5. Judicial scrutiny of regulatory decisions at the UK's specialist competition appeal tribunal

Despoina Mantzari[*]

Abstract

This chapter explores the determinants of judicial scrutiny of regulatory decisions at the UK's specialist Competition Appeal Tribunal (CAT); a unique feature of the UK's regulatory and competition law landscape. Unlike ordinary courts, the CAT's bench combines legal and non-legal expertise in areas such as economics, business and accountancy. Despite its specialist nature, however, and contrary to what intuition would suggest, the CAT does not always afford a narrow margin of appreciation to the regulators' discretionary assessments. Rather, as the chapter demonstrates, the CAT's scrutiny of regulatory decisions is determined by a *tripartite* relationship between the *expert* regulators, the *expert* CAT and the generalist Court of Appeal. It is the interplay between the *specialist/specialist* relationship, which characterises judicial scrutiny of the regulators' decisions by the CAT and the *generalist/specialist* relationship, which in turn characterises judicial scrutiny of the CAT's assessments by the Court of Appeal that determines the degree of deference to the regulators' discretionary assessments.

Keywords

Competition Appeal Tribunal; sector-specific regulation; judicial review; intensity of review; competition law; specialised tribunals.

Once thought to occupy the periphery of the emerging at the time regulatory state, courts have nowadays surged as one of its central actors.[1] In recent years, the UK, as well as other European countries, have experienced an enhancement of the role of courts (and other types of adjudicative body) in the regulatory process. The surge in the number of legal battles between the regulators and the regulated is a clear illustration of this trend.[2] Institutional and broader legal developments can explain the judiciary's involvement in regulating the regulators. On the institutional front, the number of actors involved in the production and application of the law has increased tremendously following the EU-driven liberalisation and market integration efforts. National regulatory bodies, supranational bodies, 'network agencies' as well as private actors all interact in what has become an institutionally fragmented regulatory process; often indicated with the term 'multi-level governance'.[3] As a result of such institutional complexity, rich incentives are presented to prospective litigants to challenge regulatory decisions before national, European and even the Strasbourg Court.[4]

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[*] Dr. D. Mantzari is a lecturer in Competition Law and Policy at University College London, Faculty of Laws (d.mantzari@ucl.ac.uk). Any views expressed, omissions or mistakes are mine.

[1] For example, scholars in the UK anticipated a limited role for the courts in the wake of the Conservative programme of privatisation. See Black and Muchlinksi 1998, p 1.

[2] See e.g. 'Regulatory Appeals in Practice' in BIS, 'Streamlining Regulatory and Competition Appeals-Consultation on Options for Reform' (June 2013) available at < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf > (last accessed 17 September 2018).

[3] For a commentary see Tapia and Mantzari 2013, ch 14.

[4] See e.g. Judgment of the ECtHR, September 27 2011, A/ *Menarini Diagnostics S.R.L. v Italy*, Appl. No 43509/08.

On the substantive front, broader constitutional and jurisprudential developments in several EU Member States have created new grounds for the review of regulators' decisions. Prominent amongst these is the UK, which is now said to enjoy a 'multi-streamed jurisdiction';[5] a term employed to denote that judicial review encompasses not only common law principles, but also relevant applications of EU law and of the European Convention of Human Rights (ECHR).[6] At the same time, the establishment of a specialist tribunal, the Competition Appeal Tribunal (CAT), possessing both statutory review jurisdiction (similar to common law judicial review) and statutory appeal jurisdiction (where it engages with the factual merits of the case) represents a new, attractive venue to challenge regulatory decisions. This chapter will focus on the judicial scrutiny of regulatory decisions by the specialist CAT. It will specifically focus on appeals from the sector-specific regulators of water (OFWAT),[7] communications (OFCOM),[8] and energy (OFGEM).[9]

The advent of the CAT has given rise to 'a crude equation: review of experts by generalists – wide margin of appreciation; review of experts by other experts (potentially even "more experts") narrow margin of appreciation'.[10] The story, however, is more complicated than what this paradigmatic scheme might suggest. This chapter will demonstrate that the CAT's scrutiny of regulatory decisions is determined by a *tripartite* relationship between the expert regulators, the expert CAT and the generalist Court of Appeal. At the heart of this relationship lies the interplay between the *specialist/specialist* relationship that characterises judicial scrutiny of the regulators' decisions by the CAT and the *generalist/specialist* relationship that characterises judicial scrutiny of the CAT's assessments by the Court of Appeal. This *tripartite* relationship between the regulators, the CAT and the Court of Appeal gives rise to a varying intensity of review better understood as a continuum. On the one end of the continuum lie judgments over primary facts reached following the evaluation of evidence, and discretionary decisions over which the tribunal will exercise a profound and rigorous scrutiny. On the other end of the continuum lie multifaceted policy considerations, which depend on inferences drawn from the evidence. In such cases the CAT is prepared to afford a margin of appreciation to the discretionary assessments of regulators.

The chapter will first briefly discuss the institutional landscape of regulatory appeals (section 5.2) before identifying those institutional features of the expert tribunal that enable it to exert a high intensity of review of the expert regulators' decisions (Section 5.3).

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[5] Rawlings 2008, pp 95-96

[6] See e.g. *Peter Marcic v Thames Water Utilities Limited* [2002] EWCA Civ 65 and *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66. See further *BT v OFCOM* [2012] CAT 11.

