



HM Government

# **Streamlining Regulatory and Competition Appeals**

Consultation on Options for Reform

19 June 2013



Department  
for Business  
Innovation & Skills

## Streamlining Regulatory and Competition Appeals

### Consultation on Options for Reform

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**This consultation is relevant to:** Businesses of all size, economic regulatory bodies, consumer organizations, legal bodies and academics.

**This information is also available on the GOV.UK website:**

<https://www.gov.uk/government/consultations/streamlining-regulatory-and-competition-appeals-options-for-reform>

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## Foreword

Economic regulation and competition enforcement play a vital role in ensuring that markets operate for the benefit of consumers, and that firms are confident to invest and innovate.

Firms and consumers need to have confidence that independent regulators and competition authorities are taking robust decisions in the interests of the wider economy and consumers. Appeals can provide a key route for holding regulators to account and giving parties a right of challenge.

While in many ways the UK's appeal regime is performing well, I believe we should be striving to make it even more efficient and effective, to support a world-class regulatory environment.

The UK is fortunate in having appeal bodies with expert knowledge and experience of reviewing economic regulation and competition decisions. The Competition Appeal Tribunal is frequently held up as a model in bringing together judicial scrutiny with expert knowledge of competition policy and economics. Similarly the Competition Commission has developed its practice of reviewing regulatory decisions over a long period, and has used this to good effect in scrutinising regulatory decisions across economic regulators.

At the same time, the Government is concerned that some appeals can be lengthy and expensive, increasing regulatory uncertainty. Appeals have developed in different ways across the various sectors for historic reasons, leading to a diverse range of appeal routes which does not make the best use of appeal bodies' expertise and can be confusing.

In the communications sector in particular, the Government is concerned that appeals may sometimes be seen as a one-way bet, and a chance to re-open regulatory decisions, encouraging lengthy and expensive litigation and holding back decision-making.

This consultation takes a broad look across regulatory and competition appeals, and invites views on the case for change and on a range of possible options for reforming appeals regimes.

In assessing these options, the Government is very conscious of the importance of maintaining and reinforcing regulatory certainty. The ultimate aim is to achieve better regulatory decisions, which are in the interests of the economy as a whole, and which firms in the market can have confidence in. The Government believes that proportionate changes to focus and streamline the appeals processes should help support regulators to take decisions more quickly and efficiently, providing greater certainty for firms. In deciding the way forward and reflecting on the responses to this consultation, the Government will be mindful to preserve the best features of the current regimes.

## Executive Summary

Effective economic regulation and competition enforcement is a key driver of growth. Firms need an independent, stable regulatory regime to give them confidence to invest, innovate and compete. This stability relies on regulators and competition authorities taking robust, timely decisions, setting out the ground rules for how markets operate and enforcing these rules effectively.

The right of firms to appeal regulatory and competition decisions is central to ensuring robust decision-making and holding regulators to account in the interests of justice. Where firms are materially affected by regulatory decisions, they should have an effective right of challenge if they consider that the regulator has made a mistake or has not acted reasonably.

In many ways the appeals regime works well. The UK has specialist appeal bodies with valuable experience and expertise, providing independent scrutiny of regulators' decisions. However, appeals inevitably create costs for firms and regulators and can act as a drag on decision-making. Concerns have been expressed that there are a significant number of appeals in some sectors, with relatively little downside risk to a firm from lodging an appeal. In other sectors there are few appeals. Even where there are few appeals, those that are brought are often lengthy and in turn, costly. There is a significant degree of diversity in the way these issues are handled across sectors in terms of which appeal bodies hear which types of appeal and the standards by which those appeals are decided.

The purpose of this consultation is to seek views on whether the appeals frameworks for regulatory and competition decisions strike the right balance between providing a proper right of challenge and allowing regulators and competition authorities to make decisions in a timely way. It also considers ways that appeals might be streamlined.

In assessing the case for change and options for reform, the Government's objectives for the appeals regime are to:

- Support independent, robust, predictable decision-making, minimising uncertainty.
- Provide proportionate regulatory accountability - the appeals framework needs to be able to correct mistakes made by a regulator and provide justice to parties, but allow the regulator to set a clear direction over time.
- Minimise the end-to-end length and cost of decision-making – partly through making the appeal process itself as streamlined and efficient as possible, but also by encouraging timely decision-making by the regulator or competition authority.
- Ensure access to justice is available to all firms and affected parties – not just to the largest regulated firms with the most resources and experience.
- Provide consistency, as far as possible, between appeal routes in different sectors – while acknowledging that the specific characteristics of each sector may require tailored approaches.

The appeals frameworks across different sectors have evolved over time, with the result that there is now a diverse range of appeal routes across the regulated sectors. Some of these differences

reflect genuine differences in the nature of the decisions being made. This consultation seeks views on the case for streamlining the current appeals framework so that:

- It is more focused on identifying material errors;
- Appeal bodies' expertise is applied in the most appropriate way and appeal routes are more consistent across sectors, to provide greater certainty and better use of resources;
- It is more accessible to all affected parties;
- Incentives in the system are aligned with Government's objectives for the appeals framework;
- Appeals processes are as efficient and cost effective as possible.

In order to achieve this, Government is consulting on a package of changes to the way regulatory appeals are handled. The proposals cover all steps in the appeals process, including the initial incentives on firms to launch an appeal, the grounds on which an appeal is heard, the body which hears the appeal, and streamlining the processes for conducting appeals. We have also taken into account EU Directives, where these specify appeal rights in certain sectors, and to the requirements of the European Convention on Human Rights where applicable.

First, Government is proposing that, where appeals are currently heard 'on the merits', these appeals should shift either to a judicial review standard, or to defined grounds of appeal setting out more clearly the basis on which firms can challenge a regulator's decision. The objective of these changes would be to ensure that appeals are focused on identifying cases where regulators have made mistakes which have a material impact on outcomes or where a decision is unreasonable. The specific changes being consulted on include:

- Changing the standard of review for appeals under the Communications Act 2003 from appeal on the merits to a flexible judicial review or specifying more focused grounds for these appeals;
- Making similar changes to the standard of review for appeals under the Competition Act 1998 (excepting decisions relating to the level of penalty);
- Aligning the grounds of appeal for energy (in Great Britain), aviation and postal services decisions; and
- Considering what the costs and benefits would be of moving to a similar appeal model for rail decisions.

Second, Government is proposing reforms to appeal bodies, including reviewing governance of the Competition Appeal Tribunal (CAT). The Government believes that there are significant benefits in retaining a specialist appeal body with expertise in competition and regulatory issues, and with the ability to progress appeals quickly. However, Government considers that some changes could be made to re-route appeals between different appeals bodies to increase the overall effectiveness of the system and make it easier to understand for firms and investors.

Third, Government is proposing a series of reforms to ensure that regulatory decisions are transparent and well-informed and that firms are not incentivised to make unmeritorious appeals. Government is consulting on measures including:

- Making clearer rules on the admissibility of new evidence in an appeal, and awarding costs against new evidence which could have been brought earlier at the decision-making stage;
- Increasing use of confidentiality rings by regulators and/or greater transparency and more effective consultation;
- Encouraging regulators to claim their full costs and clarifying that courts will only award costs against a regulator where they have acted unreasonably.

Finally, Government intends to streamline processes for hearing appeals. The UK's specialist appeal bodies – the CAT and the Competition Commission – already have a good record in carrying out cases efficiently, but the Government considers that further steps can be taken to support a world-class regulatory system, including:

- Introducing (and where they exist reducing) target case time limits and/ or fast track processes similar to those proposed for private actions in competition law;
- Encouraging cases to be resolved on the papers wherever possible, for example for cost awards and straightforward matters.

The Government is committed to stable and predictable regulatory frameworks to protect consumers, facilitate efficient investment and contribute to sustainable growth. It is important that regulatory frameworks avoid adding undue uncertainty to the business environment. Therefore, any changes proposed in the light of responses to this consultation will be the subject of detailed engagement and consultation with representatives of the relevant regulators, industries and investor communities.

This consultation is a HM Government document, covering the responsibilities of a number of Government Departments. The Government will consider all responses to this consultation and take decisions in the round on any reforms. This consultation covers all competition enforcement and economic regulation matters which are reserved.

The Northern Ireland regulatory regimes, in particular those relating to gas, electricity and water, while included within the scope of this consultation are devolved. It will be for the Northern Ireland Executive to consider the responses to the consultation and determine their own policy direction for these areas.

Economic regulation of water in Scotland is devolved, and outside the scope of this consultation.

The Government welcomes views on these proposals from all interested parties. There is a full list of consultation questions at page 79. Written responses should be sent by 5 September 2013.

## How to Respond

This consultation will begin on 19 June 2013 and will run for 12 weeks, closing on 11 September 2013.

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

The consultation response form is available electronically on the consultation page: <https://www.gov.uk/government/consultations/streamlining-regulatory-and-competition-appeals-options-for-reform>

The form can be submitted by email or by letter or fax to:

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1 Victoria Street

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Email: [tony.monblat@bis.gsi.gov.uk](mailto:tony.monblat@bis.gsi.gov.uk)

A list of those organisations and individuals consulted is in Annex K. We would welcome suggestions of others who may wish to be involved in this consultation process.

You may make printed copies of this document without seeking permission.

Other versions of the document in Braille, other languages or audio-cassette are available on request.

## Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

## **Help with queries**

Questions about the policy issues raised in the document can be addressed to Gail Davis at the above address.

## **What happens next?**

Following the close of the consultation period, the Government will publish all of the responses received, unless specifically notified otherwise (see data protection section above for full details).

The Government will, within 3 months of the close of the consultation, publish the consultation response. This response will take the form of decisions made in light of the consultation, a summary of the views expressed and reasons given for decisions finally taken. This document will be published on the BIS website with paper copies available on request.

## **Comments or complaints**

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,  
BIS Consultation Co-ordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone John on 020 7215 6402  
or e-mail to: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk)

The consultation principles are in Annex J.

However if you wish to comment on the specific policy proposals you should contact the policy lead.

# Chapter 1: Growth and the Appeals Framework

## Economic regulation, competition and growth

- 1.1 Economic regulation and competition enforcement play a key role in the Government's growth strategy by laying the foundations for effective markets and good outcomes for consumers.
- 1.2 At its core, economic regulation and competition policy is focused on addressing problems of market power and encouraging effective competition. Competition rules prohibit firms from behaving anti-competitively either by making agreements to avoid competition or abusing a position of market power. Where market power is inherent in a market, for example because of natural monopoly, economic regulation can be used to impose price controls as a proxy for competitive market outcomes.
- 1.3 But economic regulators and competition authorities also have a role, between these extremes, in making their markets work as effectively as possible and to encourage competition. Some of the trickiest decisions for economic regulators involve deciding how far to open up markets to greater competition, when to intervene to support consumers, and how to balance the need for long-term investment with the desirability of giving consumers greater choice.

## Government's vision for regulatory decision-making

- 1.4 Given the importance of the judgements that regulators are being asked to make – balancing the interests of consumers against those of different competing firms – it is vital that they make decisions in a way which is transparent, objective and evidence-based.
- 1.5 As set out in the Government's Principles for Economic Regulation<sup>1</sup>, the Government is committed to encouraging stable and predictable regulatory frameworks to facilitate efficient investment and sustainable growth. This requires regulatory frameworks to reflect the principles of:
  - Accountability
  - Focus
  - Predictability
  - Coherence
  - Adaptability
  - Efficiency
- 1.6 These principles apply equally to regulatory decision-making. In particular, regulators and competition authorities need to be accountable for the decisions they make, and as far as possible decisions need to be predictable. This can help increase regulatory certainty, giving firms greater confidence to invest or to innovate.

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31623/11-795-principles-for-economic-regulation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31623/11-795-principles-for-economic-regulation.pdf)

- 1.7 Decision-making also needs to be adaptable and efficient. Markets evolve over time, and regulatory decisions need to keep pace with those market changes. Particularly in fast-moving markets such as communications, regulatory decisions may be important in allowing the market to develop – for example by enabling greater convergence between different types of communications. All of this puts a premium on efficient decision-making. Government wants to enable regulatory decisions to be made quickly where necessary, so that there is the greatest possible degree of certainty for firms going forward, and market problems are tackled in a timely way.
- 1.8 Finally, Government recognises that there is not always a single right answer in all regulatory decisions. Particularly where regulators are making decisions about the way a market should operate in the future, there will be a degree of judgement involved in reaching a decision. In addition, many regulators have a role in managing trade-offs between a range of statutory duties or priorities - for example to balance social, economic and environmental considerations. Part of the reason for establishing independent, expert regulators is to allow them to reach these judgements in an objective way. Any system of regulatory decision-making and appeals needs to allow for the proper exercise of independent judgement, within a framework of overall regulatory accountability both to regulated firms and to Government and Parliament.

## **What is the appeals framework for?**

- 1.9 Appeals form a vital part of the regulatory decision-making framework.
- 1.10 First, appeals are a way of holding regulators to account. Particularly where decisions have been delegated to independent public bodies, firms need to have a mechanism for challenging regulatory decisions in the interests of justice. This is necessary in order correct regulatory mistakes, and to ensure regulators are behaving in a reasonable and consistent way. Appeals are not the only form of accountability. For example, effective consultation and sharing of information during decision-making plays an important role. Nevertheless appeals are a key element.
- 1.11 Second, appeals can help to ensure consistency between sectors and over time. For example, the Competition Commission hears appeals or references of price control decisions across the different regulated sectors, and can thereby ensure a degree of consistency between the regulatory approaches. Similarly, in reviewing competition decisions, the Competition Appeal Tribunal (CAT) considers consistency of case law over time and between markets.
- 1.12 At the same time however, it is clear that appeals can impose costs on regulators, regulated firms and the wider economy. There is a risk that appeals become the de facto route for decision-making, with appeals bodies being asked to make detailed regulatory judgements, effectively becoming a second regulator. There is also a risk that appeals are used as a gaming tactic either to delay specific decisions or more generally to discourage regulators from making more radical or controversial decisions because of fear of appeal. The appeals framework needs to strike a careful balance between providing proper accountability, but not inadvertently holding back growth.

## **Objectives for the appeals regime**

- 1.13 In considering how to strike this balance, the Government's overarching objectives for an appeals framework are that it:
- Supports independent, robust, predictable decision-making, minimising uncertainty.

- Provides proportionate regulatory accountability - the appeals framework needs to be able to correct mistakes made by a regulator and provide justice to parties, but allow the regulator to set a clear direction over time.
- Minimises the end-to-end length and cost of decision-making – partly through making the appeal process itself as streamlined and efficient as possible, but also by encouraging timely decision-making by the regulator or competition authority.
- Ensures access to justice is available to all firms and affected parties – not just to the largest regulated firms with the most resources and experience.
- Provides consistency, as far as possible, between appeal routes in different sectors – while acknowledging that the specific characteristics of each sector could affect the preferred approach.

1.14 The following chapters consider how far the current regulatory and competition appeals regimes fulfil these objectives, and whether changes could be made.

## Scope of the consultation

1.15 This consultation covers:

- Reviews and appeals of economic regulatory decisions made by Ofcom, Ofwat, Ofgem, CAA and ORR and NIAUR.
- Appeals of competition decisions made by the Office of Fair Trading and Competition Commission<sup>2</sup>, and other sector regulators exercising concurrent competition powers.

1.16 Competition enforcement and economic regulation are, for the most part, reserved matters. The exceptions are the economic regulation of rail, water, electricity and gas markets in Northern Ireland and economic regulation of the water sector in Scotland, which are devolved.

1.17 Government considers that the principles outlined in this consultation could apply more widely to other economic regulator functions, such as those of Monitor in the healthcare sector. However, Government is not proposing specific recommendations in relation to these regulators as part of this consultation. It has had dialogue with the Northern Ireland Executive, which will consider the outcome of this consultation in respect of those devolved matters it has responsibility for.

1.18 The consultation does not include appeals of decisions made by non-economic regulators such as the Health and Safety Executive and Environment Agency. The Government considers that the decisions made by economic regulators and competition authorities are distinct from those of non-economic regulators, and the approach taken to economic regulatory appeals would not necessarily translate across more widely to other non-economic regulators. Through the Focus on Enforcement initiative the Government has been working with industry on a series of reviews to examine the way regulation is enforced by national and local regulators in a wide variety of sectors. In addition to identifying issues at a sectoral level, the reviews uncovered evidence of similar problems occurring in every sector examined. A package of reforms to address these systemic issues was announced in the Autumn Statement and included a Focus on Enforcement review of appeals systems in non-economic regulators. The review looked at evidence from a range of businesses and regulators and a report of the findings will be published later this year.

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<sup>2</sup> The functions of the OFT and the Competition Commission will be taken over by a new Competition and Markets Authority (CMA) from 2014, established by the Enterprise and Regulatory Reform Act 2013. Any references in this document to the OFT or Competition Commission should be taken as applying to the CMA in future.

- 1.19 The Government recently consulted on proposed reforms to judicial review. This consultation sits alongside that work, setting out complementary proposals on the appeals framework for competition and regulatory decisions.

## Chapter 2: The Current Appeals Framework

### Introduction

2.1 This section summarises the current appeals framework for decisions made by the economic regulators and competition authorities. It sets out:

- The different types of decisions which regulators and competition authorities make;
- The different types of appeals which can be made against regulatory decisions.

### Types of regulatory and competition decisions<sup>3</sup>

2.2 The decisions made by regulators vary according to the statutory legislation and in certain cases, European law<sup>4</sup>, underpinning them. There is specific sector legislation relating to each of the main regulated sectors – energy, water, post, rail, aviation, and communications. Competition law is applied by the OFT and Competition Commission<sup>5</sup> and by the economic regulators under concurrency arrangements. In order to compare between different regimes, the Government has looked for ways of grouping together similar types of decisions.

2.3 First, there are forward-looking or ‘ex ante’ regulatory decisions. These generally fall into the following categories:

- Price or access charge control decisions
- Licence modifications
- Interconnection code modifications
- Other ex ante regulatory decisions – including market reviews conducted by Ofcom.

2.4 Second, there are retrospective or ‘ex post’ regulatory decisions. The main categories are:

- Regulatory enforcement decisions
- Dispute resolution

2.5 Third, there are competition decisions which can be separated into ex ante and ex post categories. Ex ante competition decisions include:

- Merger decisions – determining whether the merger of two firms should be blocked or remedied in order to address competition concerns.
- Market investigation decisions - determining whether markets are working well or whether changes should be made in structure or behaviour

2.6 Ex post competition decisions are those under the Competition Act 1998 or Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU). Competition enforcement

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<sup>3</sup> See Annex A for summary the different types of regulatory and competition decisions.

<sup>4</sup> See Annex I for summary of relevant European legislation.

<sup>5</sup> As a result of reforms enacted by the Enterprise and Regulatory Reform Act 2013, from April 2014 the OFT and Competition Commission will no longer exist and competition functions and the Competition Commission’s role as an appeal body will be performed by the new Competition and Markets Authority (CMA). Any references to the OFT or Competition Commission throughout this document should be taken to also mean the CMA from April 2014.

decisions relate to prohibitions on anti-competitive agreements and on the abuse of a dominant position.

2.7 Ex post competition enforcement decisions under the Competition Act can be made by the OFT and by economic regulators through concurrent competition powers. In contrast, ex ante decisions on mergers and markets are only made by the Competition Commission (as the second phase competition authority).

## Appeal routes

2.8 Annexes A and H contain tables summarising these different types of decisions for each regulator, with reference to the underpinning legislation for each different appeal route.

2.9 This document uses the term “appeal route” to describe any process that involves the reconsideration by a different public body of a decision that a regulator has taken or is proposing to take. It therefore includes not only judicial review of regulators’ decisions, but also cases of administrative reconsideration of proposed regulatory actions by a second administrative body (primarily by the Competition Commission). We describe this class of appeal route as the “regulatory reference model”.

2.10 In the regulatory reference model, if a regulated firm does not agree with the regulator’s proposed decision, the regulator can refer a defined question to the Competition Commission to be reconsidered. The Competition Commission is then required to determine the matter in the overall public interest, taking into account the statutory duties of the regulator. A number of important features of this model are:

- It is only triggered if a regulator insists on making a regulatory change which the regulated entity refuses to agree to;
- The Competition Commission must reconsider the whole matter on its merits, although in practice it is likely to concentrate its inquiries on the particular areas of disagreement previously identified between a regulator and licensed firm– the licensed firm/s affected by the decision cannot choose the issues and evidence which they want to be re-examined;
- The process adopted by the Competition Commission in these cases is inquisitorial, rather than adversarial – it conducts an investigation rather than adjudication between parties to a dispute; it, rather than the regulator, and affected parties, decides what evidence it needs to gather and assess.

2.11 This regulatory reference approach contrasts with the appeal model, where an appellant can bring a challenge directly to the appeal body. The responsibility is with the appellant to identify the element(s) of the regulator’s decision that they believe are wrong, and to bring evidence to support their appeal. The appeal body will judge the appeal based on the case brought by the appellant, and the counter-argument by the authority.

2.12 Direct appeal routes now exist in a number of sectors (electronic communications, energy in GB, and aviation). However, regulatory references are provided for in the water and rail sector and for energy decisions in Northern Ireland.

## Appeal bodies

2.13 All appeal routes from regulatory decisions described above involve one of the following:

- Competition Commission;

- Competition Appeal Tribunal;
- High Court of England and Wales, Court of Session, and High Court of Northern Ireland.<sup>6</sup>

2.14 A description of the role and function of each body is set out at Annex B.

## Standard of review

2.15 The intensity of review of a regulator's decision by an appeal body depends on the standard of review. By standard of review, we mean the grounds on which a regulator's decision may be challenged before an appeal body. The standard of review may comprise a judicial review, on the merits or in accordance with a statutorily defined standard which sets out particular grounds for an appeal.

2.16 A judicial review may be available in circumstances where a regulator makes a decision and the legislation is silent on any right of appeal. For example, this is the case with Ofcom decisions specified in Schedule 8 of the Communications Act 2003, which are not subject to section 192 provisions contained within that Act and thus are appealable on judicial review grounds only. Similarly, there will be regulatory decisions in other sectors which have no appeal route specified by the underpinning legislation, but which will be part of the inherent jurisdiction of the senior courts.

2.17 A judicial review is essentially a review to establish the lawfulness of an action, based on the grounds described in the case of the Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374. These are:

- illegality e.g. the decision was not made in accordance with the applicable law;
- irrationality in the exercise of any discretion e.g. the regulator acted in a way in which no reasonable regulator would have acted; and
- procedural impropriety e.g. the regulator has not followed the proper procedures, such as the requirement to give reasons or where an individual has been led to believe a certain procedure will apply and that legitimate expectation is not fulfilled.

2.18 It is also accepted that a breach of a legitimate expectation (e.g. where a regulator has promised it will act in a particular way but does not) is also a ground for a judicial review. As the grounds for judicial review are based on case law i.e. decisions of the courts, they evolve over time. A judicial review can sometimes be brought where there is a manifest error in factual assessment, but in general, the court will not expect to conduct a full factual reassessment.

2.19 The intensity of the review into the rationality of a regulatory action may vary. In general, any court conducting a judicial review is expected to show particular restraint in "second guessing" the educated predictions for the future that have been made by an expert and experienced decision maker, such as a regulator or competition authority. However, the degree of restraint may be reduced where what is proposed involves a potential interference with EU rights or human rights; the rationality test is flexible and may be adjusted to take this into account.

2.20 In contrast, an appeal on the merits would at its highest, potentially allow an appeal body to consider all aspects of the case, rather than just aspects connected to the judicial review grounds. It may involve a consideration of whether a decision was right. An appeal on the

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<sup>6</sup> The reference to the High Court throughout this document includes the Court of Session, except for Ofwat decisions appealable to the High Court. Ofwat does not have any regulatory jurisdiction in Scotland, so its relevant decisions can only be appealed to the High Court in England and Wales

merits may therefore succeed where a judicial review would not: i.e. where the decision was made in accordance with the law, there was no irrationality or procedural impropriety, but nevertheless, in the appeal body's judgment, the decision was wrong, based on the facts of a particular case. This judgment would usually be on the basis of the appeal body going beyond judicial review grounds and considering what the decision should have been in light of the statutory duties imposed on the regulator.

2.21 The grounds on which regulatory appeals can be brought vary between the regulatory statutes. Some make plain they are the same as a court would apply on a judicial review; some that they shall be on the merits; and a number specify the grounds with more particularity; for example, in the aviation sector, legislation allows for appeal on the grounds that a decision was wrong based on an error of fact, law or in the exercise of discretion by the regulator.

## Chapter 3: The Case for Change

### Summary

**Regulatory appeals have evolved differently across different sectors and for different types of regulatory and competition decisions.**

**Appeals are an important means of regulatory accountability, and in many ways the UK appeals frameworks perform well. But appeals inevitably take time and lengthen regulatory decision-making. Therefore, it is important that they are appropriately focused and that the system is efficient and predictable.**

**In some cases, particularly in the communications sector, there appear to be strong incentives on parties to appeal decisions. This may be due to:**

- **the standard of review, which allows the appeal body significant scope to review regulators' judgements;**
- **the fact that some appellants face a limited downside to appealing, even if their appeal is not upheld, compared with significant potential upside if the appeal is won.**

**In other sectors and for other decisions there appear to be fewer appeals, although across most sectors there is the scope for appeals to be wide-ranging, lengthy and costly. There is also significant inconsistency between sectors, for example in terms of which body hears appeals.**

**The Government considers that there may be a case for reforming the appeals framework across regulatory and competition decisions so that:**

- **It is more focused on identifying material errors;**
- **appeal bodies' expertise is applied in the most appropriate way and appeal routes are more consistent across sectors, to provide greater certainty and better use of resources;**
- **it is more accessible to all affected parties;**
- **incentives in the system are aligned with Government's objectives for the appeals framework;**
- **appeals processes are as efficient and cost effective as possible.**

3.1 Appeals play a vital regulatory accountability role by allowing regulators' decisions to be challenged. Several recent appeals have demonstrated that regulators have made clear factual errors, allowing appellants to successfully demonstrate flaws in the regulator's decision. More generally, appeals allow for a regulator's reasoning to be explored in more detail, even where the decision is ultimately upheld. In this way, appeals can provide an important discipline upon regulators and element of regulatory accountability and transparency. The UK has highly regarded appeal bodies, which are respected by competition and regulatory practitioners.

3.2 However, the Government is also aware of concerns about the appeals regime in some sectors and for some types of decisions. These concerns include:

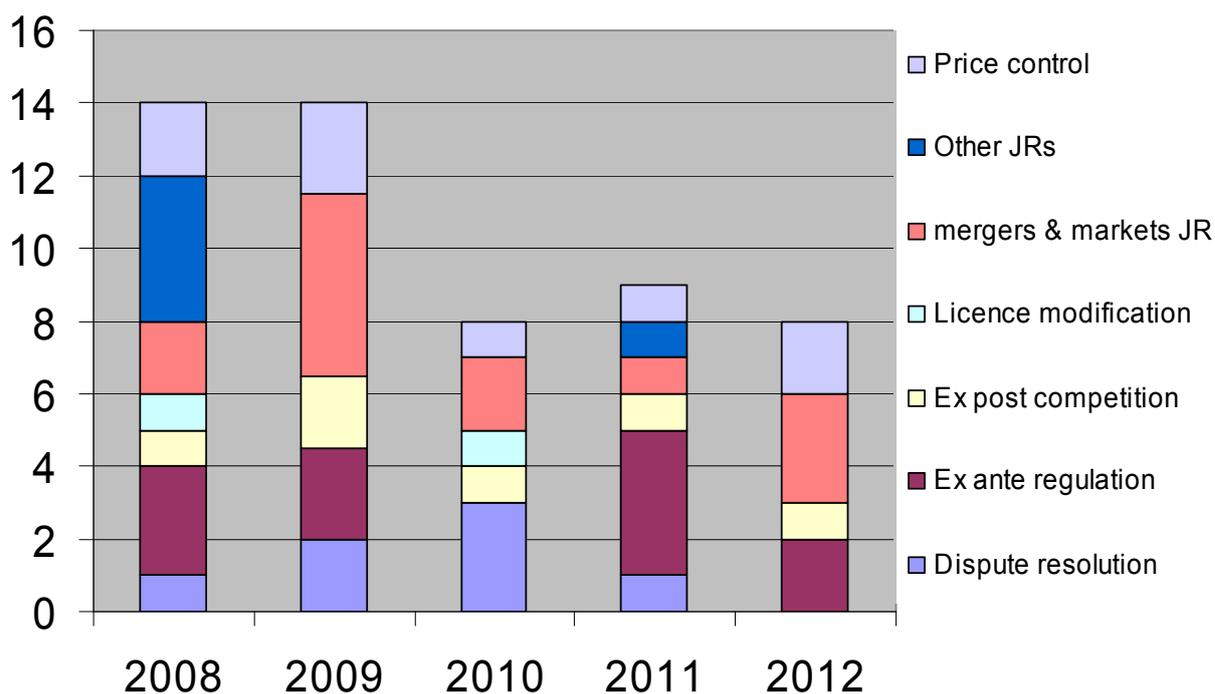
- The current framework can impose significant time and costs on all parties, which slows down efficient regulatory decision-making and can create regulatory uncertainty;
- The length and scale of some appeals, involving large volumes of evidence and legal and technical arguments;
- The lack of consistency across sectors and across different types of decisions.

### Variation in number of appeals between sectors<sup>7</sup>

3.3 There are a range of different statutory appeal routes across regulatory and competition decisions. These have emerged over time, and with significant differences between them. This has led, in part, to variation in the number of appeals heard against different types of regulatory decisions.

3.4 Figure 3.1 shows the number of appeals broken down by type of regulatory decision. It demonstrates the wide variety of different types of appeal that have been heard over the past five years.

**Figure 3. 1 Number of appeals by year and type of decision that was appealed (2008 - 2012)**

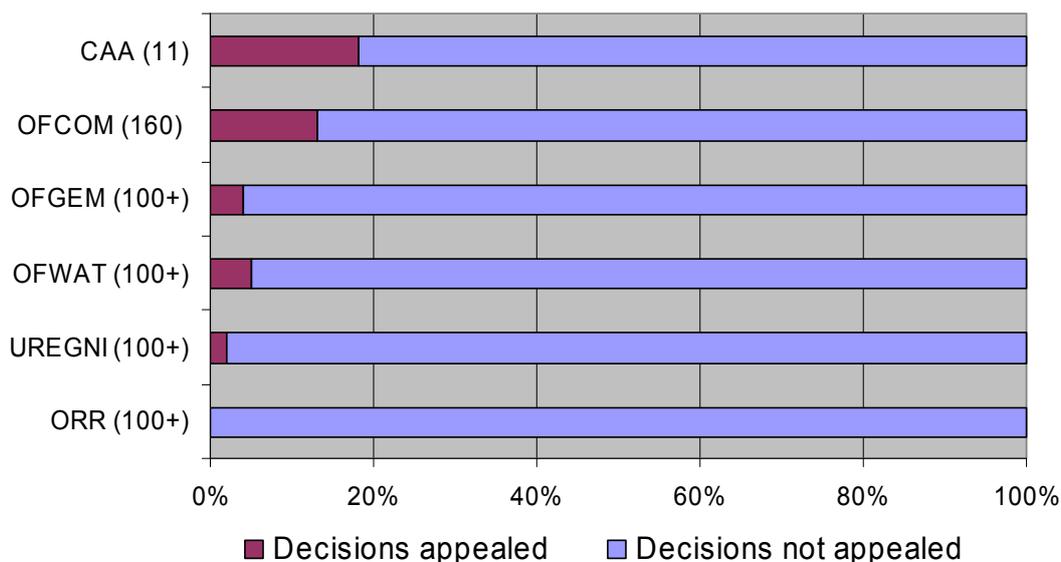


Note: some decisions are a mix of price control and ex ante regulation and so are ascribed as half a case to each category. The categories of decision are discussed above in Chapter 2.

<sup>7</sup> See Annex E for list of regulatory appeals between 2008 and 2009. Annex D provide additional evidence regarding the number and length of regulatory and competition appeals.

3.5 As well as looking at total number of decisions, it is also relevant to look at the proportion of decisions appealed. This is not straightforward to estimate, since regulators will not necessarily keep track of all decisions (including ‘non-decisions’) which might have been appealed. In addition, decisions can sometimes be appealed at different stages, not just at the ‘final decision’ point. Bearing these caveats in mind, Figure 3.2 illustrates the estimated proportion of decisions appealed for each regulator.

**Figure 3. 2 Number of decisions appealed compared with total number of decisions (2008 - 2012)**



Note: These are lower bound estimates of the total number of decisions because of the difficulty of identifying discrete decisions that could have been appealed.

3.6 As might be expected, the number of decisions appealed is a relatively small proportion of the absolute number of decisions. However, there are significant variations in proportion of decisions appealed. In particular:

- CAA appears to have the highest proportion of decisions appealed, but this is based on a relatively small number of decisions in total and significantly in a regime where the CAA had to make a compulsory reference (appeal) to the Competition Commission before any price control decisions could be made. This framework has been reformed by the Civil Aviation Act 2012.
- Ofcom has the next highest number of decisions appealed – around one in eight. However, as might be expected more appeals have been brought against the most significant decisions Ofcom has taken. For example, there have been 7 telecoms price control appeals in the last five years<sup>8</sup>. Ofcom has taken 9 price control decisions in this time. In contrast, there have been relatively few recent appeals in the water, rail and energy sectors.

3.7 This lack of consistency in outcome may be driven in part by the nature of the different markets. For example, there will be a range of factors which could influence the number and type of appeals including the number and nature of the parties involved (particularly whether

<sup>8</sup> These figures count appeals as they are heard by the CAT - where multiple cases are heard together they are counted as one appeal

they are operating in a competitive environment or as a regulated monopoly provider), the type of decision and how that decision is taken, and the wider characteristics of the sector.

