STREAMLINING REGULATORY AND COMPETITION APPEALS CONSULTATION ON OPTIONS FOR REFORM

Summary of stakeholder views from consultation workshops (24 July 2013 – 1 August 2013)

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Contents

Summary of stakeholder views from July and August 2013 consultation workshops on regulatory and competition appeals

Each session covered the same issues, following the proposals described in the consultation document: the case for change, proposed changes to the standard of review, appeal bodies and routes of appeal, getting incentives right and, streamlining the process.

Below is a summary of some of the key points made by attendees. This is not intended to be comprehensive, but provides a high level overview of the main topics discussed.

Case for change

Some attendees questioned the strength of evidence in support of change. They criticised the consultation for lack of evidence on how the number of appeals, and appeals themselves, affects the regulatory administrative process.

Some noted that, compared to international courts as identified in the consultation document, the CAT is relatively quick. Furthermore, some stakeholders questioned the suggestion that the current appeals regime is perceived as a 'one way bet'. A number of attendees emphasised that firms take decisions on whether to appeal very seriously, and aware of both the costs of appealing and of the potential downside risk should they lose the case.

There was some agreement that appeals and the risk of appeals, particularly in the communications sector, could have a chilling effect on the sector.

One stakeholder argued that appeals are usually brought by parties which are not subject to the regulatory decision but are new entrants seeking tougher regulation on incumbents. Other stakeholders questioned whether that changing the standard of review might make it harder for these third parties to appeal due to having more limited grounds of appeal.

There were concerns raised about the lack of focus of the Government consultation. One stakeholder argued that appeals are brought because regulators include more and more detail in an attempt to avoid challenges which, in itself, leads to more challenges. Their view was that regulators should stop trying to appeal-proof their decisions, focussing

instead on making the right decision as quickly as possible. Another made the point that regulators are given wide discretion to reach a decision, therefore, it is only right that a strong appeal process is in place to discipline them.

Other stakeholders were concerned that the consultation primarily focused on problems on the telecommunications sector, and questioned whether there was a case for change in other sectors. One stakeholder argued that wholesale reform of the standard of review would make it easier for regulators to make wrong decision which will harm growth.

One stakeholder made the point that each regulated sector is different therefore there is a limited need for consistency. Another stakeholder argued that consistency is important within a sector but not across sectors. A further point was made about the differences in sectoral maturity. They suggested that young markets need to test regulatory decisions on a merits basis; by removing that avenue the Government could risk damaging the sector and its development.

Some stakeholders raised concerns about the impact assessment, and the failure to monetise either the benefits of consistency or the consequences of a bad regulatory decision. Particular reference was made to the Call Termination case.

Several stakeholders were of the view that changing the standard of review could lead to further litigation as firms test the news appeals system.

Some stakeholders questioned the inclusion of competition appeals in the Government consultation given that competition regulation was reviewed with the Enterprise and Economic Reform Act 2013.

One stakeholder pointed out that the threat of appeal becomes self-neutralising once all interested parties engage and use it (i.e. on both sides of the market). The most destabilising thing for a regulator is when one camp threatens to appeal and others do not.

Several stakeholders noted that recent changes had been made to appeals in some sectors (including energy and aviation) and argued that further changes at this point might create uncertainty.

Standard of review

Some stakeholders argued that the current standard of review is well understood and any change to Judicial Review would be tested in the UK and Europe. This could risk creating uncertainty, and so fail to achieve the stated objectives of the consultation document. Others commented that moving to a JR standard would lead to unintended consequences, such as skirmishes between parties at the preliminary stages as to whether the matter can be heard. This increase in litigation would impact on the overall

litigation timetable. One stakeholder argued that specifying the grounds of appeal would avoid any period of uncertainty.

Some stakeholders questioned whether changing the standard of review would reduce the incentives to appeal. They also expressed concerns that changing the standard of review would affect the ability of appellants wishing to make use of witness evidence.

Several stakeholders pointed out that the grounds of appeal set out in the consultation document are different to the defined grounds in the Civil Aviation Act 2012, and questioned the reason for these differences.

Comments were also made highlighting the importance of achieving faster appeals through procedural changes rather than changes to the standard of review. Their view was that faster decisions should not be at the expense of parties being able to present their case before an independent tribunal.

A stakeholder in the water industry argued that the proposals would be a major change in the water sector. The current mechanism is highly valued by investors and customers. Concerns were raised that moving from a regulatory review approach to targeted appeals could risk leading to more appeals, as it could encourage firms to appeal specific parts rather than the whole decision, where they believed they may have a greater probability of success.

