

# ***Ping Europe Limited v Competition and Markets Authority: Navigating the Admission of Evidence in Appeal***

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## **1. Introduction**

One of the ‘unusual’<sup>1</sup> powers the UK Competition Appeal Tribunal (‘CAT’) enjoys is that it can direct under its rules the evidence that it considers necessary or useful for the determination of a dispute. This flexible approach to evidence includes the discretionary power to admit or exclude new evidence in appeals; that is evidence that was not put forward by the parties during the investigatory phase. Enunciated in Rule 21(2) of the CAT’s recently amended Rules of Procedure 2015,<sup>2</sup> this power applies to both statutory appeals and reviews and, unlike its predecessor rule, it attempts to guide the Tribunal’s exercise of discretion by enumerating, on a non-exclusive basis, factors that the Tribunal is required to take into account in its determination.

The scope of this Rule was tested for the first time in the context of the on-going dispute between Ping Europe Limited (‘Ping’) and the Competition and Markets Authority (‘CMA’). On 26 March 2018, the CAT published its ruling in relation to a CMA application to exclude evidence from Ping’s appeal of its £1.45 million fine for breach of the Competition Act 1998, and Article 101 of the Treaty on the Functioning of the European Union (‘TFEU’).<sup>3</sup> The CAT’s ruling is significant not only because it constitutes the first judicial interpretation of Rule 21(2), but also, and on a much broader level, because of its potentially far-reaching implications for the effective administrative enforcement of UK Competition Law.

This case comment subjects the CAT’s interpretation of Rule 21(2) to scrutiny, concluding that the Tribunal engaged in a literal rather than purposive interpretation of its content that risks transforming the very nature and structure of the UK competition law regime from an administrative enforcement model to a quasi-prosecutorial one. The ruling may also incentivize other undertakings to refuse to provide evidence to the CMA during the course of the investigation undermining the original legislative purpose behind the revision of the rule, that of the need to avoid any gaming of the system as well as unnecessary costs and delay.<sup>4</sup>

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<sup>1</sup> In *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245 per Toulson LJ at [21].

<sup>2</sup> The Competition Appeal Tribunal Rules (SI 2015 No. 1648).

<sup>3</sup> *Ping Europe Limited v Competition and Markets Authority* [2018] CAT 8.

<sup>4</sup> Department for Business Innovation and Skills, ‘Competition Appeal Tribunal Rules of Procedure-Government Response’ (September 2015) at 2.39.

## 2. Background

On 24 August 2017, the CMA fined Ping, a manufacturer of golf clubs, golf accessories and clothing, for infringing Chapter 1 of the Competition Act 1998 and Article 101 TFEU by entering into agreements with two UK retailers, which banned the sale of its golf clubs online.<sup>5</sup> Relying on the Court of Justice of the European Union (CJEU) ruling in *Pierre Fabre*,<sup>6</sup> the CMA held Ping's online sales ban restricted competition 'by object'. Whilst the CMA accepted that the promotion of custom fitting was a 'genuine commercial aim', it thought Ping could have achieved this through alternative, less restrictive means. In appealing the CMA's decision, Ping argued that its in-store custom fitting is the best way to optimise its products and enhance consumer choice and quality and that this could not be carried out over the Internet. Crucially for our purposes here, Ping sought to rely on new factual and expert evidence, that is evidence which was not placed before the CMA during its investigation, to support that there are no alternative and less restrictive measures than online sales ban which could promote custom fitting.