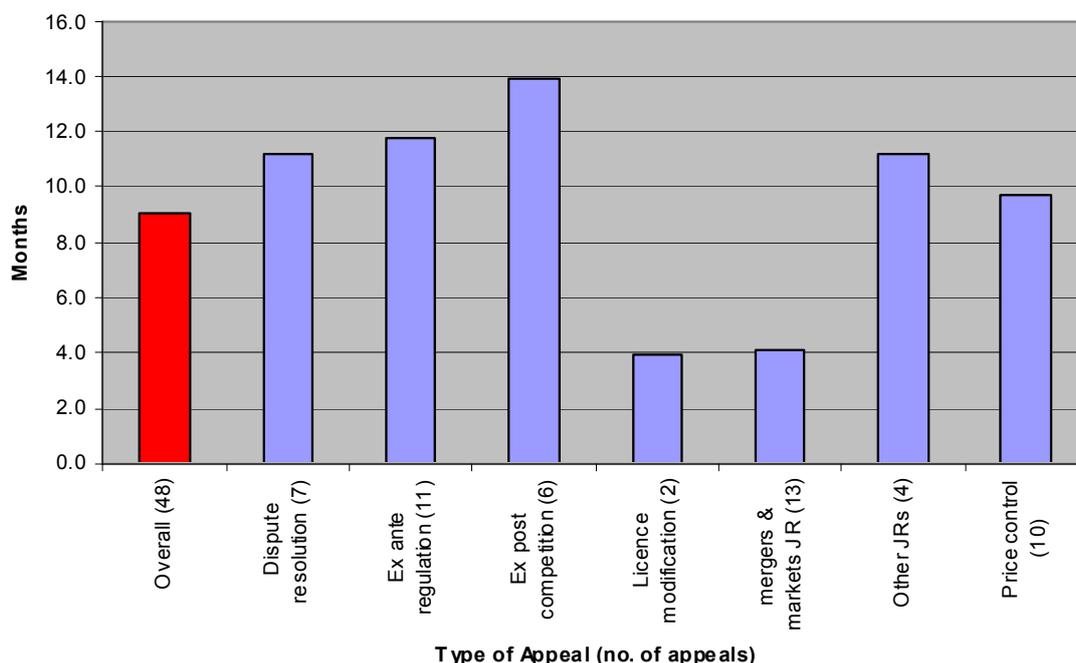
3.8 However, as noted below, the Government considers that some of the differences in outcomes between sectors may also reflect differences in the characteristics of the appeals regimes.

### Length of appeals and impact on the overall regulatory process

3.9 The process of bringing and hearing appeals inevitably takes time and imposes costs on the appeal bodies, regulators, appellants and third party interveners.

3.10 Figure 3.3 shows the average time taken by different types of appeal over the past five years. On average, first stage appeals have lasted just over 9 months over the last five years, but with significant variation around this average. For example, some cases have taken as long as 24 months. Other cases have been very short (as little as 10 days for example in the Merger Action Group appeal against the Lloyds/HBOS merger). When there are further appeals to the Court of Appeal and/or the Supreme Court, this adds an average of a year to the total time taken.

Figure 3.3 Average time taken by type of appeal



3.11 These case timescales are broadly in line with international comparators although these vary significantly and some comparators outperform the UK. For example, telecoms and energy appeals in the Cour d’appel de Bruxelles in Belgium average 23.5 months and 14.1 months respectively. All proceedings heard in 2009 at the Verwaltungsgericht Koln in Germany average 9.4 months. Telecoms and energy appeals heard at the Cour d’appel de Paris in France average 7.5 months and 8.8 months respectively. In comparison, the Government

estimates that on average, in the UK, communications and energy appeals last 10.1 months and 12.4 months respectively.<sup>9</sup>

- 3.12 Appeals can also impose significant costs on firms, regulators and appeal bodies. The impact assessment accompanying this consultation estimates that the current appeal system costs £21.8m per annum (£16.9m incurred by businesses, £3.4m by regulators and £1.5m by the courts and tribunal services).

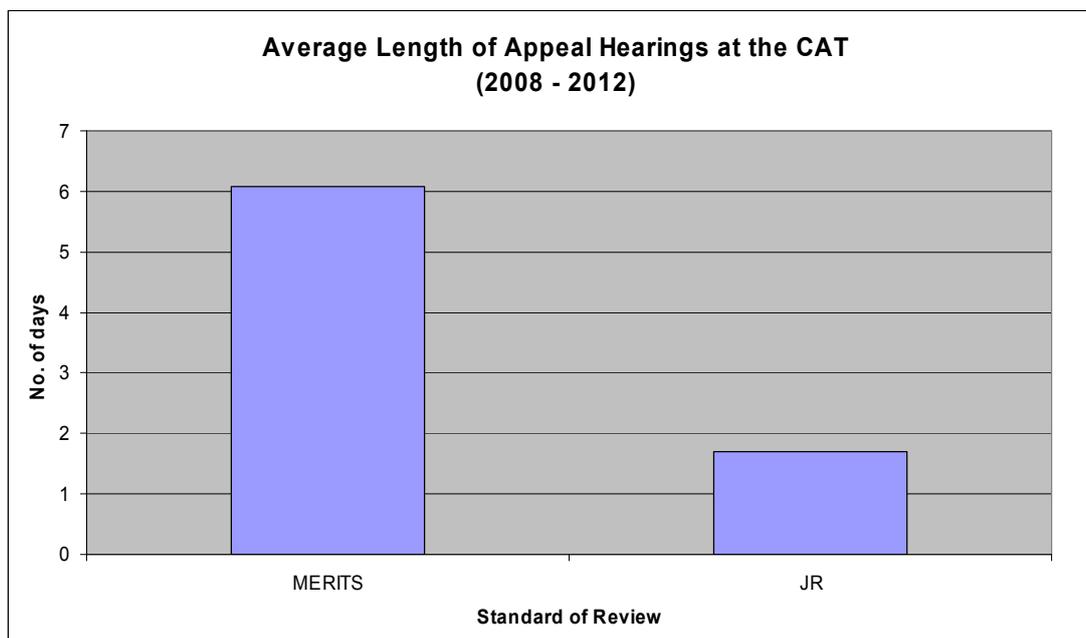
### **Impact of standard of review**

- 3.13 The standard of review will have a significant impact on the scope of the appeal body to re-examine a decision, the length and cost of an appeal. The degree to which decisions can be reopened on appeal may affect both companies' propensity to appeal and the length of appeals.
- 3.14 First, the more intense the review and the more widely the appeal body is able to review and in some cases retake a regulator's decision, the more incentive parties are likely to have to bring an appeal.
- 3.15 Second, cases heard on judicial review grounds appear to be resolved more quickly than full merits appeals. Between 2008 and 2012, appeals cases heard by the CAT on a full merits review lasted around 11 months on average. This compares with around 4 months for cases heard by the CAT on a judicial review standard over the same period.
- 3.16 The standard of review will also have an impact the time spent in court. Data collected for this review indicates the average length of hearing for cases heard at the CAT on the merits is 6 days<sup>10</sup>, while those heard under judicial review take on average 1.5 days. However, this data needs to be interpreted carefully. Many judicial review cases heard at the CAT are relate to merger inquiries, and will tend to be completed relatively quickly as parties have a strong incentive to resolve the case as soon as possible.

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<sup>9</sup> Larouche, P., Taton, X., Enforcement and judicial review of decisions of NRAs, CERRE, 2011, p.107, [http://www.cerre.eu/sites/default/files/110421\\_CERRE\\_Study\\_EnforcementAndJudicialReview\\_0.pdf](http://www.cerre.eu/sites/default/files/110421_CERRE_Study_EnforcementAndJudicialReview_0.pdf)

<sup>10</sup> In estimating this figure, only one of the OFT construction appeal cases has been included, to avoid skewing the average.

**Figure 3. 4 Average length of hearing at the CAT (2008 - 2012)**

3.17 Third, the standard of review can arguably have an impact on regulatory certainty. On the one hand, allowing more detailed scrutiny of facts and legal arguments underpinning a decision through a full merits review should make it less likely that errors will occur in decision-making, contributing to greater regulatory certainty. A merits review could also avoid some of the unintended consequences of judicial review, for example that regulators focus on the procedural aspects and setting out detailed explanations to 'JR-proof' their decisions. Equally a merits review could allow a regulatory decision to stand, even if there were procedural deficiencies, whereas a judicial review would require a decision to be remitted to the regulator.

3.18 On the other hand, lengthy appeals could increase uncertainty, because regulatory decisions are delayed or are under overall consideration for longer. In cases where there are a large number of appeals, a merits-based standard could reduce the credibility of the regulator, particularly where there is a concern that the appeal body could act as a second regulator 'waiting in the wings', and in turn negatively affect regulatory certainty.

## Incentives to appeal

3.19 Firms can rightly be expected to have a strong incentive to appeal where a regulator's decisions have a material effect on them, and where they believe that the regulator's reasoning is flawed or they have insufficient evidence on which to base their decision. As noted in previous sections, appeals are a key way of holding regulators to account, and are a means by which regulatory decisions can be corrected where appropriate. It is important that any changes to the appeals frameworks preserve firms' incentives and ability to appeal in these cases.

3.20 However, in some cases there appear to be few downsides to appealing, even if the appellant does not stand a good chance of winning. This can be the case where parts of a decision can be appealed, rather than the entire decision – in particular some price control decisions. It has been argued that this 'cherry-picking' approach is likely to lead to more appeals, although these appeals may be more focused in themselves. The water and rail sectors, where there remains a regulatory reference system where an entire price control

decision can be looked at afresh by the Competition Commission, have had relatively few appeals. This may be due, in part, to the fact that the Competition Commission will balance a number of factors in the same way that the regulator was required to when taking its decision. This has the possibility of leading to a worse outcome for appellants so they are only likely to use the reference mechanism in limited circumstances.

3.21 Second (and related), in some cases the costs of appealing often appear low relative to the benefits. This is particularly the case where decisions have a major impact on the market, or where substantial fines have been imposed, and where there is little risk of the decision going worse for the appellants. It is also not the case that a losing appellant has to pay all costs: in the telecoms sector, the CAT has only issued costs orders in 5 of the 30 appeals where costs were incurred (and therefore cost orders could have been issued)<sup>11</sup>. In all other cases, parties only had to pay their own costs.

3.22 Third, appeals can routinely involve substantial amounts of new evidence presented at appeal. This evidence can be crucial to the determination of the appeal, but is not always available to the regulator when making its decision. For example, in the British Sky Broadcasting Limited (Conditional access modules) case, there were over 35,000 pages of submissions and evidence, and 41 witnesses (including 14 experts), of whom 25 gave oral evidence.

3.23 The Government has seen no evidence that parties are purposely holding back evidence until the appeal stage. Appellants argue that it is often only once a regulator makes a decision that they realise the importance of certain pieces of evidence. It is right that they are able to raise such points on appeal, if the appellant was not reasonably able to realise the importance of a piece of evidence earlier in the administrative process. In price control cases, it is also often the case that parties are unable to see much of the information that regulators take into account when making their decisions, for commercial confidentiality reasons. Nevertheless, the Government observes that where appeals can consider new evidence, this can create an incentive for an appellant to attempt to bring new points on appeal – in this sense it gives the appellant a ‘second chance’ to make its case.

3.24 Fourth, there may be an incentive for parties to appeal in some cases in order to delay a decision or make further regulatory action more difficult. In a limited number of cases, firms are able to use appeals directly to delay regulatory decisions from coming into effect. Examples of this include payment of fines for Competition Act infringements.

3.25 In other cases, firms are able to appeal to the Courts for a decision to be stayed for the duration of the appeal. However, for most regulatory decisions, appeals will not automatically delay a decision from coming into effect unless there is an application for interim relief. Even where a decision remains in force during an appeal, there can sometimes be other significant indirect impacts. For example, in the case of Ofcom’s spectrum award plans for 2010 MHz and 2.6GHz bands, the auction could have been undertaken sooner had its decision not been the subject of extensive litigation.<sup>12</sup>

3.26 Another example is mobile telephony price controls, where recent Ofcom decisions have set price controls for a three year period. In this case, appeals have sometimes lasted for a significant portion of the price control period, creating uncertainty not only for the current price control, but also for the regulator’s approach to the next price control.

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<sup>11</sup> Cost orders were issued on individual cases 1169/3/3/10, 1168/3/3/10, 1146/3/3/09, 1057/3/3/05. Cases 1146/3/3/09, 1091/3/3/07 and 1090/3/3/07 are treated as one since they were heard together.

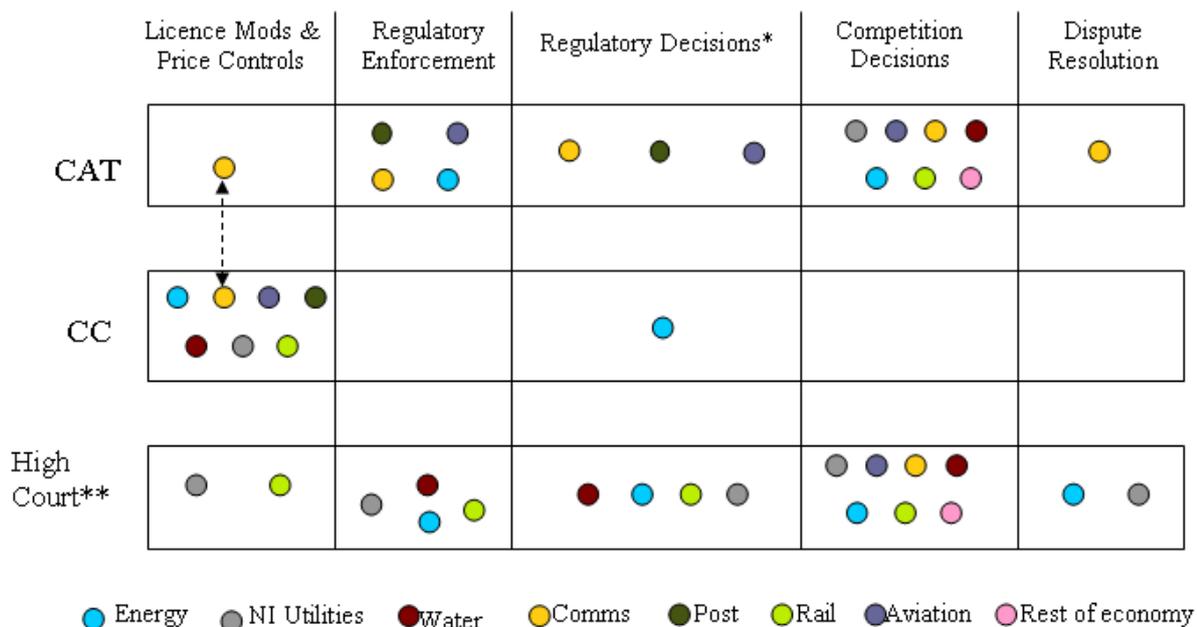
<sup>12</sup> For more detail on case studies, see Annex E.

3.27 Conversely some features of the appeals framework may make it more difficult for smaller or less well-resourced parties to bring an appeal. The broader the grounds of any appeal, the more issues can be raised with an inevitable effect on costs. This is mitigated to some extent in the Competition Commission’s regulatory reference reviews where the Competition Commission can take evidence from third parties without those organisations or individuals having to be a party to the appeal itself.

### Inconsistency of appeal routes

3.28 Aside from the incentives facing firms in individual appeals, looking across sectors it is clear that there is a complex mix of appeal routes across different types of decisions. Figure 3.5 illustrates which types of decisions are heard by which appeal body<sup>13</sup>. More detail of regulatory decisions and appeal routes is given in Annex H.

Figure 3.5 Summary of current routes of appeal



\*Including ex ante and ex-post regulatory decisions & market review

\*\*High Court of England and Wales, Court of Session, or High Court of Northern Ireland

3.29 This complexity suggests that the appeal body hearing an appeal may not always be the one with the greatest expertise in those cases i.e. if expertise has built up in another appeal body which has heard a greater number of similar cases.

3.30 In addition, investors across sectors may have less certainty about how the regime operates because of differences in appeal routes.

<sup>13</sup> In this figure the reference to the High Court includes the Court of Session (and High Court in NI), except for Ofwat decisions appealable to the High Court. Ofwat does not have any regulatory jurisdiction in Scotland, so its relevant decisions can only be appealed to the High Court in England and Wales

## Impact on regulatory decision-making

3.31 Finally, there are concerns that the cumulative effect of regulatory appeals can be to make regulators overly risk-averse, and delay important regulatory decisions. While the appeals processes is only one element in a complex set of factors affecting regulatory behaviour, some regulators have strongly argued that the appeals regime has a significant effect. For example, DCMS's 'Consultation on implementing the revised EU electronic communications framework – appeals'<sup>14</sup> suggests Ofcom is spending increasing amounts of time per year addressing appeals. Some have argued that Ofcom has become reluctant to make significant pro-competition decisions as a result of the proliferation of litigation in the sector.

## A case for reform?

3.32 This consultation seeks views on the case for reforming appeals in relation to some regulatory and competition decisions so that:

- It is more focused on identifying material errors;
- appeal bodies' expertise is applied in the most appropriate way and appeal routes are more consistent across sectors, to provide greater certainty and better use of resources;
- it is more accessible to all affected parties;
- incentives in the system are aligned with Government's objectives for the appeals regime;
- appeals processes are as efficient and cost effective as possible.

3.33 The Government acknowledges that the case for change may be stronger in some sectors and for some types of decisions than for others.

3.34 The following sections set out potential changes that might be made to the appeals frameworks to achieve these objectives.

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<sup>14</sup> <https://www.gov.uk/government/consultations/consultation-on-implementing-the-revised-eu-electronic-communications-framework-appeals>

## Chapter 4: Standard of Review

### Summary

The grounds on which parties can appeal, and the standard of review to which regulatory decisions are subjected, are central to achieving the right balance between appeal rights and effective regulatory decision-making. They will have a material impact on the level of scrutiny, length and cost of an appeal.

The Government's aim is that appeals focus on where the regulator or authority has made an error that is material to its decision or, in extreme cases, where a body has come to an unreasonable decision.

This consultation is seeking views on the following proposals:

For Communications Act appeals:

- Moving to either a judicial review standard, or introducing more focused grounds of appeal;

For Competition Act appeals:

- Moving to either a judicial review standard, or introducing focused grounds of appeal;

For price control decisions in the communications, aviation, energy and postal services sectors:

- Moving to either a judicial review standard, or having consistent and focused grounds of appeals across sectors;

For regulatory decisions in the rail sector:

- What the costs and benefits might be to introducing a direct appeal mechanism to replace the current regulatory reference approach

### Introduction

4.1 Decisions made by competition authorities and economic regulators may go to the heart of how a business is run or may impose fines running into many millions of pounds. They are significant both for those directly affected by the decisions, and for the wider economy and the public.

4.2 Rights of appeal against those decisions are crucial to ensure robust decisions are made in the right way. They form an important part of the accountability framework for regulators and competition authorities, alongside other arrangements, such as accountability to Parliament.

4.3 There is a balance to be struck between enabling interested parties to have appropriate rights of appeal and ensuring that the system as a whole functions efficiently and enables the

regulator or authority to take decisions in an efficient and timely way, to achieve its duties. A well designed and proportionate appeals process can contribute to the quality, predictability and certainty of the regulatory framework, by exposing regulatory decisions to additional scrutiny and, if necessary, correction. Conversely a poorly designed process can lead to lengthy delays and regulatory uncertainty.

4.4 The grounds on which parties can appeal, and the standard of review to which regulatory decisions are subjected, are central to achieving this balance between appeal rights and effective regulatory decision-making. If there are wide grounds of appeal and the appeal body can subject regulatory decisions to very detailed scrutiny, this may affect both incentives to appeal and outcomes in some cases. On the other hand, the standard of review needs to provide appeal bodies with sufficient scope to properly scrutinise regulatory decisions and identify material errors.

## The current position and rationale for change

4.5 As noted in Chapter 2, there are currently a range of different standards of review across different types of regulatory appeal, from judicial review to a merits review. For some decisions legislation specifies the grounds on which parties can appeal, and again there are a range of appeal grounds across sectors. Many of these differences appear to be driven more by historical or incidental factors, rather than by a genuine policy desire for parties to have different appeal rights.

4.6 The standard of review, which may be determined by the grounds of appeal that can be brought, will have a material impact on the level of scrutiny applied, the length and cost of an appeal. Evidence collected for this review indicates that judicial reviews (during the period 2008-2012) for merger and market investigation appeals take, on average, 4.0 months whereas merits-based reviews across a range of decisions take, on average, 10.9 months. A merits review will apply a greater level of scrutiny to the case and will tend to involve longer court hearings, with larger volumes of evidence and submissions from the parties. For these reasons a merits-based review will also tend to be more costly for all parties.

4.7 In the communications sector, where most appeals are on the merits, there have been a number of long-running, in-depth cases which range over a wide number of issues – arguably slowing down regulatory decision-making and potentially increasing regulatory uncertainty. For example in the *BT vs. Ofcom (Partial Private Circuits)*<sup>15</sup> case, the decision was appealed to the CAT in December 2009 and the CAT provided its judgement in March 2011. This judgement was appealed to the Court of Appeal which gave its judgement in July 2012<sup>16</sup>. A number of other dispute cases were held up, pending the final resolution of this case.

4.8 In some other sectors there have been very few appeals. For example, in the rail sector there were no appeals against economic regulation decisions between 2008 and 2012. Some of these sectors have a different appeal approach (they are subject to an investigation by the appeal body, rather than an adversarial direct appeal). This may lead to fewer appeals, which minimises direct costs due to appeals. Conversely, this approach may prevent the system from achieving quicker regulatory decisions and in some cases does not provide a simple route of appeal against an error in one part of a decision.

4.9 The term “merits review” can be unhelpful as it is not always clear at the outset how this standard of review will be applied in any particular case. For example in *Vodafone Limited v Office of Communications* undertaking a merits review, the CAT recognised that there may be

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<sup>15</sup> CAT case 1146/3/3/09, <http://www.catribunal.org.uk/237-5136/1146-3-3-09-British-Telecommunications-PLC.html>

<sup>16</sup> Case number C3/2011/1683, [2012] EWCA Civ 1051

no single “right answer” to a dispute, and would be “slow” to overturn a decision which is arrived at by an appropriate methodology; whereas in other merits review cases the CAT has adopted a more amorphous test, namely that a decision should “withstand profound and rigorous scrutiny”<sup>17</sup>.

- 4.10 This can lead to lengthy pleadings from parties who, naturally, will want to ensure the highest level of scrutiny that is available is applied. For example, in *T-Mobile UK Limited and Telefonica O2 UK Limited v Ofcom* [2008] CAT 15<sup>18</sup> the appellants argued that judicial review was not sufficiently flexible to take into account the requirements of Article 4(1) of the EU Electronic Communications Framework Directive that the merits of the case be duly taken into account. This case on the CAT’s jurisdiction took around 8 months to complete, including an appeal to the Court of Appeal<sup>19</sup> and a request for permission to appeal to the House of Lords. Therefore there may be benefits from being clearer at the outset on the degree of scrutiny that will be applied in appeals against different types of decisions.
- 4.11 In some cases appeals are successful and have acted as a valuable check on the regulator. It is important that this continues to be the case, and that where appeals are brought that these are focused on the key issues and resolved swiftly, to provide greater regulatory certainty.
- 4.12 The Government also notes that international comparators have looked at this issue of appropriate appeal rights. For example, in Australia a new regime was put in place for the Australian Competition Tribunal to undertake a ‘limited form of merits review’ of the economic regulatory decisions of the Australian Economic Regulator (AER) and Economic Regulation Authority in the case of gas and electricity decisions.
- 4.13 A recent review of the new system<sup>20</sup> found that the immediate impacts have been higher prices for users and consumers. However, the review found that this was in a large part due to the fact that the system did not ensure that consumer interests had been taken sufficiently into account, both at the decision-making stage and at the appeal stage. For example, relevant questions about how decisions would contribute to the regulator’s objectives, which the regulator is required to ask in exercising its discretion, were not addressed at the appeal stage.
- 4.14 One of the Government’s objectives for the appeal system is to ensure access to justice is available to all firms and affected parties, and this includes ensuring the consumer interest is fully reflected. Any changes to the standard of review would not change the ability of the appeal body to consider whether the regulator in achieving its duties had acted reasonably in exercising its discretion.
- 4.15 The Government believes that there are opportunities to focus the grounds of appeal and the standard of review that can be applied and make these more consistent across sectors, to ensure that the system concentrates on those areas where regulators or competition authorities have made material errors or have acted unreasonably.

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<sup>17</sup> Case 1094/3/3/08, <http://www.catribunal.org.uk/237-657/1094-3-3-08-Vodafone-Limited.html>

<sup>18</sup> Case 1103/3/3/08 <http://www.catribunal.org.uk/237-664/1103-3-3-08-Telefonica-O2-UK-Limited.html>

<sup>19</sup> Case number C1/2008/2257,2257(A) and 2258, [2008] EWCA Civ 1373

<sup>20</sup> <http://www.scer.gov.au/files/2012/06/Stage-One-Report-to-SCER-29-June3.pdf>

<https://scer.govspace.gov.au/files/2012/10/Review-of-the-Limited-Merits-Review-Stage-Two-Report.pdf>

## Standard of review principles

- 4.16 An appropriate and proportionate standard of review should address the Government's policy objectives for the appeals framework set out in paragraph 1.13.
- 4.17 The principle of proportionality is an important one. While a merits-based appeal is sometimes seen as bringing more certainty to the regulatory environment by allowing affected parties to challenge the full reasoning behind a regulator's decision, where there are many appeals a merits-based standard may also have the opposite effect – of reducing the credibility of the regulator which in itself impacts on certainty. The length of appeals will also impact on the certainty of the regime, particularly if this delays implementation of the regulator's decision, or if it has wider impacts on the timeliness of regulatory decision-making.
- 4.18 The Government believes that appeals should focus on identifying material errors or unreasonableness in regulatory decisions, rather than providing for a second body to reach its own regulatory judgement. This preserves regulatory accountability and the rights of parties to challenge decisions, while ensuring the system is efficient and allows regulators to take timely decisions.
- 4.19 In the absence of a more specific statutory ground of appeal, the standard of review applied to public bodies' decisions is judicial review. **The Government believes there should be a presumption that appeals should be heard on a judicial review standard unless there are specific legal or policy reasons for a different approach.** Judicial reviews generally strike an appropriate balance between enabling interested parties to have robust rights of appeal with ensuring that the system as a whole functions efficiently and enables the regulator to take decisions effectively. Judicial review is also a flexible standard as it is not defined in statute but is based on case law. Indeed, Lord Diplock stated at paragraph 410 in the well-known Council of the Civil Service Unions case<sup>21</sup>: "further development on a case by case basis may ... in course of time add further grounds". Therefore, judicial review may evolve over time. This also means that judicial review can adapt to the requirements of a particular case, so as to comply with EU law or European Convention on Human Rights obligations.
- 4.20 In some cases there may either be a legal requirement, or a policy rationale, for a more intensive standard of review than the traditional form of judicial review (i.e. a narrow judicial review) which focuses on the process of decision-making. The Government's view is that different types of decisions may, to some extent require a different approach. The case for moving away from a judicial review standard in particular cases is outlined in more detail below.
- 4.21 **The Government further believes that where an appeal is not heard on a judicial review basis, the standard of review should be determined by clear grounds of appeal which are focused on identifying material errors or unreasonable judgements on the part of a regulator. The term 'merits review' can result in different levels of scrutiny, so having more well-defined grounds of appeal for these types of reviews will provide greater clarity and certainty up front. The following principles should therefore apply to any appeals which are not heard on a traditional judicial review standard:**

### Box 4.1: Principles for non-judicial review appeals

#### *Material error of law*

- Appellants should be able to bring an appeal where a decision may be wrong in law. This is a basic right of appeal and well understood in the UK's legal system. The Government's view is that appeals should consider whether an error of law is material – that is, significant enough to

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<sup>21</sup> Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374

have an impact on the ultimate decision. Therefore, not all errors of law will result in overturning a decision.

*Material error of fact*

- Appellants should be able to bring an appeal where the regulator may have got facts wrong in reaching a decision. Appellants must demonstrate the error was material to the final outcome. "Material" means an error of fact which is significant enough to have an impact on the ultimate decision, so that it might be different. Therefore, not all errors of fact will result in overturning a decision.

*Material procedural irregularity*

- Appellants should be able to bring an appeal where there may have been a procedural irregularity. A "procedural irregularity" involves the procedure by which a decision was reached, it concerns matters of natural justice. For example, circumstances where a decision maker appears to be biased or where a consultation process was so inadequate as to be unfair, with the result the regulator was not equipped with the material it should reasonably have obtained had it consulted properly. Appellants must demonstrate that the procedural irregularity was material to the decision, i.e. that it was significant enough to have an impact on the ultimate decision so that it might be different. Therefore, not all procedural irregularities will result in overturning a decision.

*Unreasonable exercise of discretion*

- An appellant should be able to bring an appeal if it can be shown the regulator exercised its discretion in a way which no reasonable regulator would act. "Exercise of discretion" refers to the fact that regulators are conferred with discretion in their decision making and the exercise of that discretion would only form a ground of appeal in circumstances where the regulator exercises that discretion in a way which falls outside the band in which a reasonable regulator would act. Appellants should also be able to bring an appeal where the exercise of discretion was reasonable at the time the decision was made, but where it is no longer reasonable at the time of the appeal (for example, due to a significant change of circumstances).

*Unreasonable judgments or predictions*

- An appellant should be able to bring an appeal if it can show the decision was based on a judgment or prediction which no reasonable regulator would make.
- "Judgment" refers to circumstances where the regulator is engaged in an evaluative function, considering various factors, assessing the balance of advantages and disadvantages and then deciding what outcome would most appropriately meet the regulatory objectives. It might, for example, include a situation where a regulator is balancing their objectives or duties. In contrast, reference to "prediction" concerns circumstances where a regulator applies economic or other expert analysis to form a view on what will happen in the future, for example the effects of a particular price control on the market.
- Where a regulator has made a judgement or prediction, the appeal body should defer to the regulator's expertise. In practice this test should be the same under a judicial review or any other kind of appeal. It should focus on whether the judgement or prediction was reasonable. As Lord Justice Lloyd stated in *BT v Ofcom* [2012]: "There may be a range of conclusions that could be drawn from the same facts, but provided the regulator focuses on the relevant factors and exercises its judgement in a proper manner, the appeal body should not overturn the decision."
- Under this principle, there would be a ground for appeal where the judgment or prediction was reasonable at the time of the decision, but at the time of the appeal it is clear that the judgment or prediction is no longer reasonable (for example, due to a significant change of circumstances which meant the predictions were factually wrong).

**Q1 Do you agree that there should be a presumption that appeals should be heard on a judicial review standard, unless there are particular legal or policy reasons for a wider standard of review?**

**Q2 Do you agree with the Government’s principles for non-judicial review appeals set out in Box 4.1? If you disagree, what would you propose?**

**Q3 How would moving to a judicial review standard impact the length, cost and effectiveness of the appeals framework?**

## Applying the principles to different regulatory and competition appeals

4.22 The following table shows where appeals currently have a standard of review which goes beyond a normal judicial review:

**Figure 4. 1 Appeals with standard of review beyond judicial review standard**

Court	Type of decision	Legislation
CAT	Ex-post Enforcement	Communications Act 2003 s195 (Communications), Electricity Act 1989 s27 (Energy), Gas Act 1986 s30 (Energy), Civil Aviation Act 2012 sch5 (Aviation)
High Court	Ex-post	Energy (NI) Order 2003*
CAT	Regulatory Decisions	Communications Act 2003 (Communications), Civil Aviation Act 2012 sch 1 (Aviation)
CAT	Competition Decisions	Competition Act 1998 (ALL REGULATORS and OFT)
CAT	Dispute Resolution	Communications Act 2003 s195 (Communications)
Competition Commission	Licence Modification & Price Control	Communications Act s193 (Communications) Postal Services Act 2011 s59 (Post) Civil Aviation Act 2012 s24-s30 (Aviation) Railways Act 1993 s13(7), s14(1) sch4A paragraph 9(9) and 11(1)-(3) (Rail) Water Industry Act 1991s12 (Water) Electricity Act 1989 s11C (Energy),

		Gas Act 1986 s11C (Energy), Energy Act 2004 s175 (Energy) Electricity (Northern Ireland) Order 1992 Art15** Gas (Northern Ireland) Order 1996 Art15**
CAT	Price Control	Communications Act 2003, s193 (Communications)
Competition Commission	Regulatory Decisions	Energy Act 2004 s175 (Merits)

\*Standard of review differs from that of judicial review

\*\* Referral process not an appeal process

4.23 The main areas where appeals currently go beyond a judicial review are:

- Communications Act decisions
- Competition Act decisions
- Price controls
- Certain other regulatory decisions e.g. market power determinations

4.24 The following sections explore whether there is a case for moving to a narrower standard of review and/or more tightly defined grounds of appeal in these cases.

## Communications Act 2003 appeals

4.25 Telecoms decisions taken by Ofcom under the Communications Act 2003 must have an appeal framework which is consistent with the requirements of the EU Electronic Communications Framework Directive. Article 4 of this Directive outlines the requirements for appeals of these decisions, and states that the merits of the case must be duly taken into account during an appeal<sup>22</sup>

4.26 As discussed in DCMS’s ‘Consultation on implementing the revised EU electronic communications framework – appeals’<sup>23</sup> the Government’s view is that the current UK legislation gold-plates the requirements of the Framework Directive.

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<sup>22</sup> **Article 4(1)**: “Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise to enable it to carry out its functions effectively. **Member States shall ensure that the merits of the case are duly taken into account** and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law.”

<sup>23</sup> <https://www.gov.uk/government/consultations/consultation-on-implementing-the-revised-eu-electronic-communications-framework-appeals>

4.27 In addition it is clear from evidence collected to support this review, and as part of the DCMS consultation, that significant time and cost is spent on appeals within the communications sector. There is also a concern that the increased frequency of market reviews as required by the Framework Directive, when combined with the current appeals process, may lead to a number of overlapping appeals and market reviews which are also potentially subject to appeal. For example, following Ofcom's decision in 2009 on Local Loop Unbundling<sup>24</sup> the appeals process which followed delayed the next price control decision by a year. This has a real risk of increasing regulatory uncertainty.

4.28 Furthermore it is likely that the threat of appeal is having an impact on the speed of decision-making in the first instance, potentially making the regulator unduly risk averse. For example, in the case of Ofcom's spectrum award plans for 2010 MHz and 2.6GHz bands, the auction could have been undertaken sooner had its decision not been the subject of extensive litigation.

*Options for reform: judicial review or focused specified grounds of appeal*

Option 1: Judicial review

4.29 Government's previous consultation considered the possibility of moving to a judicial review standard 'duly having regard to the merits'. Having considered this matter further, including in light of responses to the consultation, the Government considers that specifying that the appeal body should have due regard to the merits is not necessary in order to comply with the Directive. It also considers that it offered no significant advantage over the judicial review standard which is sufficiently flexible to enable the courts to interpret the requirements of Article 4, without the need to specify explicitly that they should have regard to the merits.

4.30 One implication of moving to a judicial review standard is that the appeal body would be left with discretion to determine how the requirements of Article 4 should apply. While there may be benefits in this flexibility, the Government has also considered an alternative option which would provide greater clarity and certainty for all market participants at the outset as to the grounds on which appeals can be brought and as to the level of scrutiny that will be applied. This should increase regulatory certainty and provide appropriate and proportionate appeal rights.

Option 2: Focused specified grounds

4.31 This option would involve applying the principles for standard of review set out in Box 4.1, moving away from an explicit 'merits' standard and introducing clearer and more focused grounds of appeal which specify the scope of the review and focus on clear errors on the part of the regulator. This would make clear up front the standard on which the appeal would be assessed.