[7] OFWAT was established by the Water Act 2003 and is responsible for the regulation of the water and sewerage industries in England and Wales.

[8] But only with respect to the regulation of telecommunications. OFCOM was established by the Communications Act 2002 and operates under a number of Acts of Parliament and other statutes. It is responsible for regulating the TV and radio sectors, fixed line telecoms, mobiles, postal services and the airwaves over which wireless devices operate.

[9] OFGEM was set up by the Utilities Act in 2000. It is charged with implementing the Gas Act 1986, the Electricity Act 1989, the Utilities Act 2000, the Competition Act 1998, the Enterprise Act 2002, the Energy Acts of 2004, 2008, 2010, 2011 and the relevant EU legislation as well as the administration of a number of environmental projects on behalf of the Department of Energy and Climate Change (DECC).

[10] De la Mare 2007

It will then explore the inter-institutional interactions between the CAT and the generalist Court of Appeal and highlight the latter's role in regulating the tribunal's decision-making process (Section 5.4). It will be shown that in a number of cases the Court of Appeal points to institutional competence considerations that ought to govern the CAT's scope of review of regulatory agencies' decisions.[11] Those primarily refer to the regulatory agency's superior institutional legitimacy in deciding cases involving multifaceted policy considerations. Section 5.5 offers some concluding remarks.

5.2. The institutional landscape of regulatory appeals in a nutshell

For our purposes here, judicial review should be understood as the scrutiny by the judicial branch of administrative action. The traditional function of judicial review as commonly understood is to control the legality of administrative decisions.[12] In the UK a distinction exists between appeal and review. Appeal is understood to be concerned with the merits of the case and further entails the power to substitute the decision for that of the primary decision-maker. Appeal rights are statutory, meaning that the courts have no inherent appellate jurisdiction. Review is understood to be concerned not with the merits of the decision, but with its 'validity'. Unlike appeal, it is not based on a statute, but on an inherent jurisdiction within the superior courts.

The appeal routes against sector-specific regulatory agencies' decisions vary, as we shall see below, depending on the nature of the case and further, differ significantly for each of the regulated sectors. The existence of this complex institutional architecture for appeals can be explained historically. There were no precedents for the regulators to work with when the first industries were privatised back in the 1980s and the early 1990s and the whole policy process developed in an incremental fashion.[13] While in the original legislation establishing the utility regulators, regulatory decisions could only be challenged by way of judicial review before the generalist High Court and on limited grounds, namely illegality, irrationality or procedural impropriety, today the routes of both appeal and judicial review are available. In fact, the introduction of statutory rights of appeal in the late 1990s have gradually led to the marginalisation of judicial review as the primary means to challenge regulatory decisions. Furthermore, the establishment of the specialist CAT has largely replaced the High Court as the primary venue for hearing such challenges. As we shall see in greater detail below, contrary to the ordinary courts, the CAT's bench combines legal and non-legal expertise in areas such as economics, business and accountancy. The turn towards a closer supervision of regulatory agencies' decisions could also be interpreted in the light of the wider transformation of judicial review following the incorporation of the ECHR into domestic law via the Human Rights Act 1998. Potentially new grounds of review, such as that of proportionality, have blurred the boundaries between 'merits' review and judicial review.

[11] For an in-depth analysis of the role of institutional competence considerations in judicial scrutiny of economic evidence enshrined in the regulatory agencies' discretionary assessments, see D Mantzari, 'Economic Evidence in Regulatory Disputes: Revisiting the Court-Regulatory Agency Relationship in the US and the UK' (2016) (2016) 36(3) *Oxford Journal of Legal Studies*, pp 565-594.

[12] Wade 1961

[13] To this effect see Prosser 2005.

Subsequently, the courts' review of the decisions of agencies is moving from a position of traditional reluctance to intervene in areas of policy to a position of more intense scrutiny.[14]

The processes for the review of regulatory decisions are largely inconsistent. Financially significant regulatory decisions for the investors and ultimately the consumers (e.g. price control decisions, licence modifications) can be appealed on the merits to the specialist Competition and Markets Authority (CMA). In contrast, OFCOM's licencing decisions under the Communications Act 2003 were, until very recently, subject to an appeal on the merits before the CAT by any party affected by the decision. Such an appeal can cover material errors of fact or of law and it can go beyond that to challenge the exercise of discretion. That said, Jacob LJ in *T-Mobile (UK) Limited v Office of Communications*[15] emphasized that such an appeal is not intended to duplicate, still less, usurp, the functions of the regulator:

After all it is inconceivable that Article 4 [of the Framework Directive], in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something materially 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.[16]

But, section 87 of the recently enacted Digital Economy Act 2017 has introduced a judicial review standard. It remains to be seen what will be the scope and intensity of review applied by the CAT under this new standard of review. A further appeal on point of law can be brought to the Court of Appeal on behalf of a party or anyone else with sufficient interest. However, in the case where an appeal raises a price control matter this is hived off by the CAT and referred to the CMA for determination 'on the merits'. Finally, where the sectoral regulators exercise concurrent powers with the CMA under the Competition Act 1998, there is a right of appeal on the merits to the CAT and then on a point of law to the Court of Appeal. In such cases, the CAT's powers extend to substituting the decision for that of the regulator. In contrast, challenges against penalties and companies' licence conditions are heard by the High Court on grounds similar to those of judicial review.

