

# Who is guarding the guardians?

## The Competition Appeals Tribunal and its review of OFT and sectoral regulators

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Most large companies only tend to deal with regulators and competition authorities when they need a merger cleared, or are fending off investigations of their activities. Few companies complain about their competitors' conduct when they are convinced that they are being excluded from a market, or otherwise being disadvantaged by anti-competitive conduct. The authorities, including the Office of Fair Trading (OFT) and its regulatory counterparts in telecoms, water and energy, are obliged to examine all matters brought to their attention and, while they have limited resources, must follow-up well-founded complaints. More often than not, however, cases will be turned away for lack of evidence or due to the priorities of the enforcers. In some cases the authorities have been too quick to dismiss a complaint. In others they have leapt to action too quickly without substantiating a pressing need for intervention. Until the introduction of the Competition Act 1998, these authorities, in particular the OFT, were seen as having the final word. In recent years a new and effective player has entered the enforcement fray, one that believes it has a clear mandate to help companies have their case properly considered by the authorities. In a number of recent and striking decisions the Competition Appeals Tribunal (CAT) has made it clear that it will not tolerate regulatory decisions made too quickly and without rigorous analysis. This article examines the main cases of this type over the past year, and offers suggestions on how this new enforcement environment can be turned to companies' advantage.

### The CAT's power to review and replace a decision

In passing the Competition Act, Parliament made it clear that the CAT was not simply an appellate court. The CAT has a broad right in statute to review decisions of competition authorities, and is not confined to the narrow standards of judicial review.

From its earliest decisions, the CAT did not shy away from criticising agency decisions and has on occasions<sup>1</sup> been so scathing of the OFT's work that, rather than waste the time and resources of remitting the case back to the agency, it has decided the case itself.

In *Claymore Dairies* in late 2005, the CAT reviewed the OFT's investigation into a complaint by Express Dairies that its larger competitor, Wiseman, was keeping it out of the Scottish market through predation, discriminatory prices, exclusive contracts and market-sharing agreements. The CAT set aside the OFT's decision, finding it had misapplied the law, failed to state adequate reasons for rejecting the complaint, and that its methodology and legal analysis were flawed.<sup>2</sup> The OFT had to re-open its investigation into the Scottish milk market and undertake a much closer analysis.

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<sup>1</sup> *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading*, final judgment 15 January 2002

<sup>2</sup> *Claymore Dairies and Arla Foods UK plc (formerly Express Dairies) v OFT*, judgment of 2 September 2005 ([2005] CAT 30).



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The CAT went further in the *Burgess* case. This involved a complaint made by Burgess, a funeral home denied access to its rival's crematorium.<sup>3</sup> The OFT rejected the complaint, so Burgess appealed. It did so successfully and the CAT overturned the OFT decision. Rather than remitting the case back to the OFT, the CAT itself decided that Burgess' rival had abused its dominant position and Burgess was granted complete access to its rival's facility. The CAT stated that it should make its own decision when it had all the evidence to do so, that it could respect procedural guarantees and that to do so was more expeditious and cheaper than remitting the decision back to the agency itself.

In 2006 this approach was endorsed by the Court of Appeal in another case<sup>4</sup>. It confirmed that the CAT could rule on complaints itself. This case involved the CAT's decision to replace OFCOM's decision with that of its own. The telecoms regulator had rejected Floe Telecom's complaint that Vodafone was denying it access to certain telecommunications gateway services, while still supplying other providers, including those in the Vodafone group. The CAT found that OFCOM's decision to reject Floe's complaint had not been fully reasoned. The Court of Appeal upheld the CAT's approach, confirming that if sufficient evidence were at hand it should decide for itself what the correct result of the investigation should have been.<sup>5</sup> This was consistent with Parliament having granted the CAT extensive powers, allowing it to set aside findings of fact, order the production of documents, hear witnesses and appoint experts.

In the *Albion Water* case, the CAT criticised the analysis of the water regulator OFWAT when it rejected a complaint that the wholesale price of water charged to a new entrant by the dominant incumbent did not allow for a sufficient profit margin.<sup>6</sup> The CAT re-examined the basis for the

calculation of the costs-to-price ratio, on which the margin itself was based, and disagreed entirely with OFWAT's analysis. The CAT found that the specialist regulator had not checked the data adequately, neither had it tested the assumptions on which it had relied to identify whether there was a likelihood of competitive harm.

The CAT's scepticism of regulators is not limited to those cases where complaints have been rejected. The OFT was quick to act on a complaint of a competitor to the London Metal Exchange (LME). The LME was about to launch a new trading platform that the complainant said would put it out of business. The OFT imposed interim measures which prohibited the LME from launching the platform. Soon thereafter, the OFT withdrew its decision saying that new evidence had come to light which showed the public interest was not in such jeopardy as to justify interim measures. On hearing the case, the CAT noted that the OFT had attained only a very limited understanding of the markets involved before issuing its interim measures decision.<sup>7</sup> It appeared that the OFT had merely relied upon the complaint itself, and that while it had had ample time to ask for more evidence, had not even sought views from third parties.

The theme running through these decisions is clear. In particular the CAT is concerned that the OFT has not been managing its caseload as well as it should and is making relatively quick decisions without sufficient investigation.

Some commentators believe that the CAT may have gone too far and that its constant and outspoken criticism of the regulators is undermining the deterrent effect that their investigations should engender. It would not be surprising that these authorities would like legislative changes to clip the CAT's wings. There have been attempts to narrow the scope of the CAT's review through appeals to the Court of Appeal. Notably in *Floe*, OFCOM appealed from a judgment of the CAT which effectively set a timetable for OFCOM's investigation. The Court of Appeal said that the CAT had exceeded its jurisdiction in so doing.

<sup>3</sup> *J Burgess & Sons v OFT*, CAT judgment of 6 July 2005

<sup>4</sup> *OFCOM and OFT v Floe Telecom Limited*, Court of Appeal judgment of 15 June, 2006 ([2006] EWCA Civ 768)

<sup>5</sup> *VIP Communications v Ofcom*, judgment of 22 January 2007

<sup>6</sup> *Albion Water Limited v Water Services Regulation Authority*, summary of judgment of 6 October 2006

<sup>7</sup> *London Metal Exchange v OFT*, judgment of 8 September 2006

What does this mean for companies? For complainants it means that they should provide as much material as possible to help the OFT make an accurate decision and should not feel they have no 'court of last resort' when the OFT rejects their arguments. The agencies are under an obligation to conduct a thorough investigation, and while they have limited resources and cannot take up every case, they must at least fully examine serious complaints, and be prepared to explain their reasons for not taking up a case. If unsatisfied with this, complainants are likely to find that the CAT will thoroughly test those reasons. Equally, companies should not tolerate regulatory intervention on the basis of inadequate reasoning; they should always be prepared to test regulators' arguments against them.

The OFT is actively recruiting senior directors to manage its caseload and to supervise multiple investigations. Their analysis, and that of the sectoral regulators, will only improve, particularly with this Damoclean sword of the CAT hanging over their heads. While the President of the CAT, Sir Christopher Bellamy, has now moved on to private practice, the CAT cannot be expected to relax its scrutiny of the decisions of the agencies. The body of jurisprudence is so firm that companies on either side of a case should be prepared to test decisions that go against them.

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