

Process and Substance Review Before the UK Competition Appeal Tribunal: A Model Case or a Cautionary Tale for Specialist Courts?

Athanasios (Akis) Psygkas
Lecturer in Law, University of Bristol
a.psygkas@bristol.ac.uk

I. Introduction.

II. From formalist to substantive judicial review: The evolution of the role of the courts in the UK.

III. The CAT as a specialist regulatory court.

A. The jurisdiction of the CAT and the nature of its expertise.

B. The merits and risks of the CAT as a specialist court.

IV. The ‘double-helix model’ of review: Interweaving process with substance review before the CAT.

A. The cases.

B. The advantages of blending procedural and merits review.

V. Conclusion: Lessons for institutional design.

I. Introduction.

A key question in comparative administrative law is the tension between accountability and expertise.¹ The puzzle of designing institutional mechanisms that mediate between these two values permeates administrative law both at the level of setting up independent regulators and, at the next step, in the process of designing a model of regulatory review (namely, review of the regulators’ decisions by another institution, commonly a court). How a polity answers the latter question will shape the relationship between the judiciary and the executive. What is more, the bulk of public decision-making is made by the administrative state broadly defined. Within this

¹ Susan Rose-Ackerman & Peter L. Lindseth, *Comparative Administrative Law: An Introduction*, in *COMPARATIVE ADMINISTRATIVE LAW* 1, 2, 9 (Susan Rose-Ackerman & Peter Lindseth eds., 2010).

set of decisions, policymaking by arm's-length regulatory institutions is fundamentally important as it affects a broad swath of economic and social activity.²

Therefore, an institutional puzzle which scholars on both sides of the Atlantic have debated is whether regulatory agency decisions should be reviewed by specialist bodies or generalist courts. The former model (“experts reviewing experts”) often assumes a more intensive substantive review while the latter paradigm (conventional judicial review) seems to focus on procedural aspects of agency decisionmaking. The story, however, is more complicated than what this paradigmatic scheme might suggest. This paper uses the UK Competition Appeal Tribunal (CAT), a specialist regulatory court which assesses the substantive correctness of a range of regulatory decisions by applying rigorous standards, as a case to explore both the institutional design puzzle (review by a generalist court or a specialist court?) and the type of review (process or substance?) that these review bodies undertake. I argue that, because of its institutional design and operation in practice, the CAT provides the advantages of a specialist court whilst mitigating the associated risks of specialization. I also explain that one of the key benefits of the CAT model is that the Tribunal has integrated procedural review into full merits review in a way that promotes both democratic accountability and expertise. This “high-powered tribunal”³ could therefore serve as a model case for other countries facing similar questions of effective review of expert regulatory decisions.

To appreciate the distinctive nature of review on appeal before the CAT, Part II provides a brief outline of the development of judicial review in English administrative law and draws the contrast between review on appeal and judicial review. Against this backdrop, Part III describes the powers and composition of the CAT and evaluates the merits and potential disadvantages of this Tribunal in light of the general literature on specialist courts. Part IV focuses on a distinct advantage of the CAT, the blending of procedural and merits review. Part V concludes with lessons that can be drawn from the UK experience and a discussion of institutional alternatives.

² Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 *CARDOZO L. REV.* 2189, 2189 (2011).

³ Richard Rawlings, *Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory*, in *THE REGULATORY STATE: CONSTITUTIONAL IMPLICATIONS* 283, 302 (Dawn Oliver, Tony Prosser & Richard Rawlings eds., 2010).

II. From formalist to substantive judicial review: The evolution of the role of the courts in the UK.

A key background distinction to appreciate the role of the CAT in the next part is that between judicial review, which, in principle, focuses on formal matters and the validity of the administrative decision, and appeal, which focuses on the merits of the decision and is therefore also described as “merits review.”⁴

The “classic model of administrative law” reflected a formalist agenda for judicial review and an emphasis on judges avoiding the examination of policy issues.⁵ The fundamental mission of the courts was to carry out of the legislative will by “policing the boundaries” set in the enabling statute: the doctrine of narrow ultra vires allowed the courts keep the exercise of administrative powers within these statutory limits.⁶ By contrast, review of the substance of administrative action should only apply in cases where a high threshold was met. This idea was captured saliently in one of the most famous administrative law cases, *Wednesbury*, in which the court set a demanding “unreasonableness” standard before judicial intervention could be justified. In the words of Lord Greene,

if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. [B]ut to prove a case of that kind would require something overwhelming ... It is not what the court considers unreasonable, a different thing altogether ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another.⁷

The grounds of conventional judicial review, as set out by Lord Diplock in *GCHQ*, a later and oft-cited case, also reflect the prioritization of form over substance, the latter only coming in the

⁴ PAUL CRAIG, *ADMINISTRATIVE LAW* 6-7 (7th ed., 2012); Peter Cane, *Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals*, in *COMPARATIVE ADMINISTRATIVE LAW* 426, 433-34 (Susan Rose-Ackerman & Peter Lindseth eds., 2010). See also ANNETJE OTTOW, *MARKET AND COMPETITION AUTHORITIES: GOOD AGENCY PRINCIPLES* 218 (2015) (distinguishing “marginal” or “light-touch” review from “full review on the merits” or “full jurisdictions” which echoes the French corresponding term).

⁵ CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 99 (3rd ed. 2009); Michael Taggart, *Reinventing Administrative Law*, in *PUBLIC LAW IN A MULTI-LAYERED CONSTITUTION* 311, 312-13 (Nicholas Bamforth & Peter Leyland eds, 2003).