5.3. The specialist/specialist interplay: CAT vs regulators

This section will discuss the implications of the specialist/specialist interplay for the judicial scrutiny of regulatory decisions. In doing so, it will identify which of the CAT's institutional characteristics allow the latter to exercise its self-proclaimed 'profound and rigorous scrutiny'[17] over all aspects of the regulators' decisions.

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[14] To this effect see Poole 2009.
[15] [2008] EWCA Civ 1373.
[16] Ibid, at para. 31.
[17] See *Hutchison 3G v OFCOM* [2008] CAT 11, at para. 164*; Vodafone Ltd v OFCOM,* [2008] CAT 22, at para. 46*;* and *TalkTalk Telecom Group Plc v OFCOM* [2012] CAT 1 (TalkTalk case), at para. 71.

It will then explore how these institutional characteristics played out in a seminal competition law appeal against a non-prohibition decision of the water regulator, OFWAT; the so-called Albion saga. [18]

A. The impact of the CAT's institutional features on the intensity of review

The CAT epitomises the example of a hyper-specialised adjudicative body. A number of reasons are identified in support of this statement, including the tribunal's membership and composition, its limited jurisdiction over regulatory and competition law disputes and the judges' perception of their role. To the aforementioned features this section will add the CAT's dual – appellate and review – jurisdiction over regulatory disputes and the tribunal's procedural rules.

First, the CAT's membership coupled with its subject-matter expertise has a direct impact on the degree of deference afforded to regulatory agencies' discretionary economic assessments. The CAT itself has acknowledged that 'the relevant expertise in its disposal may render the tribunal a more demanding and/or less deferential tribunal than might otherwise be the case where a court is called upon to review a decision of a specialist regulator'.[19] The membership consists of two panels: a panel of chairmen and a panel of ordinary members. The majority on the panel of chairmen are judges of the Chancery Division of the High Court. Some chairmen and all the other members come from academia, private practice, the civil service, business and industry. Typically, a three-member tribunal (a chairman and two ordinary members) will be constituted by the President to hear a particular case. Because competition and regulatory law are areas of law heavily influenced by economics and economic evidence and analysis, the specialist CAT does not suffer to the same extent from the 'epistemic deficit'[20] vis-à-vis the expert regulator as the one observed in generalist courts, such as the High Court or the Court of Appeal.

Secondly, the CAT's perception of its role also influences the intensity of the review. That is clearly illustrated in the early cases, where the CAT made a bold attempt to establish its image as a hyper-competent tribunal. For example, in the *IBA Health* case,[21] the Court attempted to disengage itself from the *Wednesbury* test of unreasonableness that required a decision 'to be so unreasonable that no reasonable authority would have ever come to it',[22] in favour of the 'ordinary' and 'natural meaning' of the word.[23] The ordinary meaning of unreasonableness would enable a more wide-ranging factual inquiry than that allowed under the restrictive *Wednesbury* test.

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[18] The Albion saga is long and complicated. Emphasis is placed primarily upon the following judgments: [2008] CAT 31 (hereinafter, 'Albion unfair pricing judgment'); [2006] CAT 23 (hereinafter 'Albion Main Judgment') [2006] CAT 36 ('Albion Further Judgment'); 2008 EWCA Civ 536 (hereinafter 'Albion Court of Appeal judgment'); [2009] CAT 12 (hereinafter 'Albion remedies').

[19] *BSkyB v Competition Commission* [2008] CAT 25, at para. 61.

[20] Brewer 1998, p. 1586

[21] *IBA Health Ltd v OFT* [2003] CAT 27.

[22] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223, at para. 230.

[23] Ibid, at para. 225.

Thirdly, the CAT's statutorily defined standards of review allow the tribunal to review any error of law, fact and discretion.[24] In particular, the tribunal has interpreted the reference to an appeal 'on the merits' to mean that it has 'full jurisdiction to find facts, make its own appraisals of economic issues, apply the law to those facts and appraisals, and determine the amount of any penalty'.[25] These grounds of challenge are partly based on the need to avoid the Tribunal converting itself from an appellate tribunal to a first instance decision-maker. Its remedial powers are also very wide. The CAT may not only remit a decision to the CMA or to a sectoral regulator, but may also take any decision these bodies could themselves have taken. The following passage illustrates the expansive terms in which the CAT has expressed its approach to its appellate jurisdiction vis-à-vis the Office of Fair Trading (now CMA) and sector-specific regulators:

It is in our view inevitable that matters will often be gone into in more detail on appeal than was possible at the administrative stage, particularly since at that stage the OFT has no power to compel witnesses or to cross-examine. As a matter of general approach, we do not think we should seek artificially to limit or inhibit a deeper development of the case at the appeal stage, always provided that the basic procedural framework, and the overriding principle of fairness, are respected.[26]

Fourthly, the CAT's expansionary review is greatly facilitated by the court's procedural rules, which favour a laborious examination in respect of each aspect of the regulators' findings of fact and expert analysis.[27] Crucially, the tribunal enjoys broad discretion to consider new evidence, which was not submitted to the regulator before it made the decision which is being appealed or, evidence that informed the regulator's decision during the administrative phase but that was made available to the parties either in the regulator's final decision or during the appeal process.[28] In contrast, a High Court judge will typically refuse to allow a decision-maker to adduce evidence to justify its original decision or to allow a party to challenge a decision on the basis of material that was not available to the decision-maker when the original decision was made. In such cases, the High Court will normally remit the decision for reconsideration by the original decision-maker on the basis of the new evidence.