4.32 Under this option, the Government would propose to reform the standard of review and grounds of appeal that can be brought against Communications Act 2003 decisions. Box 4.2 below gives an example of how the principles outlined in Box 4.1 above might translate into legislation, which would necessitate an amendment to the Communication Act 2003. The Government has considered a range of existing models to inform the proposed changes including: the Civil Procedure Rules; the Civil Aviation Act 2012; and the Electricity Act 1989 and Gas Act 1986 as amended. Government would have to consider the drafting further in due

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<sup>24</sup> Case 1111/3/3/09, <http://www.catribunal.org.uk/237-4154/1111-3-3-09-The-Carphone-Warehouse-Group-Plc.html>

course, and in the light of consultation responses on the appropriate principles for non-judicial review decisions in Box 4.1.

**Box 4.2: Proposed legislative changes to the Communications Act 2003**

Insert a new section 195(2A):-

"The Tribunal may allow an appeal only to the extent that it is satisfied that the decision appealed against is wrong on one or more of the following grounds-

- (a) that the decision was based on a material error of fact;
- (b) that the decision was based on a material error of law;
- (c) because of a material procedural irregularity;
- (d) that the decision was outside the limit of what Ofcom could reasonably decide in the exercise of a discretion;
- (e) that the decision was based on a judgment or a prediction which Ofcom could not reasonably make."

Amended section 192(6) as follows :-

- (6) The grounds of appeal must be set out in sufficient detail to indicate on what grounds under section 195(2A) the appellant contends that the decision appealed against was wrong."
- Section 195(2) – delete "on the merits and".

4.33 The Government considers that these proposed changes should apply to an appeal:

- I. under section 192(1)(a) of the Communications Act 2003 against a decision by Ofcom under Part 2 of the Communications Act 2003 and Parts 1 to 3 of the Wireless Telegraphy Act 2006,
- II. under section 192(1)(b) against a decision by Ofcom to which effect is given by a direction, approval or consent relating to a condition set by Ofcom and
- III. under section 192(1)(c) against a modification or withdrawal of a direction, approval or consent.

4.34 Section 192(1)(b) and (c) provide a right of appeal against a decision by Ofcom or another person. It would seem logical that the basis of appeal should be changed for appeals under section 192(1)(b) or (c), not only against decisions of Ofcom, but also against decisions of another person. It also seems logical that if the basis of appeal is being changed for an appeal against a decision by Ofcom to give a direction under section 132 to suspend or restrict an operator's entitlement in an emergency, the same should apply to appeals under section 192(1)(d)(iii) against a decision of the Secretary of State to direct Ofcom to give a section 132 direction.

4.35 There are also some rights of appeal from decisions of Ofcom which are outside the Communications Act 2003, but which are analogous to the rights of appeal under the 2003 Act. Those appeals, under the Mobile Roaming (European Communities) Regulations 2007 (SI 2007/1933) and the Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations 2010 (SI 2010/672), are also currently decided on a

merits basis, and it would be logical to align the basis of these appeals with that of appeals under the 2003 Act.

- 4.36 Price control decisions by Ofcom can be appealed to the Competition Commission (via the CAT). The Government's view is that the same standard of review should apply to those decisions. This is discussed in further detail below in paragraph 4.88.
- 4.37 Finally, although broadcasting appeals under s316 and s 317 for appeals against a decision by Ofcom where it exercises its Broadcasting Act Powers for a competition purpose are not covered by the requirements of the Framework Directive, the Government is minded to continue to apply the same standard of review to broadcasting as to telecoms appeals. This means that any changes to the standard of review for telecoms appeals would also apply to broadcasting appeals. This reflects the Government's aim for greater consistency in appeal standard across sectors.
- 4.38 The alternative of maintaining a full merits review for broadcasting would be inconsistent with the principles outlined above, and would introduce added complexity and inconsistency within communications appeals. Equally, moving to a different standard for broadcasting than for telecoms could lead to inconsistency in approach across sectors which are converging.
- 4.39 The proposed changes would not affect the process for appealing decisions under Schedule 8 of the Communications Act 2003 which would continue to be by way of a judicial review<sup>25</sup>.

### *Impact*

- 4.40 The Government's view is that these reforms will expedite appeals and reduce costs for appellants, regulators and appeal bodies alike, without reducing the accountability of the regulator and preserving parties' ability to challenge regulators' or competition authorities' decisions where a material error or unreasonable conduct is identified.
- 4.41 In the case of Option 1: moving to judicial review, it would be for the courts to interpret how the requirements of Article 4 of the Framework Directive should be applied in any particular case. While the Government believes that this approach would expedite appeals, it believes there may be additional benefits from Option 2: focused specified grounds of appeal.
- 4.42 A tighter focus on permissible grounds of appeal will instil discipline and discourage parties from adducing evidence of limited relevance to the key issues in a case. It would also ensure that appeals focus on where the regulator has made a material error, rather than where the parties merely disagree with the regulator's value judgement on a matter. For example in the recent "08x" cases (BT v Ofcom, Case 1169/3/3/10; Everything Everywhere Limited v Ofcom, Case 1168/3/3/10 (Termination charges: 0845 and 0870 numbers); and BT (Termination Charges: 080 calls) v Ofcom, Case 1151/3/3/10)) BT had argued that Ofcom had made a wrong value judgement. The Court of Appeal found that the CAT did not have the jurisdiction to overturn Ofcom's decision for this reason<sup>26</sup>.
- 4.43 Where a material error has been made by a regulator, parties will continue to be able to challenge this through an appeal based on the principles above, and an appeal body would uphold such a challenge. However, the benefit of this more focused approach is that it will not encourage appeals which seek to fully reargue the substantive merits of a regulator's decision

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<sup>25</sup> <http://www.legislation.gov.uk/ukpga/2003/21/schedule/8>

<sup>26</sup> Case number C3/2011/3121, 3124, 3315, 3316 and 2012/0692, [2012] EWCA Civ 1002

on the basis of extensive and lengthy evidence and argument. Parties will need to focus on the real issues that could have a material impact on the decision. The Government's aim is to streamline the system and prevent appeals being unnecessarily protracted due to extensive argument and evidence on these matters.

4.44 A further argument for reform is to achieve greater consistency across sectors (see sections below). This may create greater regulatory certainty as it would allow jurisprudence to build up across a greater breadth of case law. It would rely on achieving consistency in grounds of appeal and standard of review across sectors. However, Government recognises that different appeal processes might be justified for some regulatory decisions in some sectors.

4.45 The Government also recognises that any change in the standard of review or grounds of appeal will lead to some precedent setting litigation as the new standards are tested. The Government believes that the benefits of creating greater certainty and more focused appeals will outweigh the short-term uncertainty this may create.

**Q4 For decisions in the communications sector, do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a more focused 'specified grounds' approach, or something different?**

**Q5 What would the impacts be on the length, cost and effectiveness of the appeals framework if the standard were changed to: i). judicial review; ii) focused specified grounds?**

## Competition Act decisions

4.46 The OFT and economic regulators, where they are using concurrent powers, are able to take decisions on whether or not competition law as set out in the Competition Act 1998 has been broken. These cases are concerned with proving whether or not an infringement of the law has taken place, on the basis of strong and compelling evidence. In this respect they are somewhat different to decisions that regulators take, looking forwards, to shape and set parameters for the markets they regulate.

4.47 Firms can be fined if their past behaviour is shown to breach competition law, and these fines can be very significant (up to 10 per cent of total turnover). In addition, a finding of infringement is binding for the purposes of any follow-on action for damages action (under Section 58A of the Competition Act 1998). The Government recognises that where significant and punitive fines can be imposed, and there may be additional follow-on damages, it is important that the decision is scrutinised to a high standard.

4.48 It is also now widely recognised that decisions determining whether competition law has been broken and which impose quasi-criminal penalties invoke Article 6 of the European Convention of Human Rights<sup>27</sup>. For example, in *Société Stenuit v France (1993) 14 E.H.R.R.*

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<sup>27</sup> Article 6(1)

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the

509 a fine imposed under French competition law by the French Minister of Economic and Financial Affairs in respect of a cartel operating between companies tendering for public works was determined to be a 'criminal charge' within the meaning of Article 6(1) ECHR. Article 6 entitles the person, or business, to a fair hearing within a reasonable time before an independent and impartial tribunal established by law. This is commonly referred to as the 'right to a fair trial' and means that the facts of the case will need to be considered before an independent and impartial tribunal.

- 4.49 The case law on the application of Article 6 to competition cases is developing as a number of challenges have been brought about the compatibility of various competition regimes. In *Case 43509/08 – A Menarini Diagnostics SRL v Italy, judgment of 27 September 2011*, the court determined that a fine imposed by the Italian competition authorities was criminal for the purpose of Article 6(1) of the ECHR and that the right of appeal to an Italian administrative court was compatible with Article 6. This was because the Italian administrative court had “full jurisdiction” – it did not simply consider the legality of decision made by the Italian competition authority.
- 4.50 Within the EU legal system, the Treaty of the Functioning of the EU (TFEU) makes a distinction between the jurisdiction of the (European) General Court to review decisions about whether competition law has been infringed, and the decision on the level of any penalty imposed. The TFEU provides the Court with more scope to review completely the level of penalty. The Court has ‘unlimited jurisdiction’ to review the level of penalty, whereas the decision about infringement can be reviewed ‘on grounds of lack of competence, infringement of an essentially procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers’. This is more akin to a judicial review.
- 4.51 There has also been consideration as to whether the standard of review adopted by the General Court (which hears appeals in respect of EU competition cases) acts in accordance with Article 6. In *C-272/09 – KME and Others v Commission*, *C-386/10 – Chalkor v Commission* and *C-389/10 – KME and Others v Commission*, judgement of 8 December 2011, the European Court of Justice dismissed the appellants appeal that the standard of review conducted by the General Court was in breach of Article 6 and the Charter of Fundamental Rights. The European Court of Justice held that the EU Courts must carry out a review of both the law and facts and that they have the power to assess the evidence, to annul the European Commission’s decision and to alter the amount of a fine. The European Court of Justice concluded that the General Court does provide effective judicial protection.
- 4.52 The framework for competition appeals was considered in the Government’s response to its consultation on the competition regime<sup>28</sup> which led to the Enterprise and Regulatory Reform Act changes, including creation of the Competition and Markets Authority (CMA). At this time the Government confirmed the need to retain an appeal which could consider the merits of antitrust decisions (page 54 of the Government’s response to the consultation<sup>29</sup>). The Government also proposed changes to make administrative decision-making in the CMA more robust. Any changes considered to the standard of review should be viewed alongside the existing reforms to administrative decision-making (which are described in more detail in Chapter 6).

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private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

<sup>28</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31411/11-657-competition-regime-for-growth-consultation.pdf)

<sup>29</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf)

*Options for reform: judicial review or clearer specified grounds of appeal*

Option 1: Judicial review

- 4.53 The Government has considered whether a judicial review would be sufficient standard of appeal for this type of decision.
- 4.54 In the same way that a judicial review is able to flex to accommodate the requirements of Article 4 of the EU Framework Directive on Communications, it would arguably be sufficiently flexible to be able to consider the facts and law of the case where it is required, and therefore satisfy the requirements of Article 6 of the ECHR.
- 4.55 The aim of moving to a judicial review standard for these appeals would be to produce more focused and shorter appeals, whilst protecting parties' rights to challenge errors made in decision-making (including, for example, a material error of fact). The flexibility of judicial review would allow the courts to consider the merits of the case where required.
- 4.56 Whilst this standard is sufficiently flexible to satisfy the requirements of Article 6, the Government believes that given the level of potential penalties which can be imposed there is a greater rationale for having unlimited jurisdiction on the level of the penalty itself. This approach would mirror the differentiated approach followed by the European Courts.
- 4.57 One implication of moving to a judicial review standard for non-penalty decisions is that the appeal body would be left with discretion to determine how the requirements of Article 6 should apply. While there may be benefits in this flexibility, the Government has also considered an alternative option which would provide greater clarity and certainty for all market participants at the outset as to the grounds on which appeals can be brought and as to the level of scrutiny that will be applied.

Option 2: Introducing focused and specified grounds of appeal

- 4.58 The Government has also considered introducing clear and specified grounds on which appeals can be brought. These would follow the principles for non-judicial review appeals set out in Box 4.1. The Government believes this would provide greater clarity and certainty about the scope and level of scrutiny that will be applied during an appeal. Under this option, the Government would propose to reform the standard of review and grounds of appeal that can be brought against Competition Act 1998 decisions. Box 4.2 above gives an example of how the principles outlined above might translate into legislative wording.
- 4.59 This would apply to all of the appealable decisions set out in section 46 of the Competition Act 1998 except for the imposition of any financial penalty or as to the amount of any such penalty.
- 4.60 The Government believes there would be an argument for retaining unlimited appeal rights in relation to decisions on the level of penalty itself, given the potential size of these fines, and their 'criminal' nature in the eyes of the law.

*Impact*

- 4.61 The Government's view is that these reforms could expedite appeals and reduce costs for appellants, regulators and appeal bodies alike, without reducing the accountability of the regulator and preserving parties' ability to challenge competition authorities' decisions where a material error is identified, in the same way as the proposed changes for Communications Act appeals.

- 4.62 In the case of Option 1: moving to judicial review, it would be for the courts to interpret how the requirements of Article 6 of the ECHR should be applied in any particular case and whether (and how) the merits of the case should be reviewed. While the Government believes that this approach would expedite appeals, it believes there may be additional benefits from Option 2: focused specified grounds of appeal.
- 4.63 A tighter focus on permissible grounds of appeal could discourage parties from adducing evidence of limited relevance to the key issues in a case. It would also ensure that appeals identify where the decision is materially wrong or unreasonable, rather than simply challenging the decision because appellants take a different view of the ‘right answer’.
- 4.64 Where a material error has been made by an authority, including in the substance of the decision, it is important that parties continue to be able to challenge this through an appeal based on the principles above, and an appeal body would uphold such a challenge. However, the benefit of this more focused approach may be that it would not encourage appeals which seek to fully reargue the substantive merits of a regulator’s whole decision on the basis of extensive and lengthy evidence and argument. Parties would need to focus on the real issues that could have a material impact on the decision. The Government’s aim is to streamline the system and prevent appeals being unnecessarily protracted due to extensive argument and evidence on these matters.
- 4.65 A further argument for reform is to achieve greater consistency across sectors. This may create greater regulatory certainty as it would allow jurisprudence to build up across a greater breadth of case law. However, Government recognises that ex-post decisions about whether the law has been broken are different to ex-ante decisions taken by regulators shaping how the market will work in the future. There may therefore be an argument for having a different approach for Competition Act appeals.
- 4.66 Government also recognises that any change in the standard of review or grounds of appeal will lead to some precedent setting litigation as the new standards are tested. The Government believes that the benefits of creating greater certainty and more focused appeals could outweigh the short-term uncertainty this may create. However the Government would be interested in respondents’ views on these points.

**Q6 For decisions under the Competition Act 1998 (which do not involve setting the level of penalties) do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a focused ‘specified grounds’ approach, or something different?**

**Q7 What would the impacts be on the length, cost and effectiveness of the appeals framework if the standard were changed to: i). judicial review; ii) focused specified grounds?**

## Price control appeals

### *Regulatory reviews*

- 4.67 Price control decisions in all regulated sectors have, in the past, been subject to a reference by the regulator to the Competition Commission, which permits a full redetermination

of the price control. This is the highest degree of scrutiny of regulators' decisions, with the Competition Commission able to reconsider the whole decision.

4.68 This form of regulatory review remained in most sectors until relatively recently, and still exists in the water and rail sectors. Over time there has been a move towards more focused reviews and a direct right of appeal in some of the regulated sectors (e.g. communications, energy in Great Britain, aviation). This may provide an opportunity for more transparent and swifter decision-making by the regulator in the first instance, and in some cases will allow specific elements of the decision to be appealed, while preserving the rights of licensees to appeal where a regulator has erred either in its process of decision-making or in the decision itself. Conversely, it is likely that a direct appeal approach could lead to more appeals. This seems to have been the experience in the communications sector, although recent changes in the energy and aviation sectors have not yet been tested through appeals. Box 4.3 sets out the key features of regulatory reference and direct appeal approaches.

4.69 In Northern Ireland, in the energy and water sectors price control decisions are currently subject to regulatory referral to the Competition Commission. However, in relation to the energy sector the Department of Enterprise, Trade & Investment for Northern Ireland (DETI), in 2012, consulted on changes to the electricity and gas licence modification arrangements<sup>30</sup>, which would align the arrangements with those currently in place in GB following the Electricity and Gas (Internal Markets) Regulations 2011. The NI consultation closed in October 2012. Final policy decisions and legislation to give effect to any new arrangements have not yet been published.

#### **Box 4.3: Key features of different appeal approaches**

##### **Regulatory reference**

- Regulator or licensed company makes a reference to the Competition Commission if one or more licensed companies disagrees with the proposed price control and regulator wishes to proceed with it;
- The Competition Commission is, generally, required to investigate whether any matter referred to in the reference may be expected to operate against the public interest and if so, whether the matter could be remedied;
- Competition Commission must review the whole decision, taking into account the public interest although it will in practice try to concentrate on the areas of disagreement between the regulator and the regulated company;
- The process is inquisitorial rather than appellate, so the appeal body directs the enquiry.

##### **Direct appeal**

- Regulator takes a price control decision following due consultation with industry;
- Regulated companies and/or other materially affected parties (depending on sector) are able to bring an appeal against the decision to the Competition Commission;

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<sup>30</sup> The consultation on the revised electricity and gas licence modification arrangements - [http://www.detini.gov.uk/consultation\\_on\\_revised\\_procedure\\_for\\_licence\\_modifications\\_and\\_appeals\\_process.pdf](http://www.detini.gov.uk/consultation_on_revised_procedure_for_licence_modifications_and_appeals_process.pdf)

- Competition Commission must review the case before it as presented by the appellant, and the counter-argument presented by the regulator. The enquiry is focused on the grounds of appeal brought by the appellants.
- Competition Commission is, generally, required to consider whether the regulator's decision was wrong on one or more grounds and if so whether it is material to the overall decision.

4.70 Having a direct right of appeal can allow the potential for other affected parties, such as customers or nominated consumer groups, to appeal decisions. There is an argument that this should provide greater balance and accountability of regulatory decision-making and provide less scope for 'regulatory capture', where regulators might be more risk averse in making pro-consumer and pro-competition decisions.

4.71 A move towards enabling direct appeals, including of parts of a decision rather than only the whole decision, and expanding the right of appeal to customers (or for example consumer groups) is likely to increase the number of appeals. This may increase costs of the system, and could in some cases lengthen the overall process of regulatory decision-making. The design of the appeal framework is therefore important in ensuring that the system remains efficient and manageable.

4.72 In those sectors where a direct appeal approach is now in place (communications, postal services, energy in Great Britain, aviation), appeals are assessed against a standard which goes further than the traditional judicial review. The grounds of appeal that can be brought are set out in legislation and will provide a good indication of the scope that an appeal may have. The Government believes this is a helpful approach, providing greater clarity up front. However, the grounds of appeal are not consistent across these sectors.

4.73 There may be a stronger argument for retaining a standard of review for price control decisions which allows for greater scrutiny than the traditional judicial review. Price control decisions are central to the way regulated businesses are operated – they will affect the rate of return on a firm's assets, which in turn affect investors' decisions. In addition, the economic analysis required for a price cap determination is not only complex, but also involves a substantial degree of judgment on the part of the regulator. There is an argument that providing a merits-based appeal rather than judicial review for price control decisions will create greater regulatory certainty by providing a higher level of scrutiny and accountability for these decisions.

4.74 An additional benefit of having one appeal body, the Competition Commission, reviewing all price control decisions, assuming the appeal body is consistent in its approach over time, is to achieve greater consistency of approach on key elements of price control methodology across sectors, promoting regulatory certainty. It also benefits from the Competition Commission's economic, legal and financial expertise and experience to carry out detailed analysis which is central to price control decisions, and weighs this up in the round taking into account the regulator's duties.

4.75 It is also worth noting that price control appeals and references are time limited, with the time limit depending on the sector. This will limit the time and cost spent on these appeals to some extent, although in some sectors possible extensions mean that a review or appeal could last up to 12 months (time limits for price control appeals are discussed further in Chapter 7).

4.76 The Government recognises that the new regimes in aviation, postal services and energy (in Great Britain) are yet untested. However, Government believes there would be benefits to having a more consistent approach across sectors and believes that appeals across all sectors should be as efficient as possible, focusing on the most important issues.

4.77 The following section discusses options for reform in sectors where there is a direct appeal route, rather than a regulatory reference approach.

*Options for reform: judicial review or consistent specified grounds of appeal*

Option 1: Judicial review

4.78 The Government has considered whether a judicial review would be an appropriate standard of appeal for this type of decision. A judicial review would enable the appeal body to determine whether or not the decision was legal and reasonable. It would be unlikely to consider the merits of the case brought and, for example, would be unlikely to consider any new evidence which was not available at the time the regulator took its decision.

4.79 If there was a move to a judicial review for these types of appeals there may be an argument to move the jurisdiction for these appeals to the CAT, which is more used to undertaking a judicial review process than the Competition Commission would be. It might be argued the expertise available within the Competition Commission would be less central to the appeal under a judicial review standard, although evidence of the Competition Commission handling price control appeals in Communications Act cases to date suggests that it may be able to do so in an effective way.

4.80 It would be for the appeal body to interpret how it applied the judicial review standard and whether it felt it necessary to consider the facts of the case. It is likely that parties would seek to argue for a flexible application of the standard and the Government's view is that there would be a material degree of uncertainty about how this would be applied in practice. As noted in paragraph 4.73 the Government believes that there may be a stronger argument for a merits-based appeal for price control decisions. The Government has therefore considered an alternative option which builds on the existing approach defining specific grounds of appeal across these sectors, which would bring greater consistency across sectors.

Option 2: Introducing consistent specified grounds of appeal

4.81 The Government has considered introducing consistent specified grounds on which appeals can be brought, across all sectors where there is a direct route of appeal. These would follow the principles set out in Box 4.1, and Box 4.2 gives an example of how the principles outlined above might translate into legislative wording of more consistent and focused specified grounds of appeal.

4.82 The Government believes this would provide greater focus to appeals and would bring greater consistency across sectors, promoting regulatory certainty. It would retain the ability for the Competition Commission to review the facts of the case where relevant, albeit in a more focused way.

4.83 The following sections outline the legislative changes that would be required to implement this option across the sectors in question – in most sectors the legislation already sets out specified grounds on which appeals can be brought so in the main any changes would be ensuring these are focused and consistent across sectors.

*Aviation appeals*

4.84 The appeals framework around decisions by the CAA has recently been modernised through the Civil Aviation Act 2012. Broadly the legislation follows the principles set out for non-judicial review appeals in Box 4.1. If the Government implemented Option 2: Consistent grounds of appeal, some amendments to this legislation would be required. Box 4.2 gives an example of how the principles outlined above might translate into legislative wording. The intention of any changes in the aviation sector would be to bring greater consistency across sectors, and to focus appeals. There is no intention to revisit the broader changes made in the Civil Aviation Act to streamline regulatory processes, including removing previous mandatory references to the Competition Commission and introducing a defined grounds of appeal system.

#### *Energy appeals*

4.85 The appeals framework around licence modification decisions by Ofgem has recently been revised through the Electricity and Gas (Internal Markets) Regulations 2011, which implemented certain requirements of the EU Third Package. For price control appeals the legislation broadly follows the principles set out for non-judicial review appeals (see Box 4.1). If the Government implemented Option 2: Consistent grounds of appeal, some amendments to this legislation would be required. Box 4.2 gives an example of how the principles outlined above might translate into legislative wording.

#### *Energy and water appeals in Northern Ireland*

4.86 As noted above, DETI consulted in 2012 on proposals to revise the electricity and gas licence modification arrangements<sup>31</sup> (including price control modifications) under the Electricity (Northern Ireland) Order 1992 and the Gas (Northern Ireland) Order 1996 to align them with the revised energy arrangements in GB following the Electricity and Gas (Internal Markets) Regulations 2011. Final policy decisions and amending legislation have yet to be published and in the meantime, the regulatory referral arrangement continues for general modifications, including price control modifications.

#### *Postal services*

4.87 The appeals framework for Ofcom decisions in the postal services sector are set out in the Postal Services Act 2011. Where these decisions can be appealed to the courts outside of the normal judicial review procedure (for example, the imposition or modification of regulatory conditions including price controls) the legislation broadly follows the principles for non-judicial review appeals (outlined in Box 4.1). If the Government implemented Option 2: Consistent grounds of appeal, some amendments to this legislation would be required. Box 4.2 gives an example of how the principles outlined above might translate into legislative wording.

#### *Communications*

4.88 Under the s193 of the Communications Act price control matters are referred to the Competition Commission which then determines the matter under its rules. No standard of review is specified in the Communications Act for such appeals. If the Government implemented Option 2: Consistent grounds of appeal, it would be our expectation that the Competition Commission would determine appeals on price controls in line with the proposed

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<sup>31</sup> The consultation on the revised electricity and gas licence modification arrangements - [http://www.detini.gov.uk/consultation\\_on\\_revised\\_procedure\\_for\\_licence\\_modifications\\_and\\_appeals\\_process.pdf](http://www.detini.gov.uk/consultation_on_revised_procedure_for_licence_modifications_and_appeals_process.pdf)

grounds of appeal for other communications appeals, following the principles set out in Box 4.1. It may be desirable to amend s193 to reflect this expectation

**Q9 What would the impacts be on the length, cost and effectiveness of price controls appeals in these sectors if the standard were changed to: i). judicial review; ii) focused specified grounds?**

**Q8 For price control decisions in the communications, aviation, energy and postal services sectors, do you agree that there should be a change in the standard of review? If so, should this be to judicial review, a focused and consistent ‘specified grounds’ approach, or something different?**

**Q10 Bearing in mind the proposals that the NI Executive has already consulted upon in relation to electricity and gas; to what extent should the changes proposed in this consultation be extended to Northern Ireland?**

#### *Rail references*

4.89 There decisions taken by the ORR can be reconsidered by a route other than judicial review (e.g. licence modifications and price controls) these are by way of a reference to the Competition Commission who will undertake an investigation of the decision. In coming to its decision the Competition Commission must have regard to the ORR’s statutory duties.

4.90 The Government is considering whether there would be benefits in reforming the framework for appeals against ORR decisions. These might include quicker and more efficient initial decision-making – there would be less need for protracted negotiations to secure agreements to licence modifications. Following due consultation and discussion with industry, the regulator could impose a new licence condition and companies would have the option to appeal it.

4.91 It would also provide appellants with greater opportunity to appeal only a specific element of a decision, rather than having to appeal the whole decision which may be more costly and time-consuming, and could provide more opportunity for extending appeal rights to customers (or representative groups). The process would also provide greater transparency around regulatory decision-making, making it clear how the regulator has revised its plans to reflect industry views following consultation. There is an argument that it provides less opportunity for regulatory capture.

4.92 Conversely there may be costs to a direct appeal approach, if it meant that there were significantly more appeals which themselves slowed regulatory decision-making. Parties may ‘cherry-pick’ elements of a decision to appeal which are the least favourable for them. This may in itself contribute to greater regulatory uncertainty.

4.93 Further work is required to determine whether reforming the appeals process in this sector would bring benefits which outweighed its costs. It is unclear where the balance lies between the two approaches in terms of regulatory certainty and overall speed of regulatory decision-making.

**Q11 What do you think the costs and benefits might be of moving to a direct appeal approach in the rail sector with either i) a judicial review standard or ii) a specified grounds approach?**

### *Water references*

- 4.94 There decisions taken by the OFWAT can be reconsidered by a route other than judicial review (i.e. licence modifications and price controls) these are by way of a reference to the Competition Commission. In a price control matter the Competition Commission will review the decision afresh and make a determination.
- 4.95 During 2012 there were ongoing discussions between the water services regulator, Ofwat and the water and sewerage industry regarding proposals to make changes to water and sewerage company licences. In December 2012 all parties reached agreement on changes that will enable Ofwat to introduce separate retail and wholesale price limits in the 2014 Periodic Review.
- 4.96 The debate over the scope and nature of these changes focused attention on the statutory process for making changes to water company licences and on the appeals process. Defra will shortly be issuing its own consultation on this process and whether there is a case for reform. The objective is to enable any future changes to licences to be made in a way that delivers appropriate outcomes as efficiently as possible; taking due note of good practice in other sectors. Any proposals to reform the process for appealing changes to water and sewerage company licences will be made in the light of this consultation process.
- 4.97 Arrangements for economic regulation of the water sector only apply to England and Wales. This consultation is not proposing any change to the regulation of water industry in Scotland. The Northern Ireland Executive will consider separately, following this consultation, if it wishes to make revision to its current arrangements for the economic regulation of the water industry in Northern Ireland.

### **Other types of appeals**

- 4.98 Regulators take a range of other decisions, some of which are ex-ante regulatory decisions, others where the regulator acting in a dispute resolution or enforcement role. These might include, for example, licence modification decisions, or decisions on whether or not an operator has market power, and decisions on whether or not an operator has breached their licence conditions. Currently some decisions are heard on a judicial review basis, while others are heard on a merits basis. In some cases the same type of decision are heard on different basis in different sectors. For example, in some sectors enforcement decisions are heard on a judicial review, whereas in others they are heard on a merits basis. This does not seem to promote certainty or consistency across the regulated sectors.
- 4.99 There are relatively few examples of these types of appeals (outside the communications sector which is discussed above).
- 4.100 It has been argued that these types of decisions may have a less significant impact on firms than price control decisions. For example, DECC's consultation on 'Implementing the Third Package: Consultation on licence modification appeals' discussed whether price control decisions were a more fundamental decision than other licence modifications and therefore may require a higher level of scrutiny. However, in some instances the impact of such decisions on a firm may still be very significant. There may also be an argument for having consistency across the regimes for price control and other decisions as these may be difficult to separate, for example price control and service quality may be inherently interlinked.
- 4.101 In some cases there may be a strong presumption towards judicial review standard, in line with Government's general presumption for this standard. For example, where the regulator is acting in an arbitration type of role in dispute resolution, and could already be considered to be a quasi-appeal body.

**4.102 Where decisions are already appealable on judicial review grounds the Government is not proposing any change.**

*Options for reform: judicial review or consistent specified grounds of appeal*

Option 1: Judicial review

4.103 The Government has considered whether a judicial review would be an appropriate standard of appeal for all decisions other than price controls. A judicial review would enable the appeal body to determine whether or not the decision was legal and reasonable.

4.104 It would be for the appeal body to determine how it applied the judicial review standard and whether it felt it necessary to consider the facts of the case, although it is unlikely that this would generally be the case. It is likely that parties would seek to argue for a flexible application of the standard and the Government's view is that there would be a material degree of uncertainty about how this would be applied in practice.

4.105 The Government's presumption is that judicial review should provide appropriate and proportionate appeal rights, unless there are particular legal or policy reasons for a wider standard of review.

Option 2: Introducing consistent specified grounds of appeal

4.106 An alternative option would be to introduce consistent specified grounds on which appeals can be brought. These would follow the principles set out in Box 4.1 above and an example of how these might translate into legislative wording is provided by Box 4.2. The Government believes this would provide clarity and certainty about the scope and level of scrutiny that will be applied during an appeal. It would also retain the ability for the Competition Commission to review the facts of the case where relevant, albeit in a more focused way. It would also create much greater consistency of appeal grounds and standard of review across sectors and, potentially, across decisions.

**Q12 Are there any legal or other reasons why other regulatory decisions should be heard on an appeal standard other than judicial review? If so, which decisions and why?**

**Q13 What would the impacts be on the length, cost and effectiveness of other regulatory appeals if the standard were changed to: i). judicial review; ii) consistent specified grounds?**

*Implementation of any reforms*

4.107 The Government recognises the need for regulatory stability and predictability. In deciding whether or not to make changes to the regulatory appeals process in any sector the Government will take account of the particular circumstances of that sector, for example where other reforms are already underway or have recently been introduced. If the Government decides to introduce changes to the appeals framework for any particular regulated sector, these will not apply to any significant decisions which are already being considered. Where a periodic price review process is currently under way (for example, the 2014 Price Review in water), any changes to the appeals framework for that process would only apply decisions taken in a subsequent Price Review.

## Chapter 5: Appeal Bodies and Routes of Appeal

### Summary of proposals

There is currently a complex mix of different routes for different competition and regulatory appeals.

The Government believes that there remains a case for having specialist appeal bodies alongside the High Court in England and Wales, Court of Session in Scotland and High Court of Northern Ireland. The CAT and the Competition Commission provide complementary skills and expertise for different types of cases. There is evidence that the CAT is generally quicker than the High Court for similar types of cases.

However, the Government believes that reforms could be made to the CAT to streamline its processes and enable it to use resources more efficiently. Government will also undertake a full review of the CAT's governance arrangements and Rules of Procedure to ensure they are fit for purpose.

In addition, it is not clear that appeals are currently heard by the most appropriate appeal body in all cases. This means resources are not used in the most efficient and effective way. The Government believes there is scope to increase consistency and is consulting on whether certain appeals could be rerouted to achieve this, including:

- **Bringing communications price control appeals directly to the Competition Commission rather than being routed through the CAT;**
- **Potentially changing the jurisdiction for energy code modification appeals from the Competition Commission to the CAT;**
- **Hearing all regulatory enforcement appeals in one appeal body, either the High Court (in England and Wales), Court of Session (in Scotland) and High Court (of Northern Ireland) or the CAT;**
- **Hearing all dispute resolution appeals in one appeal body, either the High Court (in England and Wales), Court of Session (in Scotland) and High Court (of Northern Ireland) or the CAT;**
- **Where the CAT has jurisdiction for an appeal of a decision, aligning jurisdiction for judicial reviews of that same decision in the CAT to prevent two different appeal bodies having to review the same decision.**

5.1 As set out in Chapter 2, different regulatory and competition decisions are appealable to the Competition Commission, the CAT or the High Court (in England and Wales), Court of Session (in Scotland) and High Court (of Northern Ireland), or in some cases more than one of these appeal bodies. In undertaking this review the Government has considered whether it is necessary to have three different appeal bodies hearing regulatory and competition appeals, and particularly whether it is desirable to have specialised appeal bodies rather than using general appeal courts.

5.2 The Government has also considered which appeal body should hear different types of appeal. This section sets out the potential changes that might be made to appeal routes, in order to increase consistency across regulatory and competition appeals.

### Appeal bodies: why have specialised courts or tribunals?

5.3 There are arguments for and against specialised tribunals. These are well documented in academic literature. The rationale for having specialised tribunals is that:

- Judges will be more experienced in hearing similar cases and therefore will make better decisions and get to the nub of the issues more quickly;
- There may be greater flexibility to deal with urgent cases more quickly because the overall caseload is smaller;
- Greater consistency of approach over time, providing greater certainty.