⁶ See Craig, *supra* n. ..., at 5-7. See also Colin Scott, *Accountability in the Regulatory State*, 27 *JOURNAL OF LAW AND SOCIETY* 38, 43 (2000) (“In its narrowest form, an adequate accountability system would ensure that all public bodies act in ways which correspond with the core juridical value of legality, and thus correspond with the democratic will”).

⁷ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223. The case has been described as “the locus classicus of British administrative law” (Lord Irvine, *Judges and Decision Makers: The Theory and Practice of Wednesbury review* [1996] *PUBLIC LAW* 59, 62 (1996)).

form of the exacting ‘Wednesbury unreasonableness’ standard. The three heads of judicial review are:

- ‘illegality,’ meaning that “the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it”;
- ‘irrationality’ (namely ‘Wednesbury unreasonableness’), which “applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”;
- ‘procedural impropriety.’⁸

Even this brief delineation of the grounds of review and the statement that they reflect an emphasis on form could be contested. For instance, the treatment of legality as a formal rather a substantive question might be seen as orthodoxy in the UK, Australia and New Zealand but not so in Canada.⁹ The point that I make, however, is that the original position and the doctrine until the latter part of the 20th century demonstrated the clear intent of the courts to, at least, appear to focus review on the form rather than the substance of the administrative decision.¹⁰ This becomes clearer if one compares the role of the courts in cases with an EU law dimension or ECHR dimension. The latter sets of cases followed the enactment of the Human Rights Act 1998, which incorporated ECHR rights into domestic law.

The English courts acknowledged the ECtHR jurisprudence, which had held that the orthodox domestic approach set the threshold of review too high, and began to apply the proportionality test to assess the compatibility of administrative action with the ECHR.¹¹ The approach was (and is), in principle, results-oriented rather than process-oriented.¹² That is to say,

⁸ *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁹ Hanna Wilberg & Mark Elliott, *Introduction*, in *THE SCOPE AND INTENSITY OF SUBSTANTIVE REVIEW TRAVERSING TAGGART’S RAINBOW* 1,6 (Hanna Wilberg & Mark Elliott eds., 2015).

¹⁰ MIKE FEINTUCK, “THE PUBLIC INTEREST” IN *REGULATION* 68 (2004) (describing the broader position as one the judiciary will seek at almost any cost to confine its decisions to the procedure of administrative decision-making rather than risking giving the slightest appearance of reviewing the substance of decisions”).

¹¹ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 545-546 (per Lord Bingham, citing *Smith and Grady v United Kingdom* (1999) 29 EHRR 493) and 548 (per Lord Steyn outlining the questions that the court should ask itself in applying the proportionality test: whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”)

¹² See Claudia Geiringer, *Process and Outcome in Judicial Review of Public Authority Compatibility with Human Rights: A Comparative Perspective*, in *THE SCOPE AND INTENSITY OF SUBSTANTIVE REVIEW TRAVERSING TAGGART’S RAINBOW* 329, 331-338 (Hanna Wilberg & Mark Elliott eds., 2015)

the English courts will look at whether the substantive decision reached by the public authority is in compliance with the ECHR rather than impose procedural requirements on public authorities to carry out the proportionality analysis with courts then showing deference to the primary decision-maker. Lord Hoffmann emphasized that proportionate restrictions should not be struck down because “the decision-maker did not approach the question in the structured way in which a judge might have done” and that the primary decision-makers “cannot be expected to make such decisions with textbooks on human rights law at their elbows.”¹³ In a similar vein in another case, he argued that interpreting the Human Rights Act to require “ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the respondent’s Convention rights or it did not. If it did, no display of human rights learning by the [primary decision-maker] would have made the decision lawful. If it did not, it would not matter if the [decision-maker] had never heard of article 10 or the First Protocol.”¹⁴

The introduction of the proportionality framework in cases with an ECHR or EU law dimension highlights the increasing importance of the substantive content of administrative decisions and the role of the courts in ascertaining whether these decisions are a proportionate restriction of fundamental rights. The intensity of review is particularly high at the last two stages (necessity and fair balance),¹⁵ which could be seen as bringing courts closer to merits review. One hears echoes of the former statement in judicial pronouncements¹⁶ but an express repudiation of the latter idea that this type of review might be akin to merits review.¹⁷ A recent series of cases includes dicta that further point to the increasing role of substantive review in

¹³ *R (on the application of SB) v Governors of Denbigh High School* [2007] 1 AC 100 [para 13].

¹⁴ *Miss Behavin’* at para 13.

¹⁵ See Jud Mathews in this volume. The step of *stricto sensu* proportionality was added to the de Freitas test in *Huang v Secretary of State for the Home Department* [2007] UKHL 11.

¹⁶ See, e.g., Lord Cooke in *Daly* [para 32] describing *Wednesbury* as “an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. . . . It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.” See also Lord Steyn in *Daly* [para 27] explaining that “(i) Proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. (ii) The proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.”

¹⁷ Lord Steyn in *Daly* [para 28]: “The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. This does not mean that there has been a shift to merits review.”

administrative law through the potential application of proportionality in cases without a HRA/ECHR or EU law dimension.¹⁸ Similarly, however, in these cases as well, different Justices have stressed that the potential expansion of the proportionality test to “purely domestic” cases does not turn judicial review into merits review of the substantive correctness of the administrative decision.¹⁹