In other words, the new evidence adduced goes right to the heart of the legal question of whether the restriction of competition by object resulting from the online sales ban was proportionate to the legitimate aim pursued. The CMA argued that this is an important contextual point insofar as Ping, and not the Authority, bears the evidential burden of proof in establishing objective justification and proportionality. This evidence, the CMA argued, was within Ping's knowledge during the administrative stage and it deliberately chose not to provide it to the Authority; hence it should be excluded.<sup>7</sup> The appellant on the other hand forcefully argued, among others, that the Tribunal's case-law and the 2015 Guide to Proceedings 'give rise to a very strong presumption that a party accused of infringing the 1998 Act, and facing a penalty of a criminal nature, is entitled to adduce new evidence in appeal'.<sup>8</sup> In exercising its discretion to admit or exclude the new evidence, the Tribunal unanimously concluded that it would be just and proportionate to admit the new evidence. In doing so, it argued that Ping's reasons for not submitting evidence during the investigative face, though a significant factor against the admission of the new evidence, does not outweigh the other factors in favour of admission, namely the statutory provision and the standard of review, the prejudice to Ping were the new evidence to be excluded, and the necessity of the new evidence to the Tribunal's determination.

The remainder of this case comment will examine the CAT's reasoning and explain why ruling sets a murky precedent for the UK competition law enforcement regime.

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<sup>5</sup> CMA, 'Decision of the Competition and Markets Authority – Online sales ban in the golf equipment sector' (Case 50230, 24 August 2017).

<sup>6</sup> Case C-439/09, *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-000.

<sup>7</sup> See n (3) at para. 44.

<sup>8</sup> See n (3) at para. 23.

### 3. Rule 21(2) in Context

Rule 21(2) reads as follows:

‘In deciding whether to admit or exclude evidence, the Tribunal shall have regard to whether it would be just and proportionate to admit or exclude the evidence, including by reference to the following factors—

- (a) the statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal;
- (b) whether or not the substance of the evidence was available to the respondent before the disputed decision was taken;
- (c) where the substance of the evidence was not available to the respondent before the disputed decision was taken, the reason why the party seeking to adduce the evidence had not made it available to the respondent at that time;
- (d) the prejudice that may be suffered by one or more parties if the evidence is admitted or excluded;
- (e) whether the evidence is necessary for the Tribunal to determine the case.’

Before considering the specific wording of Rule 21(2) and the way it was interpreted by the CAT, it is important to first place this provision in the broader context of the UK competition law regime, under which the CMA is the primary fact-finder and the decision-maker and a right of appeal to the Tribunal lies on the merits, that is on defined grounds following a full investigation of facts. In competition law appeals, the CAT is in practice a court of first instance.<sup>9</sup>

It is equally important to consider the legislative history behind the changes to the rule, as it sheds light on the main rationale behind its revision; that is no other than the concern that litigants may deliberately withhold evidence during the investigatory phase, only to produce it at the appeal phase.<sup>10</sup> This is spelt out clearly in Rule 21(2)(c): ‘the question of whether the evidence was available and the reasons why it wasn’t made available’. Of course this is one of the criteria enumerated, but read in conjunction with our point made above, it seeks to safeguard the very nature of the UK competition law enforcement, which is administrative and not prosecutorial in nature. The CMA enjoys a host of wide-ranging and compulsory, at times, powers to gather and assess evidence during the administrative phase, which could be severely undermined and compromised if it were open to undertakings to deliberately and without proper reason, withhold evidence during the course of the investigation. The appeal against the authority’s decision is meant to be on specified grounds and not a primary inquiry into the facts, which could have been addressed as part of the investigation.

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<sup>9</sup> Hence, the situation is different from the *Ladd v Marshall* rule in civil litigation, where a matter has been heard and decided by a lower court and a party seeks to adduce new evidence on appeal to a higher court.

<sup>10</sup> See n (4) above.

#### 4. The CAT's Ruling: A Murky Precedent?

In contrast to the Rule's spirit and overall purpose discussed above, the CAT engaged in a seemingly textual rather than purposive interpretation of its provisions and failed to consider the wider implications of its determination. In other words, the Tribunal refused to seriously engage with the broader aims and objectives the Rule seeks to serve, treating it more as a procedural rule governing the admission of evidence in the context of the adversarial process and overlooking the underlying reasons that constrain the admissibility of evidence. These reasons do not merely seek to discourage tactical behavior on the part of the undertakings, but also, and perhaps most crucially, safeguard the inherent feature of the UK administrative enforcement regime that prescribes all matters relevant to the CMA's decisions to be addressed to the extent possible during the administrative phase.