5.4 On the other hand there may be arguments against having specialised courts:

- There may be confusion over jurisdictions of the various courts;
- Expert judges or lay members may develop particular views on regulated markets, and be more willing to consider further detailed evidence presented by appellants. At the extreme, the risk is that the appeal body may become a de facto second regulator.<sup>32</sup>

5.5 It has been difficult to gather firm evidence on many of these points. There are a range of approaches across international comparators, with some countries such as Germany having a general court, whereas others such as the Netherlands have a specialised tribunal. Others, such as France, have created specialised chambers within a general court. However, it is clear that:

- where a review of the facts is required, there is a stronger argument for having an appeal body with specialised expertise or knowledge;
- in practice the CAT is very likely to conclude similar cases quicker than the High Court (in England and Wales), as it is not required to prioritise regulatory and competition appeals against a range of other appeals. For example the average length of a High Court judicial review in 2011 was 9.9 months. On average, CAT judicial review cases (as opposed to those heard on the merits) have taken only just over four months between 2008 and 2012.<sup>33</sup>
- It is true that in some cases appellants have argued over the jurisdiction of the courts, creating avoidable delay and costs to the system overall.

5.6 The Government's view is therefore that there is a good argument for retaining specialised appeal bodies to ensure that the appeals system functions as efficiently as possible. To use these specialist bodies to best effect the following principles should be followed:

- *Competition Commission* – has the economic, legal and financial expertise and project management experience to undertake in-depth analysis across a range of sectors, both in its role as appeal body for price control and other decisions by all economic regulators, and in its role investigating markets across the economy to ensure they are competitive under the

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<sup>32</sup> In the T-Mobile case (T-Mobile (UK) Ltd v Ofcom [2008] EWCA Civ 1373) the Court of Appeal has made clear that the role of the Competition Appeal Tribunal is not to be a second regulator 'waiting in the wings'

<sup>33</sup> Further detail is given in Annex A.

Enterprise Act 2002. The Competition Commission should therefore hear appeals and reviews which require detailed economic analysis. It has less expertise in hearing adversarial appeals<sup>34</sup> (for example dispute resolution).

- *Competition Appeal Tribunal* – is a specialist tribunal set up to hear appeals against a range of different decisions across all the economic regulators and competition authorities. It has expertise in competition and economic regulation matters, and also has expertise in hearing adversarial appeals.
- *High Court* – the Queen’s Bench division’s Administrative Court hears public law judicial reviews, including against certain regulatory decisions. The Government’s general policy is that any specialist appeals, including judicial reviews, should be heard in specialist tribunals rather than the High Court.
- *The Court of Session* – Scotland’s supreme civil court, sits as a court of first instance and a court of appeal. The court is divided into the Outer House and the Inner House. The Outer House hears cases at first instance on a wide range of civil matters, including cases based on delict (tort) and contract, commercial cases and judicial review.
- *High Court of Northern Ireland* – the Queen’s Bench Division hears judicial reviews.

## The Competition Appeal Tribunal (CAT)

5.7 The CAT hears appeals against a range of regulatory and competition decisions, including on judicial review grounds and appeals on the merits. It was created in 2003, as a result of the Enterprise 2002 Act, to provide a specialised and swift appeal body for competition and regulatory decisions.

5.8 *The Competition Appeal Tribunal Rules* set out in secondary legislation (SI 2003/1372) how the tribunal will operate and hear cases. It provides the CAT with certain powers to enable effective management of cases. In addition the CAT’s *Guide to Proceedings* explains how cases will be conducted before the CAT in practice.

5.9 Consistent with the normal Triennial Review process for Arms Length Bodies, the Government believes that it is appropriate to review the governance arrangements, Rules and operation of the CAT, given the wider reforms to the competition regime and that it is well established and has experience of hearing a range of cases. The Government has decided to retain a specialised CAT and will review the governance and CAT Rules with a view to ensuring:

- Governance arrangements are in line with best practice and promote good governance principles;
- Appeals processes are focused on identifying material errors, and enable the CAT to identify the key issues swiftly;
- Incentives to game the system are minimised;
- Appeals processes are streamlined and as efficient as possible.

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<sup>34</sup> The distinction between adversarial appeals and other regulatory reviews is of course not an absolute one. For example, a significant proportion of the Competition Commission’s recent regulatory appeals have been in the communications sector and have followed a more adversarial approach with specified grounds of appeal.

5.10 **The Government will complete a review of the CAT’s governance within 3 months of this consultation publication.**

5.11 **The Government will undertake a full review of the CAT’s Rules by the Autumn.** This work will sit alongside work to develop new rules to govern how private competition law cases will be brought before the CAT. This consultation identifies a number of areas the Government is already minded to reform the CAT’s Rules (e.g. in Chapter 6 and Chapter 7). However, the full review of the Rules will be a comprehensive exercise, looking across each section of the Rules.

**Q14 Are there any reforms of the CAT’s Rules the Government should make to achieve its objectives set out in paragraph 5.9?**

5.12 As part of the review of CAT’s governance arrangements and Rules, Government is considering making two technical changes which will affect how those CAT Chairman who hold a High Court appointment or Scottish and Northern Ireland equivalents sit in the jurisdiction. An issue arises because CAT Chairmen are appointed for a term of eight years. High Court and equivalent appointments are not limited by any term and ordinarily run until retirement. The impact of the fixed term nature of the CAT chairman appointment is that High Court judges that also hold a CAT appointment are unable to sit in the CAT after eight years due to the expiry of their term. This means that their expertise in competition and regulatory appeals is lost after eight years.

5.13 A second issue relates to how High Court and equivalent judges in Scotland and Northern Ireland are deployed to sit in the CAT. Currently, a CAT Chairman appointment can only be obtained after successfully completing a Judicial Appointments Commission (JAC) recruitment competition. However, in the case of High Court Judges and their equivalents, they would have completed a JAC appointment in order to hold their High Court or equivalent judicial office. This is an issue of particular concern in Scotland and Northern Ireland as the practice of requiring judicial officeholders to undertake a second appointment exercise for an equivalent office acts as a bureaucratic barrier to enabling any of these judges to sit in the CAT.

5.14 The Government is therefore minded to make two changes, and would welcome views on both. **Firstly, Government is minded to legislate to enable the heads of the UK judiciaries<sup>35</sup> to deploy appropriate judges to sit as a chair of the CAT if they are High Court judges of England and Wales or of an equivalent level in Northern Ireland or Scotland.**

5.15 **Secondly, it is minded to legislate to enable these existing judicial office holders to sit in the CAT free of any restriction in terms of the length of their tenure.**

**Q15 Do you agree that the relevant Chief Justice should be able to deploy judges at the level of the High Court or their equivalents in Scotland and Northern Ireland to sit as a Chairman of the CAT?**

**Q16 Do you agree that these judicial office holders should not be limited to a term of 8 years? Please include any views you may have concerning the 8 year term limit and CAT Chairman that do not hold another judicial office.**

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<sup>35</sup> The Lord Chief Justice of England and Wales, the Lord President of the Court of Session in Scotland, and the Lord Chief Justice of Northern Ireland

5.16 Under the Enterprise Act 2002 the CAT is required to sit with a panel of three – a Chairman and two lay members. The Government now believes that this unnecessarily restricts that CAT and increases the cost of some cases unnecessarily. **The Government's view is that the CAT should be able to sit with a single judge, particularly for cases which are concerned with points of law only or more straightforward cases.** This may allow some cases to be completed more quickly and more efficiently.

**Q17 Do you agree that the CAT should be permitted to sit with a single judge (without panel members)?**

## Greater consistency across sectors

### *The current position and rationale for change<sup>36</sup>*

5.17 There is currently a complex mix of appeal routes, both within sectors and across sectors. This stems in part from the range of appealable decisions made by all regulators. Whilst the decisions may be sector specific, the type of decision being made is, in many instances, similar across sectors. For example, all the regulators make price control and licence modification decisions and all make enforcement decisions where regulatory conditions have been breached. This is in addition to competition enforcement powers all regulators have under concurrency arrangements (Competition Act 1998).

5.18 The Government's view is that to make best use of scarce judicial and expert economic resources, similar types of decision should be heard by the same appeal body, regardless of which regulator made the original decision. Appeal bodies would also benefit from building expertise on a particular type of case.

5.19 In most cases, the current system follows this approach. For example the Competition Commission hears all price control and licence modification decisions. In other cases however, similar types of decision are heard by different appeal bodies. For example some enforcement decisions are heard by the CAT and some by the High Court (or Court of Session in Scotland or High Court of Northern Ireland), which seems to be as a result of regimes developing separately over time.

5.20 There are some decisions which are more sector-specific and are not undertaken by all regulators. For example, Ofcom has ex-ante regulation powers in determining significant market power and setting price controls; whilst Ofgem makes energy code modifications which are only applicable in the energy sector.

5.21 Finally, there are historical inconsistencies which may now appear unusual. The main example here would be appeals against Ofcom price control decisions, which are brought first to the CAT and referred to the Competition Commission to resolve any price control issues, instead of being made directly to the Competition Commission by the appellant.

### *Principles for a consistent appeals framework*

5.22 The Government's view is that there may be benefits to having a more consistent approach across sectors – promoting efficient use of resources and enabling skills and expertise to develop in the right places. This will in turn create speedier appeals and provide external parties with more clarity over the appeals framework as a whole.

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<sup>36</sup> See Annex G for summary of route of appeals as proposed by this consultation.

5.23 Government recognises, however, that consistency for its own sake is not necessarily desirable, and some decisions may require a separate or different appeal route for reasons exclusive to that sector.

5.24 As outlined above Chapter 2, appeal bodies have expertise in different areas and appeal routes should be designed to maximise this expertise. In order to design an appeals framework which makes best use of this expertise, it is possible to consider the various types of regulatory decision in the following groups and determine which appeal body is the most appropriate to hear appeals in these groups:

- Price Control and Licence Modification
- Other Ex Ante Regulatory Decisions
- Enforcement
- Dispute Resolution
- Ex-post Competition Decisions

*What would a more consistent framework look like?*

#### Price controls and licence modification

5.25 The Competition Commission currently undertakes all price control and licence modification appeals and/or regulatory references. The Competition Commission is well-placed to undertake complex economic, legal and financial analysis required to support these types of decisions and appeals and has strong project management skills enabling it to adhere to tight time limits for decision taking.

**5.26 The Government's view is that the Competition Commission should continue to hear all appeals on price control and licence modification decisions.**

5.27 One exception to this generally consistent approach is the process in the communications sector. In these cases appellants must bring any appeal to the CAT in the first instance. The CAT will then remit any price control matters to the Competition Commission, outlining the questions for the Competition Commission to consider. The Competition Commission then provides its conclusion to the CAT which makes a final judgement.

5.28 The Government's view is that this process is overly complex and can lead to delays in the overall appeal process. It is also an anomaly when compared with all other sectors.

**5.29 The Government is therefore minded to simplify the process so that communications price control appeals are brought directly to the Competition Commission and any other matters are taken directly to the CAT.** This approach has been introduced in the postal services sector and the aviation sector through the Civil Aviation Act 2012 (where all licence condition appeals go to the Competition Commission). The Government would envisage modelling a reformed process for communications on the Civil Aviation Act 2012.

**Q18 Do you agree that the Competition Commission should continue to hear appeals against price control and licence modification decisions?**

**Q19 Do you agree that the process for bringing appeals against price control decisions in the communications sector should be simplified so that these appeals go directly to the**

## Competition Commission? If so, would the Civil Aviation Act 2012 be an appropriate model to follow

### Ex-ante regulatory decisions

- 5.30 A number of regulators take ex-ante decisions on how the market in question should operate, outside of price control and licence modification decisions.
- 5.31 These include Ofcom and CAA market power determinations and Ofwat's new appointment decisions and are usually based in part on analysis of the market and expert knowledge of the sector. The appeal body considering appeals against these decisions should not itself need to undertake its own detailed economic analysis of the issue in question, as the appeal is against the decision of the relevant regulator and not a full rehearing although competition and regulatory expertise will enable these appeals to be completed more quickly and efficiently.
- 5.32 The Government's view is that appeals against these decisions should be heard in the CAT, where expertise in regulatory matters can be applied.
- 5.33 Most of these appeals are already heard in the CAT. The exception is that Energy Code modification appeals are currently heard in the Competition Commission. There is a question around whether energy code modifications are more akin to licence modifications, which are heard in the Competition Commission, or other ex-ante regulatory decisions which are heard in the CAT on an adversarial basis. **The Government considers that there may be a case for moving the jurisdiction for energy code modification appeals from the Competition Commission to the CAT, to benefit from the CAT's expertise in hearing adversarial appeals on regulatory matters.**
- 5.34 Through the Water Bill the Government is planning to introduce similar Water Code modification decisions. If the Bill passes into legislation then the Government's proposal would be for appeals against these decisions to be consistent with those for energy code modifications.

**Q20 Do you agree that the CAT is the most appropriate appeal body to hear appeals against ex-ante regulatory decisions?**

**Q21 Do you agree that Energy Code modification appeals should be heard by the CAT rather than the Competition Commission?**

### Regulatory enforcement decisions

- 5.35 Enforcement decisions are concerned with whether a firm has breached its licence condition or some other statutory or regulatory requirement. These may be more straightforward legal decisions which require less substantial economic analysis or value judgement. An appeal against these decisions is usually done through a judicial review.

5.36 In Northern Ireland DETI has consulted<sup>37</sup> on and is taking forward proposals<sup>38</sup> under new primary legislation to amend the current enforcement provisions under the Energy (Northern Ireland) Order 2003 that allow regulated persons (including energy companies) to appeal to the High Court of Northern Ireland in relation to the imposition by the Utility Regulator of a financial penalty. Currently, the jurisdiction of the High Court of Northern Ireland to consider an appeal against the imposition of a financial penalty is limited to grounds set out in Article 49(4) of the 2003 Order and the proposals will amend the Energy Order to provide for a full right of appeal for a regulated person aggrieved by the imposition or amount of a penalty or the date by which a penalty is required by the Utility Regulator.

5.37 Currently both the High Court (or Court of Session in Scotland or High Court of Northern Ireland) and the CAT hear these types of appeals, depending on the sector. The Government believes that it would be more beneficial for a single appeal body to hear these types of appeal, although it also recognises that there is benefit to having consistency within a sector, as well as across sectors.

5.38 The High Court (or Court of Session in Scotland or High Court of Northern Ireland) has expertise in hearing public law judicial reviews. The CAT also hears judicial reviews against decisions taken by competition authorities in merger and market investigations. Therefore it also has some expertise in hearing this type of case, particularly in the competition sector.

**Q22 Do you agree that there should be a single appeal body hearing enforcement appeals?**

**Q23 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate appeal body to hear enforcement appeals?**

**Q24 Bearing in mind the proposals already agreed by the NI Executive and the legislative process which is underway covering enforcement appeals relating to financial penalties, are any further changes required in Northern Ireland?**

#### Dispute resolution

5.39 Some regulators are required to provide decisions on commercial disputes. Currently appeals against these decisions are either heard in the CAT (e.g. for Ofcom telecoms decisions) or in the High Court (or Court of Session in Scotland or High Court of Northern Ireland).

5.40 Government's view is that there would be benefit from having a single appeal body hear these types of appeals. There are arguments for either appeal body being the most appropriate forum. The CAT has greater expertise and knowledge of the regulated sectors, and may be quicker at getting to the nub of the issues. On the other hand the High Court (or Court of Session in Scotland or High Court of Northern Ireland) has significant expertise in hearing commercial disputes in its Chancery Division, including private competition law cases.

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<sup>37</sup> consultation on the Energy Bill - [http://www.detini.gov.uk/energy\\_bill\\_consultation\\_document\\_-\\_11\\_june\\_2012\\_2\\_.pdf](http://www.detini.gov.uk/energy_bill_consultation_document_-_11_june_2012_2_.pdf)

<sup>38</sup> decision paper on the Energy Bill - [http://www.detini.gov.uk/government\\_response\\_to\\_public\\_consultation\\_on\\_the\\_energy\\_bill\\_-\\_february\\_2013\\_2\\_.pdf](http://www.detini.gov.uk/government_response_to_public_consultation_on_the_energy_bill_-_february_2013_2_.pdf)

**Q25 Do you agree that there should be a single appeal body hearing dispute resolution appeals?**

**Q26 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate appeal body to hear dispute resolution appeals?**

### Competition decisions

5.41 In some of the regimes covered by this consultation, certain appeals of decisions go to the CAT but judicial review challenges against the process of decision-making taken (or not taken) by regulatory or competition authorities are heard by the High Court of England and Wales, High Court of Northern Ireland or the Court of Session, as the case may be. Most notably, the CAT hears appeals to certain decisions (mainly concerning infringements and penalties but also including the imposition of interim measures) under the Competition Act 1998. But if a person seeks review of the way that an investigation is being conducted the case must be heard by one of those courts.

5.42 This may not be the most efficient way of ordering judicial arrangements. A particular example of the difficulties that can arise came in the *Cityhook*<sup>39</sup> case when the appellant appealed to the CAT on the grounds that the closing of the file by the OFT amounted in substance to a non-infringement decision. But the appellant was also required, because of the CAT's lack of jurisdiction, separately to seek a judicial review of the lawfulness of the OFT's case closure decision in the Administrative Court (Queens' Bench Division) of the High Court and a claim for damages for the alleged infringement in the Chancery Division of the High Court.

5.43 In dealing with the jurisdictional question it was necessary for the CAT to familiarise itself with the substance of the decision to close the file and with the authority's reasons for so doing. The same material came before the Administrative (High) Court when the judicial review of that decision was considered, and might also have formed the background to any action in the Chancery Division. The requirement for two or three different courts to be involved is clearly undesirable in a number of respects, not least because of the inefficient duplication (or even triplication) of costs and effort for the complainant and the other parties to the various sets of proceedings, as well as for the courts themselves.

5.44 Although the Government is considering changes to appeals of non-infringement decisions (see paragraph 6.35-6.42) and has also proposed giving the CAT the jurisdiction to hear stand alone and follow on actions for damages<sup>40</sup> which would prevent these particular circumstances being replicated, **the Government considers that the CAT, as the specialist competition judicial body, may be well placed to hear judicial review applications in respect of cases under the Competition Act 1998 along with its current role in considering appeals against any decisions on such cases.** The CAT already has jurisdiction to hear judicial reviews under the merger and markets provisions of the Enterprise Act 2002 so, coupled with its proposed jurisdiction to hear private actions, the CAT would have jurisdiction over all facets of competition law.

**Q27 Do you agree that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998?**

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<sup>39</sup> ; CAT reference; *Cityhook vs OFT* [2009] EWHC 57

<sup>40</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf)

**Figure 5.1: Summary of appeal routes**

	Licence Mods, Price Controls or Access Charge Control	Enforcement Decisions	Regulatory Decisions*	Competition Decisions	Dispute Resolution
CAT	OFCOM Telecoms Price Control (CA03), Appeal on Merits	OFCOM Ex-post Enforcement (CA03), Appeal on Merits	OFCOM Ex-ante Regulation (CA03), Appeal on Merits	All Regulators, Ex-post Competition (CAA12), Appeal on Merits	OFCOM Telecoms Dispute Resolution (CA03), Appeal on Merits
		OFCOM Ex-post Enforcement (PSA110, PSA11), Judicial Review	OFCOM Ex-ante Regulation (PSA11), Judicial Review		
		OFGEM Ex-post Enforcement (EA10), Merits	CAA Market Review & Revoke Licence (CAA12), Appeal on Merits		
		CAA Ex-post Enforcement (CAA12), Appeal on Merits			
Competition Commission	OFCOM Telecoms Price Control (CA03), Appeal on Merits				
	OFCOM Postal Price Control (PSA11), Appeal on Material Error				
	CAA Price Control & Licence Mod (CAA12), Appeal on Merits		OFGEM Ex-ante Regulation (EA04 & EA89) Merits (if Ofgem agrees)		
	UREGNI Price Control & Licence Mod (ENIO92 & GNIO96), Ref. on Merits				
	ORR Price Control & Licence Mod (RA93), Reference on Merits				
	OFWAT Price Control & Licence Mod (WIA91), Reference on Merits				
	OFGEM Price Control & Licence Mod (EA89, GA86, EA04), Appeal on Merits				
High Court**	UREGNI Licence Grant or Extension (ENIO92 & GNIO96), JR	OFWAT Ex-post Enforcement (WIA91), Judicial Review	OFWAT Ex-ante Regulation (WIA91), Judicial Review	All Regulators, Enterprise Act 02, referrals to CC [this refers to appeals against CC's determinations in regulatory references], Judicial Review	UREGNI Dispute Resolution (ENIO92, GNIO96, WSS(NI)006), Judicial Review
	ORR Price Control HS1 (Concession Agreement), Judicial Review	OFGEM Ex-post Enforcement (EA98), Judicial Review	ORR Ex-ante Regulation (RA93, TA00, RA05, RIR05, RR05, RR11), Judicial Review		OFGEM Dispute Resolution (EA89), Judicial Review
		UREGNI Ex-post Enforcement (ENIO03), Judicial Review	OFGEM Ex-ante Regulation (EA04) JR (if Ofgem disagrees)		
		ORR Ex-post Regulation (RA93), Judicial Review	UREGNI Ex-ante & Ex-post Enforcement (PSA11) not covered elsewhere, Judicial Review		

● Energy   
 ● NI Utilities   
 ● Water   
 ● Comms   
 ● Post   
 ● Rail   
 ● Aviation

\* ex-ante and ex-post regulatory decisions, & market review

\*\*High Court of England and Wales, Court of Session, or High Court of Northern Ireland

## Chapter 6: Getting Decisions and Incentives Right

### Introduction and summary of proposals

In an effective regulatory environment the regulator or competition authority is able to reach robust and well-informed decisions, interested parties are able to engage extensively in the process and there are no undue incentives to appeal. Measures to improve the dialogue with the parties during the decision-making phase should help create such a system.

This consultation is seeking views on the following proposals and questions:

- Competition authorities and regulators should be given additional powers to impose confidentiality rings – potentially with a role for the CAT in supervising such arrangement.
- The circumstances in which appeal bodies should exercise their discretion to admit new evidence which was not put before the administrative body should be defined in legislation:
  - in antitrust and Communications Act cases the CAT should only grant permission if the person wishing to introduce new evidence shows good reason, the evidence could not reasonably be expected to have been placed before the administrative authority, the evidence is likely to have an important effect on the outcome of the appeal and it is in the interests of justice that the evidence be admitted.
  - In other regulatory cases (except where the decisions are only subject to judicial review) similar provision should be made to that in the Civil Aviation Act 2012: evidence should not be considered if it was not considered by the regulator unless the regulator could not reasonably have been expected to consider the evidence; the evidence is likely to have an important effect on the outcome of the application or appeal; and the evidence could not reasonably be expected to have been raised with the regulator.
- Whether administrative bodies' exposure to costs for appeals might be limited, with costs generally not being awarded against them unless their conduct can be characterised as having been unfair or unreasonable or there are exceptional circumstances (to ensure access to justice is available to all).
- Administrative bodies should be encouraged to claim their full costs, including their in-house legal costs, when successful in an appeal.
- They should also actively challenge appeals and particular aspects of appeals which are unlikely to succeed.
- Similarly, the CAT should review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success.
- Whether the principles proposed for decision-making in antitrust cases should be adopted for regulatory decisions, whether there are other ways in which regulators could consult more effectively and transparently at an earlier stage and whether regulators need more investigatory powers, such as a power to compel questions to be answered.
- Whether non-infringement decisions under the Competition Act 1998 should continue to be appealable decisions.

- 6.1 There will always be some incentive for businesses to appeal regulatory or competition decisions which have a significant financial impact – where for example they impose large fines or they constrain the returns the business is able to earn so the costs of bringing an appeal are heavily outweighed by the possible gains. As noted at several points above, it is right that businesses are able to challenge these decisions where they consider that a material error has been made, but ideally parties should have every opportunity and incentive to rebut fallacious evidence and argument during the administrative phase; and they should not have undue incentives to appeal particularly where an appeal could delay regulatory decision-making.
- 6.2 If the parties do not properly understand the case being made against them until a late stage, an appeal will be more likely (and indeed an incorrect decision is more likely to have been made). An unrestricted ability to adduce new evidence on appeal might also weaken the incentives on parties to put their best foot forward and engage fully during the administrative phase.
- 6.3 A system will be efficient, so long as:
- regulators' and competition authorities' decisions are robust, well reasoned and properly reached;
  - they have the appropriate tools to get to the bottom of issues;
  - the parties understand in good time the case alleged against them and the evidence relied upon, and put forward their counter-arguments and evidence during the administrative phase ;
  - incentives and opportunities for the parties to game the system are limited;
  - the appeal bodies are able to concentrate on the key issues and any errors that may be significant.
- 6.4 This Chapter considers what might be done to improve administrative decision-making and engagement between authorities and parties during the administrative phase, to reduce incentives to game the system and to focus appeals on the key issues. The proposals in Chapter 4 to define standards of review more explicitly will also assist in the last two of these objectives.

## **Confidentiality rings**

- 6.5 One reform which might help engagement during the administrative phase would be to facilitate greater use of confidentiality rings during that stage.
- 6.6 Regulatory and competition decisions are commonly founded on confidential data which cannot be disclosed directly to all the parties. Without this, parties may not be able fully to understand the case against them, or may not until the decision has been made, so an appeal may be more likely. Earlier and improved disclosure to parties of the case through confidentiality rings should lead to better decision-making during the administrative proceedings. This should in turn reduce the need for appeal and would also lighten the administrative burden on competition authorities and regulators, who are often required to undertake costly and time-consuming redaction exercises.
- 6.7 As a way of streamlining the access to file process<sup>41</sup>, competition authorities and regulators have developed the practice of exploring with the parties concerned whether, instead of insisting on redactions and representations on redactions, they would consent to the use of a confidentiality

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<sup>41</sup> The 'access to the file' process is equivalent to the disclosure process in litigation. It is designed to safeguard the rights of the defence, so that relevant parties have access to the evidence on the file backing up the decision and, where relevant, any exculpatory materials that are also on the file.

ring to facilitate the access to file or disclosure process. Under a confidentiality ring, copies of the documents on the file can be shared with members of the ring, without the need to make redactions on confidentiality grounds, because the members of the ring agree to the sharing of each others' confidential information, often on a lawyer-only basis, and the parties to the confidentiality ring are bound not to disclose the information further, other than with the agreement of the file owner and for the purpose for which the disclosure is made. But the administrative bodies cannot impose confidentiality rings. By contrast, under their powers courts can and do impose confidentiality rings.

6.8 It is not as easy as it might be, across the suite of antitrust, regulatory decisions and appeals and references, for regulators and competition authorities to use confidentiality rings as a means of sharing relevant information and thinking whilst ensuring confidentiality is protected. **The Government is considering whether competition authorities and regulators should be given additional powers to impose confidentiality rings with appropriate sanctions. The CAT might or might not be given a role in supervising the confidentiality ring**, to ensure its integrity and to take decisions on issues such as whether in-house lawyers might be included in a confidentiality ring. There might be a power to fine **persons who breach the undertakings** used to enforce confidentiality provisions.

**Q28 Do you agree with the proposal to increase the use of confidentiality rings at the administrative stage of decision-making?**

**Q29 If so, how do you see such rings operating? Should there be a role for the CAT in supervising them? Who should they be extended to and what sanctions should be available for the breach of such rings?**

## **New evidence, costs and incentives to game the system**

6.9 In the light of the desirability of parties engaging fully during the administrative phase, the Government has considered the circumstances in which new evidence which was not submitted to the administrative authority when taking its decision should be admitted on appeal.

6.10 No party should have an unfettered right to adduce fresh evidence on appeal and parties should present their cases during the administrative phase as fully as the circumstances permit<sup>42</sup>. To encourage this and avoid excessive incentives to appeal, as well as limiting the material before the appeal body so that the appeal is more manageable for it and the parties, in the Government's view appeal bodies should not admit on appeal evidence that was not considered by the administrative authority prior to its decision unless it can be shown that it is significant and relevant to the aspect of the decision which is being appealed and good reasons why the evidence was not produced at the administrative phase are provided.

6.11 In some cases the interests of justice will require new evidence to be considered. This is especially the case in antitrust cases where the issue is whether the law has been broken and an appeal to the CAT is the first time a court will have considered the case (an administrative body is not in the same position as a court of first instance, in front of which evidence from both sides may be adduced and tested in cross-examination).

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<sup>42</sup> See the comments of Toulson LJ, *British Telecommunications plc v. Office of Communications*, [2011] EWCA Civ 245, at §71.

6.12 The CAT rules already provide the CAT with wide powers to control the admission and use of evidence, both written and oral. The circumstances in which the CAT should admit fresh evidence have recently been elucidated in principle by the judgment of Toulson LJ in *BT v Ofcom*<sup>43</sup>: the question is a matter for the CAT's discretion, but it is open to the CAT to admit evidence which was not before Ofcom (in that case) if it considers that the party who wishes to adduce it has shown good reason to justify it and the CAT considers that it is in the interests of justice to admit it.

**6.13 The Government is minded to set out in statute the scope of the CAT's discretion in competition and Communications Act cases (where the focus is on the merits of the decision) along similar lines: permission to adduce new evidence should only be granted if the person wishing to introduce it shows good reason, the evidence could not reasonably be expected to have been placed before the administrative authority, the evidence is likely to have an important effect on the outcome of the appeal and it is in the interests of justice (including any potential prejudice that other parties might suffer) that the evidence be admitted.**

6.14 The intention of these changes would be to underline the responsibilities of the parties to be open in their engagement with the administrative authorities and, coupled with defining the standard of appeal more explicitly, could help focus any appeal and instil discipline in its conduct. However, the Government also recognises that, by setting out the grounds for admitting fresh evidence more clearly in statute, there may be a risk that companies have a greater opportunity to appeal the CAT's decisions on whether new evidence should be allowed in a particular case. The Government would be interested in respondents' views on whether this is likely to occur in practice.

6.15 Turning to other appeals, the ability of new evidence to be adduced in relevant appeals has recently been articulated in the Civil Aviation Act 2012. Broadly, paragraph 23 of Schedule 2 prevents evidence being considered if it was not considered by the CAA unless the CAA could not reasonably have been expected to consider the evidence; the evidence is likely to have an important effect on the outcome of the application or appeal; and the evidence could not reasonably be expected to have been raised with the CAA.

**6.16 The Government considers that similar provision should be made in respect of regulatory decisions in other sectors except where they are subject to judicial review.**

6.17 Consistent with the limited scope of judicial review the evidence which may be considered by the court is normally restricted: the decision-maker will defend the decision by reference to the evidence which was (or ought to have been) considered by it at the time of the decision, and by reference to any reasons given for the decision at the time. **The Government considers this should continue to be the case for judicial reviews of competition and regulatory cases.**

**Q30 Do you agree that the factors the CAT should take into account in exercising its discretion to admit new evidence in antitrust and Communications Act cases should be set out in statute along the lines proposed?**

**Q31 Do you agree that the approach to new evidence in Schedule 2 to the Civil Aviation Act 2012 should be applied to other price control appeals?**

6.18 As well as providing powers to control the admission and use of evidence, the CAT Rules also provide wide powers to penalise through cost orders any conduct which is regarded as

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<sup>43</sup> *Ibid.* at §68-74

unreasonable or abusive of the system. If it emerged in the course of proceedings that an appellant was seeking to adduce evidence which it could reasonably have been expected to adduce at the administrative stage, then the CAT would be able to penalise the party in question through the cost order it makes. For example, the CAT could deprive a successful appellant of some or all of its costs of the appeal, or it could even order a successful appellant to pay some or all of the unsuccessful regulator's costs<sup>44</sup>.

6.19 Regulators and competition authorities should make an application to the CAT in these circumstances so that it can consider exercising its discretionary powers in this way.

6.20 More generally, there are no express provisions about how the discretion is to be exercised and the CAT adopts a fact-dependent approach<sup>45</sup>. The CAT has held that there is no rule that costs orders against a regulator will only be made where the regulator's conduct can be characterised as having been in 'bad faith, unfair or unreasonable'<sup>46</sup>.

6.21 The Government believes that way costs are awarded should be consistent with the aim of focusing appeals on significant regulatory errors and not unnecessarily delaying regulatory decision-making. This means that costs should create a real disincentive on parties to appeal where there is no merit in the arguments being brought, or where the objective of the appeal is to delay a decision. However, this should not penalise against those who may have less resource to bring an appeal and flexibility should be retained to ensure that this does not happen.

**6.22 The Government is considering whether to make express legislative provision that (a) in a case in which the regulatory body is successful, the regulator should be awarded its costs unless there are exceptional circumstances; (b) where the regulator is unsuccessful, costs should not be awarded against it unless the regulator's conduct can be characterised as having been unfair or unreasonable or there are exceptional circumstances (for example appellants who do not have many resources).**

6.23 In a number of other regulatory systems (such as in professional disciplinary proceedings) the practice has been to go further so that for example costs are only awarded when the regulator's conduct is in bad faith, unfair or unreasonable. In the Government's view requiring the regulator to behave unfairly or unreasonably for it to bear costs (absent exceptional circumstances) might strike a balance between the interests of appellants and the need to avoid a chilling effect on a regulator exercising public responsibilities in an environment in which many of the players are extremely well resourced. Exceptional circumstances might be where there are small business or consumer appellants who would otherwise be deterred by the cost of appeal. It is important that this flexibility is retained in these cases.

6.24 The Government does however acknowledge the general principle applied by courts is that costs should follow the event, and that it should carefully consider the impacts of any move away from that general principle.

6.25 In cases in which regulators are successful there has historically been a tendency for them to claim only their external legal costs. **The Government would encourage regulators to claim the full costs, including their in-house legal costs, when successful in an appeal.**

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<sup>45</sup> In slightly different circumstances, the CAT has shown itself willing to penalise those who have been shown to have given the regulator "the run around": for example in the Allsports case (*reference*) where a company had its fine increased at the appeal stage because it was shown that the company had been less co-operative at the administrative stage than was thought to have been the case.

<sup>45</sup> See, among many cases, *The Number (UK) Limited v Office of Communications* [2009] CAT 5

<sup>45</sup> See, among many cases, *The Number (UK) Limited v Office of Communications* [2009] CAT 5

<sup>46</sup> *North Midland Construction v. OFT* [2011] CAT 37 (Costs).

**Q32 Do you agree that when successful the regulator should be awarded its costs unless the regulator’s conduct can be characterised as being unreasonable or there are exceptional circumstances; and that when unsuccessful, costs should not be awarded against it unless the regulator’s conduct can be characterised as having been unreasonable, unless there are exceptional circumstances?**

**Q33 Do you agree regulators should be encouraged to claim their full costs, including internal legal costs?**

6.26 The CAT rules further provide for the circumstances in which the CAT may reject an appeal, in whole or in part<sup>47</sup>. These cover such matters as the validity of the appeal, the sufficiency of the interest of the appellant, and vexatious proceedings. Given not least the wide grounds on which antitrust decisions, for example, may be overturned, parties may have an incentive to appeal on all conceivable grounds in the hope that one might succeed. This makes appeals less focused on the key issues than they might be.