This express attempt to dissociate the more intensive proportionality framework from merits review may be another example of the potential of the structured proportionality test to “disguise just how close [judges] have moved to review on the merits.”²⁰ The broader point is that it is not easy to neatly disentangle merits review and formal judicial review. As Paul Craig has suggested, all the different tests of substantive review entail some consideration of the merits, and can be placed along a spectrum with classic *Wednesbury* review at one end and judicial substitution of judgment on a correctness standard at the opposite end.²¹ Indeed, later in this paper, I will explain that substance and process are intertwined in certain judicial review cases cited in this part. However, it is helpful to situate the novelty of the standard of review on appeal before the CAT (Part III) within the broader framework of judicial review. The former is expressly about merits review, the latter would originally emphasize formal matters. Even during the rise of substantive review under proportionality, however, the distinction from merits review has been reiterated on multiple occasions. Despite these recent developments, the default position of regulatory review under conventional judicial review is captured well in the image of a division of labor: “a long-lived harmonious relationship between the judges and the regulatory agencies: the judges would focus on the process of regulatory decision making, whereas the

¹⁸ [Insert cases: Kennedy (per Lord Mance), Pham, Keyu, Youssef]

¹⁹ Keyu, para 133: “The move from rationality to proportionality, as urged by the appellants, would appear to have potentially profound and far-reaching consequences, because it would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests [Daly]... However, it is important to emphasise that it is no part of the appellants’ case that the court would thereby displace the relevant member of the executive as the primary decision-maker” (per Lord Neuberger) and para 272: “a review based on proportionality is not one in which the reviewer substitutes his or her opinion for that of the decision-maker. At its heart, proportionality review requires of the person or agency that seeks to defend a decision that they show that it was proportionate to meet the aim that it professes to achieve. It does not demand that the decision-maker bring the reviewer to the point of conviction that theirs was the right decision in any absolute sense (per Lord Kerr).

²⁰ HARLOW & RAWLINGS *supra* n.... at 126.

²¹ CRAIG *supra* n. at 643.

agencies would focus on the substance thereof.”²² The introduction of review on appeal complicated this picture.

III. The CAT as a specialist regulatory court.

A. The jurisdiction of the CAT and the nature of its expertise.

The Competition Appeal Tribunal was created by Section 12 and Schedule 2 to the Enterprise Act 2002. It is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy. Its function is to hear and decide cases involving competition or economic regulatory issues. In particular, certain of the key areas of its jurisdiction, which can be appeals or judicial review cases, include:

- appeals on the merits in respect of decisions applying the competition rules found in Articles 101 and 102 TFEU and Chapters I and II of the Competition Act 1998, decisions imposing penalties pursuant to sections 114 or 176(1) of the Enterprise Act 2002, and decisions applying the relevant provisions of the Communications Act 2003.
- applications for review of merger and market investigation decisions under the 2002 Act, and determinations concerning a price control matter under section 193(7) of the 2003 Act.
- claims for damages brought by claimants who have suffered loss or damage as a result of an infringement of one of the relevant prohibitions contained in the TFEU or the 1998 Act (“private actions”).²³

The CAT is headed by the President. 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.²⁴ Typically, a three-member tribunal (a chairman and two ordinary members) will be constituted by the President to hear a particular case. The cross-disciplinary nature of the Tribunal has been described as the CAT’s great

²² Despoina Mantzari, *Economic Evidence in Regulatory Disputes: Revisiting the Court–Regulatory Agency Relationship in the US and the UK*, (2015) OXFORD JOURNAL OF LEGAL STUDIES 1, 15 (2015)

²³ More information is available at <http://www.catribunal.org.uk/242/About-the-Tribunal.html#Appeal-under-CA98>

²⁴ The bios of the members of the CAT are listed on the Tribunal’s website (<http://www.catribunal.org.uk/246/Personnel.html>).

strength as a “specialist regulatory court.”²⁵ Its composition may also account for the intensity of review on appeal. In the words of a practitioner, “review of experts by generalists – wide margin of appreciation; review of experts by other experts (potentially even ‘more expert experts’) - narrow margin.”²⁶

Before examining this standard of review, it is helpful to consider the statutory language using electronic communications as an example (although similar language is used in other domains over which the CAT has appellate oversight). Under the Communications Act 2003, s. 192(6):

The grounds of appeal must be set out in sufficient detail to indicate—

(a) to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both; and

(b) to what extent (if any) the appellant is appealing against the exercise of a discretion by OFCOM, by the Secretary of State or by another person.

The CAT must decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal (s. 195(2)). Its decisions may be appealed only on a point of law, with the permission of the CAT or the appellate court, to the Court of Appeal or to the Court of Session (s. 196).

There are several CAT cases that demonstrate the intensive standard of review building on this statutory framework. For instance, in a 2008 decision the CAT stated: “this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 Statement is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts ... that *it is a specialist court* designed to be able to scrutinise the detail of regulatory decisions in a *profound and rigorous* manner. The question for the Tribunal is not whether the decision to impose a price control was within the range of reasonable responses but whether the decision was the right one.”²⁷

The expertise of the CAT is derived from two types of specialization: subject-matter and professional background specialization. Subject-matter (or opinion or functional) specialization comes from the fact that specialist courts only hear specific categories of cases and therefore,

²⁵ Harlow & Rawlings supra n. ... at 321.

²⁶ Thomas de la Mare, Regulatory Judicial Review (quoted in Harlow & Rawlings, id).

²⁷ Hutchison 3G UK Limited v Office of Communications, [2008] CAT 11, at para. 164 (emphasis added).

through continuous exposure to similar types of disputes, can develop experience and expertise in this specific area.²⁸ As outlined earlier in this section, the CAT is a specialist court under this definition since it hears a specific set of regulatory and competition disputes. Professional background specialization refers to the specific experience that the members of the tribunal bring to its operation because of their professional or educational background.²⁹ All the fourteen ordinary members and five chairmen are not judges but professionals with specialized training or educational background in relevant areas (mostly economics and competition law) and/or work experience in the industry or regulatory institutions.

