Regulatory and competition appeals: options for reform - consultation responses I-Z

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In-House Competition Lawyers' Association (ICLA)

Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

RESPONSE BY THE IN-HOUSE COMPETITION LAWYERS' ASSOCIATION

11 September 2013

Introduction

1. The In-House Competition Lawyers' Association ("ICLA") is an informal association of in-house competition lawyers across Europe. The Association meets quarterly to discuss matters of common interest, as well as to share competition law knowledge and best practice. There are currently almost 180 members in 14 countries. The Association does not represent companies, but is made up of individuals as experts in this area of the law. This paper represents the views of some of its UK members.

2. Because of their role, in-house competition lawyers have a clear interest in a fast, efficient and cost effective appeal system that leads to a proper review and to good regulatory decisions.

3. We welcome the opportunity to comment on the BIS document "Streamlining regulatory and competition appeals: consultation on option for reform". We do not seek to respond to every question posed in the Consultation Paper; rather, we focus on those areas on which ICLA members' views and experience can assist the Government the most.

4. We will focus our response on competition law appeals. Many of our members are active in regulated sectors (such as communications and energy) and will input directly to the consultation on other areas covered. Suffice it to say that we believe that a merits appeal should be, whenever possible, the norm.

5. Our members are concerned firstly, that the case for change has not been substantiated by the Government and, secondly, that the proposals would not achieve the Government's aims. Indeed, we consider that the proposals, if enacted, are likely to have the opposite effect to that intended and hinder growth.

The case for change

6. The UK competition law regime is going through a period of considerable change. Not only are the two UK competition authorities (the OFT and the Competition Commission) being merged into a single body (the CMA) but there are currently in Parliament proposals to foster collective redress. These changes will have considerable impact on the regime and are the result of several consultations in which many of our members have been involved.

7. In the last few years, the Government has looked in detail at the way the competition system works. In particular, when the proposal to create a single authority was discussed, the Government considered whether the UK should maintain an investigative process based on administrative proceedings or it should move to a prosecutorial system. At that time there was considerable interest in a prosecutorial system which, according to many, would focus the attention of the OFT on key cases, would be faster and lead to better decision-making. In the end, the Government decided to maintain the administrative system but, as a *quid-pro-quo,* the OFT had to improve its internal decision-making and a full merit appeal would be retained. In October 2012, less than a year ago, the OFT published its "Guide to the OFT's investigation procedures in competition cases". That document aims to improve considerably the internal processes of the OFT (improved review by senior officials, separation of case team and case decision group, better engagement with the parties etc.). The underlying intention was that these improvements would lead to better decisions. We are therefore surprised that the Government is now looking again at the regime when it has not yet been possible to test whether those recent internal changes have still not had a chance to show whether they are in fact leading to better decisions able to withstand the scrutiny of an independent tribunal.

8. Absent any evidence or explanation, it is difficult for us to understand what has happened in these 11 months to lead to such fundamental change of mind. Certainly, the Consultation does not contain any compelling evidence of a change of circumstances.

9. The key elements of the Government's review in the Consultation seems to be whether we should have a merits appeal or a JR (or JR+) standard. The Government, incorrectly in our view, believes that a merits appeal leads to delays,

unmeritorious appeals, increased costs and, in doing so, hampers growth. We do not believe this is the case. We have read with interest the response of the Competition Appeal Tribunal (CAT) and we strongly support those views. If the UK is to have a world-class competition law regime, its regulators should be aiming to issue decisions that withstand scrutiny on the merits, and not just against the JR standard (under which only unlawful decisions or decisions that "no reasonable regulator" would have taken can be successfully challenged). The focus should be on the substance and on the evidence underlying the decision, not just the procedure under which it has been taken.

10. We believe also that the Government's proposals would actually lead to the opposite effect to that which the Government is aiming for and lead to delays, increased costs and have a negative impact on UK business and growth. This would ultimately have a negative impact on consumers.

11. On the other hand, like the CAT, we support some of the changes proposed such as rerouting price control aspects of communications appeals directly to the CMA or that the CAT's competence should be extended to include judicial reviews under the Competition Act 1998 (which currently are only possible in the High Court),

Our experience of the CAT

12. Many of our members have appeared in front of the CAT. Even though in many cases a CAT's decision might have gone against them, overall we have all had a very positive experience of the Tribunal. In our view, it has the powers to deal properly with the issues raised in the consultation and it has actually dealt with them in an appropriate manner. We therefore welcome and strongly support its expertise: in our view justice is best served by having a specialist tribunal. Having such a specialised tribunal looking at the merits - at a case 'in the round' - is more likely to lead to the right decision either on appeal or at the administrative stage. The prospect of such independent review constrains regulators to ensure that they conduct a thorough investigation and analysis and issue well reasoned decisions based on the evidence. A more limited review process will not provide the same constraint and is unlikely to lead to better decisions at the administrative stage.

Why an appeal on the merits is essential for the proper functioning of the system

13. An appeal on the merits is, in our view, an essential element of the competition regime. The competition authority has the power to take decisions that have far reaching consequences on business. Those decisions can impose large financial penalties, they may result in criminal convictions and can have an enormous reputational impact. In addition, businesses can now be subjected to significant damages actions arising from an adverse finding by a competition authority and decisions can be used as a way of increasing fines in subsequent cases. The scale of the liability that arises with an infringement decision requires a full merits appeal to ensure that the interests of justice are properly served. It is crucial that these decisions should all be subject to a standard of review that is flexible enough to scrutinise it in detail. In our view, the Consultation fails to set out an adequate justification for changing the standard of review in competition cases. Our members also struggle to understand why there should be a distinction between the standard of review applicable to the substantive finding and that applied for a review of the fine imposed. In our view both need to be subject to a full merits appeal in the interest of a fair trial and access to justice.

14. We believe that the ultimate aim of any review of the competition regime should lead to good decision-making by a regulator. Decisions have a significant impact on business and the wrong decisions could hamper and impede growth, as well as increase regulatory uncertainty.

15. Transparency and evidence-based decisions are an important part of regulators' decision-making processes. A proper merits appeal provides an important independent review of regulatory decision-making that should lead to better and more robust decision-making. The positive changes we have seen at the OFT and in the sector regulators have been in part due to the need to justify their decisions in front of an independent tribunal. Lowering the standard of review would undermine the incentives of the regulators to make good decisions and to improve their internal checks and balances. In addition, we believe that the proposed costs rule to deny a successful appellant its costs unless the regulator's conduct had been unfair or unreasonable is itself unfair and would also contribute to undermining the regulators' incentives to make good decisions.

16. Case law examples also show that full merits appeals are of vital importance to smaller businesses (as well as larger businesses), as demonstrated by the cases of *JJBurgess*[1] and *Albion Water*[2]. In these cases, both JJ Burgess and Albion Water made complaints alleging CA98 infringements to the OFT and Ofwat respectively. These regulators found no competition law infringements but on appeal the CAT held that an infringement had in fact occurred. And Albion Water went on to bring only the second successful damages claim under section 47A of the Competition Act 1998 following the CAT's infringement findings on appeal.

Speed and number of appeals

17. One of the objectives by the Government is to make the appeals process quicker and in the Government's view a JR review would be faster than a merits appeal. We do not believe that is the case. Competition law cases are very complex and having JR will not lead to faster appeals. For example, the need for the CAT under JR to remit to the regulator rather than correcting the decision at the appeal stage would increase substantially the duration of cases. We must not forget that a rushed appeal would not allow the parties to have a reasonable time to present their case; and that could lead to justice not being administered adequately.

18. We also foresee that there will be considerable litigation while the new standards are debated. The current regime is now starting to bed down and we have sufficient clarity through case law to determine what is an appealable decision, what is the standard of review, what evidence can be brought forward. The proposed changes would introduce again considerable uncertainty in the system which would, inevitably, lead to satellite litigation in the UK and European courts (what is new evidence? Is this an error of fact or law? etc.) which is likely to take substantially longer to resolve than a full merits appeal under the current regime.

19. To the extent that the Government's concern is speed, there are certainly various ways in which that can be address through the CAT's procedural rules or case management practice without the need to change fundamentally the scope of appeals.

[1] ([2005] CAT 25)
[2] ([2013] CAT 6)

20. The statistics provided by the Government do not support conclusions that there are "too many" appeals or that appeals are too lengthy. The length of the appeal is sometimes due to issues that are not related to the CAT (please see the CAT's response) and certainly not disproportionate to the length of the administrative phase which can last several years.

New Evidence

21. We are also concerned about the restraints that the proposal would put on new evidence. The Consultation seems to imply that the CAT's procedures allow many appeals that have no merit to proceed and allow too much new evidence. We would not advise our companies to 'hide' evidence from the regulator and then present it for the first time in the CAT, trying to game the system and leading to the quashing of the decision (and we are not aware of cases where this has happened). We must not forget why the need for new evidence arises in competition cases and why it is justified. It arises because, for example, it was not considered relevant at the time of the Statement of Objections and its importance and relevance became obvious only at the time of the final decision or because, in cases where the decision contains forward looking analysis, the factual circumstances have changed. *Tobacco*[3] is a good example where an authority changed its position between the final decision and its case on appeal, so the appeal became the first time when the companies could address certain of the issues raised by the OFT.

22. In any case, the CAT already has discretion to exclude new evidence where there is no proper justification for introducing it at the appeal stage.

Incentives for companies to appeal

23. The Consultation seems to imply that companies might appeal to delay decisions or otherwise to game the system. This highlights a fundamental misunderstanding of how companies function. Companies carefully weigh all the available options. This exercise often results in parties trying to bring a swift close to proceedings e.g. through the use of settlements / early resolution agreements. And if a company

[3] ([2011] CAT 41)

decides to appeal, appealing a regulator's decision is not something that is taken lightly. Companies carefully assess whether they have a strong case or not before appealing. Bringing an appeal is extremely costly and can divert valuable management time. In some instances companies might feel strongly that the decision is wrong or the financial consequences are so high that there is no other way to get redress than appealing. A different standard of review would have the perverse effect that, even when the decision is incorrect, a company might find it difficult to have that quashed and therefore might decide not to appeal. The impact would be greater on SMEs which would also have to consider the proposed changes in the Consultation on allocation of costs.

Conclusion

24. While we understand some of the aims the Government is trying to achieve, we believe that these proposals have not been properly thought through and lack a sound evidential justification. For the reasons outlined above, the proposals could ultimately be expected to lead to a less robust body of decisions, and undermine confidence in the UK competition law regime as a whole. That would be a particularly unfortunate development as the UK competition law regime currently enjoys a very good reputation that is due in large part to the robust system of checks and balances – including appeals on the merits – that it incorporates. In conclusion, we believe that, when carefully considered, it is clear that maintaining the current full merits appeal regime provides businesses with the confidence needed to invest in the UK. There is a real risk that the Government's proposals will undermine that confidence and may create a brake on investment.

ICLA would be willing to discuss these views further.

For further information, please contact the chairman of the association, Paolo Palmigiano, at paolo.palmigiano@competitionlawyer.co.uk

Intellect

intellect
REPRESENTING THE UK TECHNOLOGY INDUSTRY

Intellect response to the Department for Business, Innovation and Skills consultation on:

Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

About Intellect

Intellect is the trade association for the UK technology industry. In 2007, the industries Intellect represents accounted for 8% of UK GDP, £92bn of Gross Added Value and employed 1.2m people.

Intellect provides a collective voice for its members and drives connections with government and business to create a commercial environment in which they can thrive. Intellect represents over 750 companies ranging from SMEs to multinationals. As the hub for this community, Intellect is able to draw upon a wealth of experience and expertise to ensure that its members are best placed to tackle challenges now and in the future.

Our members' products and services enable hundreds of millions of phone calls and emails every day, allow the 60 million people in the UK to watch television and listen to the radio, power London's world leading financial services industry, save thousands of lives through accurate blood matching and screening technology, have made possible the Oyster system, which Londoners use to make 28 million journeys every week, and are pushing Formula One drivers closer to their World Championship goal.

In the past 12 months 14,500 people have visited Intellect's offices to participate in over 550 meetings and 3,900 delegates have attended the external conferences and events we organise.

Response

After a careful consideration of the Streamlining Regulatory and Competition Appeals consultation document Intellect wishes to express major concerns on the changes outlined. While we are in principle supportive of the overall objective of streamlining procedures, we believe that the changes, if implemented, are likely to result in a detrimental effect on what is the necessary function of appeals procedures by bringing about their effective abolition. Specifically,

1) We are not convinced that the case for the proposed changes is sufficiently well proven
2) We are not convinced that the main proposals comply with either ECHR or the Framework Directive
3) We have significant concerns about the change to the standard of review in appeals
4) We have significant concerns about restrictions on the kinds of evidence that can be used in an appeal
5) We think that the consequences of implementing the proposed reforms could mean that where a decision was overturned and had to be remitted to the decision maker so that the matter could be reconsidered, this may have significant time and cost implications.
6) We are of the view that it is likely that proposals could lead to increased litigation during appeal and thereby be even more time-consuming.
7) We feel there is a significant risk that the changes proposed will harm competition and consumers. For example, appeals are often brought by parties other than the subject of regulation as they are by the subject of regulation. If new entrants, smaller organisations and those who buy from the regulated party feel that the regulator has erred in favour of the regulated party, they may bring a challenge on the grounds that prices need to be lower in order for them to be able to enter the market or compete in it effectively. If the change to the appeals regime was to make it harder for such challenges to be brought, this could work against the interests of competition and consumers.
8) We think there is confusion over the potential consequences of the proposed asymmetric costs regime. For example, if a challenge is brought against the regulator and the appellant loses, they will be required to meet Ofcom's legal costs. But if the appellant wins then they will not be able to recover costs from Ofcom. This may dissuade smaller organisations from bringing appeals, which in turn has the potential to lead to an impoverished standard of decision making.