Finally, although the CAT is first and foremost an appellate tribunal and not the primary fact-finder,[29] the information record is enhanced through its discretion to permit oral cross-examination of witnesses, especially when the primary facts are in dispute.

In fact, the tribunal has gone as far as to argue that a merits appeal 'provides…a right to call and cross examine witness[es]'[30] Most interestingly, the CAT recently implemented the 'hot tub'

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[24] See Competition Act 1998, schedule 8.

[25] *Freeserve v Director General of Telecommunications* [2003] CAT 5, at para. 107.

[26] *Aberdeen Journals Ltd v DGFT* [2002] CAT 4, at para. 61.

[27] See e.g. *Everything Everywhere Ltd v CC* [2012] CAT 11.

[28] See e.g. the *Tobacco litigation* where OFT did not disclose the report produced by Professor Schaffer until the appeal stage although this material was available to it during the administrative stage. See *Imperial Tobacco and others v OFT* [2011] CAT 41.

[29] In proceedings under the Competition Act 1998 Act the CAT acts both as an appellate review court and also as a court of first instance exercising the role of the primary decision-maker. See further *J J Burgess & Sons v OFT* [2005] CAT 25 where the CAT adopted its own decision, on the merits of the case, in which it disagreed with the OFT's analysis and substituted its finding of an abuse for that of the OFT.

approach.[31] A 'hot tub' refers to the mechanism by which expert witness evidence is taken concurrently with the relevant tribunal taking the lead in questioning the experts, usually with counsel then having the opportunity to ask supplementary questions of the expert called by the other side. Hot tubs seek to identify areas where experts are in agreement and to flag up those where there is disagreement. In contrast, the High Court rarely hears witnesses or expert witnesses and it has never sat with an assessor in a judicial review case.

B. The Albion Saga

The Albion saga stands out as a prime manifestation of the specialist/specialist interplay, as it offers an excellent example of the degree of intrusion of the appellate judge upon the discretionary economic assessments of the regulator. All the tools available to the CAT that enable it to perform an intensive review of economic evidence were put into play. The tribunal determined disputes over primary facts, held extensive case management conferences, cross-examined expert witnesses and finally substituted its decision for that of the authority on the appropriate pricing methodology.

The litigation concerned the lawfulness of the price offered by Dwr Cymru ('DC'), an incumbent water undertaker, for the partial treatment and transmission of non-potable water through a pipeline to a paper factory. Albion, a new entrant statutory water undertaker since the privatisation of the water industry in England and Wales, claimed that the price quoted to it by DC for 'common carriage' across part of DC's network (Ashgrove system) was excessive and gave rise to a margin squeeze in violation of Chapter II of the Competition Act 1998.[32]

No statutory provision for common carriage was in place at the time of the complaint, although both OFWAT and the Office of Fair Trading (OFT) recognised that if an undertaker refused a request for common carriage or imposed an unreasonable price this would constitute a breach of the Competition Act 1998 rules. Following an investigation, OFWAT found that the common carriage price was justified on their application of the retail-minus pricing methodology (ECPR methodology.) It further noted that the same result would have been achieved if the 'costs principle' inserted by the Water Act 2003 had been applied; a provision not yet in force at the time of the complaint.

Albion appealed to the CAT against OFWAT's non-prohibition decision, arguing that DC had abused its dominant position by i) demanding excessive prices and ii) by causing a margin squeeze. The CAT upheld the appeal founding that the undertaking had engaged in margin squeeze practices. The tribunal delivered a number of judgements on this matter, scrutinising several aspects of the regulatory decision in great detail. In determining whether OFWAT's decision on excessive pricing was correct, the CAT referred to the EU case law on the matter and held that the appropriate costs to consider were those 'actually' and 'efficiently' incurred. The CAT scrutinised the 'averaging accounting costs'[33] approach that OFWAT sanctioned. Although

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[30] *VIP Communications Ltd v OFCOM* [2007] CAT 3, at para. 43.

[31] *British Telecommunications Plc v Ofcom* [2017] CAT 4; *Socrates Training Limited v The Law Society of England and Wales* [2017] CAT 12.

[32] Albion was granted an inset appointed under Section 6 of the Water Industry Act 1991.

[33] This method calculates the price for common carriage on the basis of average revenue for all customers, apportioning those revenues between different classes of activity (in this case resources, treatment and distribution and then making adjustments for specific classes of customers).

the CAT agreed that OFWAT was right to apply the 'average accounting costs' methodology, it disapproved of the regulator's 'regional averaging approach'. Lengthy arguments were held over the differences that exist in relation to the cost drivers of potable and non-potable water supply pipes. The CAT found that separate cost drivers exist in operation, and judged that DC erred in grouping the different types of pipe together for the purposes of common carriage price regulation.[34] The tribunal criticised DC sharply for the lack of 'any detailed or verifiable breakdown of the components of cost'.[35] Furthermore it did not accept the argument that the information provided was corresponding to that demanded by OFWAT.[36] It therefore, held that a regulated price does not necessarily reflect cost nor it is necessarily 'reasonable'.

With regard to the margin squeeze allegation, the CAT criticised OFWAT for failing to apply the guidance contained in its own paper on pricing issues for common carriage[37] as well as the guidance provided by the then Office of Fair Trading and the European Commission on the issue. The tribunal took the view that the margin between the first access price (23.2p/m3) and the retail price (26p/m3) gave rise to an abusive margin squeeze.