B. The merits and risks of the CAT as a specialist court.

The designation of the CAT as a specialist court invites consideration of the consequent merits and disadvantages of this tribunal. This assessment draws on the general literature on specialized courts but applies it to the CAT taking into account its special institutional features. The first advantage is expertise. Competition and regulatory law is a highly technical, specialized area of law that intersects extensively with other disciplines, primarily economics. As a specialist court, the CAT is not in a position of epistemic imbalance vis-à-vis the regulatory agencies and does not suffer to the same extent from the deficits typically characterizing generalist courts, such as lack of specialized technical knowledge and information asymmetries.³⁰ The second advantage is efficiency defined as ‘increasing the court’s outputs for any given level of inputs, holding constant the quality of the outputs.’³¹ While this argument has intuitive appeal, it is difficult to quantify efficiency in these terms.³² The closest to relevant data we have is the

²⁸ Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists versus Generalists*, 36 FORDHAM INT’L L.J. 788, 790; Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1671 (2009); Mantzari, supra n. at 25.

²⁹ See Ginsburg & Wright, *ibid* (referring to the specialized human capital); Banks Miller & Brett Curry, *Experts Judging Experts: The Role of Expertise in Reviewing Agency Decision Making*, 38 LAW & SOC. INQUIRY 55, 60 (2013) (referring to expertise through formal training or membership of the specialized bar).

³⁰ On the comparative institutional disadvantages of courts, see Mantzari, supra n. at 18-21 (drawing on the work of Scott Brewer on ‘epistemic deference’); Ginsburg & Wright, supra n. ??? at 797- 800. On the CAT in particular, see Peter Freeman, *Competition Decision Making and Judicial Control – The Role of the Specialised Tribunal*, Remarks at the Centre for Competition Policy, UEA Annual Conference, Norwich 6-7 JUNE 2013, pp. 6-7.

³¹ Ginsburg & Wright supra n., at 793.

³² *Id.*

comparison of the length of CAT judicial review cases and High Court cases but the comparison cannot yield reliable results in light of the different types of cases heard.³³

However, the flipside of specialization may be tunnel vision. The risk identified in the literature is that immersion in a narrow field may lead to insularity and the loss of broader perspective that generalist judges may bring to bear in their judgments.³⁴ Tunnel vision is similarly hard to measure accurately. Even in the absence of effective operationalization, however, the risk of insularity would be much less of a concern in the case of the CAT since it is a hybrid body that brings together High Court judges and non-judicial experts. Indeed, the evidence from the CAT jurisprudence is that the tribunal cites relevant Court of Appeal cases. Even if there were a risk of insularity, the generalists on the tribunal would be expected to step in to help, in the words of Judge Wood, the “specialists need to emerge from their cocoons.”³⁵

The second, and related, risk is that the specialist court might “go native” and usurp the function of the agencies “second guessing” their positions on policy issues.³⁶ The result of assertiveness may be an increased willingness to overturn administrative decisions.³⁷ However, the counter-argument has also been made: specialist tribunals, which commonly hear cases in which the government is a party, may be more favorable to the government’s interests.³⁸ This is an empirical question and the evidence is limited and mixed.³⁹ Using an original dataset of all the judgments that have been decided on the merits and involved Ofcom as one of the parties,⁴⁰ I found that the risk of excessive reversal of agency decisions does not seem to have materialized

³³ Department for Business, Innovation and Skills, *Streamlining Regulatory and Competition Appeals Consultation on Options for Reform* (June 2013), p. 85 (providing data showing that, on average, CAT JR cases took about four months whereas High Court JR cases took ten months. However, the government recognizes that this “far from a perfect comparison”).

³⁴ Baum (2009), at 1677-78; Ginsburg & Wright *supra n.*, at 802-04.

³⁵ Diane P. Wood, *Generalist Judges in a Specialized World*, 50 S.M.U. L. Rev. 1755, 1767 (1997).

³⁶ Freeman *supra n.* at 7.

³⁷ See Baum (2009 article) at 1677.

³⁸ Ginsburg & Wright *supra n.*, at 801-02; Baum (2011 book), at 39 (discussing that governments are in an especially good position to benefit as a result of judicial specialization).

³⁹ See, e.g., Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1151-53 (1990) (arguing that specialized are likely to be biased in favor of the agency); Miller and Curry *supra n.* (using a dataset of decisions in which the Board of Patent Appeals and Interferences (BPAI) is reviewed by the Court of Appeals for the Federal Circuit, and finding that greater subject-matter expertise makes it more likely that a judge will vote to reverse an agency decision). *But see* James Edward Maule, *Instant Replay, Weak Teams, and Disputed Calls: An Empirical Study of Alleged Tax Court Judge Bias*, 66 TENN. L. REV. 351 (1999) (finding the allegations of pro-government bias on the part of Tax Court judges lacks statistically significant empirical evidence).

⁴⁰ In compiling this dataset, I have excluded all the case management rulings since the crux of the issue is whether the substantive agency decision has been affirmed or not.

in the context of CAT review of Ofcom decisions. Despite the highly intensive standard of review, the CAT dismissed the appeal (ie upheld Ofcom's original decision) in 57% of the cases, allowed the appeal in 24% and allowed the appeal in part in 19% of the cases. To put these figures into context, a recent study of the application of *Chevron* by the US Supreme Court and irrationality review by the UK House of Lords/Supreme Court found that the former affirmed agency decisions at a rate of 64.3%, whereas the latter at a rate of 88.5%.⁴¹ However, on balance, the numbers we see in the context of the CAT do not, *prima facie*, suggest reasons for concern in either direction. Furthermore, this is another example that the language used to describe the intensity of review, more or less deferential, will not necessarily translate into a lower or higher rate of reversal respectively.⁴²

To sum up, because of its institutional design as a hybrid regulatory body and its operation in practice, the CAT provides the advantages of a specialist court whilst mitigating the associated risks. The following part examines an additional and distinctive benefit of the CAT model, namely the integration of procedural review into full merits review.