Overall, we are concerned that the effect of the changes could be that the lack of industry's genuine ability to appeal will lead to poorer decisions and act as a disincentive to invest in the UK.

In addition to these specific responses to the document, we also believe that it would be better if there were further consultations and discussions such as with Intellect prior to, or during, the process of proposal composition so as to better involve the technology industry earlier and so lessen the likelihood of appeals in the first place.

Joint Working Party of the UK Bars and Law Societies on Competition Law (JWP)

STREAMLINING REGULATORY AND COMPETITION APPEALS

RESPONSE OF THE JOINT WORKING PARTY OF THE UK BARS AND LAW SOCIETIES ON COMPETITION LAW

1. This is the response of the JWP to the BIS Consultation Document published on 19 June 2013. In accordance with our general remit, we have focused on the implications for the development of UK competition law of these proposals.

2. In preparing this response, the JWP has been assisted by the detailed response submitted on behalf of the Competition Appeal Tribunal ("CAT") and published on 23 August 2013. Given the centrality of the CAT to the UK system of regulatory and competition law appeals, and its unrivalled collective expertise in this field, the JWP considers that its view necessarily carries very considerable weight. In general terms, the JWP endorses the concerns expressed by the CAT, both in relation to competition law and regulatory appeals, and its responses to the individual questions.

3. The JWP makes some general comments on the proposals before addressing the specific issues of competition law and regulatory appeals and, more briefly, the individual consultation questions.

General comments

4. The JWP has a number of overarching comments on the proposals:

    a. An efficient and effective system of regulatory and competition law appeals forms a central part of the overall regime for the regulation of the UK economy. As such, any proposed changes to the appeal regime have a potential impact on the overall regime and need to be assessed on that basis.

    b. Viewed from that perspective, the JWP does not consider that a wholesale shift to a judicial review standard of review would promote an efficient or effective system of appeals, for a number of reasons:

i. There is a serious risk that the effect of the proposed change would exacerbate rather than eliminate delays and uncertainty. That would be likely if the effect of the proposals was that the CAT or the CC were unable, where appropriate, to substitute their own views of the merits of a case for those of the regulator and to make suitable determinations and directions on the basis of those views – regulatory and competition law cases are frequently complex and it can take the regulatory bodies many months or years to conclude the administrative stage. If an error is made that emerges on an appeal (which may itself take some time to determine, particularly if there is a further appeal to the Court of Appeal or the Supreme Court on a point of law) then it is highly undesirable for the administrative process then to be resumed or recommenced as a matter of course. The JWP considers that the ability of the CAT to resolve issues on appeal rather than remitting them to the regulator is an important virtue of the current UK regime.

ii. Indeed, this was a deliberate design feature of the original regime established by the Competition Act 1998: see paragraph 118 of the judgment of the CAT in *Napp v. OFT* [2002] CAT 1, referring to the statement made in the House of Commons by the then Minister for Competition and Consumer Affairs (Mr Griffiths) during the passage of the Competition Bill on 18 June 1998 (Hansard Col 496):

> "It is our intention that ***the tribunal should be primarily concerned with the correctness or otherwise of the conclusions contained in the appealed decision and not with how the decision was reached or the reasoning expressed in it***. That will apply unless defects in how the decision was reached or the reasoning make it impracticable for the tribunal fairly to determine the correctness or otherwise of the conclusions or of any directions contained in the decision. Wherever possible, we want the tribunal to decide a case on the facts before it, even where there has been a procedural error, and to avoid remitting the case to the director general. We intend to reflect that policy in the tribunal rules.
>
> This is an important aspect of our policy, and I shall explain the rationale behind our approach. ***The Bill provides for a full appeal on the merits of the case, which is an essential part of ensuring the fairness and transparency of the new regime***. It enables undertakings to appeal the substance of the decision including in those cases where it is believed that a failure on the part of the

> director general to follow proper procedures has led him to reach an incorrect conclusion. The fact that the tribunal will be reconsidering the decision on the merits will enable it to remedy the consequences of any defects in the director general's procedures" (emphasis added).

iii. Procedurally, dilution of appeal rights, particularly in respect of cases concerning enforcement of competition law or regulatory conditions, would inevitably lead to additional demands for greater protection for due process rights to be provided at the administrative stage. Given the well-known difficulties facing regulators as administrative bodies in providing necessary guarantees for impartiality and independence in their decision-making, the JWP considers that it would undermine rather than promote the efficiency of the system for such a change to be made. The JWP also considers that it is inconsistent with the basis on which BIS recently decided to retain a system of administrative rather than prosecutorial enforcement of competition law for rights of appeal to be significantly diluted, and in particular for rights to challenge the factual and economic basis for a competition law decision to be impaired.

iv. The CAT and CC are expert specialist bodies that are particularly well suited to determine issues of fact and, where appropriate, to reconsider issues of regulatory policy. The JWP does not consider that it accords with their specialist composition and expertise for their role to be limited to a process of judicial review.

v. Both the CAT and the CC, and where necessary the Court of Appeal, are able to give guidance to the regulators not only as to the correct interpretation of the statutory scheme under which they operate but also as to best practice in respect of the gathering of evidence and the conduct of administrative proceedings. The JWP considers that the CAT in particular has performed this role with considerable benefit to the competition law regime – many of the recent and ongoing changes to the administrative stage of competition law enforcement have been driven by guidance provided to the OFT and other regulators on

appeals that have succeeded in whole or in part.[1] The JWP considers that an appeals system limited to judicial review of administrative action would tend to undermine the CAT and CC in performing this valuable role.

vi. The character of the regulatory decisions that form the subject matter of this consultation varies considerably, from quasi-criminal "prosecutions" under the Competition Act 1998 and the enforcement provisions of the sectoral regimes, where the JWP does not consider that a conventional judicial review would be a sufficient guarantee of due process, to issues of regulatory policy that may be better suited to reconsideration by the CC and/or to some form of judicial review. In addition, particularly in the telecoms field, some regulatory decisions are in substance the public arbitration of a commercial dispute, where again a judicial review standard of appeal does not appear appropriate.

vii. The JWP considers that some form of "merits review" of the kind provided for in the existing legislation provides the CAT and the CC with a suitable degree of flexibility to vary the intensity of review depending on the nature of the issues raised on an individual appeal. By contrast, an appeal that was primarily focused on issues of legality and due process, and where the appellate court was highly restricted in its ability to reconsider the evidence and/or the underlying merits of the case (or to substitute its own view for that of the regulator), would not be appropriate for many of the cases likely to come before the CAT or the CC.

viii. The JWP considers that the CAT, the CC and the Court of Appeal are in reality fully aware of the need for appropriate flexibility in the application of the "merits" test – as the CAT points out at paragraph 14

[1] For example, the series of construction appeals heard by the CAT enabled the CAT to give detailed guidance to the OFT not only in respect of the correct approach to the assessment of penalties but also in relation to the gathering of evidence and the standard of proof that should be applied: see *Durkan Holdings Limited and others v OFT* [2011] CAT 6; *North Midland v. OFT* [2011] CAT 14. Likewise, the CAT gave valuable guidance to the OFT on the correct approach to evidence gathering in both the Tobacco appeals and in the recent Tesco dairy appeal: *Imperial Tobacco et al. v. OFT* [2011] CAT 41; *Tesco v. OFT* [2012] CAT 31.

of its detailed response, there are numerous instances of the CAT distinguishing between cases where an a full review of the factual basis for a decision is appropriate and other cases where issues of policy are properly matters for the regulator rather than for the CAT.[2]

c. Although the introduction of a single statutory test for regulatory and competition law appeals might have a theoretical benefit of increasing the clarity and consistency of the system, the JWP has doubts that these benefits would be significant:

   i. There is already a considerable degree of convergence as to the relevant statutory test – for example, the statutory wording of section 195 of the Communications Act 2003 is closely modelled on that of Schedule 8 of the Competition Act 1998. In each case, the CAT is required to determine appeals on the merits and by reference to the grounds set out in the notice of appeal, which must identify whether those grounds raise issues of fact, of law or of discretion. The JWP is doubtful that the proposed "Box 4.1" criteria, which are more detailed but retain the same essential distinction between issues of fact, law and discretion, would materially alter or clarify the existing statutory wording.

   ii. The application of this statutory wording to the different classes of case that come before the CAT and the CC has generated a substantial body of case law from the CAT and the Court of Appeal. The JWP considers that it is inevitable that a material alteration to the statutory wording would lead to a further round of litigation in which the various interested parties (the regulator, the addressee of any regulatory action; and third parties with a commercial interest in the outcome of the case) would seek to argue that the change to the statutory wording did or did

[2] See in particular the citation at 14(3) of *British Telecommunications plc v OFCOM* (080) [2011] CAT 12 at [230]: "We consider questions of policy preference to be, par excellence, the sort of question where there is no single "right answer", and we agree with the Tribunal's statement in *T-Mobile* that the Tribunal should be slow to overturn such decisions. This is particularly the case here, where OFCOM is seeking to articulate policy preferences that are compliant with its statutory duties under the 2003 Act. We remind ourselves that these duties, which are broadly framed and clearly give OFCOM a measure of discretion, are duties imposed upon OFCOM itself and not on this Tribunal."

not override that earlier guidance. The JWP does not consider that this would be conducive to regulatory certainty or clarity – on the contrary, there is a significant risk that the overall effect would be to cause further appeals for an extended period while the various contested points of dispute were tested on appeal.

d. So far as the individual appellate bodies are concerned, the CAT and the CC have excellent reputations in their handling of appeals based on the statutory regimes currently in force, both in respect of the general competition rules set out in the Competition Act 1998 and the Enterprise Act 2002 and under the various sectoral schemes. As such, the JWP considers that any alteration to the current regime requires detailed justification and should be limited to incremental rather than radical changes:

   i. The CAT is still a relatively new appellate body that has developed an extensive body of case law as to the nature of its appellate role, both under the 1998 Act and under the Communications Act 2003. Its jurisdiction and procedural rules were specifically designed to enable it to discharge its functions flexibly and efficiently in the light of best practice in both the UK and the EU courts.

   ii. Particularly in the telecoms field, the case law of the CAT has been complemented by a series of judgments of the Court of Appeal considering the nature of the CAT's appellate jurisdiction. The JWP does not consider that this body of case law needs wholesale revision, although it might usefully be codified or summarised in a guidance document.

   iii. Likewise, the JWP does not consider that the case has been made out for radical change to the CAT appeals regime. The timescales under which the CAT operates compare favourably to relevant UK and international comparators, and the CAT's procedures and rules have been specifically developed to enable it to exercise strong case management powers and to deal with the complex economic cases that

come before it in an efficient and cost-effective way.[3] To the extent that BIS considers that further improvements in its performance are possible, the JWP considers that they can be achieved by incremental changes to the CAT Rules.

iv. The role of the CC, which has existed in a variety of forms for over 50 years, is already in a process of fundamental change as the preparations are made for the creation of the CMA in 2014. The JWP does not consider that any case has been made out requiring further urgent changes. In our view, it would be preferable to allow the ongoing changes to take place before making another fundamental change.

v. In contrast with the CAT, which is a judicial tribunal that already has a limited but important judicial review jurisdiction under the Enterprise Act 2002 (in respect of mergers and market investigations), the CC is an administrative body whose procedures are essentially inquisitorial rather than adversarial and whose composition does not make it suitable to undertake a supervisory judicial role. As such, although the material scope of appeals to the CC could be defined, and guidance could be issued indicating the extent to which the CC would give weight to the views of the regulator on, for example, issues of regulatory policy, the JWP does not consider that a case has been made out for a radical change to the standard of review. On the contrary, the JWP considers that the CC is ill-suited to perform a judicial review function and that a defined merits/public interest review is a much more appropriate standard for the CC to apply.

[3] In this area in particular, the JWP considers that the detailed comments of the CAT itself on the way in which it has exercised those powers warrant very close attention.

Competition law appeals

5. Before turning to the questions posed in the Consultation, the JWP considers it appropriate to make the following preliminary remarks in relation to antitrust appeals. Again, the JWP to a large extent summarises and endorses the points made by the CAT at paragraphs 23-31 of its response:

    a. The first point is that, as the Consultation recognises, antitrust decisions are different from regulatory decisions in various ways. Such decisions are penal, quasi-criminal, in nature: many antitrust decisions result in substantial financial penalties for their addressees and expose them to follow-on damages litigation under a statutory regime that renders such decisions binding.[4] Likewise, the directors of firms found to have engaged in breaches of competition law are exposed to disqualification. It is not appropriate for such consequences to be imposed as a result of an administrative decision that is subject only to an appeal by way of judicial review.

    b. Moreover, such decisions are "*ex post*" enforcement actions: they consider whether past or present practices or conduct have infringed or infringe the law. As such, they do not involve predictions in the way that merger decisions and many economic regulatory decisions do. In consequence, decisions tend to revolve much more around the facts, including the interpretation of documentary evidence. Even economic appraisals (of, say, the extent to which conduct by a dominant firm forecloses the market, or of the relevant market) are based on actual facts and data. Such appeals raise issues of a different character from those traditionally associated with domestic judicial review.