In doing so, the CAT, first of all, chose the relevant 'imputation test'. There are two main 'imputation tests' for the assessment of an abusive margin squeeze: the 'as efficient competitor' test (AEC) and the 'reasonable efficient competitor' test' (REC).[38] The AEC test focuses upon the costs of the dominant undertaking's own downstream operation, while the REC pays more attention to the costs of an actual or potential competitor, even one less efficient than the incumbent, in the downstream market. Both of them feature in the EU soft law. Nonetheless, the CAT followed the AEC test which has been adopted by the EU Courts.[39]

The Court further delved into the following three issues related to the application of the AEC test: a) the way to assess access policies; b) the form of cost-analysis and c) the rule to determine margins. Each will be examined in turn.
First, the CAT ruled that in cases where the dominant undertaking is not separated at different levels of the supply chain, a correct analysis in order to establish whether there is a squeeze would require the assumption of a 'notional business' – i.e. a hypothetical downstream arm of

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[34] Albion Main Judgment, at para. 628.
[35] Ibid at para. 464.
[36] Ibid at para. 468.
[37] See Ofwat Reference MD 163, published 30 June 2000.
[38] See Commission's Notice on the Application of Competition Rules to Access Agreements in the Telecommunications Sector ('Access Notice') OJ [1998] C 265/2, at paras. 117 and 118: the AEC implies 'that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the operating arm of the company.' Regarding the REC: 'In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient).'
[39] The Commission has applied the AEC test since its 1998 decision in Napier; see 88/518/EEC: Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 Napier Brown - British Sugar). In 2000, the General Court reaffirmed the AEC test in Case T-2/95, *Industrie des Poudres Sphériques v Council* [1998] ECR II-3939 and in 2007 in case T-271/03, *Deutsche Telekom v Commission* [2008] ECR II-477.

the incumbent acting in competition with DC.[40] Then the costs must be allocated to that hypothetical retail arm of the incumbent, including an appropriate amount for profits. If the retail arm can trade profitably at the level of the upstream price charged to the competitors, there is no squeeze. Hence, the endorsement of the AEC test led the CAT to reject the notion of 'avoided costs' as a 'satisfactory basis' for the margin squeeze test.[41] Because the avoided costs method does not take into account the incumbent's fixed costs or the entrant's total costs, the application of such a notion would imply that the competitor would need to be 'more efficient' than (as opposed to 'equally efficient' to) the incumbent in order to be able to compete in the market. Finally, the CAT ruled on the appropriateness of the ECPR test to determine margins and any alleged squeeze; hence signalling that pricing methodologies are not immune from strict scrutiny, nor do they form part of the margin of appreciation, as the EU Courts have ruled in a number of preliminary rulings delineating the NRA's arena of discretion.[42] The application of the ECPR rule was one of the choices lying in the regulator's arena of discretionary power. There was no legal constraint to applying the ECPR in support of OFWAT's application of an average accounting cost methodology. Whether it promotes more or less competition is a different story. However, the CAT felt confident to decide whether the application of such a controversial rule should be accepted or not. Engaging in an academic discussion on the ECPR and examining its application in different countries around the globe in a comparative manner,[43] it clearly rejected the use of the ECPR: 'it cannot be assumed that [the incumbent's] upstream price is reasonable…[t]he margin squeeze in question cannot be justified on the basis of an ECPR approach which is itself unsound'.[44]

It may be argued that the CAT sought to align the access-pricing regime with orthodox regulatory practice. Notwithstanding the value of the academic criticism advanced against the ECPR, the CAT advanced competition over any other objective that the regulator could have considered when deciding to apply the ECPR. The tribunal judged that an economic approach, which requires new entrants to be 'super-efficient' effectively eliminates the development of competition and is not consonant with the government's policy goal in regulated industries. At the same time, the CAT was unable to offer any alternative choice to the regulator as the other solution advanced in the economics literature to the issue of access pricing, known as the Ramsey pricing rule, had also been discarded.[45]

Having explored the impact of the CAT's institutional features on the intensity of review the next subsection will examine the influence of the Court of Appeal on the CAT's scope of review.

5.4. 'Regulating' the CAT: The Court of Appeal's influence on the CAT's decision-making process

[40] Albion Main Judgment, at para. 900. The failure to consider the costs of a notional retail arm of the incumbent was in the CAT's view a 'central weakness' of the regulator's decision (at para. 906).
[41] Ibid at para. 910 (ruling out the 'avoided costs' principle as the basis of reasoning of some European decisions).
[42] See C-438/04, *Mobistar SA v Institut belge des services postaux et des télécommunications* (IBPT) [2006].
[43] The ECPR rule was banned in the New Zealand Telecommunications sector following the *Clear* case and it was rejected by the US Supreme Court in the *Verizon* case. See cases *Telecom Corporation of New Zealand v Clear Communications Ltd* [1995] 1 NZLR 385 and *Verizon v FCC*, 535 US 467 (2002).
[44] Albion Main Judgment, at para. 873.
[45] See generally Laffont and Tirole 2000.