6.27 Generally, the High Court, the High Court of Northern Ireland and the Court of Session scrutinise appeal grounds carefully and will reject them if they are unlikely to succeed. The Government considers that, even where there is a valid ground of appeal, competition and regulatory appeals should be focused on those aspects of a decision which are material and where the appeal stands an arguable chance of success.

6.28 Specifying the grounds of appeal that can be brought (as set out in Chapter 4) in a more focused way will encourage this focus. In addition, the Government has two suggestions in respect of the CAT’s powers to reject appeals or appeal grounds: first, that **the administrative bodies should be more active in scrutinising appeal grounds and should where appropriate challenge them at the CAT at an early stage; and second, that the CAT rules should provide for the CAT to review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success.**

**Q34 Do you agree that the administrative bodies should be more active in scrutinising appeal grounds and should where appropriate challenge them at the CAT at an early stage?**

**Q35 Do you agree that the CAT to review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success.**

## Competition and regulatory decision-making

6.29 Alongside these changes to the appeals regime, the Government recognises that the main way of dis-incentivising avoidable appeals is for firms to have confidence in the decisions made by regulators and competition authorities. The Government is aware that regulators have been criticised for not being sufficiently transparent, and for exhibiting confirmation bias – for example, not being willing to alter their initial views in the light of consultation responses. It is vital that regulators and competition authorities play their part in dis-incentivising appeals, by doing all they can to open up their reasoning and evidence to parties at the administrative stage.

6.30 The Government believes that the reforms to appeals outlined in this consultation paper should help regulators become less risk averse. However, Government is also considering whether further reforms might be required to ensure regulators and competition authorities are

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<sup>47</sup> Rule 10.

taking effective, timely decisions at the administrative stage, avoiding the need for unnecessary appeals.

- 6.31 The Enterprise and Regulatory Reform Act 2013 (ERRA 2013) paves the way for improvements in the way that investigations of infringements of the antitrust prohibitions are conducted and decisions reached on them by the CMA (in succession to the OFT) and the sector regulators with concurrent powers. Notably, the introduction of collective decision-making and a change in decision-makers between investigation and final decisions will enhance the robustness of decisions and address the possibility of confirmation bias. There will be greater use of state of play meetings to improve engagement with the parties on the progress of the investigation and improved access to decision-makers at a more interactive oral hearing. Parties will also be given greater opportunity to comment on a draft penalty statement in advance of the final decision. There will therefore be a more meaningful dialogue between the parties and decision-makers.
- 6.32 Another important provision in the ERRA 2013 is section 39 which gives the CMA and sector regulators a power to require individuals to answer questions as part of an antitrust investigation. This should enhance the ability of the competition authorities to get to the bottom of issues and to do so more swiftly, and to make better decisions; it may also make it less likely that they will be ‘ambushed’ by witness evidence on appeal.
- 6.33 These reforms therefore already go some way to ensure competition authorities’ decisions are robust, well reasoned and properly reached. The Government has reflected on whether there are any aspects of these reforms to the antitrust regime which might be mirrored for ex ante regulatory decision-making.
- 6.34 Discussions are presently underway on the details of the arrangements for antitrust decision-making, for the CMA and the regulators. Regulators may wish to consider whether some of the changes made might usefully be incorporated in their procedures for taking regulatory action. **It does not seem obvious to the Government that regulators should be required to adopt similar procedures for ex ante regulatory decisions. Similarly, it is not clear that a power to require individuals to answer questions should be part of the regulatory framework.** Such a power is normally restricted to investigations of law-breaking, especially where there is a strong incentive to conceal information, rather than regulatory control. **But the Government would be interested in views on these issues.**

**Q36 Do you consider that the principles proposed for decision-making in antitrust changes should be applied in any way to regulatory decision-making?**

**Q37 Are there other ways in which regulators could consult more effectively and transparently at an earlier stage, and could such moves be expected to reduce the number of appeals?**

**Q38 Do the regulators need more investigatory powers, such as a power to ask questions?**

## **Non-infringement decisions**

- 6.35 In the context of decision-making in antitrust cases, and in the light of the burden placed upon the competition authorities in reaching and defending decisions, the Government has considered whether the competition authorities should be able to make non-infringement decisions (findings that an antitrust prohibition has *not* been infringed) which are subject to an appeal on the merits.

6.36 On the one hand, particularly because they are subject to full review by the CAT, reaching non-infringement decisions can involve the commitment of substantial resources by the competition authorities to establish the law has not been broken and this can lead to inefficiencies and may not be the best use of their resources. First, since case law<sup>48</sup> has established that a non-infringement decision may be made even in the absence of a formal decision to that effect if substantively that is what the authority has decided, when a competition authority begins to investigate an alleged infringement it will know that it is potentially committing very significant resources even if investigation fails to substantiate the case. This limits the number of cases that can be pursued; competition authorities have to stay within budget and inevitably this means they have to prioritise cases. It may also incentivise the authority to drop cases on administrative priority grounds at an earlier point than may be optimal. Second, there are the substantial resources needed to defend non-infringement decisions given the rigorous review of the CAT and this too limits the number of antitrust cases that can be run.

6.37 On the other hand, whilst by definition such decisions do not lead to penalties or the stopping of the relevant conduct, as legal and economic findings they can give certainty as to the lawfulness of the conduct and this can have wider value than just in relation to the particular agreement or activity of the dominant undertaking concerned – non-infringement decisions can guide others as to how they can properly behave.

6.38 These issues have recently been clarified to some extent by the Tele 2 Polska case<sup>49</sup>. In that case, the European Court of Justice concluded that, under Article 5 of Regulation 1/2003, National Competition Authorities (NCAs) do not have the power to take a decision finding that there has been no breach of Article 102 of the TFEU. Only the European Commission may take such a decision, even if Article 102 is applied in a procedure undertaken by an NCA. Where an NCA finds that the conditions for application of Article 102 are not met, its power is limited to the adoption of a decision stating that there are no grounds for action.

6.39 In practice the OFT has in some cases issued relatively detailed decisions setting out its views as to why there are no grounds for action following an investigation of an alleged infringement. This enables the OFT usefully to share thinking as to the likely relevant market in particular types of case or as to whether particular behaviour is in its view likely to constitute competition on the merits. Two recent such decisions are IDEXX<sup>50</sup> and FlyBe<sup>51</sup>, both of which concerned Article 102 of the TFEU and the Chapter II prohibition. Whether a decision of the OFT amounts to an appealable decision within the meaning of section 46 of the Competition Act 1998 will depend on the relevant facts.

6.40 Section 31 of the Act in fact only explicitly provides for the competition authorities to make a decision that one of the prohibitions has been infringed. But section 46(2) provides that an appealable decision includes *whether* a prohibition has been infringed. The latter language reflects the competition authorities' powers prior to the modernisation of EU competition law, when parties could notify an agreement or conduct for a decision whether the relevant domestic prohibition was infringed.

6.41 If non-infringement decisions were no longer provided to be appealable decisions, competition authorities would still be able to decide there were no grounds for action and would be able to set out their reasoning, which would inform the market that agreements or conduct in general or in particular did not amount to an infringement. And, apart from the possibility of judicial review of a

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<sup>48</sup>Claymore v. OFT [2003] CAT 3, at 122.

<sup>49</sup>C 375/09 - Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. zoo, now Netia SA w Warszawie, judgment of 3 May 2011.

<sup>50</sup><http://www.of.gov.uk/news-and-updates/press/2011/124-11>

<sup>51</sup><http://www.of.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/flybe>

decision that there are no grounds for action, other interested parties who believe there nevertheless is an infringement and who would otherwise have appealed a non-infringement decision would remain free to go to court to challenge the agreement or conduct. The Government has already announced it will implement steps to make it easier to pursue private actions for competition infringements and to give the CAT jurisdiction to hear them<sup>52</sup>. The issue is whether, following a competition authority's investigation which resulted in no decision finding an infringement, and separate from any judicial review of the competition authority's actions, interested parties should have the right to appeal the conclusion reached by the competition authority.

6.42 In the light of these arguments, the Government seeks views on **whether only decisions that there has been an infringement of one of the antitrust decisions should be appealable decisions under section 46 of the Competition Act 1998.**

**Q39 Do you have any views on whether non-infringement decisions should continue to be appealable decisions? Why do you take this view?**

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<sup>52</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf)

## Chapter 7: Minimising the Length and Cost of Cases

### Introduction and summary of proposals

While appeals can increase certainty where they resolve a specific issue quickly, lengthy delays caused by appeals can conversely cause regulatory uncertainty and in some cases mean that the benefits of decisions for businesses and consumers are delayed. Longer appeals tend to cost more and place greater burden on the regulatory system.

The Government's aim is that appeals are carried out in the most efficient way, so that robust decisions are reached as swiftly as possible with minimum cost.

This consultation is seeking views on the following proposals:

- The Government proposes to work with the CAT to reduce its target timescale for all straightforward cases from 9 months to 6 months. The Government is also minded to ask the CAT to introduce a non-statutory target timescale for all other cases of 12 months.
- The CAT should publish regular monitoring data, including on the length of appeals.
- The CAT should agree case specific timetables for proceedings extending across the whole case, including the main judgement and any other matters which follow.
- The CAT should have the power to limit the amount of evidence and expert witnesses.
- There should be a presumption that matters should be resolved on the papers wherever possible, for example for cost awards and straightforward matters, and that oral hearings should be kept to an absolute minimum.
- The Government is minded to introduce a new time limit of 6 months for communications and broadcasting price control appeals which will be heard by the Competition Commission, with the option of a 2 month extension period in special circumstances.
- The Government is minded to reduce the extension available for regulatory references to the Competition Commission in the water, rail and aviation sectors (Transport Act 2000) from 6 months to 2 months.

### Existing approach

7.1 The CAT's Rules and Guide to Proceedings set out how the CAT should use case management processes to ensure that cases are dealt with expeditiously and fairly. For example, the CAT's Guide to Proceedings (2005) states that the Tribunal: 'will aim to complete straightforward cases within 9 months'.

7.2 The Competition Commission also has Rules which set out how it operates when undertaking reviews or appeals of price control and licence modification decisions. These vary across sectors. In most sectors the appeals or reviews have statutory time limits. These vary across sectors as set out in table 7.1:

Table 7. 1 Existing statutory time limits on regulatory reviews

Sector	Statutory time limit (months)
<b>WATER</b>	6 months [+ 6 months extension]
<b>ENERGY (Elec &amp; Gas licence modifications GB)</b>	4 months for non-price control matters; 6 months for price control matters [+ 1 month extension]
<b>ENERGY (Elec &amp; Gas licence modifications Northern Ireland)</b>	6 months [+ 6 month extension]
<b>ENERGY (Energy Code modification appeals)</b>	30 working days [+10 working days extension]
<b>COMMUNICATIONS</b>	4 months (or otherwise directed by CAT)
<b>BROADCASTING</b>	4 months (or otherwise directed by CAT)
<b>POSTAL SERVICES</b>	4 months (or 6 months if exceptional circumstances)
<b>RAIL (ORR licence modification review)</b>	6 months [+ 6 months extension]
<b>AVIATION (CA Act 2012)</b>	24 weeks [+ 8 week extension]
<b>AVIATION (Transport Act 2000)</b>	6 months [+ 6 month extension]

7.3 In general the Competition Commission completes its reviews within the allotted time limit or, occasionally, within the statutory extension time. For example in the recent Phoenix Natural Gas price control enquiry the Competition Commission extended the time limit by two months to give full consideration to the responses received following publication of provisional findings.<sup>53</sup>

#### *Other court & tribunal comparators*

7.4 The ‘overriding objective’ of the Civil Procedure Rules (CPR), which apply to civil cases heard in the Court of Appeal, High Court and County Courts in England and Wales requires the court to deal with cases justly and at proportionate cost. The rules consider this to include:  
“ensuring that it is dealt with expeditiously and fairly”

7.5 Other than this there are no specific requirements in the CPR for time limit on cases. However, some courts or tribunals do have target timescales for their cases, although these will naturally allow for the discretion of the court in particularly complex cases. For example, mental health tribunals have targets for when a hearing will be organised, depending on the urgency of the case. Equally, employment tribunals have an estimated time period for judgements of 4 weeks.

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<sup>53</sup> In regulatory references, it is formally the regulator not the CC who extends the time limit, on request from the CC, and the regulator must be satisfied there are special reasons for extending the timetable. Only one extension is permitted.

## Evidence and rationale for change

7.6 The CAT hears a range of appeals, most of which are merits-based appeals. Data collected for this review indicates that the average time taken for an appeal at the CAT between 2008 and 2012 was 8.7 months. As set out in Chapter 3 some appeals are dealt with much quicker. For example, judicial reviews of merger inquiry and market investigation decisions during the same period were completed on average in 4.0 months. Almost half of CAT cases heard between 2008 and 2012 took longer than 9 months. Two thirds took longer than 6 months. However, for judicial review cases only one case out of 13 took longer than 9 months, and only marginally longer. Clearly more lengthy cases will impose greater costs on all parties.

7.7 In contrast, some appeals of Competition Act 1998 decisions and other regulatory decisions can take much longer. This is in part because the standard of review in these cases is a merits-based appeal. It is also because the decisions themselves are complex economic and technical decisions. For example, appeals of Competition Act 1998 decisions between 2008 and 2012 took on average 13.9 months<sup>54</sup>.

7.8 The Competition Commission hears appeals and/or reviews of licence modifications and price controls. In the period 2008 and 2012 the average time taken was 7.0 months.

### *International comparators*

7.9 Evidence suggests that the UK performs well against most international comparators. For example, a study by CERRE<sup>55</sup> found that the average length of telecoms appeals in the UK's CAT was 14.7 months compared to 23.5 months in Belgium and 24 months in the Netherlands (see Annex F for more details). Anecdotal evidence suggests that the UK performs well against the EU legal system, although none of these comparators seem to be ambitious and evidence suggests that the delays in these legal systems cause significant regulatory uncertainty<sup>56,57</sup>.

7.10 The Government believes that appeals should be as quick as possible, while remaining robust, to increase regulatory certainty and so as to not act as a drag on the regulatory system. CERRE data suggests that dispute cases are processed more quickly in France (7.5 months) than in the UK (average dispute resolution using BIS data for appeals between 2008-2012 is 11.1 months). Equally the German legal system is held to be one of the quickest in Europe and the Verwaltungsgericht Koln, which hears appeals against electronic communications decisions, has an average length of appeal process of 9.4 months across all appeals heard in 2009.<sup>58</sup> While it is difficult to compare this directly with the UK system, the Government believes there is scope to reduce the length of some cases and is minded to implement the proposals set out below to deliver this aim.

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<sup>54</sup> This figure includes the Tobacco and Construction cases which were particular outliers. The construction cases were appeals by multiple parties against multiple decisions.

<sup>55</sup> Larouche, P., Taton, X., Enforcement and judicial review of decisions of NRAs, CERRE, 2011, p.107, [http://www.cerre.eu/sites/default/files/110421\\_CERRE\\_Study\\_EnforcementAndJudicialReview\\_0.pdf](http://www.cerre.eu/sites/default/files/110421_CERRE_Study_EnforcementAndJudicialReview_0.pdf)

<sup>56</sup> [http://www.towerhouseconsulting.com/docs\\_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf](http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf)

<sup>57</sup> [http://www.ectaportal.com/en/upload/Scorecards/Regulatory\\_Scorecard\\_2009/ECTA%20Regulatory%20Scorecard%20Report%202009.pdf](http://www.ectaportal.com/en/upload/Scorecards/Regulatory_Scorecard_2009/ECTA%20Regulatory%20Scorecard%20Report%202009.pdf)

<sup>58</sup> Larouche, P., Taton, X., Enforcement and judicial review of decisions of NRAs, CERRE, 2011, p.107, [http://www.cerre.eu/sites/default/files/110421\\_CERRE\\_Study\\_EnforcementAndJudicialReview\\_0.pdf](http://www.cerre.eu/sites/default/files/110421_CERRE_Study_EnforcementAndJudicialReview_0.pdf)

## Proposed reforms to reduce length of cases

### *CAT reforms*

- 7.11 The CAT as demonstrated that it can process judicial review cases particularly quickly, although there is some variation in length across these cases. For example, in the Merger Action Group appeal (against the merger of HBOS/Lloyds<sup>59</sup>) the CAT concluded the appeal in 10 days due to the urgency of the matter. Equally, proposals earlier in this consultation around the standard of review seek to focus appeals and reduce their length. The CAT's Guide to Proceedings (2005) states that the Tribunal: 'will aim to complete straightforward cases within 9 months'. **The Government proposes to work with the CAT to reduce its target timescale for all straightforward cases to 6 months. The Government would also encourage the CAT to introduce a target timescale for all other cases of 12 months.** A third of CAT cases (16 out of 48 cases) between 2008 and 2012 took longer than 12 months; therefore this target is ambitious but achievable when combined with other measures outlined in this consultation e.g. providing clearer grounds of appeal and being clearer on when new evidence will be admitted.
- 7.12 Any target time limits are just that, and judicial discretion will need to be available to ensure that justice is done and that complex cases can be properly addressed. Equally, there is benefit to the CAT having some flexibility to adjust its resources so that the most urgent cases can be prioritised.

**Q40 Do you agree with the proposal that straightforward cases heard by the CAT should have a target time limit of 6 months, instead of the existing 9 months?**

**Q41 Do you agree with the proposal to introduce target time limits for all other regulatory appeals heard at the CAT, of 12 months?**

- 7.13 The Government believes that, in line with good corporate governance practice, **the CAT should publish regular monitoring data on its website, including on the length of appeals.** This will enable the length of cases to be monitored over time, recognising that CAT and the Competition Commission deal with a wide variety of different cases.
- 7.14 The CAT Rules provide a power to set case specific time tables. The CAT's Guide to Proceedings states that at the first Case Management Conference the Tribunal should normally set a timetable for the proceedings up to the main oral hearing. **This is good practice and the Government believes there should be a case specific timetable for proceedings extending across the whole case, including the main judgement and any other matters which follow.** A review of the timetable may be needed following the oral hearing once the extent of the issues is clearer. When prioritising work the focus should be on resolving main judgements.
- 7.15 In its consultation and Government response on Private actions in Competition Law<sup>60</sup> the Government explored a range of fast-track procedures that might be introduced to provide swift conclusion of some cases, particularly where small businesses are involved. The Government is exploring extending some of these procedures to the public competition law regime, to ensure cases are processed as efficiently as possible.

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<sup>59</sup> Case 1107/4/10/08, <http://www.catribunal.org.uk/237-3402/1107-4-10-08-Merger-Action-Group.html>

<sup>60</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf)

7.16 Chapter 6 of this consultation discusses issues around the introduction of new evidence on appeal and the use of expert witnesses. Appeals can routinely involve substantial amounts of new evidence presented at appeal, which can be crucial to the determination. For example, in the British Sky Broadcasting Limited (Conditional access modules) case, there were over 35,000 pages of submissions, and 41 witnesses (including 14 expert witnesses), of whom 25 gave oral evidence. It is important that appellants have a proper chance to put forward evidence which supports their case. However, another way of streamlining cases and ensuring they focus on the most important points may be to give the CAT greater powers to limit the amount of evidence and expert witnesses that can be brought.

7.17 The Government's response to the consultation on private actions concluded that the CAT will have the power to limit the amount of evidence and expert witnesses produced by each side and the presumption will be that normally no more than two expert witnesses on each side may be helpful. **The Government is minded to design this power to limit evidence and witnesses so that it can be used in regulatory and competition appeals.** This power will be implemented through changes to the CAT's Rules of Procedure. **The Government also considers there may be merit in a voluntary fast-track procedure where parties themselves agree to limit the amount of evidence and witness evidence adduced, or having cost caps which are agreed at the outset.**

**Q42 Do you agree with the proposal to provide the CAT with the power to limit the amount of evidence and expert witnesses, including in public law cases?**

**Q43 What are your views on a voluntary fast-track procedure where parties themselves agree to limit the amount of evidence including from witnesses, and potentially capping costs?**

7.18 The Government's view is that there should be a presumption that matters should be resolved on the papers wherever possible, for example for cost awards and straightforward matters, and that oral hearings should be kept to an absolute minimum to minimise the length and cost of appeals for all parties.

#### *Competition Commission (Competition and Markets Authority) reforms*

7.19 The Competition Commission is subject to statutory time limits for its reviews or appeals against regulatory decisions. In general the Competition Commission has met these targets in sectors other than communications where the situation is more complex. These cases have taken longer than the usual prescribed 4 months, and have been set a timetable by the CAT.

7.20 The Government is minded to reform the process for bringing price control appeals in the communications sector (see Chapter 5). As a result price control appeals will be brought directly to the Competition Commission (and in due course the Competition and Markets Authority) and therefore it is necessary to reconsider how time limits for these appeals should be set.

7.21 **The Government is minded to introduce a new time limit of 6 months for communications and broadcasting price control appeals, with the option of a 2 month extension period in special circumstances.** The Government believes that streamlining the process for bringing these appeals (by allowing price control appeals to be brought directly to the Competition Commission) will allow the appeal bodies to complete cases more quickly. While the proposed new time limit is an increase from the current time limit of 4 months set out in the Communications Act 2003 in practice it will reduce the time taken. For example, BIS data collected for this review suggests that of 7 cases between 2008 and 2012, only one was completed within 6 months. However, 5 were completed within 8 months. A 6 month time limit will align communications price control appeals with other sectors and will provide a realistic but ambitious time limit for these cases. Having a 2 month extension period allows some flexibility for

particularly complex cases. **The Competition Commission would need to have its own case management powers to ensure it was able to meet these time limits (as discussed in Chapter 5). The Government is minded to use the Civil Aviation Act 2012 as a model.**

**Q44 Do you agree with the proposal to amend the time limit for price control appeals in the communications sector to 6 months with the possibility of a 2 month extension?**

**Q45 If so, do you agree with the proposal to use the Civil Aviation Act 2012 as a model to ensure Competition Commission has the relevant case management powers?**

7.22 In the water, rail and aviation sectors (Transport Act 2000) the Competition Commission has a 6 month time limit to complete a regulatory reference review. Currently the Competition Commission can extend this time limit by a further 6 months in special circumstances. Between 2008 and 2012 BIS data suggests there were 3 of these reviews, which were all completed within the prescribed 6 month period. An additional review, under Northern Ireland's Gas and Electricity regime, took around 8 months and therefore required an extension. This evidence suggests that in general the Competition Commission can complete these reviews in the allotted time and if there are complex cases or where additional issues are raised on consultation, then a short extension should be sufficient to provide adequate time for consideration. **The Government is therefore minded to reduce the extension available for regulatory references in the water, rail and aviation sectors (Transport Act 2000) from 6 months to 2 months, to ensure that appeals are swift and minimise regulatory uncertainty.** This would mean these reviews would need to be completed within a maximum of 8 months.

**Q46 Do you agree with the proposal to reduce the extension available for regulatory references in the water, rail and aviation sectors (Transport Act 2000) from 6 months to 2 months?**

**Q47 Could the CAT's and/or the Competition Commission's case management procedures be improved and if so, how?**

**Q48 Are there any other measures Government or others could take to achieve robust decisions more swiftly?**

## Chapter 8: Consultation Questions

### Chapter 4: Standard of review

- Q1 Do you agree that there should be a presumption that appeals should be heard on a judicial review standard, unless there are particular legal or policy reasons for a wider standard of review?
- Q2 Do you agree with the Government's principles for non-judicial review appeals set out in Box 4.1? If you disagree, what would you propose?
- Q3 How would moving to a judicial review standard impact the length, cost and effectiveness of the appeals framework?
- Q4 For decisions in the communications sector, do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a more focused 'specified grounds' approach, or something different?
- Q5 What would the impacts be on the length, cost and effectiveness of the appeals framework if the standard were changed to: i). judicial review; ii) focused specified grounds?
- Q6 For decisions under the Competition Act 1998 (which do not involve setting the level of penalties) do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a focused 'specified grounds' approach, or something different?
- Q7 What would the impacts be on the length, cost and effectiveness of the appeals framework if the standard were changed to: i). judicial review; ii) focused specified grounds?
- Q8 For price control decisions in the communications, aviation, energy and postal services sectors, do you agree that there should be a change in the standard of review? If so, should this be to judicial review, a focused and consistent 'specified grounds' approach, or something different?
- Q9 What would the impacts be on the length, cost and effectiveness of price controls appeals in these sectors if the standard were changed to: i). judicial review; ii) focused specified grounds?
- Q10 Bearing in mind the proposals that the NI Executive has already consulted upon in relation to electricity and gas; to what extent should the changes proposed in this consultation be extended to Northern Ireland?
- Q11 What do you think the costs and benefits might be of moving to a direct appeal approach in the rail sector with either i) a judicial review standard or ii) a specified grounds approach?
- Q12 Are there any legal or other reasons why other regulatory decisions should be heard on an appeal standard other than judicial review? If so, which decisions and why?
- Q13 What would the impacts be on the length, cost and effectiveness of other regulatory appeals if the standard were changed to: i). judicial review; ii) consistent specified grounds?

### Chapter 5: Appeal bodies and routes of appeal

- Q14 Are there any reforms of the CAT's Rules the Government should make to achieve its objectives set out in paragraph [5.9]?

Q15 Do you agree that the relevant Chief Justice should be able to deploy judges at the level of the High Court or their equivalents in Scotland and Northern Ireland to sit as a Chairman of the CAT?

Q16 Do you agree that these judicial office holders should not be limited to a term of 8 years? Please include any views you may have concerning the 8 year term limit and CAT Chairman that do not hold another judicial office.

Q17 Do you agree that the CAT should be permitted to sit with a single judge (without panel members)?

Q18 Do you agree that the Competition Commission should continue to hear appeals against price control and licence modification decisions?

Q19 Do you agree that the process for bringing appeals against price control decisions in the communications sector should be simplified so that these appeals go directly to the Competition Commission? If so, would the Civil Aviation Act 2012 be an appropriate model to follow?

Q20 Do you agree that the CAT is the most appropriate appeal body to hear appeals against ex-ante regulatory decisions?

Q21 Do you agree that Energy Code modification appeals should be heard by the CAT rather than the Competition Commission?

Q22 Do you agree that there should be a single appeal body hearing enforcement appeals?

Q23 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate appeal body to hear enforcement appeals?

Q24 Bearing in mind the proposals already agreed by the NI Executive and the legislative process which is underway covering enforcement appeals relating to financial penalties, are any further changes required in Northern Ireland?

Q25 Do you agree that there should be a single appeal body hearing dispute resolution appeals?

Q26 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate appeal body to hear dispute resolution appeals?

Q27 Do you agree that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998?

## **Chapter 6: Getting decisions and incentives right**

Q28 Do you agree with the proposal to increase the use of confidentiality rings at the administrative stage of decision-making?

Q29 If so, how do you see such rings operating? Should there be a role for the CAT in supervising them? Who should they be extended to and what sanctions should be available for the breach of such rings?

Q30 Do you agree that the factors the CAT should take into account in exercising its discretion to admit new evidence in antitrust and Communications Act cases should be set out in statute along the lines proposed?

Q31 Do you agree that the approach to new evidence in Schedule 2 to the Civil Aviation Act 2012 should be applied to other price control appeals?

Q32 Do you agree that when successful the regulator should be awarded its costs unless the regulator's conduct can be characterised as being unreasonable or there are exceptional circumstances; and that when unsuccessful, costs should not be awarded against it unless the regulator's conduct can be characterised as having been unreasonable, unless there are exceptional circumstances?

Q33 Do you agree regulators should be encouraged to claim their full costs, including internal legal costs?

Q34 Do you agree that the administrative bodies should be more active in scrutinising appeal grounds and should where appropriate challenge them at the CAT at an early stage?

Q35 Do you agree that the CAT to review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success.

Q36 Do you consider that the principles proposed for decision-making in antitrust changes should be applied in any way to regulatory decision-making?

Q37 Are there other ways in which regulators could consult more effectively and transparently at an earlier stage, and could such moves be expected to reduce the number of appeals?

Q38 Do the regulators need more investigatory powers, such as a power to ask questions?

Q39 Do you have any views on whether non-infringement decisions should continue to be appealable decisions? Why do you take this view?

#### **Chapter 7: Minimising the length and cost of cases**

Q40 Do you agree with the proposal that straightforward cases heard by the CAT should have a target time limit of 6 months, instead of the existing 9 months?

Q41 Do you agree with the proposal to introduce target time limits for all other regulatory appeals heard at the CAT, of 12 months?

Q42 Do you agree with the proposal to provide the CAT with the power to limit the amount of evidence and expert witnesses, including in public law cases?

Q43 What are your views on a voluntary fast-track procedure where parties themselves agree to limit the amount of evidence including from witnesses, and potentially capping costs?

Q44 Do you agree with the proposal to amend the time limit for price control appeals in the communications sector to 6 months with the possibility of a 2 month extension?

Q45 If so, do you agree with the proposal to use the Civil Aviation Act 2012 as a model to ensure Competition Commission has the relevant case management powers?

Q46 Do you agree with the proposal to reduce the extension available for regulatory references in the water, rail and aviation sectors (Transport Act 2000) from 6 months to 2 months?

Q47 Could the CAT's and/or the Competition Commission's case management procedures be improved and if so, how?

Q48 Are there any other measures Government or others could take to achieve robust decisions more swiftly?

## Annex A: Types of Regulatory Decision and Statutory Basis

Regulator	Sector	Price controls	Other licence modifications/Licence conditions (Communications Act)	Other ex ante regulatory decisions	Ex post regulatory enforcement	Dispute resolution	Other (excluding competition decisions)
<b>OFWAT</b>	Water	Water Industry Act 1991 s12	Water Industry Act 1991 s14, s17K	Water Industry Act 1991 (New appointment; variation to appt decisions; bulk supply determinations)	Water Industry Act 1991 s18, s21, s22E	Water Industry Act 1991	N/A
<b>OFGEM</b>	Energy	Electricity Act 1989, s11C, E or Gas Act 1986 s23B	Electricity Act 1989, s11C, E or Gas Act 1986 s11C, E	Energy Act 2004, s173 (Industry Code Mods) 56B to 56D of Electricity Act 1989 and sections 41D to 41F of Gas Act 1986	Electricity Act 1989 s27 or Gas Act 1986 s30	Electricity Act 1989 s7(3)C, C9 Electricity Transmission Licence, s5(7)(c), s44C, C7 of Electricity Distribution Licence	Competition Act Investigation 1998, sch 8
<b>OFCOM</b>	Comms	Communications Act 2003, s193	Communications Act 2003 Wireless Telegraphy Act 2006 <sup>61</sup>	Communications Act 2003 (Market Power Determinations) Wireless Telegraphy Act 2006	Communications Act 2003 Wireless Telegraphy Act 2006	Communications Act 2003	Communications Act 2003 Schedule 8 Decisions
<b>OFCOM</b>	Postal Services	Postal Services Act 2011, s59	N/A	Postal Services Act 2011 Postal Services Act 2000, s116	Postal Services Act 2011 Postal Services Act 2000	Postal Services Act 2011	
<b>ORR</b>	Rail (economic decisions only)	Railways Act 1993, Schedule 4A for Network Rail or	Railways Act 1993, s13 The Railway (Licensing of Railway Undertakings)	Railways Act 1993 Transport Act 2000 Railways Act 2005 Railways Infrastructure (Access &	Railways Act 1993, s57F	N/A	The Railway (Licensing of Railway Undertakings) Regulations 2005

<sup>61</sup> Spectrum is regulated through licensing under the WTA06 – only the appeal route is set out in the CA03 (ie decisions are made under the WTA06, an appeal is brought via the appeal provisions in the CA03).”

Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform

		By Concession Agreement (for High Speed 1 only)	Regulations 2005	Management) Regulations 2005 The Railway (Licensing of Railway Undertakings) Regulations 2005 (Licensing – Conditions) Railways (Interoperability) Regulations 2011			(Licensing – Conditions)
<b>CAA</b>	Aviation	CAA Act 2012, s15, s19, s21, s22, s24, s25  Transport Act 2000, s6, s11, s12	CAA Act 2012, mods: s15, s22, s24, s25, sch2 / revocation: s48, sch4 Transport Act 2000, s11, s12	Transport Act 2000 (for NATS), s12	CAA Act 2012 s 31, s33, s40, sch3, s51, s52, sch 5, s86, s87, sch 13 Transport Act 2000 s20, s23 s25, s27, s28	N/A	CAA Act 2012 (Market Power and Operator Power Determinations) s7, s10, sch1
<b>UREGNI</b>	Northern Ireland	Gas (Northern Ireland) Order 1996, Art15  Electricity (Northern Ireland) Order 1992, Art 15  article 19 of The Water and Sewerage Services (Northern Ireland) Order 2006 Art 19, Art 21	Gas (Northern Ireland) Order 1996, Art 8, Art 14, Art18  Electricity (Northern Ireland) Order 1992, Art 10, Art 14  The Water and Sewerage Services (Northern Ireland) Order 2006 Art 21	Water and Sewerage Services (Northern Ireland) Order 2006 (New appointment; & variation to appointment decisions)	Energy (Northern Ireland) Order 2003, Art 42, Art 44, Art 45, Art49  Water & Sewage Servies (NI) Order 2006 Art 30, Art 33, Art 39	Gas (Northern Ireland) Order 1996, Art 27A, Art 24B  Electricity (Northern Ireland) Order 1992, Art 26, Art 31A, Art 47A  Water & Sewerage Services Order 2006, Art61	Competition Act Investigation 1998

**Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform**

	Scotland (water)	The Water Services etc (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005	The Water Services etc (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005				
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## Annex B: Role and Function of Appeal Bodies

### Competition Commission

The Competition Commission (CC) is an independent public body which helps to ensure healthy competition between companies in the UK for the ultimate benefit of consumers and the economy. It conducts in-depth investigations into mergers and markets and also has certain functions with regard to the major regulated industries. The CC does not initiate inquiries independently. All its activities are undertaken following a reference to it by another authority.

The CC also has functions relating to regulated industries. The CC is not a regulator in these cases. It deals only with regulatory matters which are referred to it by other regulators, or the Secretary of State, or on appeal by a person affected by a regulator's decision.

The types of regulatory matters that the CC receives fall into the following broad categories:

- Licence modification references for water and sewerage, rail and air traffic services;
- Appeals against modifications to conditions in gas and electricity licences;
- Non-licensable activities in the gas and electricity sectors;
- Appeals against energy code modifications;
- Appeals against price controls decisions in the postal services, gas and electricity sectors;
- References in relation to designated and non-designated airports;
- Price control references in the water and communications sectors;
- Access charge references in the railways sector;
- References about the regulatory practices of certain bodies.