[4] In this respect, the present consultation needs to be read in context with the Draft Consumer Rights Bill, Schedule 7, paragraph 14, which will, if enacted, render infringement decisions binding in subsequent litigation.

c. The need for a judicial appeal route to a "merits" standard reflects the fact that there is no equality of arms at the administrative stage. For instance, many investigations turn on disputed facts, yet the administrative stage frequently does not give parties any opportunity, prior to the SO or even the decision itself, to understand precisely what is said against them on those facts, let alone the opportunity to test the authority's case by way of cross-examination of relevant witnesses. Further, many investigations rely on evidence and submissions from immunity and leniency applicants, who inevitably have strong financial and strategic incentives to tell the authority what (they think) it wants to hear, in order to safeguard the conditional immunity or lenient treatment they have been granted. Again, it will only be at the appeal stage that appellants are able effectively to challenge such evidence and submissions, and in particular to cross examine witnesses relied on by the OFT or the sectoral regulators.[5] In the JWP's view, the ability properly to test that case is critical to ensuring robust decision-making and public confidence in the antitrust investigation and decision-making process.[6]

d. In the JPW's view, any reform to the appeal process in antitrust cases would be premature. In the Government's response to its consultation on the competition regime it was recognised that, if the administrative model was to remain in place in preference to a prosecutorial model, the merits-based appeal mechanism should be maintained.[7] In the JWP's view, it is more appropriate to allow the 'enhanced' administrative process to bed down, and to take stock of the effect this has on the proportion of antitrust decisions appealed, the length of such appeals and their success rates, on the basis of proper data, before considering yet further change in this area.

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5 The JWP notes that the collapse of the OFT's case in the Tobacco appeals (*Imperial Tobacco and Others v OFT* [2011] CAT 41) followed immediately after the cross examination of the sole witness called by the OFT, a former employee of the immunity applicant in that case.

6 For a detailed exposition of the importance of a full merits review, see Burrows and Eberhardt, "*KME, Menarini* and the CAT in *Imperial Tobacco*: what does a 'full and unrestricted review' need to entail if it is to be effective?" [2012] CLJ 253.

7 See para 6.19 of the Response to Consultation.

e. The JWP is concerned that the Consultation does not distinguish clearly between the current "merits" standard provided for in the 1998 Act and a full rehearing of the case. As the CAT itself has emphasised, that fails to give due weight to the fact that the current jurisdiction is specifically constrained by the "grounds of appeal set out in the notice of appeal": see Schedule 8, paras. 2 and 3, to the 1998 Act. The current proceeding is thus not a full rehearing of the regulator's case – it is a judicial determination, to an appropriate merits standard, of the specific grounds identified by the appellant in its notice of appeal.

f. Finally, the JWP is very concerned at the absence of any evidence for various propositions made about antitrust appeals to the CAT. For instance, the Consultation does not point to any antitrust case before the CAT in support of its implicit suggestions that parties routinely adduce evidence of limited relevance to the key issues in a case (para 4.63), challenge decisions because they take a different view of the right answer (ibid) and fail to focus on the real issues (para 4.64). Nor is any evidence cited for the proposition that the scope and level of scrutiny in such cases is uncertain. The JWP considers that the Government should proceed on the basis of hard evidence before embarking on potentially radical reform in this area.

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?

6. The JWP does not consider that there should be any change in the standard of review in competition law appeals. As has already been explained, the current statutory right of appeal on the merits ensures equality of arms and, more generally, compliance with the requirements of Article 6 ECHR for a fair hearing before an independent and impartial tribunal. It is a flexible standard that is well understood by the authorities,

practitioners and businesses. It is one which, in the JWP's view, has served the UK competition enforcement regime well: it is flexible enough to cater for different types of case, enables proper scrutiny of antitrust decisions, and enables the CAT, where appropriate, to substitute its own (specialist) view for that of the authority, rather than merely remit the matter for further consideration.

7. The Consultation suggests that a merits-based appeal mechanism has a number of drawbacks in antitrust cases, including:

    a. A lack of clarity as to how the standard of review will be applied in any particular case;

    b. Reducing the credibility of the authority;

    c. Increasing the length of appeals; and

    d. Increasing costs.

8. JWP does not share the Government's concerns. Taking each in turn:

    a. The current jurisdiction allows the CAT to tailor the level of its review to the circumstances of the appeal. For example, if the authority is alleged to have committed an error of law (e.g. in rejecting a complaint on the basis that the entity under investigation was not an "undertaking" for the purposes of s.2 CA98), then the CAT's review will focus on that issue.[8] If, instead, the appellant claims that the authority has misinterpreted documents and has consequently come to an erroneous conclusion on the facts, then the CAT's enquiry will be broader. This flexibility is a positive rather than negative feature of the CAT's jurisdiction, in the JWP's view. Likewise, in terms of appeals against ***non***-infringement decisions, the CAT has made clear that appellants do not get a second bite at the cherry; rather, the CAT will seek to decide whether, on the material put before it by the appellant, the OFT was correct in arriving at the conclusion that it did.[9] Complainants will normally need to persuade the CAT that the decision is incorrect or insufficient from

[8] See e.g. *BetterCare Group v DGFT (Admissibility)* [2002] CAT 7.

[9] *BetterCare Group v DGFT (Admissibility)* [2002] CAT 6 at [96].

the point of view of the reasons given, the facts and analysis relied on, the law applied, the investigation undertaken or the procedure followed.[10] The Tribunal will normally consider the decision in the context of the complaint made, examining whether, in the circumstances, the reasons given constitute a sufficient answer to the complaint.[11]

b. The JWP does not agree that the current appeals mechanism is damaging to the credibility of the UK regulatory system. On the contrary, the existence of a robust appeals mechanism is crucial to the strong reputation of the UK competition law enforcement regime. Parties under investigation, and the wider public, can have confidence in the quality and robustness of decisions if there is an effective appeals mechanism in place in the event that the authority should go wrong. The JWP considers that the authorities' credibility would be weakened rather than strengthened by a downgrading of the CAT's jurisdiction. If the OFT's investigation and decision-making has been found wanting in certain cases, the answer does not lie in tying the hands of the appeal body; it lies in improving the quality of the output emanating from the authority itself.

c. The JWP does not regard the length of proceedings as a reason to alter the standard of review. As the Consultation acknowledges, the average length of proceedings in the CAT is broadly in line with international comparators. Antitrust appeals are often complex, multi-party proceedings challenging very long and detailed decisions covering conduct and practices over a period of several years. It is hardly surprising, therefore, that such appeals

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10 *Freeserve.com v Director General of Telecommunications (Validity)* [2003] CAT 5 at [114] (described in *Burgess v OFT* [2005] CAT 25 (at [126]) as a 'convenient check list of matters that an appellant complainant needs to establish in a case where the OFT has taken a formal non-infringement decision, albeit that the appeal is ''on the merits'''). See also *Albion Water v WSRA* [2005] CAT 40 at [244]. In *Claymore Dairies v DGFT (Confidentiality)* [2003] CAT 12, the Tribunal noted that its role in that case (an appeal brought by a complainant against a decision of non-infringement of the Chapter II prohibition) was to identify whether the OFT had made any material error of law, whether it had carried out a proper investigation, whether its reasons were adequate and whether it had made material errors of appreciation: see p 7, ln 2 et seq of the transcript; see also *Claymore Dairies v OFT (Recovery and inspection)* [2004] CAT 16 at [109] to [111], where the point was made that, in contrast to appeals brought by the subject of an infringement decision (in which the Tribunal usually has to come to a view, on the evidence before it, as to whether an infringement has indeed been made out), the Tribunal was not being asked in those proceedings to take a decision as to infringement: the Tribunal's function was accordingly different. See also *Claymore Dairies v OFT* [2005] CAT 30 at [168]-[169].

11 *Freeserve.com v Director General of Telecommunications (Validity)* [2003] CAT 5 at [117].

take time to reach determination. Of course, where the circumstances warrant it the CAT is prepared to move quickly, as various merger appeals have demonstrated.[12] Further, the JWP is sceptical as to whether a change in the wording of the standard of appeal would make any real difference: the Consultation seems to accept the importance of live witness evidence,[13] which is one of the main contributors to the length of antitrust hearing. Finally, even if the current standard of review may lead to somewhat longer hearings in some cases, that effect needs to be set against the fact that a switch to a judicial review standard would undermine the CAT's ability to determine cases and, in appropriate cases, to substitute its own decision for that of the authority. The effect would be to force the CAT to remit cases for re-consideration that it can currently resolve itself. That would inevitably increase rather than reduce overall timescales (especially given the inevitable risk of a further appeal against the new decision adopted by the authority).

d. As for the cost of proceedings, parties to antitrust proceedings have an incentive not to incur costs unnecessarily. In the JWP's experience, parties are alive to the costs rules in the CAT, in particular the usual "loser pays" rule and the issues-based approach that the CAT will take, ensuring that unreasonable conduct of litigation by the victorious party will be taken into account when determining costs.[14] Further, the cost of proceedings would be unlikely to decrease if the standard of review were to be amended, given the need for a full review of both law and fact (see below).

9. The Consultation suggests two options to replace the current statutory standard of review "on the merits", either judicial review or a more detailed statutory test. Of these, the JWP has concerns that a judicial review standard as understood under UK domestic law would either fail to satisfy the requirement of "full and unrestricted review" of both law and fact as required by EU and ECHR law,[15] or would require the

[12] It should be noted that the comparison made at para 3.15 (and para 4.6) of the Consultation between the respective lengths of merits appeals and JR appeals is inapposite, for the reason set out at para 3.16: most JR appeals relate to merger decisions and need to be determined rapidly.

[13] At para 6.11.

[14] See e.g. *Racecourse Association v OFT* [2006] CAT 1 at [10].

[15] See Case C-272/09 *KME Germany v Commission* [2012] 4 CMLR 275 at [109].

CAT and the Court of Appeal to reinterpret the judicial standard to meet that requirement (which would be binding on the regulators both under the Human Rights Act 1998 and, in EU cases at least, under the European Communities Act 1972). It is inevitable that there would be further litigation to establish what exactly a judicial review standard of review required in this specific context. If the regulators sought to argue that domestic judicial review is "sufficiently flexible" to satisfy Article 6 ECHR (Consultation, para 4.54), the JWP cannot see how that would achieve the Government's objective of providing greater clarity and certainty about the scope and level of scrutiny to be applied by the CAT.

10. As for Option 2, the JWP sees no real benefit in setting out the permissible grounds of appeal in more detail. First, as noted above, there is already sufficient clarity about the grounds of appeal that will be entertained by the CAT. Secondly, the principles set out in Box 4.1 at pp.30-31 of the Consultation closely resemble the principles deployed by the CAT already; as the CAT notes at Part II, paragraphs 17-18 and 35 of its response, there is no question under the current regime of the CAT allowing an appeal on the basis of an ***immaterial*** error of law or fact, or unless the regulator "got something materially wrong", and so spelling out the grounds of appeal in the manner suggested seems to serve little purpose. Thirdly, the introduction of fresh wording is bound to generate litigation, with consequent costs, testing the contours of the new statutory scheme.

11. The JWP therefore disagrees with the Government's assessment of the likely impact of such a reform (Consultation, paras 4.61 ff). The absence of concrete examples of antitrust appeals that have 'gone wrong' as a result of the present process, together with the likely lack of significant benefits, suggests strongly that no amendments should be made to the present standard of review.

Regulatory Appeals

12. The JWP agrees with the general position adopted by the CAT in its response that competition law appeals raise different issues from regulatory appeals, given the exposure to penal sanctions and to follow-on actions in which the findings of the

regulator are statutorily binding: see paragraph 24-31 of the CAT response. The JWP also agrees with the CAT that there may be some room for simplification and rationalisation of the various different appeal routes that are currently available: see, e.g., paragraph 37 of the CAT response.

13. Moreover, on the central issue of the standard of review to be applied by the CAT and the CC, the JWP agrees with the CAT that the Consultation does not make out a case for a general shift to a judicial review/structured review standard for regulatory appeals.

14. Firstly, although there are material differences between competition law and sectoral enforcement action, there are also important similarities: like competition law enforcement, regulatory enforcement action is based on "*ex post*" assessment of compliance and can lead to very significant penalties, harm to corporate reputations and also raises important questions as to the credibility of the regulatory regime. Appeal rights are therefore important and require assessment not only of the legal and procedural aspects of a decision but also whether it was soundly based as a matter of fact.

15. Procedurally, the JWP can see no principled objection to enforcement cases under the different sectoral regimes being heard by a single body and agree that the CAT would be well placed to be that body. So far as the appropriate standard is concerned, the JWP considers that the "merits" standard identified in the 1998 Act would be an appropriate one, allowing the CAT to scrutinise not only legal and procedural issues but also:

    a. the regulator's findings of fact;

    b. the regulator's interpretation and application of the relevant prohibition to those facts; and

    c. the factors relevant to sanction.

16. The JWP considers that any lower standard of review tends to place excessive reliance on the independence and objectivity of internal checks and balances within the regulator body itself. Contrary to the approach in the Consultation, the JWP

considers that confidence in the UK regulatory system would be enhanced rather than undermined by a system for robust scrutiny of regulatory enforcement action.

