review is applied to cases involving issues depending essentially on political judgment: not, I would observe, a feature of competition law -which "At the other end of the spectrum are decisions infringing fundamental rights - equally, property rights possibly aside, not a feature of such cases, where unreasonableness is not equated with "*absurdity*" or "*perversity*", and a "*lower*" threshold of unreasonableness is used" (para. 91). It may be in the context of competition regulation before the CAT, however, that a middle way must exist in terms of the applicable degree of intensity of review.

34. Carnwath LJ held that a further factor relevant to the intensity of review is whether the issue before the CAT is one properly within the province of the court. He referred to the dicta in **Brind** [1991] 1 AC at 767, *per* Lord Lowry that judges are not "*equipped by training or experience or furnished with the requisite knowledge or advice*" to decide issues

depending on administrative or political judgment. Carnwath LJ noted, as adopting a dictum of Lightman J that the economic regulators are often the arbiters of the means whereby the statutory aims are to be achieved (para. 98).

35. This echoed the OFT's submission before the CAT that where Parliament has nominated a specialist decision-maker, the court should defer to his expert judgment: see Lightman J in **R v DG of Telecommunications, ex p. Cellcom** (unreported, 26 November 1998) at para. 26 and the judgment of Moses J in **R (London and Continental Stations and Property) v Rail Regulator** [2003] EWHC 2607 Admin paras 27-34).

36. But, as Carnwath LJ correctly observed in **IBA/Torex**, and as previously explained by Lord Hoffmann in *Moyne* there are questions of fact and questions of inference or conclusions from the facts which lead to decisions being made having legal effects. The law does not and should not stand back and ignore those conclusions if they are beyond the bounds of reasonable judgment.

37. Carnwath LJ indeed decided that the issue before CAT was one of fact not policy [para 100], namely whether the OFT had a proper factual basis for its decision. The information upon which the OFT relied had come from responses to the "*Issues Letter*" which it sent to the parties to the merger but not to the third parties affected in the market, such as **IBA** (see, para. 2 *per* V-C). Clearly the parties to the merger had an interest in presenting the market and competitive forces in a particular way and IBA never had an opportunity to address the questions in the Issues Letter.

38. The outcome of the **IBA** case was that the matter was remitted to the OFT to reconsider the merger, either to refer it to the Competition Commission, or to issue a more reasoned decision.

39. Although the Court of Appeal in the IBA case suggested that the difficulties expressed by the CAT as to how the principles of judicial review were to be applied in the current institutional structure could be resolved through checking upon what was in the text books, there is no text book answer to resolving the key policy issue, which is to achieve the right balance between judicial control and regulatory autonomy in competition law, an area of law where that judgment relates not only to the drawing of inferences from past conduct but also predicting the nature of future conduct.

(2) <u>The UniChem case</u>

40. The CAT had an opportunity to apply the guidance provided by the Court of Appeal in **IBA** in the next case to come before it under section 120 of the Enterprise Act, **UniChem v OFT** [2005] CompAR 907 (judgment dated 1 April 2005) – another refusal by the OFT to refer a merger to the Competition Commission.

41. In that case the OFT contended that it had a wide discretion as to the evaluation of the facts and in forming a view about the "**substantial lessening of competition**" test ("SLC") in a merger case. The CAT held that this was not the correct emphasis, and that there was a point at which the improper *evaluation* of facts might divert it from proper

performance of its functions. The main question for the CAT was whether the OFT had properly evaluated the primary facts of the case (para. 73).

42. The CAT held that the OFT had not properly evaluated the primary facts of the case, quashed the decision and remitted the matter to the OFT for reconsideration.

43. It is interesting to observe the parts of the judgment of the Court of Appeal in *IBA* upon which the CAT relied as to the issue of "*intensity of review*". The CAT referred to the passages of the judgment of Carnwath LJ which emphasise that the concept of "*reasonableness*" is a flexible one and that the intensity of review varies with the statutory context (para. 165).

44. The CAT held that it was appropriate to apply close scrutiny to the OFT's examination of the primary facts. In this, the CAT appeared to give little weight to the particular fact-finding role given by Parliament to the expert regulator. The approach of the CAT, while adhering to the words of the ***IBA*** judgment in the Court of Appeal, might be said to deviate from its spirit.

45. Significantly, the CAT relies on the decision of the ECJ in Case C-12/03 **P Commission v Tetra Laval BV** (unreported, 15 February 2005) which rejected an appeal against a decision of the Court of First Instance ("**CFI**"). This case dealt with the scope of review to be applied by the CFI to decisions of the European Commission in merger cases. The CAT relied (at para. 168) on the following passage (para. 39 of the ECJ judgment):

> "*Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect*".

46. Before the CAT in the **IBA** case, the judgment of the CFI in **Tetra Laval** was relied upon by IBA. The OFT had submitted that the CAT was bound by primary legislation to apply the domestic judicial review principles and that the CAT would be acting **ultra vires** in adopting the EC test, if it differed from the domestic principles. The CAT did not resolve this issue in *IBA* and consequently the issue was not raised before the Court of Appeal.