IV. The 'double-helix model' of review: Interweaving process and substance review before the CAT.

A. The cases.

In principle, procedural questions fall within the purview of conventional judicial review and thus outside the scope of CAT review on appeal. In fact, however, in several CAT cases, procedural and merits review were intertwined.

CASE 1: *TalkTalk Telecom Group plc v Office of Communications*, [2012] CAT 1

The Tribunal considered the interplay between procedural and substantive points in a 2012 judgment.⁴³ The main issues in this case were TalkTalk's contentions that Ofcom had erred procedurally in failing to take proper steps to satisfy itself that there had been a material change

⁴¹ Eric C. Ip, *Taking a 'Hard Look' at 'Irrationality': Substantive Review of Administrative Discretion in the US and UK Supreme Courts*, 34 OXFORD JOURNAL OF LEGAL STUDIES 481, 498 (2014).

⁴² For an interesting analogy in the US context, see Thomas Myles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 832 tbl.1 (2006) (noting the irony that the Court's most vocal critic of a strong reading of *Chevron*, Justice Breyer, is the most deferential Justice in practice (voting to uphold agency interpretations 82% of the time), while Justice Scalia, the Court's most vocal *Chevron* enthusiast, was the least deferential (voting to uphold agency interpretations 82% of the time)).

⁴³ *TalkTalk Telecom Group plc v Office of Communications*, [2012] CAT 1.

within the meaning of section 86(1)(b) of the Communications Act 2003⁴⁴ (Ground A); and that Ofcom's decision that there had been no material change within the meaning of section 86(1)(b) was, in substance, wrong (Ground B). The Tribunal first noted that in the context of an appeal, its role is to "assess the correctness of OFCOM's decision, and not to apply a judicial review standard (by, for example, seeking to determine whether OFCOM has taken into account immaterial factors or failed properly to consult)."⁴⁵ Nevertheless, it went on to explain that consideration of Ofcom's decision-making process is not necessarily irrelevant, and parties are not precluded from raising such matters in an appeal. The Tribunal accepted TalkTalk's argument that Ofcom must be able to justify its decision as being "adequately and soundly reasoned and supported in fact" and added:

Without adequate consultation, it may be unclear whether there has been a material change or not. To take a hypothetical example, suppose a case where OFCOM simply fails to consider or consult upon the question of material change at all. In such a case, it may be that it is impossible – without the benefit of a proper consultation – for either OFCOM or, on appeal, the Tribunal to determine whether there has, or has not, been a material change. In such a case, on an appeal, it may be that the proper course would be for the Tribunal to remit the matter to OFCOM with a direction that a proper consultation be carried out.⁴⁶

In other words, the absence of consultation would be reviewable, but the specifics of the process are not. In the Tribunal's words, "what constitutes a proper consultation is coloured by the facts of the given case. We consider that it would be wrong, in cases where OFCOM is considering whether there has been a material change for the purposes of section 86 of the 2003 Act, to lay down strict rules as to how OFCOM should go about this process."⁴⁷

The interesting twist, however, is that this seemingly deferential approach stems not from restraint but the opposite, that is, the *intrusive* nature of merits review. The CAT stated that in cases where it has concluded that the regulator's decision was correct on the merits, it does *not* consider that it is its function "also to review OFCOM's decision by reference to the judicial review standard. . . . It is clear law that where a decision of an administrative body, such as

⁴⁴ Section 86(1)(b) reads: "OFCOM must not set an SMP services condition by a notification which does not also make the market power determination by reference to which the condition is set unless... (b) the condition is set by reference to a market power determination made in relation to a market in which OFCOM are satisfied there has been no material change since the determination was made."

⁴⁵ *Id.*, at para. 75 (emphasis in the original).

⁴⁶ *Id.* at para. 76 (emphasis in the original).

⁴⁷ *Id.* at para 121.

OFCOM, is subject to a full, on the merits appeal, such an appeal is capable of making good any deficiency in the procedure of the administrative body taking the original decision. In other words, a procedural failure at the level of the first instance administrative body can be remedied by a wide, on the merits, appeal.”⁴⁸ Conversely, “even if OFCOM’s consultation process has been unimpeachably conducted, the Tribunal may nevertheless conclude that OFCOM’s decision was wrong.”⁴⁹ The Tribunal’s approach, however, is not as simple as a scheme like “deference on the process, heightened scrutiny on the merits” might suggest. As the CAT explained,

It may be that there are cases where OFCOM’s approach in reaching its decision was so defective as to preclude the Tribunal from reaching an “on the merits” conclusion. In paragraph 76 above, we considered the case where OFCOM reached a decision regarding “material change” without any consultation at all. It may be that, in such a case, the procedural deficiency on the part of OFCOM is so serious as to render it unsafe for the Tribunal to conclude that, “on the merits”, OFCOM reached the correct decision. In such a case, where (because of the deficiencies in OFCOM’s decision-making process) it is impossible to say one way or the other whether OFCOM’s decision was right or wrong, it may be that the only appropriate course is to remit the matter back to OFCOM for OFCOM to carry out its decision-making process again.⁵⁰

The absence of any consultation whatsoever would be a clear case of procedural deficiency precluding a review on the merits. The Tribunal’s formulation, however, could also accommodate less clear-cut cases. On the merits, the Tribunal in this case held that Ofcom had reached the correct substantive decision, and therefore rejected TalkTalk’s Ground B. The CAT further explained that “this case does not disclose the sort of procedural deficiencies which cause us in any way to doubt the soundness of the conclusion we have reached on Ground B.”⁵¹ As to TalkTalk’s Ground A, the Tribunal’s short answer was that where, as in this case, “there is a full rehearing by the Tribunal of an issue initially determined by OFCOM and the appellant’s case has received ‘overall, full and fair consideration’ ... that will, in general, dispose of a challenge based upon deficiencies or alleged deficiencies in OFCOM’s procedure.”⁵²

⁴⁸ Id. at paras. 125-126.