One stakeholder argued that proportionality needed to be a key part of the regime. More specifically in the water sector, some stakeholders questioned whether there was an intention to retain a public interest test for the Competition Commission.

Some stakeholders suggested that BIS might implement broader changes, for example to case management proposals, before taking the step of changing the standard of review. Such changes (unlike changing the standard if review) would not require primary legislation.

There were also concerns that changing the standard of review would lead to regulators spending more time “JR-proofing” their decisions rather than necessarily setting out the substantive reasoning behind their proposals.

In addition, some stakeholders questioned whether a move to Judicial Review might mean the CAT or other appeal bodies having to remit more decisions back to the regulator, which could ultimately increase the time taken to reach a final outcome.

Several stakeholders commented that regulators are given significant discretion to reach a decision. Therefore, they have to be able to explain their decision and meet the appropriate standard of scrutiny. It was argued that there may be a greater risk of confirmation bias (eg where a regulator becomes less willing to alter their initial views in the light of consultation responses if changes are made to the standard of review.

Stakeholders commented that past cases have lead to very important changes in the processes and procedures of regulators. However, some stakeholders argued that the proposed grounds of appeal don’t allow for great scrutiny. Appeals are costly (firms don’t appeal lightly) and if the grounds of appeal are changed, then companies could just allow

bad decisions to pass without appealing. In particular, a stakeholder argued that this might make it harder for small and medium sized business to appeal, and suggested that these firms are unlikely to take the risk of appeals under a Judicial Review standard.

Further concerns were raised by stakeholders about the grounds of review, particularly regarding how they would fit between different sectors. One stakeholder commented that organisations will interpret this differently.

One stakeholder questioned the consistency of Government policy between regulatory appeals and private actions, where there are proposals for the CAT to be able to hear standalone competition actions.

Appeal bodies and routes of appeal

Stakeholders generally supported our proposals on CAT governance and all agreed that, wherever the appeal routes sit, there is a requirement for members with high technical knowledge and expertise.

Some attendees argued that moving dispute resolution cases to the High Court may be detrimental because dispute resolution cases are a specific form of economic regulation. Several stakeholders supported this view and argued that very few commercial disputes would be suitable for High Court determination.

One stakeholder commented that moving dispute resolution cases would not be a big change as Ofcom decisions are based on its duties so the High Court would have to take those duties into account when making its decision.

Another stakeholder argued that where appeals involve price-control and non-price control elements, it would be better for them to be dealt with holistically by one body.

Some stakeholders proposed identifying and improving process via procedural means before the Government ‘rushes off’ and makes legislative changes.

Other stakeholders voiced concerns about the failure of CAT to adequately impose case management structures. They, therefore, welcomed the proposed procedural time limits.

Getting incentives right

Several stakeholders commented that enhanced transparency at the administrative stage would be welcomed.

There was general support for exploring greater use of confidentiality rings. They agreed that further work needed to be done as to how the confidentiality rings would work in practice. Nonetheless, there were concerns about who would be allowed to enter

confidentiality rings, in order to ensure that confidential data could not inadvertently 'leak out' and influence wider business decisions.

In terms of BIS proposals regarding new evidence, some stakeholders noted that the CAT has discretion to make these decisions and argued that the CAT has been very ready to challenge new evidence. Both the CAT and Court of Appeal have made clear that they do not see it as their job to act as a 'second regulator'. A stakeholder further commented that evidence newly added on appeal is mostly due to the fact that only after a decision is made does the firm realise the basis on which the decision was taken by the regulator.

One stakeholder commented that significant amount of the evidence heard in many appeals is often brought by regulator rather than by the appellant.

Another stakeholder argued that the codification of BIS' new evidence proposal could lead to more satellite appeals. A further point was made that the consultation document assumes that cases are brought by big companies; where as stakeholders argued that a significant appeals are brought by challengers.

A stakeholder criticised the lack of examples in the consultation document of where new evidence was used to 'game' the system.

The majority of stakeholders agreed that cost awards should be claimed by both sides, though some pointed out that regulators claiming costs would disincentivise small businesses and consumers from appealing. One has to also consider the risk of pass-though to consumers.

Streamlining the process

There was general support for measures to streamline appeals processes.

Stakeholders commented that CAT case management is generally good and cases are usually heard within timescales.

Other stakeholders commented that adding time scales and targets imposes pressures that could have a knock on effect on the timescales of other appeals – if target timescales are implemented; they need to be realistic and achievable.

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