47. It remains an open question, however, since it may be argued that, notwithstanding the clear words of sections 120(4) and 179(4) of the Enterprise Act, the CAT is obliged by the duty of cooperation under Article 10 EC to avoid a divergence with EC law in this respect. It may also be argued that the **dicta** in **Tetra Laval** point to a higher level of factual scrutiny that normally applies in the Administrative Court.

48. The better view may be that the existing level of scrutiny approved by the Court of Appeal is consistent with EC law and any deviation between the practice of the CFI and CAT in this regard is unlikely to amount to a breach of EC law.

Future issues in merger and market investigation references

49. Two applications recently lodged with the CAT will provide that tribunal with an opportunity to further develop its role as a judicial review court.

(1) **Case No. 1051/4/8/05 Somerfield v Competition Commission**

50. This application lodged on 29 September 2005 under section 120 of the Enterprise Act challenges the decision of the Competition Commission to the effect that Somerfield's acquisition of Morrison's supermarkets may be expected to result in a substantial lessening of competition.

51. Somerfield alleges, among other things, that the Commission's factual analysis was "*absurd*" and that its approach to the SLC (substances lessening of competition) – the adjective mirrors that in the South Yorkshire case - test was "*illogical, self-contradictory and perverse*". Somerfield also alleges that the price rise model used by the Commission was constructed on a flawed basis and that its abstract model was not properly tested against market conditions.

52. Somerfield also makes detailed complaints regarding the remedies imposed on it by the Commission relating to divestment and restrictions on the identities of persons to whom Somerfield is permitted to divest stores.

53. Many of these grounds would not normally appear ideal for review according to judicial review principles. It will be interesting to examine the extent (if any) to which the CAT decides to stretch the concept of reasonableness and the intensity of its review to address and resolve these widening allegations by Somerfield.

(1) **Case No. 1052/6/1/05 Association of Convenience Stores**

54. This application lodged on 3 October 2005 under section 179 of the Enterprise Act challenges the decision of the OFT not to make a market investigation reference to the Competition Commission under section 131 of the Act in respect of competition issues arising in connection with certain features of market for grocery retailing in the UK.

55. As in the Somerfield application, the ACS challenges the OFT's approach to evidence and the conclusions which it drew from its factual analysis. ACS posits in its application an alternative factual analysis and claims that there is an urgent need for the Competition Commission to investigate certain competition issues in the market in which ACS operates.

56. This application, like that make by Somerfield, provides the CAT with an opportunity to deal, in its judicial review role, with issues that rarely present themselves to the

Administrative Court. In these circumstances, and based on its record in IBA and Unichem, the CAT may well seek to intensify its review and adopt a level of factual examination more akin to that of the CFI than the Administrative Court.

Whether and, if so, when should the CAT limit itself to a judicial review approach in the context of a merits appeal.

(1) Introduction

57. This issue has arisen most recently in telecoms litigation, and in particular in the **GSM Gateways** cases (see, for a background to the on-going litigation, **Floe Telecom Limited v Office of Communications and others** [2004] CAT 18).

58. Each of the mobile operators charges standard prices for the termination of calls on its own network (referred to as wholesale termination charges) although these charges vary between the mobile operators. These charges (which are currently regulated by Ofcom) apply to all third party operators (both fixed and mobile) which terminate calls on that network over a fixed point of interconnection.

59. GSM Gateways enable calls from a fixed telephone or other device to be passed from a fixed network to a mobile network in a way that is not recognised by the mobile network as being a fixed-to-mobile call. The call is first routed from the fixed network to the GSM Gateway and passed from the GSM Gateway over the mobile network to the mobile handset where the call is to be terminated.

60. Although the call originates from a fixed network, no regulated wholesale termination charge is paid to the mobile operator terminating the call. This is because the GSM Gateway contains a SIM card of the mobile network on which the call is to be terminated and effectively "*re-originates*" the call using the SIM card of the mobile network on the which the call is terminated. This means that when the call is terminated on that mobile network, it appears to the mobile operator terminating the call that the calling party and the called party are on the same mobile network. Each of the mobile operators offer the lowest retail rates for such calls.

61. Floe provided GSM Gateway services until their SIM cards were "disconnected" by Vodafone. Floe complained to Ofcom alleging that Vodafone had abused its dominant position. This complaint was rejected by Ofcom on the basis, among other things, that it was illegal for Floe to provide the types of GSM Gateway services it offered and that such restriction in English law was compatible with the EC law which applied to this area. The relevant EC Directives appear to allow certain restrictions, subject to certain procedural requirements, where there is a risk of "*harmful interference*" to the network.

62. Floe has appealed to the CAT against Ofcom's decision under section 47(1)(a) of the Competition Act. In this appeal Floe claims, among other things, that Ofcom has misconstrued the relevant EC Directives, which, Floe argues, preclude the restrictions imposed by Ofcom on GSM Gateways. Floe contends that Ofcom has erred in its

construction of the phrase "harmful interference" and, in any event, in its assessment of the risk of harmful interference for the purposes of the legal test.