17. In relation to other forms of regulatory action, the JWP considers that the Consultation paper is defective in failing to mention some important background factors:

    a. Regulatory appeal mechanisms relate to sectors of significant importance to the economy in which substantial private sector investments have been made against expectations of a stable regulatory framework. It is of crucial importance to the competitiveness of the UK economy that such investments continue to be made in the future. Changing the basis on which the "rules" or "regulatory bargain" on which investment is made, and particularly changes which shift power and discretion towards the regulator by reducing the scope of the appeal, will inevitably affect perceptions of regulatory risk and the cost of capital for infrastructure investments in the relevant sector. These are not trivial issues. The Consultation paper fails to recognise these underlying but highly significant risks. JWP members have direct experience of the relevance of regulatory appeals processes to decisions to invest in UK assets.

    b. Although there is an obvious superficial attraction in aligning appeal routes for the different sectors, the JWP notes that some of the differences in current appeal rights can be explained by wider differences in the regulatory structures for the different sectors. For example:

        i. Changes in licence conditions have tended to be driven by the consensual model in energy and by a mandated regulated model in telecoms.

        ii. Rail regulation has its particular history based on political factors and the history of Railtrack and Network Rail.

        iii. The different sectoral regimes are to a significant extent determined by the requirements of sectoral EU directives which differ significantly and which impose specific requirements for appeal rights.

c. In addition, although there are certainly differences in the procedural routes that can be followed, there is already a considerable degree of consistency in the approach adopted by the CC in respect of regulatory appeals. Unlike the CAT, which conducts adversarial hearings either to a "merits" or a "judicial review" standard, the CC has traditionally conducted the great majority of its proceedings on an inquisitorial basis by reference to some variant of a "public interest" test (varied by reference to the factors in the specific legislation in issue). This regime is long established and widely respected, and had and has the advantage of creating a framework in which the CC, as a specialist review body, could exercise a consistent "overview" independent of Government, regulator and regulated. A general shift away from that approach to a form of judicial review by one administrative body of another would create considerable uncertainty and would inevitably require judicial guidance to determine the legal parameters of such an untried regime.

18. A further factor that the JWP considers to be significant is that changes have only recently been made in the regimes for GB energy and aviation appeals, as well as a significant amendment to the EU telecoms framework. In addition, the role of the CC is undergoing radical overhaul in the context of the creation of the CMA. In such circumstances, the JWP questions whether it should be a priority to be proposing yet further amendments to the regulatory regime.

19. Against this general background, the JWP considers that any proposal for review of the regulatory framework would require strong evidence that the current system is not functioning effectively and that the differences between the sectoral regimes can no longer be justified either in themselves or by reference to the relevant EU directives on which they are based. Viewed from that perspective, the JWP considers that the case for radical change is not made out.

Other Issues

20. As will be clear from the above discussion, the JWP does not agree with the central proposal of the Consultation, that there should be a general move to a standard of review based on judicial review principles or the standard set out in Box 4.1 of the

Consultation. The answers to Questions 1, 2, 4, 6 and 8 are therefore no. So far as the other questions in this section, 3, 5, 7 and 9-12, are concerned, the JWP considers that there are good reasons to retain the current statutory standard of a "merits" review based on specific grounds set out in a notice of appeal. The principal advantages of such a regime are:

a. It is an appropriate standard for enforcement action under competition law and enforcement of regulatory conditions.

b. It clearly complies with the requirements of EU and ECHR law.

c. It enables the CAT to resolve cases without necessarily being required to remit the matter for a re-determination by the regulator, thus minimising overall delays.

d. It is a flexible standard that is well understood and that enables the CAT to vary the level of scrutiny to reflect the issues raised on an individual appeal.

21. So far as appeals to the CC are concerned, the CC is not well suited to the judicial review of decisions by the regulators. The current system of inquisitorial investigation of issues brought to the CC on appeal is well understood and has been operated for many years, in general under very strict deadlines. Again, this system of appeal minimises delay by allowing the CC to resolve issues without generally requiring any redetermination by the regulator.

22. In addition to these questions concerning the standard of review, the Consultation raises a large number of other issues concerning the operation of the CAT and the CC, and various issues at the administrative stage.

23. In general terms, the JWP considers that the CAT is an effective appellate body with extensive case management powers that are fully sufficient to meet the Government's targets for efficient case management:

a. So far as Questions 14-17 are concerned, the JWP would be content for the proposed changes to be made, although it considers that the use of single judges should be limited to procedural and interlocutory matters and preliminary issues of law.

b. The JWP can see some merit in extending the scope of the CAT's jurisdiction to deal with the issues addressed at Questions 21-27, although the CC has shown itself capable of handling satisfactorily the only Energy Code modification appeal brought to date.

c. The JWP does not consider that it is necessary to make specific provision for unmeritorious or "fast track" appeals, to impose time limits or costs rules on the CAT, contrary to the proposals to which Questions 32-36, 42-43 and 47-48 are directed. The CAT has shown itself fully capable of expediting its procedures when required and of developing suitable principles for the award of costs.

d. Likewise, in respect of Questions 30-31, the JWP does not consider that it is necessary to give statutory guidance to the CAT in respect of the admission of new evidence. The position has been the subject of recent guidance from the CAT and the Court of Appeal.

24. So far as the CC is concerned, the JWP does not consider that it would be appropriate to change the jurisdiction or procedures of the CC while the CMA is in the process of creation. Although the JWP can see some advantage in allowing price control appeals to be brought directly to the CC, there is no pressing need to make such a change and it would be preferable to deal with the issues to which Questions 18-21 and 44-47 are addressed once the new regime is established.

25. In respect of the improvement of administrative decision-making, the JWP considers that these are issues that are best addressed as part of the process of establishing the CMA. In so far as the regulators are exercising investigatory or enforcement functions analogous or identical to those of the CMA, then it is logical that they should enjoy equivalent powers – however, the JWP does not consider that such extensive powers are required in relation to the exercise of regulatory powers generally (Questions 37 and 38).

26. The JWP can see merit in the increased use of confidentiality rings at the administrative stage under the supervision of the CAT or the High Court (see Questions 28-29).

27. Finally, in relation to "non-infringement" decisions (Question 39), the JWP does not see any pressing need to alter the current regime, which is now well-established and well understood. If such a change were to be made in the light of the proposed expansion of the CAT's jurisdiction to hear civil actions for damages and injunctions, then it would need to be made clear that the CAT was not bound by a prior non-infringement finding by the CMA or a sectoral regulator.

Jon Turner and Meredith Pickford, Monckton Chambers

STREAMLINING REGULATORY AND COMPETITION APPEAL – CONSULTATION ON OPTIONS FOR REFORM

CONSULTATION RESPONSE BY CERTAIN MEMBERS OF MONCKTON CHAMBERS, BARRISTERS, SPECIALISING IN REGULATORY AND COMPETITION LAW

I: SUMMARY

1. This response provides comments on the Government's Consultation of 19 June 2013 entitled "Streamlining Regulation and Competition Appeals" (the "Consultation"). It focuses on two areas of the regulatory and competition appeals regimes in which the authors have considerable experience and to which much attention is devoted in the Consultation – appeals against Ofcom's regulatory decisions and appeals against decisions under the Competition Act 1998.

2. The Government's commitment to ensuring effective economic regulation and competition enforcement is to be welcomed. So too is its desire to review the existing system to assess ways in which it might be enhanced.

3. However, we endorse the response of the Competition Appeal Tribunal ("Tribunal") that many of the Government's specific proposals are likely ultimately to achieve the opposite of the objectives that it sets out.

   3.1 We consider that changing the standard of review would be misguided. It would lead to less robust decision-making, decisions with flawed economic analysis going unchecked, poorer outcomes for consumers and ultimately reduced economic growth. These are serious adverse consequences which the Government should strive to avoid.

   3.2 The adverse effects on growth will be exacerbated by the fact that in an increasingly globalised, internet and satellite world, companies have increasing flexibility about which jurisdiction they locate themselves in to do business. Currently, the UK is a desirable one: companies value a system which allows sloppy, poor decision-making to be addressed, and it tends to promote better, stronger decisions. Conversely, investment in the UK will be discouraged by a

system where economic regulators can get away with taking decisions that do not withstand scrutiny on their merits. By removing this important safeguard in the current UK system of economic regulation, the Government would, perversely, make the UK a less desirable place to do business. That cannot be sensible at any time, still less one where economic growth is so high on the agenda.

3.3 Further, far from clarifying the standard of review (which has become refined and well-understood through case-law), the proposals risk in practice causing substantial confusion. At the very least they are likely to provide fertile ground for lawyers to debate the true meaning of the new approach, the extent to which it represents a departure from what went before, and how it is to be reconciled with EU law and fundamental rights, and to seek references to the Court of Justice of the European Union ("CJEU") or appeals to European Court of Human Rights ("ECHR"). Similarly, rather than streamlining the appeals process, the call for greater use of preliminary procedures (for instance to strike out claims) is likely in practice to lengthen and complicate it.

3.4 We also consider that the suggested asymmetrical costs rules are unfair and will particularly disadvantage smaller companies, who will tend to be shut out of the appeals process if – even when they demonstrate a serious error in a decision affecting them – they are in general to be prevented from recovering costs.

3.5 Finally, certain of the proposals are also likely to be contrary to EU law and fundamental rights. Or at the very least, the Courts will be forced to read them in a way which avoids such incompatibilities, adding to the confusion over the standard of review noted above.

4. The suggestion that the current system has impeded growth through causing delay is puzzling. The key examples of delay cited in the Consultation have little or nothing to do with the standard of review. The litigation over spectrum rights for example was focussed on points of <u>law</u> – a ground of challenge that is always available on a judicial review. Indeed, a material part of the litigation took the form of judicial review in the Administrative Court and appeals in the Court of Appeal (of a point of law).

5. We would urge the Government to give great weight to the voices of those companies that do business in heavily economically regulated areas. It is they that – at least in the communications sphere (which takes prominence in the Consultation) – bear the costs of Ofcom's activities through the levies they pay Ofcom for its work under the Communications Act 2003 (the "2003 Act"). And it is they that suffer any uncertainty whilst an appeal is afoot (a temporary cost, given that the rigour brought about from scrutiny during an appeal tends to bring far more certainty than allowing a poor or confusing regulatory decision to stand). It is compelling economic evidence against changing the standard of review that it meets with overwhelming opposition from the companies that should - were the premise of the proposed reform a good one - be benefiting from the changes. If those that pick up the bill for the present system are happy to pay its costs, that strongly suggests that the Government should leave it alone.

6. In conclusion, therefore, given the serious consequences of the proposals, we would urge the Government to think again in relation to a number of them. Whilst it is desirable, as the Government sensibly seeks to do, to reform the existing system, for example, to achieve greater consistency in appeals routes, and to remove one-way bet appeal incentives (insofar as they exist), the proposals, particularly as they relate to the standard of review and costs, will damage a system that has in fact worked well for consumers and growth and has not led to the adverse outcomes suggested. That damage risks serious adverse consequences on the wider economy.

7. If the Government wants to improve the speed and quality of regulatory decision-making, we respectfully urge that it should focus its attention principally on the decision-making itself, rather than shooting the messenger (the Tribunal) who, in respect of a small minority of decisions, has to deliver the news that the decision-making has fallen short.

II: „The case for change'

8. The case for change appears to be centred on achieving fewer, swifter and less costly appeals (see §3.13). However, on proper scrutiny, that case is exceedingly weak:

9. As to the **length of appeals**:

9.1 The 11 month average in the CAT for a full merits appeal compares extremely favourably with the length of time taken to resolve any dispute of similar complexity in the High Court (whether in the Commercial Court, Chancery Division or Administrative Court). From our experience, equivalent cases in the High Court are not on average determined anywhere near as quickly.

9.2 The comparison made with 4 months for cases heard on a judicial review standard in the Tribunal is an erroneous one.

(a) First, such cases are typically reviews of decisions on references from a regulator to the Competition Commission ("CC"). The CC will itself already have performed a quasi-judicial role, provided the parties involved with a substantial hearing and performed a detailed investigation of referred issues. This allows the issues suitable for a yet further review to be distilled to those few remaining issues suitable for judicial review (a standard which is sensible and appropriate in these circumstances given the role the CC already performed).

(b) Second, because of the context described above, there will also already be fully „up and running' legal teams in place for each relevant party that will have been actively involved in the process before the CC and know the CC's provisional decision just a month or so prior to its final one. This makes it relatively easy to move to a swift hearing. But it would not be the case for challenge of many decisions of the OFT, Ofcom and others, for which there may be no provisional decision, and where, in contrast to decisions of the CC, the challenged decision will tend to follow without notice, in some cases years after a statement of objections or consultation.

(c) Third, by the time of any judicial review challenge of a CC decision, it has often become imperative that such challenge is conducted on an expedited basis because of the commercial imperative of achieving final legal certainty in relation to the merger decision or price control which has already been through intensive scrutiny before the CC (as indeed the Consultation appears to recognise in §3.16 in the different context of the length of time spent on the appeal). Thus parties and the Tribunal go out of

their way to allow the review to be heard on an expedited basis (which means in essence – ‚jumping the queue' of other cases already before the Tribunal and/or being litigated the parties' legal advisers).

(d) The Government would therefore be wrong to expect that changing the standard of review for appeals generally would lead to all appeals being determined in the order of 4 months because (i), the mix of cases would be very different (they would include challenges to decisions direct from regulators rather than ones that have already been scrutinised by the CC), and (ii), not every case can ‚jump the queue'.

