

Evidence in the Competition Appeal Tribunal

Evidence in Competition Law Proceedings:
A Comparative Perspective

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Overview

- ‘Rules’ of evidence in the CAT
- CAT’s approach to evidence
- Examples of the CAT’s approach to evidence

‘Rules’ of evidence in the CAT

- Rule 22 of the CAT Rules of Procedure
- *BT v Ofcom* [2011] EWCA Civ 245
- Strict rules of evidence do not apply; instead CAT is guided by “*fairness*”
- Section 4(1) and (2) of the Civil Evidence Act 1995

CAT’s approach to evidence

Tesco v Office of Fair Trading [2012] CAT 31 §124

- An appellant may challenge a decision on any ground it so wishes and may do so on the basis of evidence that was not available to the OFT
- The OFT should be prepared to defend its decision on the basis of the material before it when it took that decision

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CAT's approach to factual evidence

- Contemporary documents vs. documents created after the event (*Football Shirts; Toys and Games; Tobacco*)
- Notes of interview vs. witness statements (*Construction bid-rigging; Dairy*)
- Cross-examination of witnesses (*Enron; Cardiff Bus; Tobacco; Dairy*)
- Early resolution agreements (*Dairy*)

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Construction bid-rigging (2011)

Insufficient proof of infringements

- Some of the contemporary documents were ambiguous
- Documents created after the event had little probative value
- In many cases the appellant's witnesses were found to be honest and credible
- The CAT criticised the OFT's reliance on notes of interview: they were unsworn and unclear

Dairy: *Tesco v OFT* (2012)

Approach to early resolution agreements

« the ERAs have little or no probative value on this appeal, given their formalistic nature »

[2012] CAT 31, §111

Dairy: *Tesco v OFT* (2012)

Approach to public distancing

« one of Tesco's employees had rejected competitors' future pricing intentions on the basis of witness evidence and a contemporary internal document »

[2012] CAT 31, §450

Napp Pharmaceutical (2002)

Explanations for unilateral conduct

« Important not to put witnesses in a position where they are required to explain e.g. a pricing policy in accordance with an economic theory which differs from what they thought that they were doing at the time »

[2002] CAT 1, §252

Enron v EW&S (2009)

Approach to counterfactual

« The CAT was unwilling to substitute the behaviour of a rational economic operator for how the parties behaved in real-life »

[2009] CAT 36, §181 and §192

Conclusions

- CAT is willing to consider all types of evidence
- Key question in the CAT is the reliability of the evidence
- Importance of witness evidence, although the CAT generally looks for corroboration
- CAT tries to avoid “*the triumph of theory over commercial reality*” (*Racecourse association*)