On 15 March 2012, the Government announced its plans for reform of UK's competition regime. These include creating a new single CMA which combines the Competition Commission (CC), with the competition functions of the OFT. The CMA is being created in statute by the Enterprise and Regulatory Reform Bill. This announcement follows the Government's consultation on A Competition Regime for Growth. The Competition Commission's functions in relation to regulatory appeals will transfer to the CMA.

### Competition Appeal Tribunal

The CAT was created by Section 12 and Schedule 2 to the Enterprise Act 2002 which came into force on 1 April 2003.

The current functions of the CAT are:

To hear appeals on the merits in respect of decisions made under the Competition Act 1998 by the Office of Fair Trading ("OFT") and the regulators in the telecommunications, electricity, gas, water, railways and air traffic services sectors;

- To hear actions for damages and other monetary claims under the Competition Act 1998;
- To review decisions made by the Secretary of State, OFT and the Competition Commission in respect of merger and market references or possible references under the Enterprise Act 2002;
- To hear appeals against certain decisions made by OFCOM and/or the Secretary of State under (1), Part 2 (networks, services and the radio spectrum) and sections 290 to 294 and Schedule 11 (networking arrangements for Channel 3) of the Communications Act 2003 and (2), the Mobile Roaming (European Communities) Regulations 2007 (S.I. 2007 No. 1933).

Cases are heard before the CAT consisting of three members: either the President or a member of the panel of chairmen and two ordinary members. The members of the panel of chairmen are judges of the Chancery Division of the High Court and other senior lawyers. The ordinary members have expertise in law, business, accountancy, economics and other related fields. The CAT's jurisdiction extends to the whole of the United Kingdom.

The Queen's Bench Division has a supervisory jurisdiction over all inferior courts, and its Administrative Court is generally the appropriate legal forum where the validity (but, at least in principle, not the merits) of official decisions may be challenged.

## High Court

The High Court has three divisions: Chancery, Family and Queen's Bench. All three divisions hear appeals from other courts, though for the purposes of this review the most important is the Queen's Bench, which includes the Administrative Court and which hears judicial reviews against regulatory decisions.

### *Queen's Bench Division*

The President of the Queen's Bench Division heads the QBD, which has both a criminal and civil jurisdiction. Cases are heard by the President, and 73 High Court judges. Judges who hear civil cases in the Queen's Bench Division deal with 'common law' business - actions relating to contract, except those specifically allocated to the Chancery Division.

QBD judges also preside over more specialist matters, such as applications for judicial review, through its Administrative Court branch.

### *Administrative Court*

The work of the Administrative Court is varied, consisting of the administrative law jurisdiction of England and Wales as well as a supervisory jurisdiction over inferior courts and tribunals, including regulators.

The supervisory jurisdiction, exercised in the main through the procedure of Judicial Review, covers persons or bodies exercising a public law function - a wide and still growing field. Examples of the types of decision which may fall within the range of Judicial Review include:

- Decisions of regulatory bodies;
- Decisions of local authorities in the exercise of their duties to provide various welfare benefits and special education for children in need of such education;
- Certain decisions of the immigration authorities and Immigration Appellate Authority;

- Decisions relating to prisoner's rights.

### **The High Court of Northern Ireland**

In Northern Ireland, the High Court handles substantial or complex cases. The High Court has three Divisions, each handling different types of work:

- Chancery Division;
- Queen's Bench Division; and
- Family Division.

#### *Queens Bench Division*

The Queen's Bench Division comprises of a number of business areas namely: the Writ, Appeals & Lists Office, Bail Office, Commercial Office, Judicial Reviews Office and HM Court of Appeal Office. Collectively these Offices are referred to as The Central Office.

#### *Judicial Reviews Office*

Judicial Reviews are cases where the Court considers if the decision reached by an inferior court, Tribunal or public body or Government Minister followed the proper procedure. This includes reviews of decisions taken by the economic regulator.

### **The Court of Session**

The Court of Session, Scotland's supreme civil court, sits as a court of first instance and a court of appeal.

The court is divided into the Outer House and the Inner House

The Inner House is in essence the appeal court, though it has a small range of first instance business.

The Outer House consists of 22 Lords Ordinary sitting alone or, in certain cases, with a civil jury. They hear cases at first instance on a wide range of civil matters, including cases based on delict (tort) and contract, commercial cases and judicial review.

In judicial review proceedings, the Court, will examine the way in which the public body has made its decision – it will consider, for example, whether the decision was wrong in law, whether the person making the decision had the power to do so and whether the correct process was followed. The Court will not consider the merits, or substance, of a decision or substitute it with an alternative decision. It may, however, overturn the decision and order the public body to make the decision again.

## Annex C: Chronology of Changes to Appeal Routes<sup>62</sup>

Sector	Original Route	Changed by	New route
<b>Water</b>	<b>Regulator Reference</b> Water Industry Act 1991	Not changed	
<b>Energy</b>	<b>Regulator Reference</b> Gas Act 1986 or Electricity Act 1989	The Electricity and Gas (Internal Markets) Regulations 2011	<b>Direct Appeal</b>
<b>Comms</b>	<b>Regulator Reference</b> (Telecommunications Act 1984)	Communications Act 2003	<b>Direct Appeal</b>
<b>Post</b>	<b>Regulator Reference</b> (Postal Services Act 2000)	Postal Services Act 2011	<b>Direct appeal</b>
<b>Rail</b>	<b>Regulator Reference</b> Railways Act 1993 (as amended)	Appeal route has not changed although other changes have been made	
<b>Aviation</b>	<b>Regulator Reference</b> Airports Act 1986	Civil Aviation Act 2012	<b>Direct Appeal</b>

<sup>62</sup> Some regulators may have direct appeal for some things, regulatory reference for others. E.g. CAA has regulatory reference for NATS (EnRoute) Ltd Licence but direct appeal for airport licences.

## Annex D: Regulatory Appeals in Practice

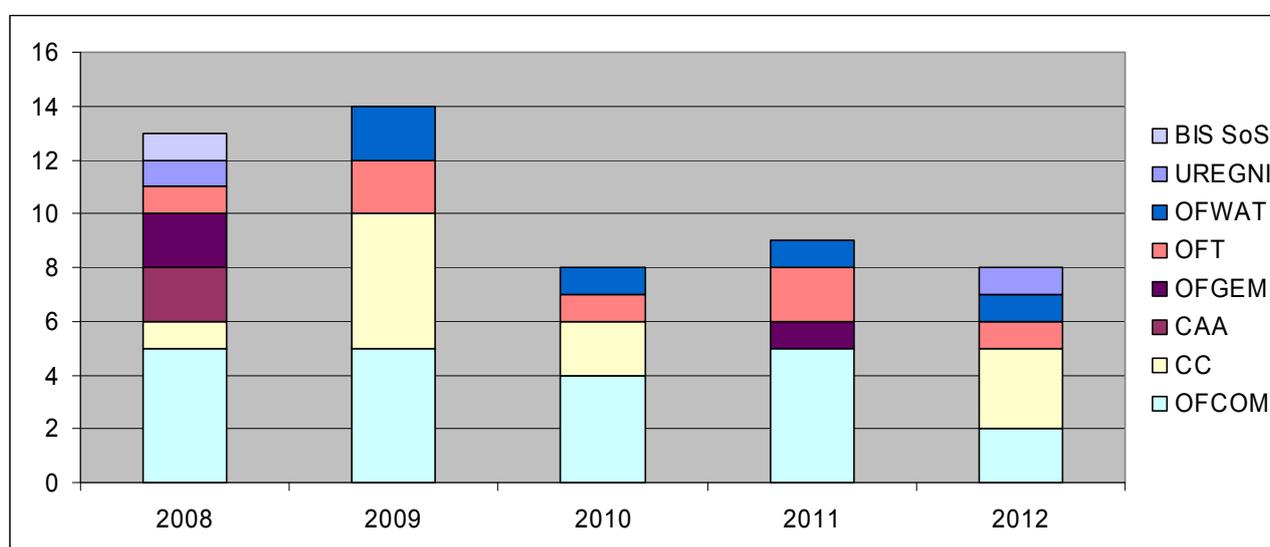
This section gives further evidence regarding the number and length of regulatory appeals.

The analysis presented here is based on information from the regulators, competition authorities and appeal bodies on cases that have taken place over the past five years (2008-2012). Figure 1.13 shows the full list of appeals on which the analysis is based.

### Number and Frequency of Appeals

Figure D1 shows the overall number of appeals by year and by regulator.

**Figure D 1 Number of appeals by year of the first appeal decision and body whose decision was appealed (2008 - 2012)**



Note: A number of Ofcom's and OFT cases in fact comprise two or more appeals by different parties, each with distinct appeals/grounds of appeal which Ofcom and OFT had to address separately, but which are counted as one appeal for the purposes of these statistics since the appeals were heard together by the CAT and were disposed of by a single CAT judgment. The two CAA appeals in 2008 were compulsory references to the CC on price control proposals.

Figure D1 shows that while there have been appeals of decisions from almost all the regulators a significant proportion come from Ofcom. It should also be noted that, in calculating these figures, appeals have been aggregated from different parties where they have been covered by a single judgement from the appeal body. A significant number of the Ofcom appeals are in fact groups of separate appeals – so in this sense Figure 2.1 under-estimates the total number of appeals that have been heard.

There have been fewer appeals per year during 2010, 2011 and 2012 compared with 2008 and 2009, though the sample size is too small to determine whether this is a genuine trend.

### Length of appeals

The standard of review will have a significant impact on the scope of the appeal body to re-examine a decision, the length and cost of an appeal.

Figure 2.4 demonstrates that cases heard on judicial review grounds are resolved quicker than full merits appeals.

**Figure D 2 Average length of CAT cases (2008 - 2012)**

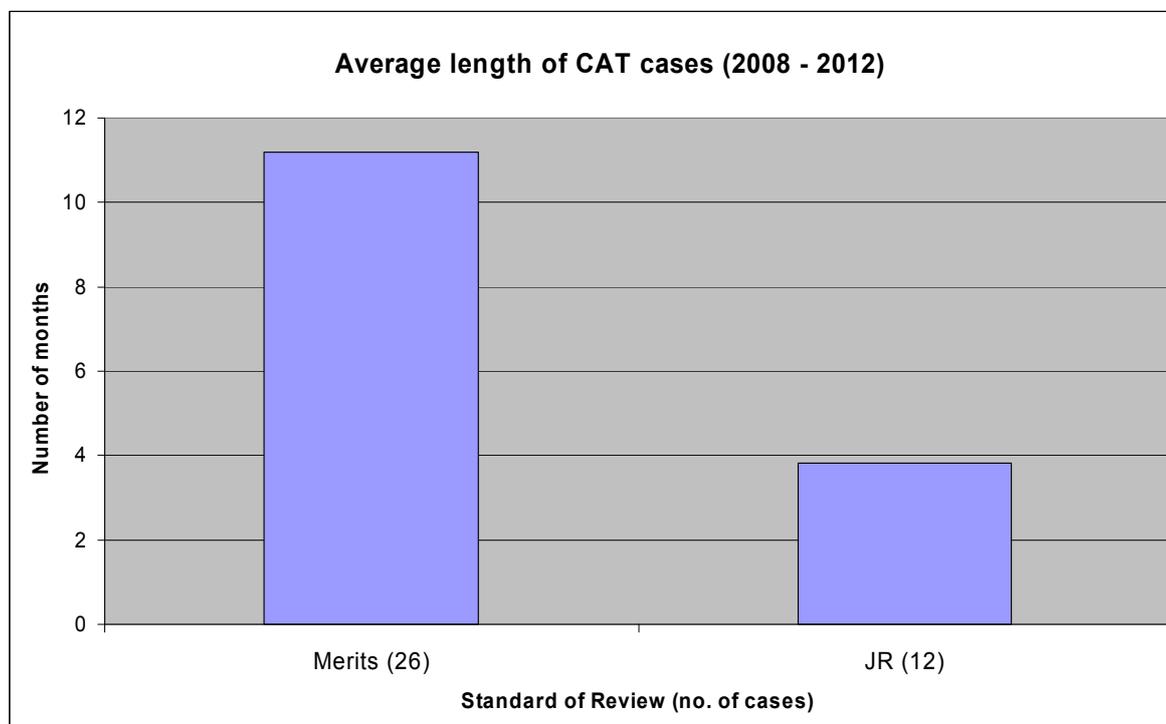


Table D2 shows the average, minimum and maximum length of appeals across all regulators broken down into different categories of decisions, for the period 2008 – 2012.

**Table D2: Average length of CAT cases (2008 – 2012)**

Type (number of cases)	Ave. Time (months)	Max. Time (months)	Min. Time (months)
Overall (48)	9.7	24.8	0.1
Dispute resolution (7)	11.2	16.1	5.6
Ex ante regulation (11)	11.8	24.8	1.2
Ex post competition (6)	13.9	18.2	5.9
Licence modification (2)	4.0	4.5	3.5
mergers & markets JR (13)	4.0	9.4	0.1
Other JRs (4)	11.2	15.2	6.0
Price control (10)	7.85	13.33	5.9

Figure D3 breaks down the average case length into different stages of appeal – from registration to hearing, and from hearing to judgement. The figures relate only to appeals against Ofcom heard at the CAT.

Figure D 3 Length of different stages of appeals to the CAT (2008 - 2011)

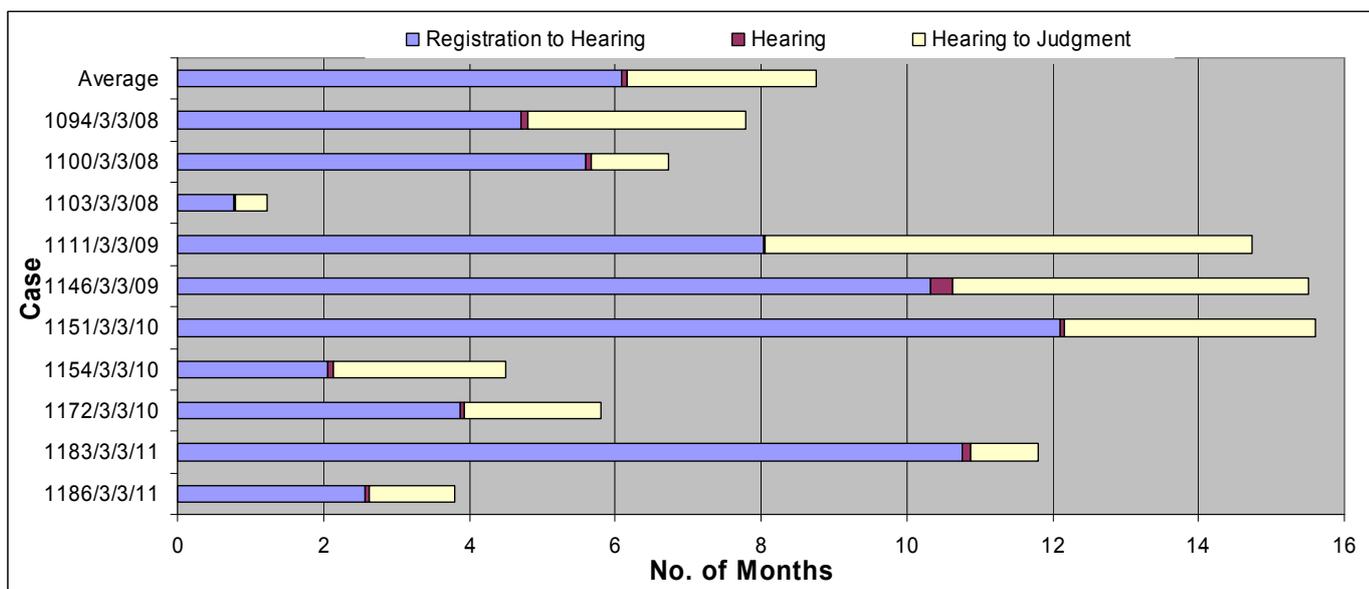


Table D 3 Communications appeals to the CAT (2008 – 2011)

Case	CAT No.
TalkTalk Telecom Group plc - Wholesale Broadband Access Charge Control	1186/3/3/11
Vodafone Limited	1183/3/3/11
British Telecommunications PLC	1172/3/3/10
Telefnica O2 UK Limited	1154/3/3/10
British Telecommunications PLC Termination Charges 080 calls	1151/3/3/10
British-Telecommunications-PLC	1146/3/3/09
The-Carphone-Warehouse-Group-Plc	1111/3/3/09
Telefnica-O2-UK-Limited	1103/3/3/08
The-Number-UK-Limited-and-Conduit-Enterprises-Limited	1100/3/3/08
Vodafone-Limited	1094/3/3/08

Figure D3 indicates the significant variation between communications cases. Typically the time from registration to hearing is longer than between the hearing final judgement.

The figures below attempt to compare timescales in the CAT with those in the High Court. Care needs to be taken with comparisons between regulatory appeals and judicial reviews. There is little similarity between the subjects and in particular regulatory decisions address economic and legal issues, whilst JRs can address a range of issues such as immigration, criminal law and planning decisions. Nevertheless, a comparison provides some indication of how long the High Court might take to make decisions.

Table D4 below sets out the average time taken for a JR to be heard, from lodging of the JR application to final hearing. This is broken down by all cases, then by immigration, infrastructure and planning. These latter three categories are less likely to contain topics with issues similar to regulatory appeals, but provide an indication of how long judicial review cases take in the High Court (Administrative Court).

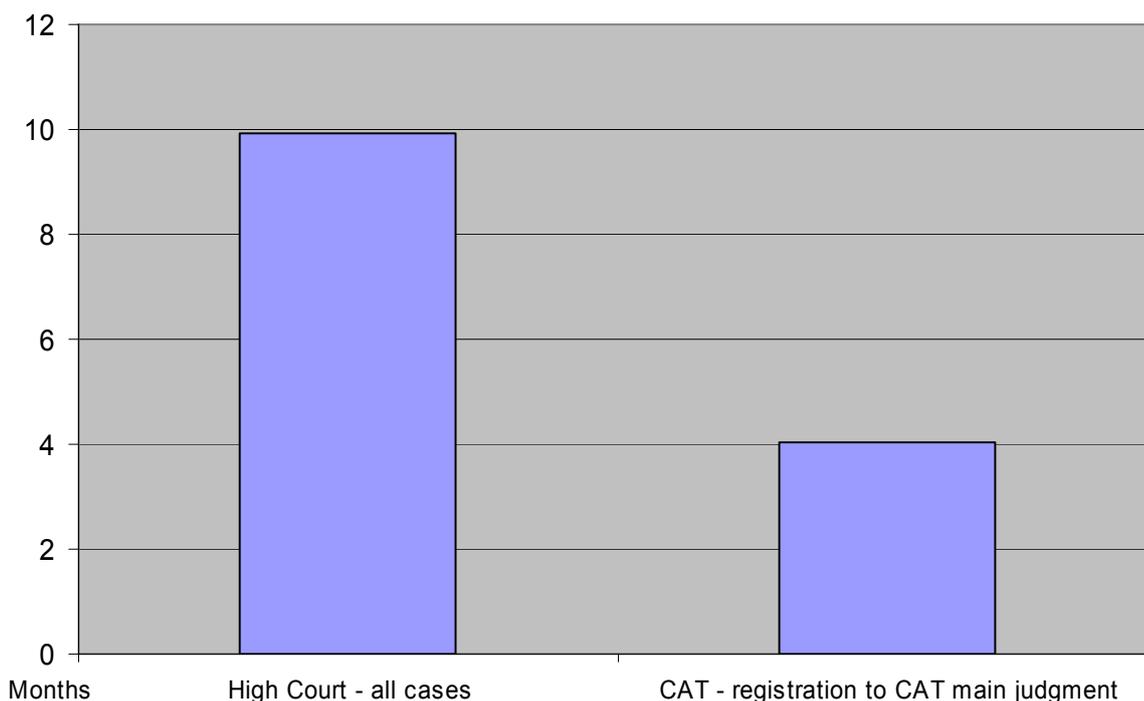
**Table D 4 Judicial Review Hearing Lengths (average number of months)**

Year	2007	2008	2009	2010	2011
All cases	12.7	11.9	11.3	11.2	9.9
Immigration Asylum	16.8	13.6	14.2	13	11.4
Infrastructure	13.2	12.4	10.6	12.2	11.6
Planning	14.4	13.4	9.5	11.9	10.1

In 2011, the average length for immigration, infrastructure and planning JRs were all longer than the overall average. (The average length of a High Court JR in 2011 was 9.9 months.)

Figure D 4 shows how High Court regulatory appeals cases within the BIS dataset compare with Judicial Review cases heard by the CAT. On average, CAT JR cases (as opposed to those heard on the merits) taken only just over four months. This is significantly quicker than High Court JR cases – though as noted above this is far from a perfect comparison, given the different types of case being heard.

**Figure D 4 Length of appeals at the High Court vs CAT (2008 - 2012)**

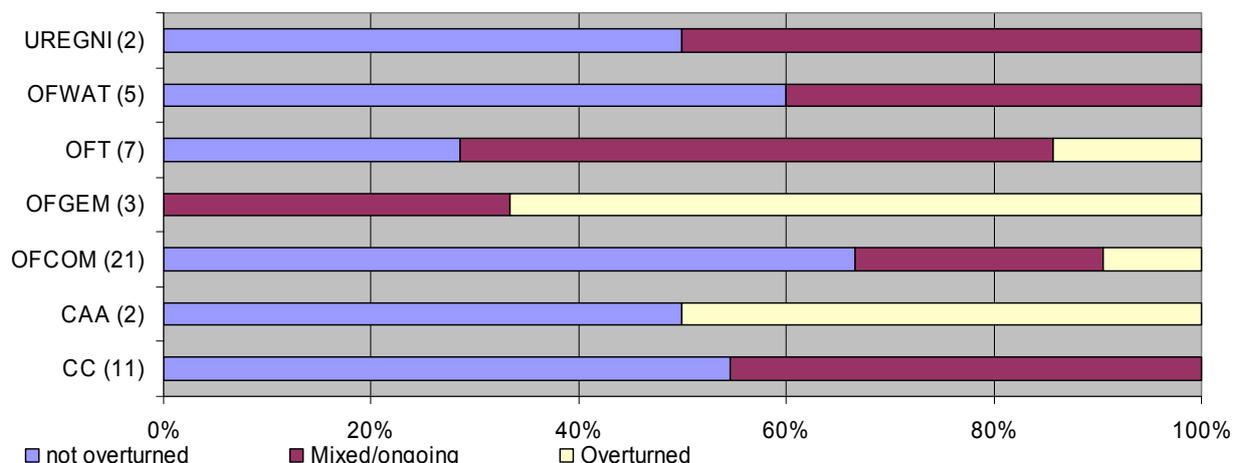


### Outcomes of appeals

This section examines the result of appeals and whether the original decision was overturned or not. A large number of appeals result in a mixed result where part of the decision is overturned and part is upheld. Therefore, categorising these type of decision in one group hides a lot of nuances (such as the number of appeals allowed in part). These decisions are counted in one group for the purposes of these statistics.

Figure D 5 summarises the outcomes of appeals over the past five years, broken down by regulator.

**Figure D 5 Outcome of appeals by regulator (2008 - 2012)**



**Table D 5 Outcome of appeals by regulator (2008 – 2012)**

Appeal Against (no. of appeals)	Not Overturned	Mixed/Ongoing	Overturned
CC (11)	54.55%	45.45%	0.00%
CAA (2)	50.00%	0.00%	50.00%
OFCOM (21)	66.67%	23.81%	9.52%
OFGEM (4)	25.00%	25.00%	50.00%
OFT (7)	28.57%	57.14%	14.29%
OFWAT (5)	60.00%	40.00%	0.00%
UREGNI (2)	50.00%	50.00%	0.00%

Ofcom has had the most decisions appealed in the period 2008 to 2012 but has the highest success rate (66.6%) relative to the rest of the regulators.

Figure D 6 presents outcomes broken down by types of decision appealed.

Figure D 6 Outcome of appeals by type of decision (2008 - 2012)

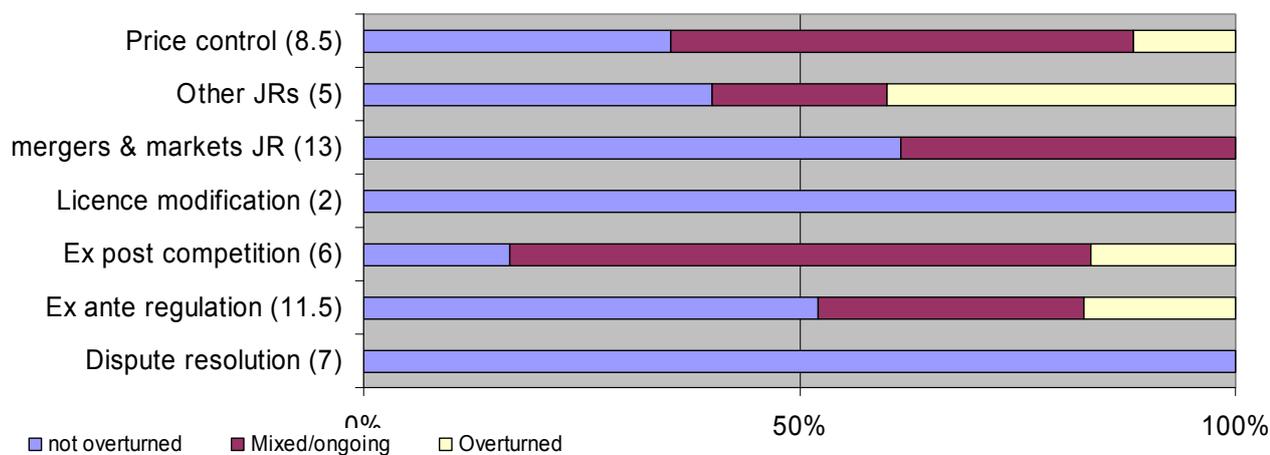


Table D 6 Outcome of appeals by type of decision (2008 – 2012)

Nature of Appeal (no. of appeals)	Not Overturned	Mixed/Ongoing	Overturned
Dispute resolution (7)	100.00%	0.00%	0.00%
Ex ante regulation (11.5)	52.17%	30.43%	17.39%
Ex post competition (6)	16.67%	66.67%	16.67%
Licence modification (2)	100.00%	0.00%	0.00%
mergers & markets JR (13)	61.54%	38.46%	0.00%
Other JRs (5)	40.00%	20.00%	40.00%
Price control (8.5)	35.29%	52.94%	11.76%

## Annex E: Summary of Regulatory Appeals Heard from 2008 to 2012<sup>63</sup>

Appeal against	Body hearing appeal	Appellant(s)/Claimant(s)	Time in months from registration to judgement	Nature of Decision Appealed	Year
BIS SoS	CAT	Merger Action Group	0.4	mergers & markets JR	<b>2008</b>
CAA	CC	Before setting the new price control for Stansted Airport Ltd (STAL), the CAA was required to refer the matter to the CC to investigate and report on.	5.90	Price control	<b>2008</b>
CAA	High Court	EasyJet	13.33	Price control	<b>2008</b>
CC	CAT	British Sky Broadcasting Group plc and Virgin Media Inc	7.33	mergers & markets JR	<b>2008</b>
OFCOM	High Court	Government of Bermuda	3.50	Licence modification	<b>2008</b>
OFCOM	CAT	Telefonica O2 UK Limited	1.23	Ex ante regulation	<b>2008</b>
OFCOM	CAT	The Number (UK) Limited and Conduit Enterprises Limited	6.70	Dispute resolution	<b>2008</b>
OFCOM	High Court	T-Mobile (UK) Limited	n/a	Ex ante regulation	<b>2008</b>
OFCOM	CAT	Vodafone Limited	7.77	Ex ante regulation	<b>2008</b>
OFGEM	CAT	National Grid plc v Gas and Electricity Markets Authority and others 2010 (Court of Appeal) - [2010] EWCA Civ 114	12.43	Ex post competition	<b>2008</b>
OFGEM	High Court	R (on the application of Excelebrate Energy Limited Partnership & Seal Sands Gas Transportation Limited) v Gas and Electricity Markets Authority	n/a	Other JRs	<b>2008</b>
OFGEM	High Court	R (on the application of Teesside Power Ltd and others) v Gas and Electricity Markets Authority [2008] EWHC 1415	9.50	Other JRs	<b>2008</b>

<sup>63</sup> A number of Ofcom's and OFT cases in fact comprise two or more appeals by different parties, each with distinct appeals/grounds of appeal which Ofcom and OFT had to address separately, but which are counted as one appeal for the purposes of these statistics since the appeals were heard together by the CAT and were disposed of by a single CAT judgment.

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		(Admin)			
OFT	High Court	(1) Crest Nicholson PLC v Office of Fair Trading	14.00	Other JRs	<b>2008</b>
UREGNI	High Court	AES Kilroot	6.00	Other JRs	<b>2008</b>
CC	CAT	BAA Limited (with Ryanair Limited intervening)	9.43	mergers & markets JR	<b>2009</b>
CC	CAT	Barclays Bank plc (with Lloyds Banking Group plc and Shop Direct Group Financial Services Ltd intervening in support of Barclays and the FSA intervening in support of the CC)	6.67	mergers & markets JR	<b>2009</b>
CC	CAT	Sports Direct International plc (with the Office of Fair Trading and JJB Stores intervening in support of the CC)	0.83	mergers & markets JR	<b>2009</b>
CC	CAT	Tesco plc (with Asda Stores Limited, Marks and Spencer PLC, Waitrose Limited and The Association of Convenience Stores intervening in support of the CC)	8.17	mergers & markets JR	<b>2009</b>
CC	CAT	Wm Morrison Supermarkets plc	0.07	mergers & markets JR	<b>2009</b>
OFCOM	CAT	British Telecommunications Plc (PPC)	15.43	Dispute resolution	<b>2009</b>
OFCOM	CAT	Cable & Wireless UK & Others	10.50	Dispute resolution	<b>2009</b>
OFCOM	CAT	Cable & Wireless UK (Leased Lines)	12.77	price control / Ex ante regulation	<b>2009</b>
OFCOM	CAT	The Carphone Warehouse Group Plc (LLU)	14.70	price control / Ex ante regulation	<b>2009</b>
OFCOM	CAT	The Carphone Warehouse Group Plc (WLR)	9.70	price control / Ex ante regulation	<b>2009</b>
OFT	CAT	(1) Eden Brown Limited v Office of Fair Trading (2) (1) CDI Anders Elite Limited (2) CDI Corp v Office of Fair Trading (3) (1) Hays PLC (2) Hays Specialist Recruitment Limited (3) Hays Specialist Recruitment (Holdings) Limited v Office of Fair Trading	16.23	Ex post competition	<b>2009</b>
OFT	CAT	(1) Kier Group plc (2) Kier Regional Limited v Office of Fair	16.20	Ex post competition	<b>2009</b>

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		Trading (2) Corringway Conclusions PLC (in liquidation) v Office of Fair Trading (3) Ballast Nedam N.V. v Office of Fair Trading (4) (1) John Sisk & Son Limited (2) Sicon Limited v Office of Fa			
OFWAT	CC	Sutton & East Surrey Water	6.00	Price control	<b>2009</b>
OFWAT	High Court	Welsh Water	13.00	Ex ante regulation	<b>2009</b>
CC	CAT	CTS Eventim AG (with Live Nation intervening in support of the CC)	0.77	mergers & markets JR	<b>2010</b>
CC	CAT	Stagecoach Group plc	5.47	mergers & markets JR	<b>2010</b>
OFCOM	CAT	British Telecommunications Plc (080)	16.07	Dispute resolution	<b>2010</b>
OFCOM	CAT	British Telecommunications plc (Ethernet)	5.63	Dispute resolution	<b>2010</b>
OFCOM	CAT	Everything Everywhere Limited (Stour Marine)	12.17	Dispute resolution	<b>2010</b>
OFCOM	CAT	Telefónica O2 UK Limited (900MHz)	4.47	Licence modification	<b>2010</b>
OFT	CAT	(1) (1) Imperial Tobacco Group plc (2) Imperial Tobacco Limited v Office of Fair Trading (2) Co-operative Group Limited v Office of Fair Trading (3)Wm Morrison Supermarkets PLC v Office of Fair Trading (4) (1) Safeway Stores Limited (2) Safeway Limited v	18.17	Ex post competition	<b>2010</b>
OFWAT	CC	Bristol Water	6.00	Price control	<b>2010</b>
OFGEM	Court of Appeal (on appeal from the Admin Court)	R (on the application of Infnis plc and Infnis (Re-gen) Limited) v Gas and Electricity Markets Authority CO/7013/2010; [2011] EWHC 1873 (Admin)	15.17	Other JRs	<b>2010</b>
OFCOM	CAT	British Sky Broadcasting Limited (Conditional access modules)	24.80	Ex ante regulation	<b>2011</b>
OFCOM	CAT	British Telecommunications plc (WBA)	8.87	price control / Ex ante regulation	<b>2011</b>
OFCOM	CAT	Talk Talk (WBA)	3.77	Ex ante regulation	<b>2011</b>

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OFCOM	CAT	Telefonica 02 UK Limited (Flip Flop)	11.70	Dispute resolution	<b>2011</b>
OFCOM	CAT	Vodafone Limited (MCT)	11.77	price control / Ex ante regulation	<b>2011</b>
OFT	CAT	(1) (1) Tesco Stores Ltd (2) Tesco Holdings Ltd (3) Tesco Plc v Office of Fair Trading	14.57	Ex post competition	<b>2011</b>
OFT	CAT	(1) Ryanair Holdings plc v Office of Fair Trading	6.73	mergers & markets JR	<b>2011</b>
OFWAT	High Court	Thames Water	21.00	Ex ante regulation	<b>2011</b>
CC	CAT	BAA Limited (with Ryanair Limited intervening)	4.60	mergers & markets JR	<b>2012</b>
CC	CAT	Ryanair	0.87	mergers & markets JR	<b>2012</b>
CC	CAT	SRCL Limited	1.20	mergers & markets JR	<b>2012</b>
OFCOM	CAT	British Sky Broadcasting Limited /TalkTalk (LLU)	n/a	price control / Ex ante regulation	<b>2012</b>
OFCOM	CAT	British Telecommunications plc (LLU)	n/a	price control / Ex ante regulation	<b>2012</b>
OFT	CAT	(1) (1)Association of Convenience Stores and (2) National Federation of Retail Newsagents v Office of Fair Trading	5.87	Ex post competition	<b>2012</b>
OFWAT	high Court	Albion Water (Shotton case)	Mixed	Ex ante regulation	<b>2012</b>
UREGNI	CC	Phoenix Natural Gas Ltd	8	Price control	<b>2012</b>

## Annex E: Case Studies

This section summarises some specific examples of recent regulatory and competition appeals.

### Case Study 1 – G F Tomlinson 1117/1/1/09 – OFT competition decision

On 21 September 2009, the OFT found that 103 construction firms had been guilty of a type of bid rigging known as cover pricing in the period 2000 to 2006. The OFT imposed substantial fines on the firms involved.