(e) Further, the Government does not in any event propose a simple judicial review test for all decisions, but for some a slightly enhanced one, at least as regards errors of fact – which tends to be one of the more time consuming aspects of any appeal, since it requires witness evidence to be prepared and tested. Any reduction in the average time for determination by changing the standard of review is likely to be relatively modest at best. Moreover, it would most likely be more than offset by other proposals in the Consultation which suggest greater use of interim proceedings, which on average inevitably tend to slow appeals down.

9.3 Further, since appeals under the current system do not automatically, and rarely in practice, lead to suspension of the decision being appealed against, regulators do not have the effects they are attempting to achieve in a market thwarted whilst an appeal is afoot. The main beneficiaries of the legal certainty brought about by swifter appeals would thus be the affected companies who may suffer uncertainty during an appeal. However, if the length of time to determine disputes is to be relied upon as a reason for change, then the Government would need to point to a strong consensus in support of the reforms from such companies for whom economic regulatory decisions play a major role (such as the communications and broadcasting industries). There is no such evidence presented; rather the consensus so far has clearly been against dilution of the standard of review, as the Government recorded in its March 2012 Statement following its earlier consultation on this issue. As the Consultation notes at §3.17 there are in fact strong arguments in favour of regulatory certainty from having an

appeals system capable of robust and rigorous review, which the present system provides.

10. As to the issue of the **costs of appeals**, it is plainly appropriate to seek to ensure that these are proportionate to the matters in issue. However, as the Consultation rightly notes at §3.21 (albeit in a different context) the costs of appeal are often low relative to the benefits. And those benefits do not just accrue to the appealing parties. If an appeal is upheld on substance it is ultimately because the regulator's decision did not properly give effect to its statutory duties – the concern of which is consumers, not those companies that serve them. Costs which lead to better regulatory decision-making are likely to be well incurred; and the Tribunal is able to deal with costs so as to ensure that they are fairly allocated.

11. Moreover, in the context of appeals under the Communications Act 2003 (a large focus of the Consultation) it is important to understand that, even if costs were to fall to be paid by Ofcom (which is very rare) they are ultimately met by the communications and broadcasting industries through the levies which they pay to fund Ofcom. Thus it is the views of those parties on which the Government should place weight. And they are in general strongly against the proposals.

12. We comment further below on costs in relation to Government's specific proposals on this issue.

13. As to the issue of **incentives to appeal**, it will indeed be the case that if the prospects of successful appeal are substantially reduced that will tend to some extent to deter appeals. However, even assuming that this is the result of the reform, it is far from clear why this is of itself desirable:

    13.1 Given the immense importance to major undertakings doing business in the UK, and to the UK economy, of many of the decisions in contemplation there is no evidence that the present proportion of decisions appealed against is inefficiently high. For example, as the Consultation demonstrates, the vast majority of Ofcom's decisions (apparently around 88% from figure 3.2) are not appealed; and Ofcom is successful in a substantial number of the appeals that are brought. So it is unclear why the numbers should be substantially reduced.

13.2 This is particularly so when the costs of Ofcom's work under the Communications Act 2003 are, as noted above, borne not out of general taxation but by the very industry Ofcom regulates. The fact that those that pick up the tab for the system favour keeping it in preference to a watered down regime is compelling market evidence that the standard of review should not be changed.

13.3 Moreover, significant numbers of appeals have revealed serious problems with regulatory decisions which the merits appeals process has exposed. It is likely that many of these would not have been picked up had a judicial review test or the similar „enhanced' judicial review test suggested in the Consultation been applied. (This is discussed further below in connection with the standard of review). It is unclear why it would benefit the UK to allow regulatory decisions containing material flaws in their reasoning to escape scrutiny when there are two bodies (the Tribunal and the CC) capable of, and experienced in, helping ensure that that does not happen.

13.4 As noted above, the costs of appeals are often very small relative to the issues at stake. This has two implications:

(a) it suggests that it is proportionate for a significant number of decisions to be subject to challenge; and

(b) the effect on the number of appeals of changing the standard of review may be relatively muted: if the stakes are high and the costs of challenge low relative to those stakes, even appeals with limited prospects may still be brought, as the Government recognises (albeit in a different context) at §3.21. The primary effect of changing the standard of review may therefore be not so much to reduce significantly the total number of appeals brought, but to reduce the proportion of those appeals which expose errors, with its obvious undesirable effects. More time spent on failed appeals is not sensible.

13.5 At §3.20, the Consultation notes that *"in some cases there appear to be few downsides to appealing, even if the appellant does not stand a good chance of winning"*. It gives the example of price controls in the telecommunications sphere where there may appear to be a „one-way bet' from appealing by cherry-

picking certain parts of a decision. This is indeed a potential problem. However the proposals are not the right way of meeting it:

(a) They do nothing to remove the one-way nature of the incentive: as the Consultation notes, the incentive will still tend to exist even if the appellant does not stand a good chance of winning.

(b) There is a better alternative which would meet the problem. What prospective appellants do not appear currently to face is the disciplining effect of the risk that the result may be made worse by appealing. On the contrary, because they know that others with different and opposing interests may also appeal, they are encouraged to put in their own appeal pre-emptively so that their points can be set against those of their potential future opponents in any appeal.

(c) The system can easily be reformed to avoid this, however: if interventions are permitted to advance independent off-setting points which could work against the appellant,[1] this has two effects:

(i) it removes the need to become an „Appellant' merely to advance one's own points to guard against the risk that someone else appeals;

(ii) it removes the one-way bet. The act of appealing opens the door to the ability of others to bring points in interventions which could more than off-set the benefits of the original appeal.

13.6 Allowing more expansive interventions thus has the effect of changing the economic „game' faced by potential appellants and would in fact work to deter appeals in the first place, where such appeals have only been brought (a) protectively or (b) because they appear to be a one-way bet. Deterring these types of appeal is likely to be beneficial, and to result in those remaining appeals that are brought being more sharply focussed.

[1] The Tribunal's rules do not preclude interventions having such a role; but its practice has tended to prevent them doing so.

14. Under the heading of “incentives to appeal” the Consultation also deals at §3.22 with the supposed problem that appeals routinely involve substantial amounts of new evidence that is not always available to a regulator making its decision. The Consultation cites the *British Sky Broadcasting (Conditional Access modules)* case in support where it says: “there were over 35,000 pages of submissions and evidence, and 41 witnesses (including 14 experts) of whom 25 gave oral evidence”. However, it is important to have a full understanding of the case cited and procedures before the Tribunal.

14.1 As a minor but relevant preliminary point, the case that the Consultation means to cite is not the *Conditional Access Modules* case but Case 1158/8/3/10, which concerned Ofcom’s pay TV decision imposing new regulation on Sky.

14.2 In that case, the majority of the 35,000 pages of documents were ones which Ofcom itself had collected during the 3 years prior to a decision (or were documents which Ofcom had itself created, such as earlier consultations documents). They were not new documents that were the product of the litigation. Ofcom itself exhibited roughly six thousand pages to one of its witness statements.

14.3 As to the size of the proceedings, these were arguably the biggest proceedings ever to take place before the Tribunal: but their scale is not surprising when the context is considered: there were 6 separate appeals involving multiple Appellants and interveners and the matters addressed in them were highly complicated and fact intensive. The main Ofcom decision being challenged itself amounted to approximately 1,000 pages with annexes; and it involved important questions for the industry and consumers.

14.4 The existing case-law of the Tribunal already means that "new" evidence runs the risk of being disregarded, if it could have been deployed before the regulator: see *BT v Ofcom* (CoA). It is not clear, therefore, what change the Government intends to achieve, given that the Tribunal is well placed to assess the appropriateness of allowing new evidence in any given case. Such a case-by-case discretion would appear to be more desirable than a blanket rule which may cause injustice in a given situation.

14.5 Further, there are number of specific problems with any blanket rule or presumption against new evidence:

(a) Such evidence often assists the Tribunal by focussing in on the key issues relevant to the appeal, synthesising the arguments that have gone before in what may have been a lengthy, detailed and far-ranging consultation process. Thus far from making the proceedings more lengthy, such evidence allows the Tribunal to focus more keenly on the issues that are live in the appeal.

(b) The obvious incentive for consultees faced with a possible bar on evidence in an appeal is to bring forward large amounts of formal witness statements on any issue that might possibly arise for later debate (and before a final regulatory decision is taken, there may be many such issues). This will have the effect of substantially increasing costs for consultees, and drowning consultations in evidence submitted on a precautionary basis, just in case it is needed on appeal, impeding the efficiency of administrative proceedings.

15. The Consultation refers to at §3.24 – 3.25 to appeals being used to delay decision-making, and in particular to the litigation over the award of 2010MHz and 2.6 GHz bands of spectrum. However:

15.1 To the extent that such litigation took place in the Tribunal, much of it was taken up with debating an ambiguity which existed in the Communications Act 2003 concerning whether the Tribunal or Administrative Court had jurisdiction. That issue has now been resolved but it had not been at the time of the litigation.

15.2 Further, much of the litigation also took place in the Administrative Court – on judicial review. Judicial review can be used as a vehicle for delay just as much as a merits appeal. Indeed in many cases more so: success in judicial review typically means the regulator having to start again and re-take its decision; whereas on a merits challenge, the Tribunal, seized of matters in the appeal, will often be able to avoid points being remitted for further lengthy consultation or analysis because it can correct them itself during an appeal: see *TalkTalk v Ofcom*. This improves efficiency.

16. At §3.27, there appears to be a suggestion that larger companies are more able to take advantage of merits appeals than smaller ones. However, even if true, there is no evidence that this is leading to unfair results. It is often larger companies that are most affected and have most at stake in a regulatory decision; and small companies often avoid litigation altogether, whatever the standard of review. Moreover, there is no evidence presented that smaller companies would prefer not to have the option of a merits appeal in an appropriate case, just because it is more often larger companies that take advantage of it; or that they would generally prefer a system where the regulator was less able to be challenged.

17. Finally**,** as to **inconsistency of appeal routes**, this may well be an area which is suitable for simplification, albeit that careful attention will need to be given to ensuring that justifiable differences in procedure are properly reflected in any reform. The difficulties for investors of understanding the different appeals routes seems overstated, however: any investor who wants to form an intelligent opinion on the prospects of challenge of a decision is likely to need specialist legal advice in any event; the route for that appeal will tend to be a very minor part of such advice.

III: ‚Standard of Review'

18. A central proposal in the consultation is to move away from merits based appeals to ones based more closely on judicial review. The Government's belief is that this will strike a better balance between effective decision-making and appeal rights. However, we disagree. We would make the following general points in response:

    18.1 Strong appeal rights in general promote effective decision-making. The two should not ordinarily need to be set against one another. Knowing that a decision can be subject to careful scrutiny tends to promote more care and attention in that decision-making in the first place. By contrast, knowing that a decision will withstand challenge so long as it not one that no rational decision-maker could ever rationally have taken is likely to allow sloppier, poorer decision-making.

18.2 Further, merits appeals can lead to decisions being corrected in the public interest. For example, in *BT v Ofcom (mobile call termination)* the Competition Commission decided, looking at the merits, that Ofcom's economic reasoning for allowing mobile phone companies to charge higher rates for mobile termination was not robust. It therefore upheld BT's appeal, with the result that prices were substantially reduced. The CC found that this was a very good result for consumers. But it would almost certainly never have happened had the standard been ordinary judicial review (or the codified test suggested in Box 4.2). Ofcom's decision was not so bad that it was demonstrably irrational; nor was the debate about underlying facts. The decision would therefore would have survived a judicial review challenge. But Ofcom's economic reasoning was still flawed and there was better economic reasoning which supported an approach leading to lower prices (with which Ofcom did not take issue in subsequent price controls dispute). This result – reducing prices in the UK economy which is seen by many as highly beneficial to consumers – would never have been achievable under the newly proposed system.

18.3 The concern in the consultation in part appears to be driven by a belief that the Tribunal may act as a second regulator *"waiting in the wings"* (see §3.18). However, the existing law does not allow the Tribunal to do so. The Tribunal has already developed a framework for review which carefully respects the margin of appreciation that it is appropriate to afford to Ofcom in matters of policy, but nonetheless seeks to ensure that Ofcom's decisions on matters which are susceptible to review are robust: see *CPW v Ofcom, CC's* Determination of the *CC at §1.34.* Errors in economic reasoning can be picked up. But matters of policy judgment are for Ofcom and Ofcom alone and it is emphatically not the case that the current merits review amounts a re-trial; it is, rather, concerned with identifying material errors.

18.4 This system works particularly well in the context of economic regulation because economics is often susceptible to structured logical reasoning and argument, just as the law is. This distinguishes economic regulation from many other areas of decision-making where there is often a greater role for judgment. It is why judicial review is typically the appropriate standard in those other areas – particularly as the Courts do not have the relevant expertise that the decision-

makers have, but a merits review is appropriate before the Tribunal and CC. It is not sensible to read across a „one-size fits all' approach based on judicial review to the Tribunal which does have specialist expertise and operates in a field where merits review – albeit with proper respect to the regulator on issues of policy or judgment – is both feasible and desirable. To prevent effective challenge of the economic reasoning adopted by an economic regulator is to waste the valuable pool of talent contained in the Tribunal and the CC.