⁴⁹ Id. at para 78.

⁵⁰ Id. at para. 131.

⁵¹ Id. at para. 132.

⁵² Id. at para. 130.

Nevertheless, the Tribunal went on to consider Ground A in a series of obiter dicta.⁵³ More specifically, it noted that Ofcom had given third parties “every opportunity” to participate in its decision-making process... The CAT went on to reject TalkTalk’s suggestion that consideration of whether there had been a material change for the purposes of section 86(1)(b) of the 2003 Act required, in all cases, detailed and extensive consultation. The CAT held, instead, that the extent of the consultation required turns on the facts of any given case, and it is, in the first instance, for Ofcom, as the decision-maker, “to decide upon the manner and intensity of the enquiry to be undertaken.” In the case before it, “had it been necessary to do so, [the Tribunal] would have rejected TalkTalk’s Ground A on basis that Ofcom did properly satisfy itself that there had been no ‘material change’” subject to one qualification.⁵⁴ Namely, the CAT recognized that the summary description of Market 1 contained Ofcom’s Wholesale Broadband Access [WBA] Market Power Determination was “obviously wrong” and amounted to an inaccurate statement of how OFCOM had defined its markets. For the Tribunal, this was “an important point.”

For a consultation exercise to be meaningful, the consultation must be adequate. It must, amongst other things, contain sufficient information so as to enable potential consultees to make a proper and informed response Here, persons interested in the WBA Market might well not have understood exactly how OFCOM had defined Market 1 in the WBA Market Power Determination, and this might well have coloured submissions made in response to the [public] consultation. To this extent only, would we have been minded to accept TalkTalk’s contentions as regards the adequacy of OFCOM’s consultation process. However, for the reasons we have given, we consider that this deficiency of process was cured by the full rehearing that has now taken place.⁵⁵

In other words, the Tribunal did assess the adequacy of Ofcom’s policymaking processes, albeit in obiter dicta, and found one procedural deficiency which, however, would not have been so grave as to not be cured by the full rehearing before it. Importantly, this finding of a procedural flaw stemmed from the CAT’s assessment of the merits of Ofcom’s Market Power Determination. This interplay was even more telling in a second case decided in 2008.

⁵³ Id. at para 136 (“Given the conclusions we have reached, it is strictly unnecessary for us to say more about Ground A in order to resolve this appeal. However, in case this matter goes further, we make the following findings in respect of Ground A”)

⁵⁴ Id. at para. 136f.

⁵⁵ Id. at para 136g(ii).

CASE 2: *Vodafone Limited v Office of Communications*, [2008] CAT 22.

Vodafone brought an appeal against a decision by Ofcom to modify the system of telephone number portability (“the Decision”). Vodafone alleged that Ofcom had breached several of its obligations, including notably for present purposes: the obligation to correctly evaluate the likely benefits and detriments arising from the implementation of its proposed Decision, via an appropriate impact assessment, in accordance with section 7 of the Communications Act 2003; the obligation to consult with all interested parties and, in order to allow such consultation to be undertaken effectively, to act transparently, by publishing full details of the evidence and reasoning on which its proposed Decision was to be based. In the appellant’s view, each of these breaches individually, and some or all of them collectively, amounted to serious procedural and/or substantive errors, as a result of which it was likely that, or there was a serious risk that, the conclusions which Ofcom had drawn from its cost benefit analyses were wrong. The central issue in the appeal was whether Ofcom had equipped itself with a sufficiently rigorous analysis of the costs and benefits of the Decision to enable the agency to reach a lawful decision. Narrowing in on the procedural irregularities of the public consultation, Vodafone submitted that the point of consultation

is that people affected by a potential decision should have an opportunity to be heard as to what they think of the merits of the proposal and how they will be affected. This requires consultation at an appropriate level of specificity and detail. It is not supposed to be an empty exercise. ... OFCOM, Vodafone argued, did not disclose sufficient inputs and Vodafone was required to backsolve figures in order to understand the inputs adopted. ... [C]ertain inputs were only provided to [mobile network operators] after the publication of the Decision, and then only following a request by Vodafone. The lack of detail in the consultation paper affected the detail of the consultation responses, which in turn affected the quality of OFCOM’s reasoning.⁵⁶

Relying on *Coughlan* and *Greenpeace*,⁵⁷ Ofcom responded that Vodafone had been able to make detailed submissions, both to Ofcom during the consultation process and later to the CAT. Therefore, Vodafone had had adequate disclosure of inputs and, in any event, further information had been supplied once asked for. The CAT noted that the Decision had followed a lengthy process, including two consultation documents and two notices issued under Section 135 of the

⁵⁶ Id. at paras. 91-92.