**18 November 2009:** G F Tomlinson appealed against the OFT's decision. In total, there were admissible appeals by 25 companies, six challenging both liability and penalty and the remainder challenging penalty alone.

**25 January 2010:** The CAT issued an order explaining how it would manage the appeals effectively and the timetable by which it would do so.

**Summer 2010:** The CAT heard separate oral hearings for each appeal, with a number of cases grouped together. The hearing in G F Tomlinson took place on the 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> July 2010. The appeals were heard on the merits, with new evidence and oral evidence from witnesses.

**24 March 2011:** The CAT's judgment was given, which resulted in substantial reductions in the level of fines imposed. The CAT said that its judgment should not be interpreted as indicating that it considered cover pricing to be anything less than a serious infringement of the competition rules.

Total length of appeal: 1 year, 4 months, 6 days

Total length of appeal from hearing to judgment: 8 months, 18 days

(For G F Tomlinson only)

### Case Study 2 – National Grid 1099/1/2/08 – Ofgem competition decision

**21 February 2008:** Ofgem announced their decision that National Grid had abused its dominant position in the market for the provision of domestic-sized gas meters by entering into long-term contracts (known as the Legacy MSAs and New and Replacement MSAs) which locked suppliers into National Grid for a significant share of their gas meter requirements and restricted the development of competition.

**21 April 2008:** National Grid appealed Ofgem's decision.

**15 to 28 January 2009:** The CAT held hearings conducted as a merits review with oral and expert witness evidence.

**29 April 2009:** The CAT upheld the Authority's finding of abuse of dominant position (in respect of the long-term contracts known as the Legacy MSAs) but reduced the amount of the penalty. On 23 July 2009 the Tribunal handed down a ruling on costs.

On 23 February 2010, the Court of Appeal dismissed an appeal by National Grid against the Tribunal's decision on abuse. It allowed the appeal against penalty and varied the Tribunal's decision to the extent of substituting a fine of £15 million for the Tribunal's figure of £30 million.

**28 July 2010:** The Supreme Court refused National Grid leave to appeal the Court of Appeal's decision, bringing the legal proceedings to a final conclusion.

Total length of appeal: 2 year, 3 months

Total length of appeal (from hearing to judgment): 3 months, 14 day

### **Case Study 3 –Case 1102/3/3/08 – Ofcom Communications Act 2003 decision on 2.6GHz Spectrum Auction**

**16 May 2008:** O2 and T-Mobile appealed Ofcom's decision to proceed with an auction of 2.6GHz spectrum.

**26 June 2008:** Hearing in CAT on preliminary issues on jurisdiction.

**10 July 2008:** the Tribunal handed down its Judgment on preliminary issues (that it did not have jurisdiction to hear this appeal). T-Mobile also commenced proceedings in the High Court on a precautionary basis at the same time.

**3 September 2008:** the Tribunal refused O2's and T-Mobile's permission to appeal. The Tribunal decided that the most appropriate course would be for the parties to seek permission from the Court of Appeal.

**12 December 2008:** the Court of Appeal (having granted permission and expedited the hearing) upheld the CAT's decision, finding that the challenge must proceed by way of Judicial Review in the High Court.

**12 January 2009:** O2 applied for permission to appeal to the House of Lords.

**11 February 2009:** Permission to appeal was refused.

OFCOM argues that they could have undertaken the auction much sooner, were it not for the threat of litigation from the telecoms providers. OFCOM announced in December 2006 its award plans for the 2010 MHz and 2.6MHz bands. The estimated date for the completion of the auction was the end of 2007 (OFCOM 2006, p. 11). Following further consultation stages, OFCOM received substantial opposition to their award plans from the major telecoms providers and announced a new timetable for the auction to take place in September 2008 for the auction (OFCOM 2008, p.191, p.3). Due to this litigation, the auction was delayed. However, due to government intentions for the double award (see next 4G case) this auction decision was later withdrawn before the substantive judicial review was heard in the High Court.

Total length of appeal: 8 months, 26 days on preliminary issues

Total length of appeal (from hearing to judgment): 14 days in CAT

### **Case Study 4 – Local Loop Unbundling – Ofcom price control decision 2009**

**22 May 2009** Ofcom set out its decision on what the price controls should be relating to local loop unbundling and wholesale line rental in the telecoms market until March 2011 (local loop unbundling makes BT cables which run from a customer's property to the exchange available for others to use).

**27 July 2009** Carphone Warehouse appealed Ofcom decision.

**2 November 2009** Hearing took place.

**26 March 2010** CAT made a judgement on the 'non price control matters'.

**31 August 2010** Competition Commission made a judgement on the 'price control matters'.

**11 October 2010** CAT made a final judgement which found Ofcom had made certain errors, and remitted (or sent) the decision back to Ofcom. Ofcom adopted the CAT's judgement immediately so it could be implemented for the remainder of the price control period – until March 2011.

Total length of appeal: 1 year, 4 months, 14 days

Total length of appeal from hearing to judgment: 11 months, 9 days

### **Case Study 5 – Cases 1046/2/4/04 and 1166/5/7/10 – Albion Water Competition Act 1998 appeals**

#### Albion Water Case 1046/2/4/04

The Albion case is an appeal by Albion Water against Ofwat's May 2004 decision that Dwr Cymru's (Welsh Water hereafter) common carriage charges for conveying water to the Shotton Paper site were not abusive. The Tribunal has found that Dŵr Cymru abused its dominant position by offering an access price for common carriage of non-potable water via the Ashgrove system<sup>64</sup> which imposed a margin squeeze and was excessive and unfair in itself.

**23 July 2004:** Albion appealed Ofwat's 27 March 2004 decision to the CAT.

**9, 10 & 11 May 2005:** First substantive hearing.

**22 December 2005:** Interim Judgment.

**30 & 31 May, 1, 5, 6 & 7 June 2006:** Second substantive hearing.

**6 October 2006:** Main Judgment (disagreed with Ofwat's 2004 decision).

**18 December 2006:** Judgment (Dominance and other issues).

**2 February 2007:** CAT refused permission for Dŵr Cymru to appeal the judgement of 6<sup>th</sup> October and 18<sup>th</sup> December 2006.

Following a judgement on costs on the 8<sup>th</sup> of January 2007, Dŵr Cymru asked for permission to appeal to the Court of Appeal. The Tribunal refused this request. The Tribunal held that the appeal had no real prospect of success, and that it was premature as regards excessive pricing issues, given that Ofwat is due to report to the Tribunal on its further investigation of these issues by Monday 18<sup>th</sup> June 2007.

**26 July 2007:** the Court of Appeal granted permission to Dŵr Cymru to appeal based on limited scope. The scope of the appeal is limited to two questions; did the Tribunal apply the wrong test for a margin squeeze abuse? And did the Tribunal have jurisdiction to decide that Welsh Water held a relevant dominant position? This appeal failed on 22<sup>nd</sup> May 2008.

**7 November 2008:** Following Court of Appeal judgement, the Tribunal found that the First Access Price charged by Dŵr Cymru was unfair and therefore an abuse of Dŵr Cymru dominant position.

**9 April 2009:** Judgement on costs was handed down.

Total length of appeal: 4 years, 8 months, 10 days

Total length of appeal from hearing to judgment: 1 year, 4 months, 6 days

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<sup>64</sup> Welsh Water system that delivers water to Shotton Paper Mill

When analysing the appeal process for **CASE 1046/2/4/04**, it is clear that the parties pursued court actions simultaneously to the proceedings by the Tribunal. The diagram below illustrates his point. A case management conference took place on 23 October 2007. The parties indicated that they were content for the Tribunal to proceed to determine the unfair pricing issue pending judgment by the Court of Appeal in *Dŵr Cymru v Albion Water Limited*. The Court of Appeal made its decision on May 2008. During this time, in a period of two months, the Tribunal heard and then handed down its judgment on disclosure of documents. Prior the Court of Appeal Judgement, the tribunal heard the case on Unfair Pricing, and following the Court of Appeal of decision, handed down its Judgment on November 2008. It is clear therefore, that the Tribunal was constrained by the length of time it would take Court of Appeal to make its decision. The Tribunal's decision to hear cases simultaneously to the Court of Appeal was intended to speed the process as the Chairman of the Tribunal often site their concerns about the length of time spend on this case.

#### Albion Water Case 1166/5/7/10

Notice of claim for damages under section 47A Competition Act 1998 published on 2 July 2010. A hearing took place on 26 November 2010 to consider an application by the Defendant to strike out part of the claim pursuant to rule 40 of the Tribunal Rules

**8 December 2010** Dŵr Cymru appealed to strike out the Particulars of Claim lodged on June 2010 by Albion. Albion sought to claim damages worth over £14 million. The Tribunal judgment struck out the claims relation to compensation/restitution (worth £4 million) but maintained all other Albion claims.

**21 February 2011** Dŵr Cymru appealed to remove almost all of Albion's claim. The Tribunal rejected this claim. Dŵr Cymru proposes to strike out Albion's claim for restitution costs alternative or in addition to their claim for compensatory manages. The tribunal rejected this on the grounds that it did not hear arguments in the course of Rule 40 Judgement on the extent to which the sums claimed as compensatory damages by Albion can also be claimed in restitution.

**9 June 2011** Albion applied for permission to amend the Particulars of Claim. Dŵr Cymru opposed those amendments and put in a counter-application to strike out compensatory damages. CAT rejected Dŵr Cymru's application to strike out Albion's amendments.

December 2011 Dŵr Cymru successfully challenged certain passages of the Amended Particulars of Claim. A ruling on Costs was handed down 23rd April 2012.

**22 June 2012** the Tribunal ordered Albion Water to serve a draft Re-amended Particulars of Claim on Dŵr Cymru. Some of those proposed amendments are now contested by Dŵr Cymru.

**25 September 2012** a reasoned order was made deciding the Dŵr Cymru application to admit further witness evidence in response to the Albion's reply witness evidence. The main hearing took place between 15 and 26 October 2012. The parties' closing submissions were heard on 5 and 6 November 2012.

**28 March 2013** Final judgment is handed down.

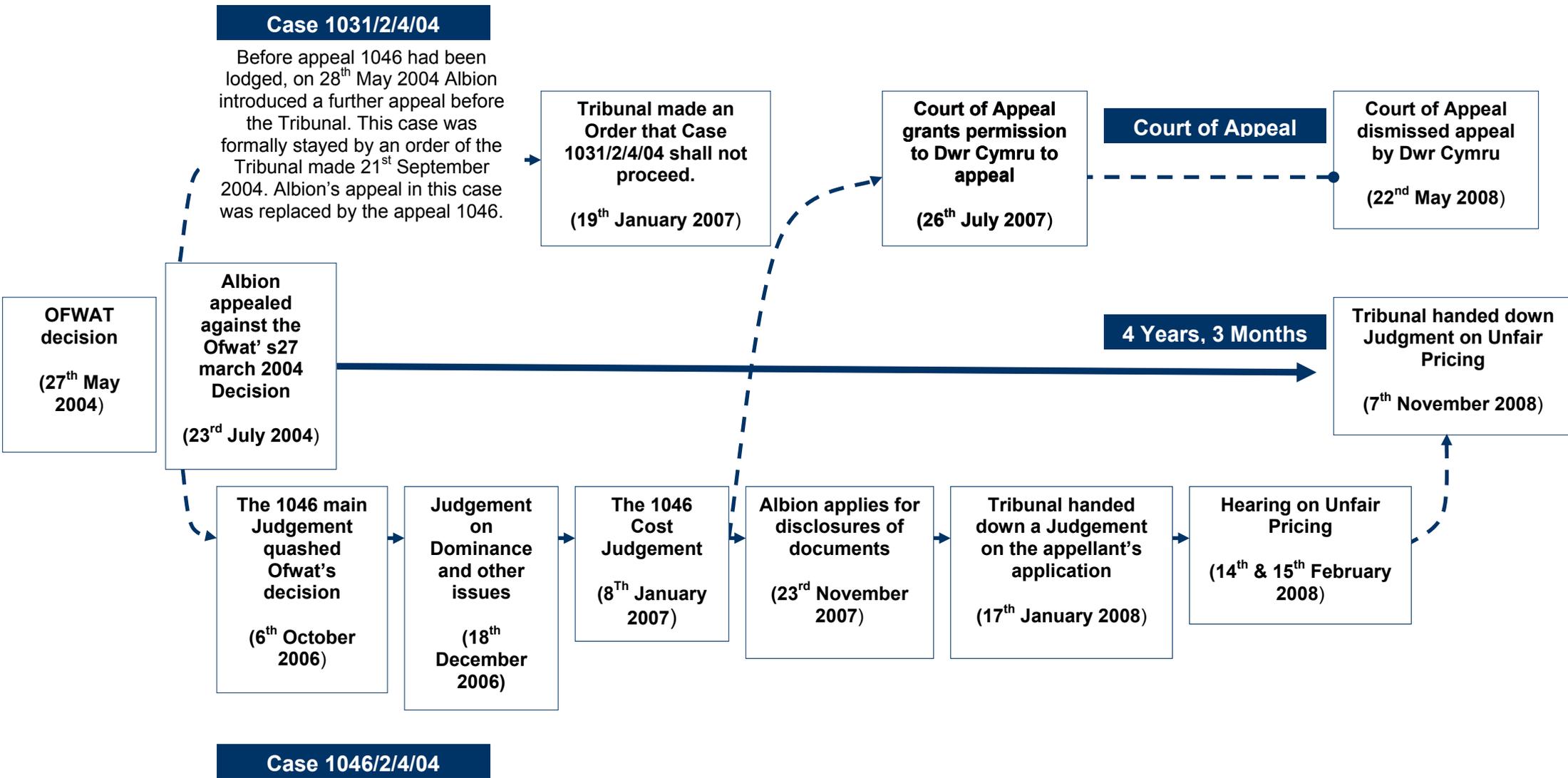
The Tribunal of Appeal noted that: "*We conclude with a few more general observations on the proceedings before the Tribunal in this case. We recognise that the subject-matter is highly complex and that the merit jurisdiction of the tribunal may call for extensive factual investigation in the course of appeals before it, all of which may contribute to the length of its proceedings and of its judgements. We are, however, concerned at the number of separate judgements in the case, the length of those judgments, the extent to which the sequential approach gave rise to duplication (which has made it*

*more difficult for us to digest and analyse the Tribunal’s reasoning for the purpose of this appeal), and the protracted nature of the proceedings overall [...]”<sup>65</sup> (EWCA Civ 536 par 130).*

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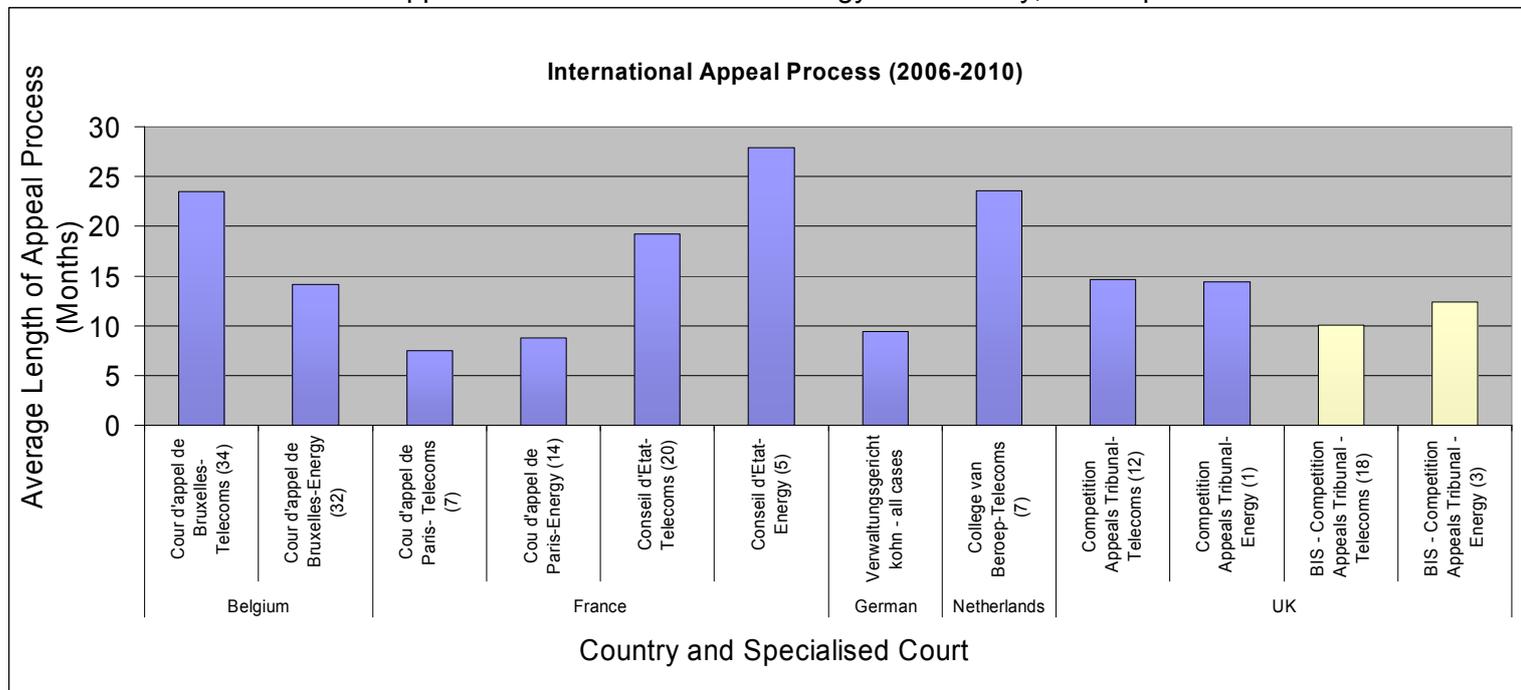
<sup>65</sup> <http://www.catribunal.org.uk/237-6629/1166-5-7-10-Albion-Water-Limited.html>

# Map of Albion Case (2004-2008)



## Annex F: International Evidence

The data shown is for appeals in the Telecoms and Energy sectors only, for the period of 2006-2010.



This data is taken from Centre on Regulation in Europe (CERRE) <sup>66</sup>

Country	Court	Average Length of Appeal Process (2006-2010)
Belgium	Cour d'appel de Bruxelles- Telecoms (34)	23.5 months
	Cour d'appel de Bruxelles-Energy (32)	14.133 months
France	Cou d'appel de Paris- Telecoms (7)	7.467 months
	Cou d'appel de Paris-Energy (14)	8.8 months
	Conseil d'Etat- Telecoms (20)	19.23 months
	Conseil d'Etat- Energy (5)	27.87 months
German	Verwaltungsgericht koln - all cases heard in 2009	9.4 months
Netherlands	College van Beroep- Telecoms (7)	23.6 months
UK	Competition Appeals Tribunal- Telecoms (12)	14.67 months
	Competition Appeals Tribunal- Energy (1)	14.43 months
	BIS - Competition Appeals Tribunal - Telecoms (18)	10.09 months
	BIS - Competition Appeals Tribunal - Energy (3)	12.37 months

<sup>66</sup> Larouche, P., Taton, X., Enforcement and judicial review of decisions of NRAs, CERRE, 2011, p107 [http://www.cerre.eu/sites/default/files/110421\\_CERRE\\_Study\\_EnforcementAndJudicialReview\\_0.pdf](http://www.cerre.eu/sites/default/files/110421_CERRE_Study_EnforcementAndJudicialReview_0.pdf)

## **Annex G: New Proposed Appeal Routes**

- A) Moving all ex-post enforcement, ex-ante regulation and dispute resolution cases to the CAT**
- B) Moving all ex-post enforcement and dispute resolution to the High Court**

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A)

	Licence Mods, Price Controls or Access Charge Control	Enforcement Decisions	Regulatory Decisions*	Competition Decisions	Dispute Resolution
CAT		OFCOM Ex-post Enforcement (CA03), Appeal on Merits	OFCOM Ex-ante Regulation (CA03), Appeal on Merits	All Regulators, Ex-post Competition (CAA12), Appeal on Merits	OFCOM Telecoms Dispute Resolution (CA03), Appeal on Merits
		OFCOM Ex-post Enforcement (PSA110, PSA11), Judicial Review	OFCOM Ex-ante Regulation (PSA11), Judicial Review		UREGNI Dispute Resolution (ENIO92, GNIO96, WSS(NI)006), Judicial Review
		OFGEM Ex-post Enforcement (EA10), Merits	CAA Market Review & Revoke Licence (CAA12), Appeal on Merits		OFGEM Dispute Resolution (EA89), Judicial Review
		CAA Ex-post Enforcement (CAA12), Appeal on Merits	OFGEM Ex-ante Regulation (EA04 & EA89) Merits		
		OFWAT Ex-post Enforcement (WIA91), Judicial Review	OFWAT Ex-ante Regulation (WIA91), Judicial Review		
		OFGEM Ex-post Enforcement (EA98), Judicial Review	ORR Ex-ante Regulation (RA93, TA00, RA05, RIR05, RR05, RR11), Judicial Review		
		UREGNI Ex-post Enforcement (ENIO03), Judicial Review			
	ORR Ex-post Regulation (RA93), Judicial Review				
Competition Commission	OFCOM Telecoms Price Control (CA03), Appeal on Merits				
	OFCOM Postal Price Control (PSA11), Appeal on Material Error				
	CAA Price Control & Licence Mod (CAA12), Appeal on Merits				
	UREGNI Price Control & Licence Mod (ENIO92 & GNIO96), Ref. on Merits				
	ORR Price Control & Licence Mod (RA93), Reference on Merits				
	OFWAT Price Control & Licence Mod (WIA91), Reference on Merits				
High Court**	OFGEM Price Control & Licence Mod (EA89, GA86, EA04), Appeal on Merits				
	UREGNI Licence Grant or Extension (ENIO92 & GNIO96), JR		UREGNI Ex-ante & Ex-post Enforcement (PSA11) not covered elsewhere, Judicial Review	All Regulators, Enterprise Act 02, referrals to CC (this refers to appeals against CC's determinations in regulatory references), Judicial Review	
	ORR Price Control HS1 (Concession Agreement), Judicial Review				

● Energy   
 ● NI Utilities   
 ● Water   
 ● Comms   
 ● Post   
 ● Rail   
 ● Aviation

\* ex-ante and ex-post regulatory decisions, & market review

\*\*High Court of England and Wales, Court of Session, or High Court of Northern Ireland

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B)

	Licence Mods, Price Controls or Access Charge Control	Enforcement Decisions	Regulatory Decisions*	Competition Decisions	Dispute Resolution
CAT			OFCOM Ex-ante Regulation (CA03), Appeal on Merits OFCOM Ex-ante Regulation (PSA11), Judicial Review CAA Market Review & Revoke Licence (CAA12), Appeal on Merits OFGEM Ex-ante Regulation (EA04 & EA89) Merits	All Regulators, Ex-post Competition (CAA12), Appeal on Merits	
Competition Commission	OFCOM Telecoms Price Control (CA03), Appeal on Merits OFCOM Postal Price Control (PSA11), Appeal on Material Error CAA Price Control & Licence Mod (CAA12), Appeal on Merits UREGNI Price Control & Licence Mod (ENIO92 & GNIO96), Ref. on Merits ORR Price Control & Licence Mod (RA93), Reference on Merits OFWAT Price Control & Licence Mod (WIA91), Reference on Merits OFGEM Price Control & Licence Mod (EA89, GA86, EA04), Appeal on Merits				
High Court**	UREGNI Licence Grant or Extension (ENIO92 & GNIO96), JR ORR Price Control HS1 (Concession Agreement), Judicial Review	OFCOM Ex-post Enforcement (CA03), Appeal on Merits OFCOM Ex-post Enforcement (PSA110, PSA11), Judicial Review OFGEM Ex-post Enforcement (EA10), Merits CAA Ex-post Enforcement (CAA12), Appeal on Merits OFWAT Ex-post Enforcement (WIA91), Judicial Review OFGEM Ex-post Enforcement (EA98), Judicial Review UREGNI Ex-post Enforcement (ENIO03), Judicial Review ORR Ex-post Regulation (RA93), Judicial Review	UREGNI Ex-ante & Ex-post Enforcement (PSA11) not covered elsewhere, Judicial Review OFWAT Ex-ante Regulation (WIA91), Judicial Review ORR Ex-ante Regulation (RA93, TA00, RA05, RIR05, RR05, RR11), Judicial Review	All Regulators, Enterprise Act 02, referrals to CC (this refers to appeals against CC's determinations in regulatory references), Judicial Review	OFCOM Telecoms Dispute Resolution (CA03), Appeal on Merits UREGNI Dispute Resolution (ENIO92, GNIO96, WSS(NI)006), Judicial Review OFGEM Dispute Resolution (EA89), Judicial Review

● Energy   
 ● NI Utilities   
 ● Water   
 ● Comms   
 ● Post   
 ● Rail   
 ● Aviation

\* ex-ante and ex-post regulatory decisions, & market review

\*\*High Court of England and Wales, Court of Session, or High Court of Northern Ireland

## Annex H: Details of Hearing Body and Standard of Review by Sector

### UREGNI APPEALS: STANDARDS AND GROUNDS

#### Statutory Framework:

Gas (Northern Ireland) Order 1996

Electricity (Northern Ireland) Order 1992

Water & Sewerage Service (Northern Ireland) Order 2006

Energy (Northern Ireland) Order 2003 [En(NI)O03]

	LICENCE MODIFICATION INCLUDING PRICE CONTROL	LICENCE GRANT OR EXTENSION	DISPUTE RESOLUTION	FINANCIAL PENALTIES
<b>Appeal Body</b>	Competition Commission	High Court	High Court	High Court
<b>Grounds of Appeal</b>	<p><u>G(NI)O96, Art 15</u> <u>E(NI)O92, Art 15</u></p> <p>15.—(1) The Director may make to the Competition Commission a reference which is so framed as to require the Commission to investigate and report on the questions—</p> <p>(a) whether any matters which—</p> <p>(i) relate to the carrying on of activities authorised or regulated by a particular licence; and</p> <p>(ii) are specified in the reference, . . . operate, or may be expected to operate, against the public interest; and</p> <p>(b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications of the conditions of the licence.</p>	<p><u>G(NI)O96, Art 8</u> <u>E(NI)O92, Art 10</u></p> <p>G(NI)O96, Art 8</p> <p>No statutory appeal exists although judicial review is available.</p>	<p><u>E(NI)O92, s31A</u> <u>G(NI)O96, Art 31, 26, 42</u> <u>WSS(NI)O06, s61</u></p> <p>E(NI)O92,</p> <p>31A (1) Any person may make a complaint under this article (hereinafter referred to as “a complaint” if-</p> <p>(a) The subject matter of the complaint constitutes a dispute between the complainant and-</p> <p>(i) the holder of a transmission licence;</p> <p>(ii) the holder of a distribution licence; or</p> <p>(iii) a distribution exemption holder;</p> <p>it is wholly or mainly a complaint against that holder regarding an obligation imposed upon him</p>	<p><u>En(NI)O03 Art 49</u></p> <p>—(1) If the regulated person on whom a penalty is imposed is aggrieved by—</p> <p>(a) the imposition of the penalty;</p> <p>(b) the amount of the penalty; or</p> <p>(c) the date by which the penalty is required to be paid, or the different dates by which different portions of the penalty are required to be paid the regulated person may make an application to the High Court under this Article.</p>

			<p>pursuant to the Directive {Directive 2009/72/EC concerning common rules for the internal market in electricity}; and</p> <p>(b) the subject matter of the complaint-</p> <p>(i) does not fall to be dealt with under article 26 or Article 42A; and</p> <p>(ii) is not capable of being determined pursuant to any other provision of this Order.</p> <p>(2) A complaint shall be made in writing to the Authority and shall be accompanied by such information as is necessary or expedient to allow the authority to make a determination in relation the complaint.</p> <p>26</p> <p>(1) A dispute arising under Articles 19 to 25 between an electricity distributor and a person requiring a connection.</p> <p>(a) may be referred to the Authority by either party, and such a reference shall be accompanied by such information as is necessary or expedient to allow a determination to be made in relation to the dispute; and</p> <p>(b) on such a reference, shall be determined by order made either by the Authority or, if the Authority thinks fit, by an arbitrator appointed by the Authority...</p> <p>(7) An order under this Article...</p> <p>(b) shall be final and shall be enforceable, in so far as it includes such provision as to costs or expenses, as if it were a judgment of the county court.</p>	<p>(3) On any such application, where the court considers it appropriate to do so in all the circumstances of the case and is satisfied of one or more of the grounds falling within paragraph (4), the court—</p> <p>(a) may quash the penalty;</p> <p>(b) may substitute a penalty of such lesser amount as the court considers appropriate in all the circumstances of the case; or</p> <p>(c) in the case of an application under paragraph (1)(c), may substitute for the date or dates imposed by the Authority an alternative date or dates.</p> <p>(4) The grounds falling within this paragraph are—</p> <p>(a) that the imposition of the penalty was not within the power of the Authority under Article 45;</p> <p>(b) that any of the requirements of paragraphs (4) to (6) or (8) of Article 45 have not been complied with in relation to the imposition of the penalty and the interests of the licence holder have been substantially prejudiced by the non-compliance; or</p> <p>(c) that it was unreasonable of</p>
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			<p>42</p> <p>(c) (1) Regulations may, after consultation with public electricity suppliers and with persons or bodies appearing to the Director to be representative of persons likely to be affected, prescribe such standards of performance in connection with the provision by such suppliers of electricity supply services to tariff customers as, in the opinion of the Director, ought to be achieved in individual cases.</p> <p>(d) (2) Regulations under this Article may—</p> <p>(e) (a) prescribe circumstances in which public electricity suppliers are to inform persons of their rights under this Article;</p> <p>(f) (b) prescribe such standards of performance in relation to any duty arising under sub-paragraph (a) as, in the Director’s opinion, ought to be achieved in all cases; and</p> <p>(g) (c) prescribe circumstances in which public electricity suppliers are to be exempted from any requirements of the regulations or this Article.</p> <p>(h) (3) If a public electricity supplier fails to meet a prescribed standard, he shall make to any person who is affected by the failure and is of a prescribed description such compensation as may be determined by or under the regulations.</p> <p>(i) (4) The making of compensation under this Article in respect of any failure by a public electricity supplier to meet a prescribed standard shall not prejudice any other remedy which may be available in respect of the act or omission which constituted that</p>	<p>the Authority to require the penalty imposed, or any portion of it, to be paid by the date or dates by which it was required to be paid.</p>
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			<p>failure.</p> <p>(j) (5) Any dispute arising under this Article or regulations made under it—</p> <p>(k) (a) may be referred to the Director by either party; and</p> <p>(l) (b) on such a reference, shall be determined by order made either by the Director or, if he thinks fit, by the consumer committee or any sub-committee of that committee;</p> <p>(m) and the practice and procedure to be followed in connection with any such determination shall be such as may be prescribed.</p> <p>(n) (6) An order under paragraph (5) shall be final and shall be enforceable as if it were a judgement of the county court.</p> <p>WSS(NI)O06</p> <p>61</p> <p>(1) In this Article “relevant dispute” means a dispute which, by virtue of any provision of this Order, may be referred to the Authority for determination under this Article...</p> <p>(5) A determination under this Article</p> <p>(a) shall be final; and</p> <p>(b) shall be enforceable as if it were a money judgment (within the meaning of the Judgments Enforcement (Northern Ireland) Order 1981 (NI 6)), in so far as it includes such provision as to costs or expenses as is mentioned in paragraph (4).</p>	
<p><b>Standard of Appeal</b></p>	<p>G(NI)O96, Art 15 E(NI)O92, Art 15</p> <p>The Commission, for the purpose of carrying out any such investigation, shall take account of any information given to them for</p>	<p>No statutory appeal exists although judicial review is available.</p>	<p>Judicial Review (as per UREGNI email)</p>	<p>Judicial Review (as per UREGNI email)</p>

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	<p>that purpose under this paragraph.</p> <p>(8) In determining for the purposes of this Article whether any particular matter operates, or may be expected to operate, against the public interest, the Monopolies Commission shall have regard to the matters as respects which duties are imposed on the Department and the Director by Article 5.</p>			
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**OFWAT APPEALS: STANDARDS AND GROUNDS**

**Statutory Framework:**

**Water Industry Act 1991**

**Water Act 2003**

**No EU Directive**

	<b>PRICE CONTROLS &amp; LICENCE MODIFICATIONS</b>	<b>ENFORCEMENT (ORDER)</b>	<b>ENFORCEMENT (PENALTIES)</b>	<b>OTHER REGULATORY DECISIONS UNDER WIA91</b>
<b>Appeal Body</b>	Competition Commission	High Court	High Court	High Court
<b>Grounds of Appeal</b>	<p><u>WIA91, s12 – Price Control &amp; Licence Determinations</u>  <u>WIA91, s14 – Undertaker Licence Modification</u>  <u>WIA91 s17K – Water Supply Licence Modification</u></p> <p>WIA91, s12(2)                      (2)Without prejudice as aforesaid, such conditions may provide for the reference to and determination by—                      (a)the Secretary of State or the Authority; or                      (b)on a reference by the Authority, the [F1Competition Commission], of such questions arising under the appointment and of such other matters, including (in the case of references to the Commission) disputes as to determinations by the Authority, as are specified in the appointment or are of a description so specified.                      (3)Where any question or other matter falls to be determined by the [F1Competition Commission] in pursuance of a provision contained in an appointment under this Chapter—</p>	<p><u>WIA91, s21</u></p> <p>If the company to which an enforcement order relates is aggrieved by the order and desires to question its validity on the ground:</p> <p>(a) that its making or confirmation was not within the powers of s18; or</p> <p>(b) that any of the requirements of s20 have not been complied with in relation to it,</p> <p>the company may, within forty-two days from the date of the order, make an application to the High Court.</p>	<p><u>WIA91 s22E</u></p> <p>s22E                      (1)If the company on which a penalty is imposed is aggrieved by—                      (a)the imposition of the penalty;                      (b)the amount of the penalty; or                      (c)the date by which the penalty is required to be paid, or the different dates by which different portions of the penalty are required to be paid,                      the company may make an application to the court under this section.                      (2)An application under subsection (1) above must be made—                      (a)within forty-two days from the date of service on the company of a notice under section 22A(6) above; or                      (b)where the application relates to a decision of an enforcement authority on an application by the company under section 22A(7) above, within forty-two days from the date the company is notified of the decision.                      (3)On any such application, where the court considers it appropriate to do so in</p>	<p><u>No statutory appeal exists although judicial review is available.</u></p>