18.5 Given the requirements of Article 4 of the Framework Directive (Directive 2002/21/EC) it is not evident how the Government considers that a „judicial review' standard would in any event remove the right to a merits appeal. The Court of Appeal in *T-Mobile v Ofcom* [2009] 1 WLR 1565 did not hold that an ordinary „light touch' judicial review would be sufficient to satisfy Article 4. On the contrary, Jacob LJ held (emphasis added):

(a) At [20]: *"the judicial review standard of review can and does mould itself to any requirement imposed by other rules of law […] the claimants would be in no way disadvantaged if they had to go via the judicial review route as compared with the CAT* [on a merits appeals under section 192 of the Communications Act 2003]";

(b) At [25] that judicial review allows for the possibility of *"a full merits review"*;

(c) At [30]: *"whether the "appeal" went to the CAT [under section 192 of the Communications Act 2003] or by way of judicial review, the same standard for success would have to be shown."*; and

(d) At [31] *"What is called for* [by Article 4] *is an appeal body and no more, a body which can look into whether the regulator had got something material wrong."*

19. The Consultation explains the rationale for change in §§4.6 and following.

19.1 As to §4.6, it is not obvious that appeals applying a judicial review test complying with Article 4 of the Framework Directive (Directive 2002/21/EC) will necessarily be much shorter or less costly. On the contrary, it can be expected that for

several years at least they will become much more lengthy as references to the CJEU etc lead to the system becoming clogged.

19.2 As to §4.7, the delays in the Partial Private Circuits case were not a function of there being a merits appeal but arose from factors such as a number of preliminary legal issues that needed to be addressed and an appeal to the Court of Appeal.

19.3 At §4.9 the Consultation complains that the term "merits review" can be unhelpful and suggests that it has been differently interpreted in different Tribunal cases. However, we would suggest that there is no conflict between the two cases cited, and that the merits test is well understood (far more so than the revised test would be) and indeed is far less amorphous than the infinitely flexible judicial review standard, which can mould itself to *"any requirement"*.

19.4 At §4.10 the Consultation refers to the *T-Mobile* case cited above; but it is not clear how this is said to support the Government's case for change. The matters litigated in that case were not merits ones, but legal jurisdictional ones which had not at that point not been clarified. The Court of Appeal provided clarity and with the benefit of that clarity no similar jurisdictional point has since arisen. This demonstrates a system working well as it should, not a dysfunctional one.

19.5 At §4.11 the Consultation notes that it is important that successful appeals continue to act a check on the regulator. But this is fundamentally at odds with the proposal in the consultation to remove the ability to challenge decisions on the merits. Assuming this were achieved, changing to a system of judicial review would lead to the focus being on the procedure adopted by the regulator, rather than a check on whether its decisions are soundly based, thus reducing the likelihood of appeals being able to correct errors. Even if the Government permitted challenge to material errors of fact, this would leave material errors of reasoning apparently outside the bounds of possible challenge except on a very limited *Wednesbury* review basis.

19.6 At §4.17 the Consultation suggests that merits appeals can reduce the credibility of a regulator. We disagree. On the contrary, a regulator whose decisions only stand-up because they can be challenged on limited, mostly procedural, grounds

is unlikely to have greater credibility than one who produces decisions which withstand scrutiny for material errors, whether in the underlying facts or in the economics applied to them. This is particularly important when the Government considers the issue of inward investment in the UK. Companies that can choose in which jurisdiction they locate themselves independently of their customers (an option for example available to broadcasters under the Audiovisual Media Services Directive (2010/13/EU)) will tend to prefer jurisdictions where regulators take sound, economically robust decisions, which stand up to scrutiny on their merits over ones where regulators face no such scrutiny. The Government should not be surprised if by removing the ability to challenge decision on the merits it removes what is currently an attraction of the UK for such business, and deters it instead.

19.7 As to §4.19, (narrow) judicial review may strike an appropriate balance in many contexts, but is likely to lead to worse decision-making in the context of economic regulation.

Answers to Qs 1-3:

20. It follows from the above that the answers to question 1 to 3 are as follows:

20.1 **Q1:** We do not agree that there should be 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.

20.2 **Q2:** We disagree with the Government's principles for non-judicial review appeals. The present statutory tests as interpreted by the Tribunal and Court of Appeal work well. In particular, the Government seems to overlook the possibility of errors in reasoning and, in particular, economic reasoning. It is unclear whether the Government considers such errors fall into the category of ones which "no reasonable regulator would make", but if "reasonable regulators" are nonetheless capable of "material errors" in economic reasoning, there is a problematic lacuna in the proposals.

20.3 **Q3:** A move to a judicial review standard could well initially increase the length and cost of appeals as the implications of the changes were debated, including

with likely references to the CJEU. Thereafter, the impact on the length and cost of appeals would depend on how far the changes actually changed the standard of review in reality. In all cases, the effectiveness of the appeals framework – in particular as a tool for correcting errors and incentivising robust decision-making, will tend to be compromised.

Communications Act 2003 Appeals

21. The Government contends (§4.40) that the reforms as applied to communications appeals *"will expedite appeals and reduce costs for appellants, regulators and appeal bodies alike, without reducing the accountability of the regulator and preserving the ability to challenge regulators' or competition authorities' decisions where a material error or unreasonable conduct is identified."* We disagree:

21.1 For the reasons given above, the effects on expedition and costs are likely to be limited.

21.2 The costs of the system are (as explained above) ultimately borne by the regulated industry – the very parties bringing appeals. They are the best judges of whether such costs are worth it.

21.3 The proposals appear, in particular, to prevent material errors of economic reasoning from being addressed on appeal, unless those errors are so bad as to be ones that no reasonable regulator could reasonably make. But there is no sense in allowing materially flawed reasoning to stand, whether or not it passes the very limited *Wednesbury* test. By and large, UK regulators are of course not so unreasonable as to take decisions which are manifestly irrational; but they may well still take decisions which, on proper scrutiny, are revealed to be poor ones which should sensibly be corrected in the interests of promoting the statutory objectives which the regulators are supposed to give effect to.

21.4 There is clear Court of Appeal authority that mere disagreement with a value judgment of a regulator is not a basis for appeal as matters presently stand (as the §4.42 indeed recognises). So no reform is required on that front.

22. §4.43 says that a benefit of the reform is that parties will need to focus on the real issues that could have a material impact on the decision. If they want to succeed, they need to do that already. And one such "real issue" is whether there is a flaw in the economic reasoning underpinning the economic regulation.

Answers to Qs 4-5:

23. It follows from the above that the answers to questions 4 to 5 are as follows:

23.1 **Q4:** We do not agree that there should be a change in the standard of review for communications appeals. If, however, there were to be a change, we would suggest an additional sub-subsection (f) in the proposed amendments to section 195(2A) :

"(f) having due regard to Ofcom's specialist expertise, there was nonetheless a clearly better alternative to the judgement, prediction or exercise of discretion by Ofcom."

23.2 Where an Appellant was able to demonstrate, having due regard to Ofcom's specialist expertise, a clearly better alternative to the judgment, prediction, or exercise of discretion by Ofcom, it is difficult to see why its decision should not be corrected.

23.3 **Q5:** the length and cost of appeals would initially most likely increase substantially as a result of either of the Government two proposals, since they would almost certainly lead to references to the Court of Justice of the European Union (and potentially the European Court of Human Rights – see further below). Thereafter, the effect would depend on the extent to which any narrowing of the basis of appeal was held to be legitimate. Much narrower appeals would it is true most likely be somewhat quicker and cheaper. But that comes at a very heavy price in terms of effectiveness, since a materially altered standard of review would undermine the effectiveness both of the appeals system and the UK system of economic regulation more generally.

Competition Act decisions

24. Much of what we have said above applies equally to decisions under the Competition Act 1998. For brevity, we make only a few comments below and rely on and endorse the comments of the Tribunal in its Consultation Response in relation to such decisions.

25. Two key points that are particularly notable in relation to Competition Act decisions are that:

25.1 they are recognised as penal in nature;

25.2 undertakings may be exposed to substantial damages that „follow on' from a competition authority's finding of infringement.

26. It is worrying in this context that an undertaking would have no right to challenge the underlying infringement decision on the merits. It is far from clear that this satisfies Article 6 of the European Convention on Human Rights (see e.g. *Menarini v Italy*). Giving the Tribunal full jurisdiction over fines does not meet this problem, because it does not allow proper scrutiny of the legal basis for the fine in the first place – the finding of infringement.

27. The comparison drawn with the approach of CJEU is both inapt and inadequate comfort: „Judicial review' before the CJEU is already a more intrusive review than domestic „judicial review' and allows intensive scrutiny of the underlying factual and, importantly, economic basis for a decision.

28. Further, the changes would act as a disincentive to bring, and be at odds with, private enforcement of competition law: any party wishing to bring its own competition claim would have it scrutinised on the merits before a Court. But a regulator would not face such scrutiny. Therefore, the incentive on private parties would be (to even greater degree than currently) to lobby the regulator to take their case rather than bring it themselves, because regulators would in practice be able to succeed with a case on a lesser standard of proof, given the limited basis on which their decision could be scrutinised. This appears to be contrary to the Government's espoused desire to promote greater use of private enforcement, thereby freeing up the burden on competition authorities. It is also questionable why there should in practice be different

standards to which competition infringements should be proved, depending on the forum. It runs contrary to the aim of promoting consistency in the approach of the Courts.

29. Finally, we note that:

29.1 breach of conditions imposed by Ofcom can also found „follow on' civil actions (see section 104 of the 2003 Act); and

29.2 decisions under the 2003 Act may also be penal (see e.g. section 143 of the Act).

30. Thus, although the Tribunal has in its Consultation response emphasised certain problems as particularly relevant to Competition Act 1998 decisions (and we agree that they are indeed particularly relevant in that context) it should not be forgotten that the same difficulties do in fact also arise with decisions under the 2003 Act – and so the points of principle carry across.

Answers to Qs 6-9:

31. It follows from the above that the answers to questions 6 and 7 are as follows:

31.1 **Q6:** We do not agree with any change in the standard of review for decisions under the Competition Act 1998

31.2 **Q7:** Please see answer to Q5 above, *mutatis mutandis*.

31.3 **Q8:** We do not agree with any change in the standard of review for price control decisions.

31.4 **Q9:** Please see answer to Q5 above, *mutatis mutandis*.

Appeal Bodies and Routes of Appeal

32. As to the specific proposals in Chapter 5 of the Consultation, we respond as follows:

32.1 **Q14:** Yes. See paragraph [on scope of interventions] above.

32.2 **Q15:** Yes.

32.3 **Q16:** Yes.

32.4 **Q17:** Yes, in simple cases and ones which are concerned only with points of law.

32.5 **Q18:** Yes.

32.6 **Q19:** Yes – insofar as the appeal concerns those parts of an appeal which would fall for reference to the CC under the current system; no – for appeals which under the current system would not be referred to the CC.

32.7 **Q20:** Yes.

32.8 **Q21:** Yes.

32.9 **Q22:** Yes.

32.10 **Q23:** Tribunal.

32.11 **Q24:** Not answered.

32.12 **Q25:** Yes.

32.13 **Q26:** Tribunal.

32.14 Q27: Yes.

Getting Decisions and Incentives Right

33. As to the specific proposals in Chapter 6 of the Consultation, we respond as follows:

33.1 **Q28:** Yes

33.2 **Q29:** We would be content with such rings being set up on similar lines to those in the Tribunal and also being supervised by the Tribunal.

33.3 **Q30:** No. We disagree with statutory guidance being necessary in relation to the admittance of new evidence. We consider that the current system works effectively, and that statutory guidance is likely to promote more interlocutory disputes on the admission of evidence (and appeals therefrom). Further, as

explained in the body of our comments above on Section 3 of the Consultation, we do not consider that in practice new evidence causes the problems suggested. On the contrary, it can make resolution of disputes before the Tribunal more efficient by focusing on relevant issues and synthesising what has gone before.

33.4 **Q31:** No, for the reasons given in answer to Q30.

33.5 **Q32:** We disagree with the asymmetric proposals on costs in favour of regulators for which there is no precedent. The usual rule that costs follow the event promotes healthy discipline on all parties. Any party which is immune from costs in all normal circumstances (that is, absent unreasonable behaviour) faces no such discipline (and thus faces no incentive, for example, to concede a bad point or to settle, as regulators such as Ofcom have done in the past). Moreover, the suggestion that costs inappropriately „chill' good regulatory decision-making is far-fetched. Regulators generally have a statutory duty to act in the public interest and need the courage to take decisions which they believe do so. Moreover, in Ofcom's case (it being Ofcom that has previously proposed that there is or should be such an asymmetric rule) its regulatory costs are funded by the communications industry. So it is hard to see how the alleged „chilling' really occurs.

33.6 The only effect of such a rule would be deter good appeals for which the prospective Appellant cannot afford to have no chance of recovering costs. There is no sensible basis for such a deterrent, particularly since it would hurt smaller companies the most. Bad appeals are already deterred by the rule that costs follow the event.

34. **Q33:** Yes.

35. **Q34:** We believe this decision should be left to the discretion of administrative bodies. We would note, however, that it is often difficult to identify cases which it is appropriate to strike out, and that interlocutory applications such as strike outs can have the effect of lengthening rather than shortening proceedings.

36. **Q35:** No, certainly not ordinarily. We believe that in an adversarial system it should generally be for the Respondent or Defendant to identify such grounds. However, the Tribunal is able in an appropriate case to act of its own motion (but an appropriate case is likely to be rare).