This section will discuss how the preferences of the generalist Court of Appeal shape and ultimately constrain the CAT's propensity towards a heightened review of multifactorial regulatory decisions. It will argue that the Court of Appeal 'regulates' the institutional interactions of the CAT with regulators on the basis of relative institutional competence considerations. Those primarily refer to the regulatory agency's superior institutional legitimacy in deciding cases involving multifaceted policy considerations. As will be shown, whilst in the early cases the Court of Appeal was primarily concerned with striking an institutional balance between the CAT and the regulators, it gradually emerged as the 'regulator' of the CAT's decision-making process. The discussion will begin with an overview of the Court of Appeal's early interaction with the specialist tribunal in the context of regulatory disputes, and will then move on to consider the CAT's exercise of self-restraint in the context of appeals from OFCOM. In particular, OFCOM's decisions related to the market review process in electronic communications represent the largest number of regulatory appeals before the CAT, rendering the authority a repeat player before the tribunal.

Institutional competence considerations were prominent in the Court of Appeal's reasoning in the early days of the CAT when the Court of Appeal sought to strike what it perceived to be as 'the right balance' between the CAT and the regulators. Hence in the *Floe I* case[46] the Court of Appeal considered that the tribunal had gone too far in requiring OFCOM to reach a conclusion, either finding an infringement or a decision to issue a statement of objections within five months.[47] In the opinion of Lloyd LJ, while it was entitled to 'express its own view as to how urgently the case should be dealt with', it is not 'able to give directions to the regulator in relation to the conduct of further investigation'.[48] In the same vein in the *Floe II* case,[49] the Court of Appeal remarked on the potential for specialist adjudicatory bodies to issue 'advisory opinions to litigants or potential litigants' and as such 'do things which they are not intended, qualified or equipped to do'.[50]

However, in subsequent case law the Court of Appeal makes more explicit the use of institutional competence considerations in cases involving the balancing of potentially conflicting considerations relevant to the regulator's objectives. The Court of Appeal's judgement in the 08 numbers case,[51] concerning the correctness or otherwise of OFCOM's dispute resolution between BT and a number of mobile network operators in respect of calls to non-geographic numbers (i.e. numbers beginning with 080, 0845, 0871) is a case in point.

Dispute resolution is a form of ex post regulation in its own right, provided by the Communications Act whenever 'meaningful commercial negotiations' between the parties have

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[46] *OFCOM v Floe Telecom Ltd* [2006] EWCA Civ 768, at para. 35. See CAT judgment, *Floe Telecom Ltd (in liquidation) v OFCOM* [2005] CAT 14.
[47] Ibid.
[48] Ibid.
[49] *OFCOM and T-Mobile (UK) Ltd v Floe Telecom Ltd* [2009] EWCA Civ 47.
[50] Ibid at para. 20.
[51] *Telefónica O2 UK Ltd v BT* (the "*08 Numbers* case) [2012] EWCA Civ 1002.

failed.[52] In resolving a dispute, OFCOM has the power to 'give a direction fixing the terms or conditions of transactions between the parties to the dispute'[53] in a way that meets the public policy objectives as set out in article 8 of the Framework Directive of electronic communications.[54] OFCOM had to decide whether it was fair and reasonable for BT to apply new termination charges for calls to the relevant numbers hosted on its network, based on the level of retail charge made by originating communications providers for calls to these numbers. In doing so, Ofcom construed an analytical framework for assessing whether the changes made by BT were 'fair and reasonable' judged by three governing principles closely related to the objectives set out in Article 8.2 of the Framework Directive: a) that mobile network operators should be able to recover their efficient costs of originating calls to the relevant numbers; b) that the new charges should provide benefits to consumers and c) that they should not entail a material distortion of competition. Ofcom found that the second principle, the so-called 'welfare test' was not sufficiently met. The regulator distinguished between three potential effects on consumers: the 'direct effect', that is the effect on consumer prices for calls to 08 numbers. The 'indirect effect', which referred to the possibility that revenue gains by BT would feed back to the consumer in the form of lower charge or higher standards of service by service providers who use 08 numbers and the 'mobile tariff package' effect, that is the potential for mobile network operators essentially deprived of one revenue stream to try to compensate themselves by seeking to raise prices elsewhere. Though Ofcom thought that the direct and indirect effect was likely to be positive, it thought that the mobile tariff package effect was likely to be negative because mobile network operators would probably try to recoup the higher termination charges by raising charges for other services. Despite these circumstances of profound uncertainty, the CAT directed the regulator to follow either of the two alternative routes it proposed:[55]

If, therefore, the test to be applied is whether the NCCNs can be shown to provide benefits to consumers, then that test is not met. However, we do not consider this to be the correct test in the circumstances of the present case, because it places undue importance on Ofcom's policy preference, at the expense of the two other relevant factors that we have identified as forming a part of Principle 2 (namely Principle 2(ii) [the risk of a distortion to competition arising from restricting CP's commercial freedom to price] and BT's private law rights.

We consider that whilst Ofcom's welfare analysis could override these other factors, it should only do so where it can clearly and distinctly be demonstrated that the introduction of the NCCNs would act as material disbenefit to consumers. In short, given the presence of the two other factors that we have identified, it is not enough for the welfare analysis to be simply inconclusive. The welfare analysis must demonstrate, and demonstrate clearly, that the interests of consumers will be disadvantaged.[56]

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[52] See Communications Act 2003, s 185. See further OFCOM, *Dispute Resolution Guidelines- Ofcom's guidelines for the handling of regulatory disputes*, available at http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/summary/condoc.pdf

[53] Communications Act 2003, s 190.