⁵⁷ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213; *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311

Communications Act 2003.⁵⁸ It could hardly be suggested, therefore, that, *at least in form*, the consultation process had been inadequate. The Tribunal added, however, that “mere consultation and transparency alone are not sufficient grounds to save a decision which is in itself flawed as a substantive matter to the extent we find in this case. The purpose of consultation is to seek the informed views of, and best available information from, industry and, with the benefit of the expertise inherent in a specialised regulatory body, apply those views and information to the perceived industry failings.”⁵⁹ Citing *Coughlan*, the Tribunal found unanimously that “the process undertaken by Ofcom had not fully allowed stakeholders to provide “intelligent and realistic responses as to the likely costs of adopting the proposed modifications. ... [I]n the absence of a provisional technical specification on which consultees could provide useful data, OFCOM deprived themselves of the opportunity properly to inform their analysis of the potential costs of their proposals.”⁶⁰

The reason the CAT made this procedural finding was its power, and technical facility, to examine the merits of Ofcom’s approach. Earlier in the judgment, the CAT stated that “the uncertainty generated by the absence of a technical specification was, in the circumstances, such as to render any estimate of costs by individual industry participants speculative and potentially misleading. This situation was exacerbated by the potential for considerably divergent cost estimates, as each consultee replied separately and on the basis of their own particular individual assumptions.”⁶¹ Contrast this with the scenario of orthodox judicial review: Faced with the same case, a generalist judicial review court could have found that the consultation was adequate because, in form, it could not be flawed. In this case, the appreciation of the flaws in the process resulted from the technical appreciation of the deficiencies of the document which should have underlain the consultation process and the types of input required. This would have been much more challenging for a generalist court to assert.

Furthermore, the Tribunal chose an interesting remedy. It remitted the whole matter to Ofcom for reconsideration, directing the agency to “seek the fresh views of the industry on the

⁵⁸ Section 135 empowers Ofcom to require industry participants to provide the agency with “all such information as [it considers] necessary for the purpose of carrying out [its] functions.”

⁵⁹ *Vodafone v Ofcom*, supra n. ???, at para. 94.

⁶⁰ *Id.* at para. 95.

⁶¹ *Id.* at para 64. The Tribunal added that “in the circumstances, this position could have been cured at an earlier stage in the consultation process by requiring MNOs and other industry participants to design a provisional sample solution, to cost this solution and thereby remove a large element of uncertainty in the figures that were subsequently adopted by OFCOM in their CBA.”

issue of altering the current arrangements in the UK for fixed and mobile porting, on the basis of appropriate evidence and analysis in light of the findings set out in this judgment.”⁶² Interestingly, the Tribunal went further in suggesting that “a staged approach to decision making in a matter of such complexity may be advantageous. Such an approach would enable information gathered from earlier stages to provide the basis for CBA-based decisions upon whether to proceed to the next stage(s)”⁶³ Even though this formulation suggests that the proposal for a “staged approach to decision making” is not a binding direction but rather a recommendation, one reading could see this as a signal for the future: when it comes to questions of high complexity—and, we would add, practical significance—such as number portability, the agency should seriously consider multiple stages in its policymaking process to better insulate its decisions from reversal on appeal.

In conclusion, CAT review on appeal may give the impression of turning conventional judicial review on its head: in principle, the Tribunal exercises profound and rigorous scrutiny of the substance of regulatory decisions, but is deferential on the process preceding those decisions. However, the Tribunal’s approach, as this section has showed, is not as simple as “deference on the process, heightened scrutiny on the merits.” I now turn to the advantages of intertwining merits and procedural review.

B. The advantages of blending procedural and merits review.

Consider first the positive political theory dimension: The prospect of judicial review (conventional or on appeal) feeds back into the regulatory agency’s decisionmaking process which will seek to structure the process to shield it from judicial invalidation. Ian Turner has proposed a model to formalize this, whereby the agency effort choices are conditional on the court regime:

- (a) when facing a Perfectly Skeptical Court the Agency will never invest high effort;
- (b) when facing a Perfectly Deferential Court the Agency will invest high effort if and only if it would absent any prospect of judicial review;

⁶² Id. at para. 159.

⁶³ Id.

(c) when facing a Conditional-Deference Court the Agency will invest high effort if its policy motivations (policy improvement) and aversion to being overturned are sufficiently high to outweigh effort investment costs. The presence of judicial review plays an integral role in inducing high effort investment from the agency *by lowering the net cost of effort*.⁶⁴

The third scenario is applicable in the context of CAT review on appeal. In other words, in general, if the agency knows the review body will be deferential as to policy decisions, it may treat the procedural requirements as a mere checklist obligation. However, if there is credible merits review by an appellate body that can appreciate the technical dimensions of the issue at stake, and then procedural review is built into the process as in the case of the CAT, there is no policy or process insurance; in turn, this reduces the incentive for the agency not to put in the effort to carry out a procedure that goes beyond mere formalities.

The second argument is related but points more to the normative attractiveness of this model of review. That is to say, merits review facilitates procedural review: I suggest that procedural review incorporated into merits review is not a one-way street. Conversely, a specialist appellate body, some members of which have backgrounds relevant to the regulated sector, is better situated to appreciate in a credible fashion what kind of process was required to reach the substantive regulatory decision under review.⁶⁵ But why do we care about robust procedural review? The normative underpinnings here recognize that procedure facilitates legitimacy.⁶⁶ Furthermore, procedural requirements, such as reason giving, have dignitarian undertones and recognize the capacity of citizens as rational moral agents who can engage in a dialogue with the public authority.⁶⁷ Last, there is the instrumental argument for robust procedures that promote better decisions.⁶⁸ A reader might see a semblance of circularity here. Process is necessary to get the substance right but I have just argued that substantive review promotes good decision-making process. My response is that we should be thinking of process

⁶⁴ Ian R. Turner, *Working Smart and Hard? Agency Effort, Judicial Review, and Policy Precision* (forthcoming in *Journal of Theoretical Politics*)

⁶⁵ See Patricia Popelier, *Preliminary Comments on the Role of Courts as Regulatory Watchdogs*, 6 *LEGISPRUDENCE* 257, 259 (2012) (referring to the literature on the limited capacity of (generalist) courts to judge the quality of the regulatory process).