37. **Q36 – 38:** We agree that regulators should be encouraged to adopt procedures which are as robust as possible. The Government recognises that the main way of dis-incentivising avoidable appeals is for firms to have confidence in the decision made by regulators and competition authorities. The proposals in relation to the standard of review will have the opposite effect.

38. **Q39:** We consider that, insofar as competition authorities continue to take non-infringement decisions, these decisions must be appealable, since otherwise affected parties have no proper redress. There may also be cases in which it is helpful for competition authorities to continue to make non-infringement decisions in the interests of legal certainty. Therefore we would favour retaining the current system.

39. **Q40:** We disagree with the reduction in target time for dealing with appeals from 9 months to 6 months. 9 months compares extremely favourably with timescales in other courts and tribunals. Given the various steps that have to be gone through in order to hear an appeal (defence, witness evidence, reply evidence, skeleton arguments, organising a hearing convenient to all involved, adjudication) 6 months is in our view too tight. Hearings which are listed without any reference to counsel's availability for example waste costs by increasing the likelihood of existing counsel being substituted.

40. **Q41:** Whilst we sympathise with the general aim of speedy appeals, and that for an ordinary case 12 months is feasible, we consider that for complex cases 12 months is too tight. The large-scale Pay TV appeals took 16 months of virtually full time work from large case teams to hear. Allowing a further 3 months (say) for judgment, a more realistic aim for a complex case would be in the order of 18 months to judgment.

41. **Q42:** We agree that the Tribunal should have the power to limit evidence (we consider that it already has such a power). What is appropriate in any given case should be left as a matter of discretion for the Tribunal.

42. **Q43:** It is not evident that fast-tracking need be formalised. Parties wishing to bring about speedier trials can (and do) already do so (e.g. reviews of CC merger decisions – as discussed above).

43. **Q44**: Yes.

JON TURNER QC
MEREDITH PICKFORD

11 September 2013 **Monckton Chambers**

Judiciary of the Queen’s Bench Division

JUDICIARY OF
ENGLAND AND WALES

THE RT HON. SIR JOHN THOMAS
PRESIDENT OF THE QUEEN'S BENCH DIVISION AND DEPUTY HEAD OF CRIMINAL JUSTICE

RESPONSE OF THE QUEEN'S BENCH DIVISION TO THE CONSULTATION

"STREAMLINING REGULATORY AND COMPETITION APPEALS: CONSULTATION ON OPTIONS FOR REFORM"

ISSUED BY THE DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS

Submitted by the President of the Queen's Bench Division on behalf of the Division

General Observations

1. This is the response of the Queen's Bench Division (QBD) to the Consultation "Streamlining Regulatory and Competition Appeals: Consultation on Options for reform", issued by the Department for Business, Innovation and Skills.

2. Competition law can exert a significant impact upon the economy and it is of importance to ensure that not only are the regulatory decisions that are taken of the highest quality, but that judicial supervision of those decisions is also expeditious, efficient and of high integrity.

3. In this connection it is right to observe that, as has been recognised in the consultation paper, the Competition Appeal Tribunal (CAT) already has an enviable reputation for the efficiency of its work and the quality of its judgments.

4. In general terms the QBD welcomes proposals that would concentrate and streamline cases involving competition law in the CAT, and in particular welcomes moves to improve the deployment of judges who are expert (either by experience or training) in competition to sit as Chairs of the Tribunal.

5. It is the general experience of the Queen's Bench Division that what matters more than anything is the expertise and quality of the Tribunal and its ability to ensure that appeals are

heard as expeditiously and as inexpensively as is consistent with the interests of justice. The key to achieving these objectives are specialist judges who can clearly identify the issues, robustly case manage and ensure hearings keep to a strict timetable.

6. In this Response the QBD concentrates upon those relatively small number of questions raised in the Consultation which are of concern to the QBD. These are Questions 1-9, 15-17, and 30.

Questions 1 – 9: Issues relating to the standard of review

7. Questions 1- 9 concern the standard of review in the CAT and the impact of making changes to the applicable standard. Whilst this is ultimately a policy issue, it cannot be divorced from matters of law particularly in relation to competition appeals.

8. In relation to Question 1 a distinction needs to be drawn between decision under the Competition Act 1998 (traditional competition law proceedings, or *ex post* proceedings) and other proceedings where the decision governs the way in which regulated undertakings conduct themselves in the future (regulatory proceedings or *ex ante* proceedings) .

9. This distinction is recognised and itself drawn by BIS.

Challenges to ex post decisions

10. So far as ex post proceedings are concerned there is no clear case advanced to change the present regime whereby the CAT conducts a full merit appeal. Indeed, given that such proceedings are categorised as criminal in nature and can lead to the imposition of very substantial fines (as the Consultation Paper recognises) were the standard of review to be limited to judicial review, this would in all likelihood trigger challenges to the use of judicial review as being non-complaint with Article 6 ECHR. The European Court of Human Rights in Strasbourg in Menarini Diagnostics SRL v Italy (27th September 2011) has held that competition law is to be categorised as criminal law for the purpose of the Convention and that Article 6 is only complied with if there is a full right for an appellate court to determine the merits of the issue.

11. The QBD notes that in its March 2012 response to the earlier consultation paper (on the creation of the CMA) the need to retain a merits appeal process was recognised by Government and it was observed then that this reflected the strong consensus of those consulted at the time. There does not appear to be a reasoned basis for departing from this conclusion and indeed it is noted that the Consultation paper records this conclusion itself (at paragraph 4.52).

12. The starting point of the Queen's Bench Division is therefore that there is no need to change what is already a well established and well regarded merits jurisdiction for *ex post* competition cases.

13. In any event a change in the standard of review to judicial review or more focused grounds of appeal would however risk satellite disputes because Respondents would be incentivised to challenge appeals upon the basis that they raised grounds not contemplated by the legislation and were hence inadmissible. Any such challenges would impose upon the CAT the possibility that it was required to determine preliminary issues relating to admissibility, a process which itself would be likely to lead to appeals. The overall result could in these circumstances be an increased length and complexity of proceedings in many cases which would impede speedy regulation and as such risks thwarting one of the objectives which the proposals in the Consultation paper seek to facilitate.

14. With particular regard to the introduction of a material error <u>of fact</u> threshold, the Queen's Bench Division would draw attention to the real risk that this might itself add to cost and create satellite litigation. If a Respondent challenges a ground of appeal upon the basis that it is immaterial (and hence inadmissible) then it is hard to see how the Tribunal can determine that issue prior to the full hearing without examining in considerable detail the economic and other evidence (much of which can be very technical) which underpins the decision and the impugned ground of appeal. This might itself take time, involve significant costs being incurred and lead to appeals. Further, in many cases the remainder of the appeal (i.e. those parts which are not alleged to be immaterial) may not be able to proceed and could be delayed until the preliminary challenge has been finally determined. This is because the Tribunal may wish to avoid appeals being determined piecemeal without all of the issues and evidence being heard together. Hence the existence of a materiality threshold risks creating collateral challenges, delay and additional cost.

15. Equally, the Tribunal might decide that it would be inappropriate for case management reasons to determine whether a particular ground should be struck out at a preliminary stage. In such a case if a ground is truly immaterial, then even if that ground is fully argued and litigated and the Tribunal concludes that it is properly made out it would still not lead to the setting aside of the decision being challenged (for the very reason that it is *de minimis* or immaterial) and indeed, could lead to the costs of litigating that particular point being awarded against the Appellant.

16. It is therefore hard to see what regulators or the efficiency of the system would gain from the introduction of a materiality ground. A point that is truly immaterial should pose no real threat to the Regulator, but may entail a disproportionate and wasteful use of resources to excise at an interlocutory stage.

17. With regard to material procedural irregularities the Consultation paper suggests that it might be appropriate to limit appeals to only those procedural errors that were material to the outcome. The Consultation does paper does not set out the types of procedural issues which could arise in competition cases. In practice disputes often arise over such matters as the decision makers decision to refuse to provide inculpatory or exculpatory documents to the defendant undertaking.

18. In these circumstances the Queen's Bench Division doubts whether introducing a materiality requirement will lead to any improvement in the efficient running of, or disposal of appeals by, the CAT and indeed has concerns that it might in fact prove counterproductive.

Challenges to ex ante decisions

19. With regard to *ex ante* decisions (such as price control), if these were to be made subject to judicial review it is not immediately apparent why setting out the grounds of judicial review in legislation would be desirable. Domestic law on judicial review is already well established. No persuasive case is set out in the Consultation paper for subjecting (say) price control decisions to some new statutory species of judicial review whilst leaving other equally complex areas of law (procurement, planning etc) to be addressed according to ordinary and non-statutory principles of judicial review.

20. For reasons already set out there is no particular reason for setting out a materiality requirement since one already exists in the common law.

21. A risk with a statutory list of grounds of challenge is that it permits decisions which are not sound to escape scrutiny and review because the list of permitted grounds is thereby constrained. It also provides fertile ground for ingenious arguments by lawyers wishing to draw fine distinctions. It has to be remembered that the existence of a rigorous Tribunal supervising the decisions of regulators is a powerful incentive on those decision makers to adopt decisions that are sustainable in the first place. It maybe that the availability of judicial review might not be overly popular with regulators but, in broader policy terms, it should nonetheless be viewed as conducive to good decision-making.

22. It is also important to recognise that judicial review is a flexible instrument and can be of varying degrees of intensity which will vary according to the circumstances of each particular case, a point recognised in the context of competition law by the Court of Appeal in IBA Health v OFT [2004] EWCA Civ 142.

23. Accordingly it is difficult to perceive that there is any need for a list of grounds of judicial review. However, if one is to be created it needs to reflect existing principles of judicial review and not leave lacuna or gaps such that bad decision become immune from challenge because of a constraint in the statutory regime of judicial review.

24. One final point that will need to be considered is, if the Government changes the grounds of review in the Communications Act 2003 to a regime which is perceived to be more constrained that at present exists, then the QBD would point out that there is the possibility that the legality of the new regime would be challenged upon the basis that it was not compliant with Article 4 of the Framework Directive. The logic would be that for a decade it has been assumed by all concerned that a merits review was the appropriate means of complying with the Directive. A dilution or diminution of that standard would risk leading to the question being posed whether the new, and less intensive, review was complaint with the Directive. The Government would, in seems, have to defend the position that it had been too generous in the past and that the new and less extensive basis for supervision was

consistent with European law. It is accordingly quite possible that any new regime might end up being referred to the European Court of Justice.

Questions 15-17: Appointment of judges

25. Questions 15 – 17 raise three issues. First, the proposal that the relevant Head of the Judiciary should be able to deploy judges at the level of the High Court or their equivalents in Scotland and Northern Ireland to sit as Chairman of the CAT. Secondly the suggestion those judicial office holders should not be limited to an 8 year term. Thirdly, whether the CAT should be permitted to sit with a single judge.

Question 15

26. First, as to question 15 the QBD strongly supports the suggestion that the Lord Chief Justice should be able to appoint or nominate suitable High Court Judges to act as Chairs of the Tribunal.

27. At present only judges of the Chancery Division (subject to the eight years rule – see below) are nominated Chairs of the Tribunal.

28. The proposal set out in paragraph 5.14 of the Consultation paper makes better sense. The Lord Chief Justice would maintain a list of High Court judges with relevant experience and they would be selected from whichever part of the High Court they normally sat in. This would in future continue to comprise the cadre of those judges of the Chancery Division who have expertise in this area of the law (whether acquired though experience whilst in practice as advocates or as judges or through training); the Chancery Division is the Division of the High Court to which competition cases are generally assigned. It would also include judges of the QBD who have similar expertise, as there are some judges who have very considerable expertise from their practice as advocates or who have acquired that expertise through hearing cases in the Commercial and Administrative Courts. Their expertise should be available to the CAT.

29. This change would provide a specialist cadre of judges who would chair competition cases in the CAT and follow the approach outlined in paragraph 5. It would mean that any judge sitting in the CAT would have expertise in competition law.

30. The deployment of a judge to the CAT would be arranged between the President of the CAT and those responsible for deployment of High Court Judges.

Question 16

31. Secondly, as to question 16 and the 8 year rule, the QBD agrees with the proposal that this should be abolished. In every other area of the law a judge with extensive experience should be able to continue to exploit that experience; it is an unjustifiable and irrational anomaly that competition law should be excluded. This is as true of competition law as it is of any other area of law.

32. The QBD therefore agrees with the proposition set out in paragraph 5.13 that there is no good reason why the experience of a judge who has sat for eight years should be lost after that period.

Question 17

33. Thirdly, as to question 17 and whether the CAT should be permitted to sit with a single Judge, it is a signal strength of the CAT that not only does it sit with a senior lawyer or judge as Chair but that it has as additional resources members who have relevant business, economics, accountancy or other experience. This is considered to be a real strength amongst users of the Tribunal and is a reason why the Tribunal is held in high esteem internationally.

34. Accordingly the general rule should remain that the Tribunal sits as a panel of three.

35. The QBD is not aware of cases in which the requirement for a panel of three has led to any material problems. It is suggested in the Consultation paper that allowing a judge alone to sit might allow cases to be completed more quickly or efficiently. Although a panel of three may well generally be appropriate, it is recognised that there might be circumstances where it might be appropriate to provide for a Judge alone to hear make interlocutory or case

management decisions or determine points of law. It would therefore be appropriate for the Rules to provide for flexibility, subject to the approval in each case of the President of the CAT.