[54] See *Hutchison 3G UK Ltd v OFCOM* [2009] EWCA Civ 683.

[55] Ibid at para 396.

[56] Ibid.

The Court of Appeal overruled the CAT and restored Ofcom's decision. It highlighted the forward-looking nature of OFCOM's assessments by stressing that the regulator had come to its conclusion by way of a balancing exercise in the face of uncertainty as to whether the changes would produce benefit or harm to consumers, taking into account the likely effects on competition and having regard to their overriding statutory duties to further the interest of consumers. Hence, the CAT was not entitled to override OFCOM's conclusions. The Court of Appeal did not actually argue that the Tribunal had balanced the various regulatory objectives in a different way from that adopted by OFCOM. Nonetheless, in a critical tone, it pointed to OFCOM's superior institutional legitimacy and expertise in cases involving the balancing exercise of the various regulatory duties.[57] It hence reminded the tribunal that it could not reach its own 'different conclusion as to how the relevant considerations should be balanced against each other, unless Ofcom's conclusions could be shown to have been wrong in law'.[58]

Potentially conflicting considerations also arise in the imposition of regulatory remedies following the finding of Significant Market Power (SMP). In such cases, the Court of Appeal has repeatedly held that:

any value judgement (of OFCOM) as between different considerations, must carry great "weight" - the weight to be attached to different considerations in forming a value judgement is a matter for Ofcom as the NRA charged with the duty of resolving disputes, and in the absence of any misdirection by Ofcom the court will normally respect its determination, whether or not the court would itself have balanced the considerations in the same way and reached the same conclusion.[59]

In remedies following the finding of a SMP, while the CAT declares that it will not simply consider whether the decision of the regulator to impose a price control is 'within the range of reasonable response' but whether the decision is the 'right one',[60] it simultaneously proclaims that 'it may be slower to overturn certain decisions where there may be a number of different approaches which OFCOM could reasonably adopt':[61]

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 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 resolution more favourable to its cause.[62]

The CAT's reasoning largely echoes the Court of Appeal's guidance to the Tribunal in cases involving the assessment of multifactorial regulatory decisions. In such cases, the tribunal

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[57] *Telefónica O2 UK Ltd v BT* (the "*08 Numbers* case) (n 51), at para. 89.
[58] Ibid.
[59] *BT v OFCOM* (PPC) [2012] EWCA Civ 1051.
[60] *Vodafone & Others v OFCOM* [2008] CAT 22, at para. 46.
[61] Ibid.
[62] *T-Mobile (UK) Ltd and Others v OFCOM* [2008] CAT 12, at paras. 82 and 83; See further Telef*ónica UK Ltd v Ofcom* [2012] CAT 28, at para. 45.

maintains a respectful attitude in not substituting its own view for a tenable view of the regulator properly made on a sound factual foundation. In spite of its specialist nature and in spite of its appellate jurisdiction, the CAT is prepared to allow a margin of discretion to the initial decision-maker.[63] The 'margin of appreciation test,' which has recently entered English domestic jurisprudence,[64] features prominently in the European Court of Justice (CJEU) case law, involving review of complex economic[65] or technical[66] appraisals. Despite the calls to 'marginalise' its application,[67] this judge-made doctrine still survives as a doctrinal constraint upon the appreciation of economic evidence enshrined in the European Commission's decisions.

The concept of a margin of appreciation suggests an ambit of discretion, a 'latitude in the factual assessment'[68] left to the Commission by the Treaty or legislative provisions. However, its wide application renders its 'properties' uncertain. The Courts have applied the doctrine in areas as diverse as mergers[69] and abuse of dominance cases,[70] as well as in fields where the Commission enjoys discretion of a political nature, such as state aid,[71] when reviewing administrative or legislative acts of institutions required to balance different interests and policies,[72] and decisions of independent expert committees.[73] The courts' recognition of a margin of appreciation triggers, in turn, a limited standard of review (contrôle restraint).

Although, as a general rule, in actions for annulment the EU Courts exercise a comprehensive, full review of legality (contrôle normal)[74] of an allegation of error of fact or of procedural

[63] Rose 2009. For a more recent pronouncement see *BT v Ofcom* [2016] CAT 22.
[64] Ibid.
[65] See e.g. Case C-42/84, *Remia v Commission* [1985] ECR I-2545, at para. 35; C-56/64 and 58/64, *Consten and Grundig* [1996] Rec. p. 279; Case C-194/99 P, *Thyssen Stahl v Commission* [2003] ECR I-10821, at para. 78; Case T-170/06, *Alrosa v Commission* [2007] ECR II-2601, at para.108.
[66] See Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, at para. 88; Case T-321/05, *AstraZeneka v Commission* [2010] ECR II-02805, at para. 32; Case C-269/90, *Technische Universität v Hauptzollamt München-Mitte* [1991] ECR I-5469, at para. 14.
[67] See e.g. Jaeger 2011.
[68] Bailey 2004; See further Kalintiri 2016.
[69] Joined Cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote* (SCPA) *and Enterprise minière et chimique (EMC) v Commission* [1998] ECR I-1375 ; T-342/99, *Airtours v Commission* [2002] ECR II 2585 ; Case T-351/03, *Schneider Electric v Commission* [2002] ECR II -4071; Case T-5/02, *Tetra Laval v Commission* [2002] ECR II-4381, at para. 119*;* T-342/99, *Airtours v Commission*, at para. 64.
[70] See e.g. Case T- 65/96, *Kish Glass v Commission* [2000] ECR II -1885, at para. 64 upheld by appeal by an order of the CJEU in Case C-241/00, *P Kish Glass v Commission* [2001] ECR I- 7759; Case T -301/04, *Clearstream v Commission* [2009] ECR II 3155, at para. 47; Case T-57/01, *Solvay v Commission* [2009] ECR II 4621, at para 250;
[71] Case C-333/07, *Société Régie Network v Direction de contrôle fiscal Rhône-Alpes Bourgogne* [2009] ECR I-10807, at para. 78.
[72] See e.g. C-225/91, *Mantra SA v Commission* [1993] ECR-I 3203, at paras. 24-25; C-372/97, *Italy v Commission* [2004] ECR I-3679.
[73] See e.g. cases T-13/99, *Pfizer Animal Health SA v Council of the European Union*, at paras. 170-2; Case T-70/99, *Alpharma Inc. v Council of the European Union*, at paras. 177-180; Joined Cases T-74/00, T-76/00, T-84/00, T-85/00, T-137/00 and T-141/00 *Artegodan GmbH a.o. v Commission* [2002] ECR II-4945.
[74] See Legal 2005