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<p>(a) it shall be the duty of the Authority, on being required to do so by the company holding that appointment, to refer that question or matter to that Commission; and</p> <p>(b) it shall be the duty of that Commission to determine any question or other matter referred by virtue of paragraph (a) above in accordance with—</p> <p>(i) F2. ....</p> <p>(ii) the principles which apply, by virtue of Part I of this Act, in relation to determinations under this Chapter by the Authority.</p> <p>WIA91, s14</p> <p>Ofwat may make to the CC a reference which is so framed as to require the Commission to investigate and report on the questions—</p> <p>Whether any matters which:</p> <p>(i) relate to the carrying out of any function of a water or sewerage undertaking; and</p> <p>(ii) are specified in the reference, operate, or may be expected to operate, against the public interest; and</p> <p>(b) if so, whether the effects adverse to the public interest which those matters have, or may be expected to have, could be remedied or prevented by modifications of the standard conditions of licences of that description.</p>		<p>all the circumstances of the case and is satisfied of one or more of the grounds falling within subsection (4) below, the court—</p> <p>(a) may quash the penalty;</p> <p>(b) may substitute a penalty of such lesser amount as the court considers appropriate in all the circumstances of the case; or</p> <p>(c) in the case of an application under subsection (1)(c) above, may substitute for the date or dates imposed by the enforcement authority an alternative date or dates.</p> <p>(4) The grounds falling within this subsection are—</p> <p>(a) that the imposition of the penalty was not within the power of the enforcement authority under section 22A above;</p> <p>(b) that any of the requirements of subsections (4) to (6) or (8) of section 22A above have not been complied with in relation to the imposition of the penalty and the interests of the company have been substantially prejudiced by the non-compliance; or</p> <p>(c) that it was unreasonable of the enforcement authority to require the penalty imposed, or any portion of it, to be paid by the date or dates by which it was required to be paid.</p> <p>(9) In this section “the court” means the High Court.]</p>	
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	<p>Ofwat may specify in a reference under this section, or a variation of such a reference:</p> <p>(a) any effects adverse to the public interest which, in its opinion, the matters specified in the reference or variation have or may be expected to have; and</p> <p>(b) any modifications of the relevant conditions by which, in its opinion, those effects could be remedied or prevented.</p> <p>WIA91 s17K          (1)The Authority may make to the Competition Commission (in this section and the following provisions of this Chapter referred to as “the Commission”) a reference which is so framed as to require the Commission to investigate and report on the questions—</p> <p>(a)whether any matters which—</p> <p>(i)relate to the carrying on of activities authorised or regulated by a particular licence; and</p> <p>(ii)are specified in the reference, operate, or may be expected to operate, against the public interest; and</p> <p>(b)if so, whether the effects adverse to the public interest which those matters have, or may be expected to have, could be remedied or prevented by modifications of the conditions of the licence.</p>			
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<p><b>Standard of Appeal</b></p>	<p>WIA91, s12 (3b)                  It is the duty of the Competition Commission to determine any question or other matter referred to in accordance with the principles which apply, by virtue of Part 1 of the WIA91, in relation to such determinations by Ofwat.</p> <p>WIA91, s14 (6)                  The Commission, for the purpose of carrying out any such investigation [F4or such functions] , shall take account of any information given to them for that purpose under this subsection.</p> <p>(6)In determining for the purposes of this section whether any particular matter operates, or may be expected to operate, against the public interest, the [F1Competition Commission]shall have regard to the matters as respects which duties are imposed on the Secretary of State and the Director by Part I of this Act.</p> <p>WIA91, s17K(9)                  In determining for the purposes of this section whether any particular matter operates, or may be expected to operate, against the public interest, the CC shall have regard to the matters as respects which duties are imposed on the Secretary of State and Ofwat by this Act.</p>	<p>WIA91, s21:                  The High Court may, if satisfied that the making or confirmation of the order was not within those powers or that the interests of the company have been substantially prejudiced by a failure to comply with those requirements, quash the order or any provision of the order.</p>	<p>WIA91, s22E</p>	<p>No statutory appeal exists although judicial review is available.</p>
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**OFGEM APPEALS: STANDARDS AND GROUNDS**

**Statutory Framework:**

**Electricity Directive 2009/72/EC**

**Gas Directive 2009/73/EC**

**Gas Act 1986**

**Electricity Act 1989**

**Energy Act 2004**

**Energy Act 2010**

	<b>PRICE CONTROLS &amp; LICENCE MODIFICATIONS</b>	<b>INDUSTRY CODE MODIFICATIONS</b>	<b>ENFORCEMENT ACTION FOR BREACH OF A RELEVANT REQUIREMENT/CONDITION)</b>	<b>ENFORCEMENT ACTION FOR BREACH OF THE TRANSMISSION CONSTRAINT LICENCE CONDITION</b>	<b>COMPETITION ACT 1998 INVESTIGATION</b>
<b>Appeal Body</b>	Competition Commission	Competition Commission	High Court	CAT	CAT
<b>Grounds of Appeal</b>	<p><u>Electricity Act 1989, s11C,E (equivalent provisions are also in the Gas Act 1986 s23B)</u></p> <p>The Competition Commission may only allow the appeal to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds:</p> <p>(a) that the Authority failed to have regard to the carrying out of its principal objective or certain specified duties set out in the Electricity Act 1989;</p> <p>(b) failed to give proper weight to such a factor;</p> <p>(c) that the decision was based wholly or partly on an error of</p>	<p><u>Energy Act 1989, s11E</u> <u>Energy Act 2004, s175,</u> <u>EA04, s175</u></p> <p>The Competition Commission's jurisdiction is to determine whether the applicant has shown that the Authority has erred in one of the following ways:</p> <p>(a) that the Authority failed to have regard to the carrying out of its principal objective or certain specified duties set out in the Electricity Act 1989 (or equivalent in the Gas Act 1986);</p> <p>(b) failed to give proper weight to such a factor;</p> <p>(c) that the decision was based wholly or partly on an error of</p>	<p><u>Electricity Act 1989, s27 (equivalent provisions are also in the Gas Act 1986)</u></p> <p>If the regulated person to whom a final or provisional order relates is aggrieved by the order and desires to question its validity on the ground</p> <p>(a) that its making or confirmation was not within the powers of section 25; or</p> <p>(b) that any of the requirements of section 26 above have not been complied with in relation to it,</p>	<p><u>Energy Act 2010, s20-21</u></p> <p>Appeal to the CAT may be made against either the imposition of a final order or the imposition or amount of a penalty (or the date by which such penalty should be made). In the case of an appeal against an order, the CAT may do either or both of the following—</p> <p>(a) re-determine the appealed matter;</p> <p>(b) or remit the appealed matter to the Authority.</p> <p>If the Tribunal re-determines the appealed matter it may do one or more of the following—</p> <p>(a) uphold the order</p>	<p><u>Schedule 8 Paragraph 3</u></p> <p>The CAT must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal and may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may – remit the matter to the Authority, impose, revoke or vary amount of penalty, give directions or make any other decisions which the Authority would have made.</p>

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	<p>fact;                  (d) that the modification fails to achieve the effect which the Authority has stated such modifications are expected to have;                  (e) that the decision was wrong in law.</p>	<p>fact;                  (d) the Authority failed to have regard to the purposes for which the relevant condition (i.e. the licence condition underpinning the relevant industry Code) has effect;                  (e) that the decision was wrong in law.</p>	<p>he may make an application to the court under this section.                   The court may, if satisfied that the making or confirmation of the order was not within those powers or that the interests of the regulated person have been substantially prejudiced by a failure to comply with those requirements, quash the order or any provision of the order.                   (s27 Electricity Act 1989)                   If the regulated person on whom a penalty is imposed is aggrieved by—                  (a) the imposition of the penalty;                  (b) the amount of the penalty; or                  (c) the date by which the penalty is required to be paid, or the different dates by which different portions of the penalty are required to be paid,                  the regulated person may make an application to the court.                  On any such application, where the court considers it appropriate to do so in all the circumstances of the case and is satisfied of one or more of the grounds falling within subsection (4), the court—</p>	<p>(b) set aside the order                  (c) substitute the order for the Tribunal's own final or provisional order                   In the case of an appeal against a penalty, the CAT may uphold, set aside, substitute or vary the penalty imposed by the Authority.</p>	
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			<p>(a) may quash the penalty;</p> <p>(b) may substitute a penalty of such lesser amount as the court considers appropriate in all the circumstances of the case; or</p> <p>(c) in the case of an application under subsection (1)(c), may substitute for the date or dates imposed by the Authority an alternative date or dates.</p> <p>The grounds of such an appeal are—</p> <p>(a) that the imposition of the penalty was not within the power of the Authority under section 27A;</p> <p>(b) that any of the requirements of subsections (3) to (5) or (7) of section 27A have not been complied with in relation to the imposition of the penalty and the interests of the regulated person have been substantially prejudiced by the non-compliance; or</p> <p>(c) that it was unreasonable of the Authority to require the penalty imposed, or any portion of it, to be paid by the date or dates by which it was required to be paid.</p> <p>(s27E Electricity Act 1989)</p>		
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Standards of Appeal	Electricity Act 1989, s11C (equivalent provisions are also in the Gas Act 1986)	Energy Act 2004, s175	Electricity Act 1989, s27 (equivalent provisions are also in the Gas Act 1986)	Electricity Act 1989 s27 or Gas Act 1986 s30	Competition Act 1998, Sch 8, par.3
	<p>In determining an appeal the CC must have regard, to the same extent as is required of Ofgem, to the matters to which Ofgem must have regard in the carrying out of its principal objective and in the performance of its duties.</p> <p>In determining the appeal the CC:</p> <p>(a) May have regard to any matter to which Ofgem was not able to have regard in relation to the decision which is the subject of the appeal; but</p> <p>(b) Must not, in the exercise of that power, have regard to any matter to which Ofgem would not have been entitled to have regard in reaching its decision had it had the opportunity of doing so.</p> <p>The CC may allow the appeal only to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds:</p> <p>(a) That the decision was based, wholly or partly, on an error of fact;</p> <p>(b) That the modifications fail to</p>	<p>In determining the appeal the CC must have regard, to the same extent as is required of Ofgem, to the matters to which Ofgem must have regard in the carrying out of its principal objective and in the performance of its duties.</p> <p>In determining the appeal the CC:</p> <p>May have regard to any matter to which Ofgem was not able to have regard in the case of the decision appealed against; but must not, in the exercise of that power, have regard to any matter to which Ofgem would not have been entitled to have regard in that case had it had the opportunity of doing so.</p> <p>The CC may allow the appeal only if it is satisfied that the decision appealed against was wrong on one or more of the following grounds:</p> <p>(a) That the decision was based, wholly or partly, on an error of fact;</p> <p>(b) That the decision was wrong in law.</p>	<p>On any such application the court may, if satisfied that the making or confirmation of the order was not within those powers or that the interests of the licence holder have been substantially prejudiced by a failure to comply with those requirements, quash the order or any provision of the order.</p>	<p>EA89 s27</p> <p>(1)If the licence holder to whom a final or provisional order relates is aggrieved by the order and desires to question its validity on the ground—</p> <p>(a)that its making or confirmation was not within the powers of section 25 above; or</p> <p>(b)that any of the requirements of section 26 above have not been complied with in relation to it,</p> <p>he may, within 42 days from the date of service on him of a copy of the order, make an application to the court under this section.</p> <p>(2)On any such application the court may, if satisfied that the making or confirmation of the order was not within those powers or that the interests of the licence holder have been substantially prejudiced by a failure to comply with those requirements, quash the order or any provision of the order.</p> <p>GA86 s30</p> <p>(1)If the [F1licence holder] is aggrieved by a final or provisional order and desires to question its validity on the ground that the making or confirmation of it was not within the powers of section 28 above</p>	<p>In the case of certain decisions, relating to commitments, the CAT must determine the appeal by reference to judicial review principles and may dismiss the appeal or quash the whole or part of the decision to which it relates and where it quashes a decision (or part of such decision) remit the matter to the Authority with a direction to reconsider and make a new decision.</p>

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	<p>achieve, in whole or in part, the effect stated by Ofgem;</p> <p>(c) That the decision was wrong in law.</p>			<p>or that any of the requirements of section 29 above have not been complied with in relation to it, he may within 42 days from the date of service on him of a copy of the order make an application to the court under this section.</p> <p>[F2(2)On any such application the court, if satisfied that the making or confirmation of the order was not within those powers or that the interests of the licence holder have been substantially prejudiced by a failure to comply with those requirements—</p> <p>(a)may quash the order or any provision of the order; F3. . .</p>	
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**ORR APPEALS: STANDARDS AND GROUNDS**

**Statutory Framework:**

**Railways Act 1993**

**Competition Act 1998**

**Transport Act 2000**

**Enterprise Act 2002**

**Railway Act 2005**

**The Railway (Licensing of Railway Undertakings) Regulations 2005**

**The Railways Infrastructure (Access & Management) regulations 2005**

ORR has the power to make ex-ante regulatory decisions on a range of matters under both domestic and European sector specific legislation. Such matters include the approval of access agreements and the grant of licences under the Railways Act 1993. Such decisions are subject to judicial review. In addition, there are specific statutory provisions which provide for certain of our decisions to be subject to further scrutiny in the following areas: licence modification, price controls (Network Rail only), the grant of European licences and the imposition of penalties under the Railways Act 1993. These are summarised in the table below.

	LICENCE MODIFICATION	LICENSING – CONDITIONS (for European Licences only)	LICENSING - PENALTIES	PRICE CONTROLS (Network Rail)	PRICE CONTROLS (HS1)	TRACK ACCESS
<b>Appeal body</b>	Competition Commission	European Commission	High Court	Competition Commission	High Court	High Court
<b>Grounds of Appeal</b>	<p><u>Railways Act 1993, s13 (1)-(3)</u></p> <p>The ORR may make to the CC a reference which is so framed as to require the CC to investigate and report on the questions:</p> <p>(a) whether any matters which:</p> <p>(i) relate to the provision of any railway services by means of a railway asset, or railway assets of a</p>	<p><u>The Railway (Licensing of Railway Undertakings) Regulations 2005, regulation 12(1)</u></p> <p>A railway undertaking may at any time refer to the EC the question of whether a condition included in a SNRP:</p> <p>(a) Is compatible with Community law, or</p> <p>(b) Has been applied in a non-discriminatory manner.</p>	<p><u>Railways Act 1993, s57F(1)</u></p> <p>That it was not within the ORR’s powers to issue.</p> <p>That any of the necessary legal requirements have not been complied with in relation to it and the train operator’s interests have been substantially prejudiced by the non-compliance.</p> <p>That it was unreasonable of ORR not to grant an</p>	<p><u>Railways Act 1993, Sch 4A para. 9(2), para.9(5)</u></p> <p>ORR reference to the CC requiring them to investigate and report on:</p> <p>(a) Whether the matters considered on the access charges review which are specified in the reference operate, or may be expected to operate, against the public interest; and</p>	<p><u>By Concession Agreement:</u></p> <p>Save in respect of those matters which the HS1/SoS Concession Agreement provides is to be referred to the Enforcement Procedure or the Decision Making Procedure, any Dispute between the SoS and HSI Co shall be</p>	<p><u>Railway Act 1993, s17, s18, s19</u></p> <p>ORR email response regarding regulatory legislation</p>

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	<p>class or description, whose operator acts as such by virtue of a licence, and</p> <p>(ii) are specified in the reference,</p> <p>operate, or may be expected to operate, against the public interest; and</p> <p>(b) if so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by modifications of the conditions of the licence.</p> <p>The ORR may specify in its reference:</p> <p>(a) Any effects adverse to the public interest which, in its opinion, the matters specified in the reference have or may be expected to have; and</p> <p>(b) Any modifications of the conditions of the licence by which, in its opinion, those effects could be remedied or prevented.</p>		<p>application to extend the deadline for payment.</p>	<p>(b) If so, whether the effects adverse to the public interest which those matters have or may be expected to have could be remedied or prevented by the making of relevant changes.</p> <p>The ORR may specify in a reference:</p> <p>(a) Any effects adverse to the public interest which, in his opinion, the matters specified in the reference or variation have or may be expected to have; and</p> <p>(b) Any relevant changes by which, in his opinion, those effects could be remedied or prevented.</p>	<p>resolved in accordance with the Disputes Resolution Agreement.</p> <p>Any Dispute shall, unless the parties shall otherwise agree, be subject to the non-exclusive jurisdiction of the Courts of England and Wales.</p> <p>This Agreement shall be governed and construed in accordance with the laws of England and Wales.</p>	
<p><b>Standard of</b></p>	<p><u>Railways Act 1993, s13(7), s14(1)</u></p>	<p><u>The Railway (Licensing of Railway Undertakings) Regulations 2005 regulation</u></p>	<p><u>Railways Act 1993, s57F(4)</u> (4)On an application under</p>	<p><u>Railways Act 1993, Sch 4A para. 9(9), para 11</u></p>	<p><u>By Concession Agreement</u></p>	<p><u>Railway Act 1993, Sch4</u></p>

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<p><b>Appeal</b></p>	<p>In determining whether any particular matter operates, or may be expected to operate, against the public interest, the CC shall have regard to the matters as respects which duties are imposed on the ORR.</p> <p>In making a report on a reference, the CC:</p> <p>(a) Shall include in the report definite conclusions on the questions comprised in the reference together with such an account of their reasons for those conclusions as in their opinion is expedient for facilitating a proper understanding of those questions and of their conclusions;</p> <p>(b) Where they conclude that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, shall specify in the report the effects adverse to the public interest which those matters have or may be expected to have; and</p> <p>(c) Where they conclude that any adverse effects so specified could be remedied or prevented by</p>	<p><u>12(2)</u></p> <p>Where a railway undertaking refers a question to the EC, and the EC delivers an opinion that a requirement imposed through a condition in a SNRP is incompatible with Community law or has been applied in a discriminatory manner, the ORR shall review the condition.</p>	<p>this section on the ground mentioned in subsection (1)(a) or (b) above the court, if satisfied that the ground is established, may quash the penalty or (instead of quashing it) make provision under either or both of paragraphs (a) and (b) of subsection (5) below.</p>	<p>In determining whether any particular matter operates, or may be expected to operate, against the public interest, the CC shall have regard to the matters as respects which duties are imposed on the ORR by section 4 of the Act.</p> <p>In making a report on a reference, the CC shall include in the report:</p> <p>(a) Definite conclusions on the questions comprised in the reference; and</p> <p>(b) Such an account of their reasons for those conclusions as in their opinion is expedient for facilitating a proper understanding of those questions and of their conclusions.</p> <p>Where they conclude that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, they shall specify in the report the effects adverse to the public interest which those matters have or may be expected to have.</p> <p>Where they conclude that any adverse effects so specified could be remedied</p>	<p>See above.</p>	<p>ORR email response regarding regulatory legislation</p>
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	<p>modifications of the conditions of the licence, shall specify in the report modifications by which those effects could be remedied or prevented.</p>			<p>or prevented by the making of relevant changes, they shall in the report:</p> <p>(a) Specify the relevant changes by which those effects could be remedied or prevented; and</p> <p>(b) State, in relation to each of the relevant changes, the date on which it should come into operation.</p>		
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**CAA APPEALS: STANDARDS AND GROUNDS**

**Statutory Framework:**

Civil Aviation Act 2012

Transport Act 2000

Transport Act 2000 (for air traffic services)

No EU Directive

	MARKET POWER DETERMINATIONS	OPERATOR DETERMINATIONS	LICENCE MODIFICATION (including price controls)	LICENCE ENFORCEMENT	LICENCE MODIFICATION (Air Traffic Services)	CONDITIONS OF NEW LICENCE	LICENCE REVOCATION	PENALTIES
<b>Appeal body</b>	CAT	CAT	Competition Commission	CAT	Competition Commission	Competition Commission	CAT	CAT
<b>Grounds of appeal</b>	CAA Act 2012, s6, s7  That the determination was based on an error of fact;  That the determination was wrong in law;  That an error was made in the exercise of a discretion.	CAA Act 2012, s10  That the determination was based on an error of fact;  That the determination was wrong in law;  That an error was made in the exercise of a discretion.	CAA Act 2012, s22, s25  (1)An appeal lies to the Competition Commission against a decision by the CAA to modify a licence condition under section 22.  (2)An appeal may be brought under this section only by— (a)the holder of the licence, or (b)a provider of air transport services whose interests are materially affected by the decision.  (3)An appeal may be brought under this section only with the	CAA Act 2012, s33  That the decision was based on an error of fact;  That the decision was wrong in law;  That an error was made in the exercise of a discretion.	Transport Act 2000, s12  CAA reference to the CC, requiring the CC to investigate and report on:  (a) Whether any matters specified in the reference operate against the public interest or may be expected to do so;  (b) If so, whether the effects adverse to the public interest could be remedied or prevented by modifying the conditions of the licence.	Civil Aviation Act 2012, s15, s24  (1)An appeal lies to the Competition Commission against a decision by the CAA under section 15 to include, or not to include, a condition in a licence when it is granted.  (2)An appeal may be brought under this section only by— (a)the holder of the licence, or (b)a provider of air transport services whose interests are materially affected by the decision.  (3)An appeal may be brought under this section only with the	Civil Aviation Act 2012, s48, Sch4  (1)The Competition Appeal Tribunal may allow an appeal under paragraph 1 only to the extent that it is satisfied that the decision appealed against was wrong on one or more of the following grounds— (a)that the decision was based on an error of fact; (b)that the decision was wrong in law; (c)that an error was made in the exercise of a discretion.  (2)It may— (a)confirm or set	Civil Aviation Act 2012, s40  <u>Impose Penalties for Breach of licence</u>  <u>Civil Aviation Act 2012, s51</u> <u>Impose penalties for not complying with information requirements under s50</u>  <u>Civil Aviation Act 2012, s52</u> <u>Impose penalties for supplying false information or destroying docs</u>  <u>Civil Aviation Act 2012, s86</u>

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		<p>permission of the Competition Commission.</p> <p>(4)An application for permission to appeal under this section may be made only by a person who, if permission is granted, will be entitled to bring the appeal.</p> <p>(5)The Competition Commission may refuse permission to appeal under this section only on one of the following grounds—</p> <p>(a)that the appeal is brought for reasons that are trivial or vexatious,</p> <p>(b)that the appeal does not have a reasonable prospect of success, or</p> <p>(c)that subsection (6) is satisfied.</p> <p>(6)This subsection is satisfied if the appeal is brought—</p> <p>(a)against a decision that relates entirely to a matter remitted to the CAA following an earlier appeal under section 24 or this section, and</p> <p>(b)on grounds that were considered, or</p>			<p>permission of the Competition Commission.</p> <p>(4)An application for permission to appeal under this section may be made only by a person who, if permission is granted, will be entitled to bring the appeal.</p> <p>(5)The Competition Commission may refuse permission to appeal under this section only on one of the following grounds—</p> <p>(a)that the appeal is brought for reasons that are trivial or vexatious, or</p> <p>(b)that the appeal does not have a reasonable prospect of success.</p>	<p>aside the notice that is the subject of the appeal;</p> <p>(b)give the CAA such directions as it considers appropriate, including directions about the time within which the CAA must act.</p> <p>(3)It may not direct the CAA to do anything that the CAA would not have power to do apart from the direction.</p> <p>(4)The CAA must comply with directions under this paragraph</p>	<p><u>Impose penalties for not complying with information under s85</u></p> <p><u>Civil Aviation Act 2012, s87</u></p> <p><u>Impose penalties for supplying false information or destroying docs</u></p> <p><u>Civil Aviation Act 2012, Sch3</u></p> <p>(1)A person may appeal to the Competition Appeal Tribunal against a penalty imposed on the person under section 39 or 40.</p> <p>(2)The appeal may be against one or more of the following—</p> <p>(a)a decision to impose the penalty;</p> <p>(b)a decision as to the amount of the penalty;</p> <p>(c)in the case of a penalty calculated entirely or partly by reference to a daily amount, a decision as to the period during which daily amounts</p>
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			could have been raised by the current applicant or a relevant connected person, as part of the earlier appeal.					accumulate; (d)a decision as to the period allowed for payment of the penalty.  (3)Where a person appeals under this paragraph against a penalty, the CAA may not require the person to pay the penalty until the appeal is decided or withdrawn.
<b>Standard of Appeal</b>	CAA Act 2012, Sch 1  The CAT may allow an appeal only to the extent that it is satisfied that the market power determination appealed against was wrong on one or more of the grounds mentioned above.  When deciding an appeal, the CAT must have regard to the matters in respect of which duties are imposed on the CAA.  The CAT must also have regard to:	CAA Act 2012, Sch 1  The CAT may allow an appeal only to the extent that it is satisfied that the market power determination appealed against was wrong on one or more of the grounds mentioned above.  When deciding an appeal, the CAT must have regard to the matters in respect of which duties are imposed on the CAA.	CAA Act 2012, s24-s30  SEE sections 24 – 30 of the Act itself. For these parts of the appeal mechanism for licensing matters were not put in the Schedules as with all the other appeals mechanisms.	CAA Act 2012, Schs 3 and 4  The CAT may allow an appeal only to the extent that it is satisfied that the decision appealed against was wrong on one or more of the grounds mentioned above.  When deciding an appeal, the CAT must have regard to the matters in respect of which duties are imposed on the CAA.	Transport Act 2000, s12  In deciding whether a matter operates, or may be expected to operate, against the public interest the CC must have regard to the matters as respects which duties are imposed on the Secretary of State and the CAA.	CAA Act 2012, s24-s30  SEE sections 24 – 30 of the Act itself. For these parts of the appeal mechanism for licensing matters were not put in the Schedules as with all the other appeals mechanisms.	Civil Aviation Act 2012, Sch4  (5)When deciding an appeal under paragraph 1 (including giving directions), the Competition Appeal Tribunal must have regard to the matters in respect of which duties are imposed on the CAA by section 1.	Civil Aviation Act 2012, Sch5  (5)When deciding an appeal under paragraph 1 (including giving directions), the Competition Appeal Tribunal must have regard to the matters in respect of which duties are imposed on the CAA by section 1.  <u>Civil Aviation Act 2012, Sch13</u>  (5)When deciding an appeal under paragraph 1 (including giving directions), the Competition Appeal Tribunal

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	<p>(a) Relevant notices and guidance published by the EC about the application and enforcement of the prohibitions in Articles 101 and 102 of the TFEU;</p> <p>(b) Relevant advice and information published under section 52 of the Competition Act 1998 (advice and information about the application and enforcement of the prohibitions in Part 1 of that Act and Articles 101 and 102 of the TFEU);</p> <p>(c) Relevant advice and information published under section 171 of the Enterprise Act 2002 (advice and information about the operation of Part 4 of that Act).</p>							<p>must have regard to the matters in respect of which duties are imposed on the CAA by section 4 of the Civil Aviation Act 1982.</p>
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**OFCOM APPEALS: STANDARDS AND GROUNDS**

**Statutory Framework:**

**Communications Act 2003**

**Postal Services Act 2011**

**EU Electronic Communications Framework Directive (2002/21/EC)**

**EU Postal Services Directive 97/67/EC (as amended by Directive 2002/39/EC and as amended by Directive 2008/06/EC)**

	<b>PRICE CONTROLS</b>	<b>ENFORCEMENT (ORDER)</b>	<b>ENFORCEMENT (PENALTIES)</b>	<b>TELECOMS EX ANTE (INC. DISPUTE RESOLUTION)</b>	<b>MARKET POWER DETERMINATIONS</b>	<b>COMMS ACT SCH 8</b>
<b>Appeal body</b>	Competition Commission + CAT	CAT	CAT	CAT	CAT	High Court
<b>Grounds of Appeal</b>	<p>Comms Act 2003, s192 Postal Services Act 2011, s59</p> <p>CA03, s192 That the decision was based on an error of fact or was wrong in law or both; and</p> <p>Against the exercise of discretion by OFCOM, by the Secretary of State or by another person.</p> <p>PSA11, s59 (1)A person affected by a price control decision may appeal against it by sending a notice of appeal to OFCOM within the period of two months beginning with the day on which the decision is</p>	<p>Comms Act 2003, s192 Postal Services Act 2011, s57 Postal Services Act 2000</p> <p>CA s192 That the decision was based on an error of fact or was wrong in law or both; and</p> <p>Against the exercise of discretion by OFCOM, by the Secretary of State or by another person.</p> <p>PSA s57</p> <p>(2)A person affected by a qualifying decision may appeal against it to the Competition Appeal Tribunal (“the CAT”).</p>	<p>Comms Act 2003, s192</p> <p>That the decision was based on an error of fact or was wrong in law or both; and</p> <p>Against the exercise of discretion by OFCOM, by the Secretary of State or by another person.</p>	<p>Comms Act 2003, s192 Postal Act 2011</p> <p>That the decision was based on an error of fact or was wrong in law or both; and</p> <p>Against the exercise of discretion by OFCOM, by the Secretary of State or by another person.</p>	<p>Comms Act 2003, s192</p> <p>That the decision was based on an error of fact or was wrong in law or both; and</p> <p>Against the exercise of discretion by OFCOM, by the Secretary of State or by another person.</p>	<p>Subject to the inherent jurisdiction of the senior courts in England and Wales.</p>

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	<p>published.</p> <p>(2)The notice of appeal must set out the grounds of appeal in sufficient detail to indicate the error (or errors) which the appellant contends OFCOM made.</p>	<p>(3)The means of making an appeal is by sending the CAT a notice of appeal in accordance with rules made under section 15 of the Enterprise Act 2002.</p>				
<p><b>Standard of Appeal</b></p>	<p><u>Comms Act 2003, s193</u> <u>Postal Services Act s59</u></p> <p>CA03, 193 Where a price control matter is referred in accordance with Tribunal rules to the CC for determination, the CC is to determine that matter:</p> <p>(a) In accordance with the provision made by the CAT rules;</p> <p>(b) In accordance with directions given to them by the CAT in exercise of powers conferred by the rules; and</p> <p>(c) Subject to the rules and any such directions, using such procedure as the CC consider appropriate.</p> <p>Where a price control matter arising in an appeal is required to be referred to the CC, the CAT, in</p>	<p><u>Comms Act 2003, s195</u> <u>Postal Services Act 2011, s57</u></p> <p>CA03, s193 The CAT shall decide the appeal on the merits and by reference to the grounds of appeal.</p> <p>PSA s57</p> <p>5)In determining an appeal under this section the CAT must apply the same principles as would be applied by a court on an application for judicial review.</p>	<p><u>Comms Act 2003, s195</u></p> <p>The CAT shall decide the appeal on the merits and by reference to the grounds of appeal.</p>	<p><u>Comms Act 2003, s195</u> <u>Postal Act 2011</u></p> <p>The CAT shall decide the appeal on the merits and by reference to the grounds of appeal.</p>	<p><u>Comms Act 2003, s195</u></p> <p>The CAT shall decide the appeal on the merits and by reference to the grounds of appeal.</p>	<p>See above.</p>

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<p>deciding the appeal on the merits, must decide that matter in accordance with the determination of that CC.</p> <p>The above does not apply to the extent that the CAT decides, applying the principles applicable on an application for judicial review, that the determination of the CC is a determination that would fall to be set aside on such an application.</p> <p>PSA11, s59 (6)On determining the appeal, the Commission must—</p> <p>(a)dismiss the appeal, (b)allow the appeal and make its own decision on the subject matter of the appeal, or (c)quash the whole or part of the price control decision to which the appeal relates.</p> <p>(7)The Commission may allow the appeal, or quash the whole or part of the price control decision to which the appeal relates, only if it considers that OFCOM made a material error.</p> <p>(8)If the Commission quashes the whole or part</p>					
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<p>of a price control decision, it may refer the matter back to OFCOM with a direction to reconsider and make a new decision in accordance with its ruling.</p> <p>(9)The Commission may not direct OFCOM to take any action that they would not otherwise have the power to take in relation to the decision.</p> <p>(10)OFCOM must give effect to any decision of the Commission under subsection (6)(b) as soon as is reasonably practicable after it is made.</p> <p>(11)The Commission may investigate any matter or do any other thing for the purpose of making a decision under subsection (6)(b) or (c).</p>					
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## Annex I: Appeal Requirements in European Legislation

Sector	Directives	Requirements
Comms	2002/21/EC Communications Framework Directive	Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.
Energy	'Energy Third Package' – incl. Electricity Directive 2009/72/EC and Gas Directive 2009/73/EC	Member States shall ensure that suitable mechanisms exist under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government. Could be a court or other tribunal empowered to conduct a judicial review.
Aviation	2009/12/EC Airport Charges Directive	The decisions of the independent supervisory authority shall have binding effect, without prejudice to parliamentary or judicial review, as applicable in the Member States.
Post	Postal Services Directive 2008/6/EC (amending Directive 97/67/EC)	Member States shall ensure that effective mechanisms exist at national level under which any user or postal service provider affected by a decision of a national regulatory authority has the right to appeal against the decision to an appeal body which is independent of the parties involved. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.
Water	Water Services Framework Directive 2000/60/EC	Member States need to identify a "competent authority" which will implement the Directive. But, no rules on appeals against the decisions of that authority are specified in the Directive.
Rail	Railway Safety Directive 2004/49/EC	Member States need to identify a "national safety authority", but no rules on appeals.
	2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification	Member States must establish a regulatory body. Regulatory body acts as an appeal body. Decisions of the regulatory body must be subject to judicial review.
	2012/34/EC on establishing a single European railway area (recast)	Member states must establish a single national regulatory body for the railway sector. Regulatory body acts as an appeal body. A decision of the regulatory body shall be binding. Decisions of the regulatory body must be subject to judicial review.

## **Annex J: Consultation Principles**

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

## **Annex K: List of Individuals/Organisations Consulted**

39 Essex Street Chambers  
Addleshaw Goddard LLP  
Allen & Overy LLP  
Anglian Water  
Arnold & Porter  
Arriva  
Ashurst  
Association of Convenience Stores  
Association of General Counsel & Company Secretaries  
Australian Competition and Consumer Commission  
BAA  
Baker & McKenzie LLP  
Bar Council  
Barclays Bank Plc  
Barry Rodger (University of Strathclyde)  
Berwin Leighton Paisner LLP  
Better Regulation Delivery Office  
Bill Wood QC  
Bird & Bird LLP  
Black Stone Chambers  
Brick Court Chambers  
Bristows  
British Brands Group  
British Chambers of Commerce  
British Council of Shopping Centres  
British Institute of International and Comparative Law  
British Private Equity & Venture Capital Assoc  
British Retail Consortium  
BSA  
BSkyB  
BT  
Building Societies Association  
Burgess Salmon LLP  
Business in The Community / Cooperation Incubator  
Canadian Competition Bureau  
CBI  
CEDR  
Centrica Storage  
Centrica/British Gas  
Chancellor of the High Court  
Charles Rivers Associates  
Charles Russell Associates  
CIPR  
Citizens Advice  
Citizens Advice Scotland  
City of London Corporation  
City of London Law Society  
Civil Aviation Authority  
Cleary Gottlieb Steen & Hamilton LLP  
Clifford Chance LLP

CMS Cameron McKenna LLP  
Compass Lexecon  
Competition Appeal Tribunal  
Competition Commission  
Competition Law Association  
Competition Law Process Man Ltd  
Consumer Council for Northern Ireland  
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