The CAT, while acknowledging that the evidence was indeed available to Ping during the investigation and that the reasons provided for not submitting it to the authority's consideration do not withstand scrutiny, accorded decisive weight on the first criterion of the Rule, namely '[t]he statutory provision under which the appeal is brought and the applicable standard of review'. Its subsequent findings of prejudice to be suffered by Ping from the exclusion of the evidence (i.e. the fourth criterion of the Rule) and the necessity of evidence for the tribunal's determination (i.e. the fifth criterion) in fact seem to derive and rely on the somewhat 'first-order' finding that in competition law appeals and in light of the criminal nature of the infringement decision for the purpose of Article 6 of the European Convention of Human Rights ('ECHR'), there is a presumption in favour of admitting new evidence.

While qualitative differences indeed exist between competition law appeals and appeals against a dispute determination by Ofcom under the 2003 Communications Act and applications for judicial review,<sup>11</sup> one should not go as far as to argue that the law establishes an overwhelming general presumption in favour of admitting new evidence in competition law proceedings. Had it been the case, the CAT would be essentially deprived of its power to exclude new evidence in competition law appeals. The statutory provision under which the appeal is brought and the applicable standard of review being applied by the Tribunal is a relative, but not a determinative consideration. Of course the criminal nature of the infringement decision is crucial, but this does not in itself confer 'a right' to the undertaking to introduce new evidence, as the Court of Appeal stressed in *BT v OFCOM*.<sup>12</sup> Rather, in the event of a dispute about its admission it should be regarded 'as a possibility of the party who wants to introduce it to show why the CAT should admit it'.<sup>13</sup> Furthermore, the CAT in its consideration of prejudice and the necessity of evidence was essentially guided by fairness considerations of safeguarding a level playing field between Ping and the CMA. Although in themselves valid, they may have the unintended consequence of altering the nature of the appeals process. The appeal process is not a prosecutorial system where both sides are approaching the evidence on

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<sup>11</sup> To this effect see CAT Guide to Proceedings 2015, at 7.78 (a).

<sup>12</sup> *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245 per Toulson LJ at [72].

<sup>13</sup> *Ibid.*

the same basis, but an appeal system within an administrative model of enforcement, which provides the CMA with a host of powers that cannot be relied upon equally effectively at the appeal stage.

Context is also significant in so far as the CAT's ruling allows an undertaking to adduce new evidence in appeal that relates to the objective justification in which the undertaking carries the evidential burden. This sets a murky precedent as it may open the Pandora's box in future CMA investigations and encourage other undertakings to refuse to provide evidence during the course of the investigation undermining the very rationale of the rule; that of the need to avoid any gaming of the system.

## **5. Concluding Thoughts**

Rule 21(2) embodies a fundamental tension between on the one hand safeguarding the rights of the defense – that carry significant weight in competition law appeals – by allowing an appellant to adduce new evidence in appeal and that of the effective enforcement of competition law that could be severely undermined if the undertakings tactically hold on to evidence without a proper reason only to deploy it later in appeal. Recourse to the legislative history of the Rule reveals that the adequacy of the reasons why the evidence was not submitted during the administrative phase is crucial in determining the admission or exclusion of evidence. The admission of new evidence in appeal in circumstances where this evidence could have been brought to the consideration of the Authority as part of the prior investigation, not only undermines the intended effect of Rule 21(2), but also the very nature of the UK competition law enforcement regime. It is not for the CAT to usurp the role of the CMA as the primary fact-finder. The expansive interpretation of Rule 21(2) engaged by the CAT, may render the Tribunal a *de facto* primary fact-finder against the legislative will.