impropriety,[75] review is limited when faced with complex economic assessments. As a consequence, the EU judicature will limit itself to:

verifying whether the rules on procedure and on statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.[76]

Despite the Courts' recognition of the existence of a margin of appreciation since the *Tetra Laval* case the CJEU has granted the General Court the power to exercise a deep review of the Commission's analysis. It can be argued that the CAT's control of regulatory agencies is very close to the EU courts' standard of review. The tribunal is prepared to test whether the regulators' findings withstand its 'profound and rigorous' scrutiny, while at the same time allowing a margin of appreciation in cases involving policy judgements.

Apart from institutional competence considerations, broader systemic considerations also affect the degree of judicial scrutiny at the CAT. The first one is enforcement-related. Regulatory disputes have never been tested before in a specialist adjudicatory body. By integrating institutional competence considerations into its reasoning, the CAT avoids institutional conflict with the regulatory agencies and ensures that its rulings will be carried out by the regulators. The second consideration is related to the legitimacy of the CAT. Adherence to the Court of Appeal's guidance not only weakens the possibility of a costly reversal of its judgements, but further contributes to its legitimacy-building exercise vis-à-vis the regulators and the other actors of the regulatory space.

5.5. Conclusion

This chapter examined the determinants of judicial scrutiny of regulatory decisions at the specialist CAT. In doing so, it highlighted the interplay of two different interactions: the *specialist/specialist* interaction that is reflected in the tribunal's scrutiny of the regulatory agencies' discretionary assessments and the *generalist/specialist* interaction that manifests itself in the Court of Appeal's review of the CAT's determinations. The chapter showed that the *specialist/specialist* interplay mostly manifests itself in the context of appeals involving the assessment of liability for competition law infringements. In those cases, the CAT does not only exercise an intensive scrutiny of the merits of the regulatory agencies' decisions, but it also does not hesitate to substitute its decision for that of the authority on issues which have been traditionally considered as 'no-go' areas for generalist courts (e.g. pricing methodologies). The chapter attributed this intensity of review to a number of institutional features of the tribunal, such as its membership, its subject-matter expertise and its perception of its role.

Special attention was paid to the tribunal's rules of procedure, which, contrary to those of the High Court, favour an extensive examination of each aspect of the regulator's findings of fact and expert analysis. The chapter then turned to consider the *generalist/specialist* situation and the role of the Court of Appeal in constraining the CAT's propensity towards a more intensive

[75] Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, at paras. 67, 69 and 71.
[76] GC, T-28/03 *Holcim v Commission*, [2005] ECR II- 1357, at para. 95. See also ECJ, Case C-7/05 P *John Deere v Commission*, [1998] ECR I-3111, at paras. 34-36; Case 42/84 *Remia v Commission*, [1985] ECR I-2545, at para. 34-5; Case C-194/99 P, *Thyssen Stahl v Commission* [2003] ECR I-10821, at para. 78.

review. It was shown that the Court of Appeal regulates the institutional interactions of the CAT with the regulatory agencies on the basis of considerations of relative institutional competence. Those primarily refer to the agency's superior institutional expertise and legitimacy in deciding cases involving multifaceted policy considerations. Thus, the CAT, in reviewing OFCOM's decisions involving the assessment of SMP remedies in electronic communications, essentially multifactorial disputes, exercises a measure of self-restraint predicated upon considerations of institutional competence. The chapter shows that there is scope for a specialist tribunal conducting a merits review of regulatory decisions to confer 'a margin of appreciation' to the discretionary assessments of the regulatory authority. It also pointed to a number of other micro-level considerations and broader systemic considerations that affect the degree of judicial scrutiny at the CAT (i.e. enforcement-related, legitimacy-building).

In conclusion, the status of the reviewing court and its access to epistemic competence is an important factor, but not a dispositive one, in determining the intensity of review of regulatory decisions. This is mostly attributable to nature of regulatory disputes.[77] Even specialist tribunals are limited in their ability to decide on regulatory remedies, which involve the representation of diverse interests, the balancing of a variety of goals, and prospective analysis.

[77] I have referred to such disputes as 'polycentric' in nature in a related piece referred to in (n 11) above.

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