⁶⁶ Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens To Assess the Fairness of Legal Procedures*, 22 *LAW & SOC'Y REV.* 103, 104 (1988) (referring to the research suggesting that "citizen assessments of the justice of the procedures used by legal authorities to make decisions influence reactions to those decisions.").

⁶⁷ See Jerry L Mashaw, *Public Reason and Administrative Legitimacy*, in *PUBLIC LAW ADJUDICATION IN COMMON LAW SYSTEMS PROCESS AND SUBSTANCE* 11 (John Bell et al. eds., 2016)

⁶⁸ [insert reference to Osborn]

and substance as a double helix. In highly technical fields such as economic regulation, procedural requirements may lead to better substantive decisions but an expert appreciation of merits considerations can help structure the process more effectively to achieve the correct final outcome. Therefore, the CAT model serves as an example what I call the ‘double-helix model of review’ in which procedural and merits review should not be disentangled.

Furthermore, I would argue that another aspect of the normative oomph of this model is that the blend of merits and process review facilitates participation rather than being undemocratic. I adopt (and adapt) here Neil Komesar’s framework in which “variation in the performance of an institution is tied to the participation of important institutional actors.”⁶⁹ A credible system of ‘double-helix review’ enhances the robustness of the decisionmaking process by ensuring, for instance, that public consultation has been properly conducted in a way that has allowed the voices of different stakeholders to be heard or that the cost-benefit analysis demonstrates an appreciation of the complexity of the interests at stake. This process-enabling function of merits review is particularly important in the context of polycentric disputes.⁷⁰ Last, the intrinsic connection between process and substance as “two aspects of the public law form” has recently also found strong jurisprudential support.⁷¹

There is a third, empirical argument in favor of blending procedural and substantive review. This approach is consistent with trends we see in other contexts, where substantive review of public decisions has been enriched to include some review of the process that has led to these decisions. This has been termed “semiprocedural judicial review.”⁷² Even if this is not a novel, separate type of review but a reflection of an evidence-based judicial reflex,⁷³ the point remains that the “double-helix model” of CAT review could fit well into broader patterns that have begun to emerge. Indeed, even in human rights cases in the UK where, as Part II has

⁶⁹ NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* 3 (1994). For another take on Komesar’s ‘participation-oriented approach,’ see Mantzari *supra* n. . .

⁷⁰ For the concept of a polycentric dispute, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353 (1978).

⁷¹ David Dyzenhaus, *Process and Substance as Aspects of the Public Law Form*, 74 *CAMBRIDGE LAW JOURNAL* 284 (2015).

⁷² Ittai Bar-Siman-Tov, *Semiprocedural judicial review*, 6 *LEGISPRUDENCE* 271 (2012) (discussing European and American cases in which courts have scrutinized the quality of the lawmaking process as part of their evaluation of the substantive constitutionality of the Acts in question).

⁷³ This is Alemanno’s argument, see Alberto Alemanno, *The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review*, 1 *THE THEORY AND PRACTICE OF LEGISLATION*, 1:2, 327(2013).

outlined, the courts have adopted a results-oriented approach, the decisionmaking process may still feature in the courts' judgment as to the deference to the primary decisionmaker.⁷⁴

This section has argued that the case law of the CAT reflects a “double-helix model” of review of merits and process and this represents a distinctive advantage that this Tribunal brings to regulatory review. Admittedly, the risk of scrutiny on both these counts is a potential duplication of the regulatory process and the introduction of further delays—I call this “ossification squared.” There are complicated trade-offs associated with one or the other institutional choice. However, the example of the CAT does not bear out these risks. Indeed, if one is sympathetic to substantive review by a specialist court (for which Part III suggested there are good reasons), integrating procedural review into the enterprise facilitates a more robust substantive assessment with specific procedural signposts, and creates the right incentives for the agency.

V. Conclusion: Lessons for institutional design.

[to be updated after the conference]

Model 1: review of regulatory decision by ordinary, generalist courts

Model 2: generalists plus assessors and scientific advisors appointed by the court as external consultants, eg in the UK s. 70 of the Senior Courts Act 1981 & CPR 35.15 (“An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to – (a) prepare a report for the court on any matter at issue in the proceedings; and (b) attend the whole or any part of the trial to advise the court on any such matter”).

I would contest the view that appointing assessors is an adequate equivalent in the judicial review context. Because of the *ad hoc* nature of the external appointment, assessors cannot

⁷⁴ Even Lord Hoffmann, who was the most vocal proponent of the results-oriented approach, has acknowledged that the way in which a public authority has approached the problem “may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law” (*Denbigh High School*, at para 68). Lady Hale’s approach in *Miss Behavin’* is more indicative (para 37, noting that had the public authority expressly set itself the task of balancing the rights of individuals against the interests of the wider community, a court would find it hard to upset this balance. However, “where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, giving due weight to the judgments made by those who are in much closer touch with the people and the places involved than the court could ever be”). See also Geiringer, *supra* n. ??? at 333 (noting that a failure of process is not an *independent* basis to find an incompatibility but may be relevant to the question of the weight to be accorded to the judgment of the public authority).

develop an institutional ethos in the way a member of the tribunal, who can associate with a public institution with clear statutory responsibilities, does.

Model 3: Specialist court with subject-matter specialization

E.g.

- Finland: Market Court

- Portugal: Court of Competition, Regulation and Supervision

- Belgium: From 1 September 2007, a new single chamber will be established at the Brussels Court of Appeal dealing with appeals against decisions of the Belgian Institute for Postal Services and Telecommunications (the "BIPT"); the Competition Council and its Chairman; and the Regulatory Council for Electricity and Gas (the "CREG").

- Mexico

Model 4: The CAT model: subject-matter *and* professional background specialization (similar to the Canadian model of a Competition Tribunal)