(2) The arguments in favour of low-intensity review

63. Vodafone is presently arguing before the CAT (the transcripts of the hearings are on http://www.catribunal.org.uk/archive/casedet.asp?id=67), that these arguments relate to technical issues which raise regulatory questions of a specialist judgmental nature. As such, Vodafone argues, the Secretary of State (in enacting the domestic regulations) and Ofcom (in implementing them) enjoy a wide margin of appreciation. Vodafone and Ofcom contend that, in this context, the CAT does not have the full merits jurisdiction identified in **Napp Pharmaceuticals v DG Fair Trading** [2002] CAT 1. Instead, it is argued, the CAT must approach the matter with the same limited review as would the Administrative Court hearing a judicial review.

64. Vodafone argues that such an approach would be consistent with the decision of the ECJ in Case C-120/97 **Upjohn Limited** [1999] ECR I-223 at paragraph 34:

> "*According to the Court's case-law, where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion (see, in particular, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, Case 55/75 Balkan-Import Export v Hauptzollamt Berlin-Packhof [1976] ECR 19, paragraph 8, Case 9/82 Øhrgaard and Delvaux v Commission [1983] ECR 2379, paragraph 14, Case C-225/91 Matra v Commission [1993] ECR I-3203, paragraphs 24 and 25, and Case C-157/96 National Farmers' Union and Others [1998] ECR I-2211, paragraph 39)*".

65. Vodafone and Ofcom argue that very substantial deference should be given to the regulator's assessment of the risk of harmful interference and its technical assessment of the effects of the GSM Gateways.

(3) The arguments in favour of high-intensity review

66. All of this sounds like proper orthodoxy to any judicial review practitioner. The difficulty with the analysis is that the challenge in not made by way of judicial review. Since the matter is raised in an appeal under section 47(1)(a) of the Competition Act, it "*must*" be determined "*on the merits by reference to the grounds of appeal set out in the notice of appeal*" (paragraph 3(1) of Schedule 8 of the Competition Act).

67. The argument of the GSM Gateways in the CAT is that the issue under the EC Directives is whether the restriction on the use of the GSM Gateways is objectively justified, non-discriminatory, proportionate and transparent. This will involve the consideration of less onerous means of achieving the legitimate objectives of such restrictions. Any such consideration in relation to the GSM Gateways will require technical expert evidence.

68. Floe relied on the fact that, unlike the Administrative Court, the CAT is an expert tribunal, which, by virtue of its composition and powers, is designed to resolve just such issues on their merits (**Freeserve.com plc v Director General of Telecommunications** [2003] CAT 5 paragraphs 102-106). Floe contends that where Parliament intended the Tribunal to limit its review to judicial review grounds only, it made express provision (sections 120(4) and 179(4) of the Enterprise Act and paragraph 3A(2) of Schedule 8 to the Competition Act). A clear distinction is drawn in the Competition Act and the Enterprise Act between appeals "*on the merits*" and reviews which must be determined according "*to the same principles as would be applied by a court on an application for judicial review*".

69. By virtue of paragraph 3(1) of Schedule 8 of the Competition Act, it is not open to the CAT to limit itself to a review on judicial review grounds only.

70. Floe contends further that Vodafone's attempt to rely on the passage at paragraph 34 of the ECJ's judgment in **Upjohn Limited** ignores the significant jurisdictional differences between the Community judicature and the CAT. The CAT is not limited to the heads of review set out in Article 230 EC (see, **Freeserve** paragraph 106) and unlike the ECJ or CFI, in certain circumstances the Tribunal is expressly empowered to substitute its own assessment of the facts for the assessment made by the authority concerned (paragraph 3(2)(e) of Schedule 8 of the Competition Act).

71. The nature of the review described by the ECJ in paragraph 34 of its judgment in **Upjohn** is tailored to those jurisdictional limits and cannot (Floe argues) be carried over to the CAT by virtue of section 60 of the Competition Act or otherwise.

(4) Conclusion

72. It is not possible at this stage to predict the resolution of this important question. If the CAT decides firmly against Ofcom, an application for permission to appeal to the Court of Appeal is more than likely and (as in the appeal presently before the Court of Appeal in another part of the *Floe* case) any such appeal is likely to be supported by one or more of the other sectoral regulators.

73. As noted above, however, it is undoubtedly the case that the economic regulators can take decisions of major economic significance without being answerable to any effective extent to the legislature or even the Government. Some substantive control by the CAT is likely to be necessary as a matter of principle as well as being required by the legislation.

74. The solution is likely to lie, as is so often the case in public law, not in a rigid rule but in the balance properly struck according to the relevant context.

75. The CAT has already indicated such a solution in the **Freeserve** judgment. The CAT there held that the way in which it would exercise its broad merits jurisdiction is likely to be affected by the particular circumstances of the case. While the CAT is unlikely to impose upon itself the strict limitations of judicial review save where expressly stated in the legislation, it will avoid, in considering matters on their substance, converting itself into a court of first instance (paragraph 111-113). In **Freeserve**, the CAT indicated that, as an appeal court, it would be reluctant to re-try matters of fact which had already been properly resolved by the regulators. The CAT is not concerned with *de novo* hearings and is likely to focus on the potential errors of law and fact, including those within the sphere of regulatory judgment, in the decisions of the economic regulators.