Question 30: New evidence

36. Question 30 concerns whether the CAT should limit new evidence being adduced in competition and Communications Act cases.

37. As to this, what is referred to as new evidence in the consultation is not new evidence as that term would be understood in appeals before the Courts (the so called Ladd v Marshall test).

38. In the competition law field evidence tendered during an administrative procedure is not submitted to a court or an impartial tribunal. In contrast in the case of an appeal to a higher court the parties will have had a full opportunity at first instance to present their case to an impartial body and an appeal is accordingly not the first occasion upon which a court has reviewed the case and the evidence. The two situations are not comparable.

39. The final point is that the Consultation paper does not set out any evidence supporting the proposition that parties are routinely withholding evidence from regulators with a view to running a fuller and new case on appeal. But if such gaming of the system did occur then the Tribunal rules, as presently cast, are sufficient to protect against such misuse. If new rules were instituted the concern, yet again, is that this would lead to collateral disputes as between the parties as to whether evidence should or should not be tendered.

Linklaters LLP

Response to consultation on options for reform of the regulatory and competition appeals regime

This is Linklaters LLP's ("**Linklaters**") response to the BIS Consultation document dated 19 June 2013 ("**Consultation**").

We welcome the Government's initiative of streamlining the regulatory and competition appeals regime in order to have a consistent framework. However, we consider that a number of the proposals in the Consultation are not supported by the evidence presented and there are significant risks that if they go ahead, they could create an imbalance between, and the wrong incentives for, businesses and regulators.

This response provides Linklaters' general views on certain aspects of the proposals and then provides specific answers to some of the questions in Chapter 8 of the Consultation.

We note the Competition Appeal Tribunal's ("**CAT**") response[1] to the Consultation and agree with many of the points addressed in it. Where relevant, we cross refer to it in this document.

The key areas which we would like to comment on at a more general level are as follows:

- Rationalisation
- Standard of review
- Competition Act and regulatory enforcement decisions
- Shift in appeal bodies hearing different types of cases
- Costs, incentives and timing for appeals
- Restrictions on the CAT's procedures, powers and timetable

1 Rationalisation

1.1 As set out above, we would welcome a move to consolidation and rationalisation of the appeals framework, although we note that some differences between regimes are the result of those regimes' features and their evolution over time. In particular, in our view it is entirely appropriate to focus/limit review of regulatory and competition decisions to existing expert bodies such as the CAT and the Competition Commission ("**CC**") which have the appropriate level of economic, competition and regulatory knowledge to handle these types of cases.

1.2 This does not mean that the High Court and/or the Court of Appeal[2] would not be suited to handle these cases but in our view, appeal/review processes are likely to be faster if the first instance appeal body regularly handles similar appeals.

2 Standard of review

2.1 We do not agree that the default standard of review should be judicial review and have doubts as to whether the grounds set out in box 4.1 of the Consultation would also be appropriate for all regulatory and competition appeals. We consider that the Consultation has not made the case for a general shift to a judicial review / structured review standard

[1] Response of the CAT Tribunal to the Consultation, 22 August 2013 (the "**CAT Response**").

[2] We note that the High Court and Court of Appeal have extensive experience in dealing with public law and judicial review cases.

for regulatory appeals. In particular we think that a judicial review standard for Competition Act ("**CA 98**") would be wholly inappropriate and likely to raise issues regarding its compatibility with European legislation (see further **Section 3**).

2.2 In addition, we set out below a number of reasons why we disagree with the general presumption that appeals should be heard on a judicial review standard or restricted to the grounds set out in box 4.1 for all regulatory and competition appeals:

- We are not opposed to a judicial review standard being applied in appropriate cases. However, in certain cases (such as those involving complex or disputed facts), it is necessary and desirable that courts review the factual circumstances of the case. Applying a judicial review standard in such cases would preclude the court from assessing and weighing any competing evidence and would thereby prevent it from coming to its own view as to which version of the facts was correct.

- We consider that the CAT should have an effective appeals mechanism which is capable of adapting to the circumstances of particular cases (including allowing for appropriate factual and documentary evidence) in order to redress the power imbalance between economic regulators and competition authorities on the one hand, and appellants on the other hand. Accordingly, we would caution against any decision to get rid of any *prima facie* right to appeal on the merits given the importance of maintaining flexibility in the system to hear particular appeals according to more stringent standards.

- One of the major bases for the proposed movement to a judicial review standard is the belief that a merits review will tend to involve longer court hearings and be more costly for the parties involved.[3] We do not comment in detail on the evidence used in the Consultation in determining that merits reviews generally take longer than judicial reviews as this has been commented on extensively by the CAT in its response.[4] However, in our view, moving to a judicial review standard would not necessarily shorten the time within which appeals are reviewed. The outcome of cases heard according to a judicial review standard may be to remit the case back to the regulator for a fresh decision (which may itself be appealed). Remitting a case back to the regulator is itself a very time consuming process, given that such a decision will necessarily involve a fresh consultation and evidence gathering process to be undertaken. If an error is made that emerges on appeal, it is difficult to see how it is preferable for the CAT to refer the matter to resume the administrative process rather than allow the appellate body to resolve the issue on appeal.

- Applying a judicial review standard would also significantly limit any witness evidence and would prohibit a judge from hearing any evidence which has not been presented during the administrative process. We are concerned that if a presumption that appeals be heard on a judicial review standard is introduced, it may result in certain cases not being disposed of fairly (particularly where fresh evidence comes to light subsequent to the initial proceedings). As the CAT has outlined, the CAT rules enable it to exclude evidence where it should reasonably

[3] Consultation, paragraph 4.6.

[4] CAT Response, pages 23-30. We note in particular that data on length of judicial is undoubtedly skewed by the inclusion of reviews of mergers which are usually conducted within a specified accelerated period of time.

have been brought to the attention of the regulator during the administrative process.[5]

- Finally, the concern outlined in the Consultation that appeal bodies could act as a second regulator 'waiting in the wings'[6] is unwarranted given that the CAT does not, when undertaking a merits review, act as a secondary regulator substituting its decision for that of the administrative body. The scope of the CAT's review is limited to establishing whether the grounds of appeal reveal material errors by the regulator[7] and there is no evidence to support the government's concern.

2.3 As regards the appeals process outside CA 98 cases and regulatory enforcement, precedent in the new regimes has already been created. Changing the system and standard of review is likely to lead to further litigation to clarify the boundaries of any new regime (potentially even through references to the Court of Justice of the European Union), causing delay and uncertainty for the next few years where there is already an established body of case law and experience on these matters. Although maintaining the status quo is not always preferable, cogent reasons for change are required where there is considerable potential downside to reform.

2.4 Some of the regulatory appeal processes have been recently introduced and stem from EU legislation (energy licence modifications, telecoms).[8] In addition, with the creation of the Competition and Markets Authority ("**CMA**"), the CC's role is in the process of being radically reshaped. Introducing changes at this stage might run the risk of being contrary to such legislation, adding costs to businesses/the regulator which have prepared themselves for these new processes and impact on investors' views of the stability and predictability of the regulatory framework.

2.5 In considering changes to the appeal processes, it is also key to factor in the impact this may have on the competitiveness of the UK economy. Regulatory appeal mechanisms relate to sectors of real importance to the economy in which substantial private sector investments have been made against expectations of a stable regulatory framework. Changing the basis on which the rules apply, and in particular changes which shift power and discretion towards the regulator by reducing the scope of the appeal, will inevitably affect perceptions of regulatory risk and the cost of capital for infrastructure investments in the relevant sector.

2.6 Any proposal for review of the regulatory framework would require strong evidence that the current system is not functioning effectively and that the differences between the sectoral regimes can no longer be justified either in themselves or by reference to the relevant EU directives on which they are based. Viewed from that perspective, we consider that the case for radical change is not made out.

3 CA 98 and regulatory enforcement decisions

3.1 By way of introduction, whilst acknowledging the differences between them, we note that there are also important similarities between competition law and sectoral regulatory enforcement. Both systems are based on an "*ex post*" assessment of compliance; both can lead to very significant penalties, harm to corporate reputations; both raise important questions as to the credibility of the regulatory regime. All these factors highlight the

[5] CAT Response, paragraph 42.

[6] Consultation, paragraph 3.18

[7] See CAT Response, paragraph 17-20.

[8] See eg. EU Electronic Communications Framework Directive and EU Third Internal Energy Package.

importance of appeal rights and require assessment not only of the legal and procedural aspects of a decision but also whether this was soundly based as a matter of fact.

3.2 The Consultation recommends a shift from a merits review for CA 98 cases and suggests keeping such a standard only for decisions on penalties. Whilst we recognise that CA 98 appeals can be lengthy, we do not consider that this is due to the standard of review and it is rather a function of the complexity of the case, the extensive administrative file and evidence and the fact that there are often numerous parties or hearings.[9] Similar concerns apply with respect to regulatory enforcement decisions given the potential size of the penal sanctions.

3.3 There are a number of reasons why we think that moving from a merits appeal for these cases would not be appropriate:

- Firstly, a finding of infringement of CA 98 can impact significantly companies' reputations and commercial interests (e.g. through the imposition of fines). In light of these considerations, we see no reason why a company should not be offered a full legal challenge on the merits of the finding of infringement.

- Related to this is the fact that introducing such a presumption may run counter to human rights law. In the *Menarini* judgment,[10] the European Court of Human Rights ("**ECtHR**") found that the imposition by an administrative authority of a fine characterised as criminal in nature was not *per se* incompatible with the European Convention of Human Rights ("**ECHR**"), provided it was possible to review any such decisions thoroughly in relation to both questions of fact and questions of law. We accordingly consider that restricting the grounds upon which a company can appeal against such a finding either risks violating Article 6 ECHR[11] or would at least require the CAT and the Court of Appeal to reinterpret the judicial standard to meet that requirement. The Consultation seems to suggest that the judicial review standard is flexible enough to allow the courts to consider how to interpret the requirements of Article 6 ECHR.[12] This fails to recognise that the inevitable litigation on these issues (leading to uncertainty in the interim) clearly runs counter to the government's stated objectives of delivering clarity to the system.

- It must be appreciated that there is no equality of arms at the administrative stage of proceedings in CA 98 and regulatory enforcement investigations. Indeed, notwithstanding efforts to increase transparency, there are inevitable limitations as to how much is disclosed to allegedly infringing parties prior to a Statement of Objections (or statement of case in regulatory investigations), or even the decision itself, diluting their understanding of the precise allegations against them. It is only at the appeal stage that companies are able to effectively challenge evidence and submission and so it is key to have a merits review. This is particularly true given that the regulator plays the role of both investigator and prosecutor.

- Separately, the proposals raise significant issues for companies who may be subject to damages claims in the future, where a finding of a CA 98 infringement is binding for the purposes of follow-on damages. Given the financial impact that these might have on businesses, and the fact that damages actions can easily exceed the (already very high) penalties resulting from the administrative

[9] For instance, there were 25 separate appeals against the OFT"s Construction decision, which were not heard together.

[10] See A. Menarini Diagnostics S.R.L. v Italy, no. 43509/08, 27 September 2011 (ECHR).

[11] Or indeed Article 47 of the Charter of Fundamental Rights of the European Union.

[12] Consultation, paragraphs 4.56 and 4.62.

proceedings themselves, a merits review is clearly required for decisions under CA 98.

3.4 We note that the government has chosen to depart from its recently stated position as outlined in its Response document of March 2012 in relation to the reform of the competition regime that: "*The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system.*"[13] The Consultation provides no explanation for the government's *volte-face* regarding the desire/necessity for a review on the merits in CA 98 cases.

3.5 We consider that, given the similar consequences of CA 98 infringement decisions and regulatory enforcement decisions, there is a case for moving the standard of appeal for enforcement regulatory decisions from judicial review to an appeal on the merits before a specialist body such as the CAT**,** and allowing that body to consider the regulator's findings of fact, as well as its interpretation and application of the relevant prohibition to those facts, together with the factors relevant to any sanction.

3.6 It should be noted that regulatory enforcement decisions can also carry significant fines and reputational consequences for the companies involved and in these cases the regulator plays the role of both investigator and prosecutor.

4 Shift in appeal bodies hearing different types of cases

4.1 We consider that there is a case for the CC to hear all price control appeals given its experience in the water and energy sectors, and the fact that it hears price controls under the Communications Act 2003 if referred to it by the CAT.

4.2 Equally, it appears that the CAT would be well placed to hear appeals against ex-post enforcement regulatory decisions and CA 98 decisions given these are likely to require a more adversarial review rather than inquisitorial.

5 Costs, incentives and timing for appeals

5.1 The cases referred to in the Consultation do not support a finding that there are currently the wrong incentives for companies in considering whether to appeal. The assumption that companies simply challenge decisions without there being material issues with such decisions is misconceived and unfounded in fact. A legal challenge entails significant legal costs and efforts on the part of companies in addition to reputational issues if the challenge is spurious.

5.2 Incentives need to go both ways and reducing the level of scrutiny seems likely to lower the incentives for regulators to make robust and objectively defensible decisions. A lower standard of review would tend to place excessive reliance on the independence and objectivity of internal checks and balances within the regulator body itself. We consider that confidence in the UK regulatory system would be enhanced rather than undermined by a system for robust scrutiny of regulatory enforcement action. As set out by the CAT in its response, "*Reducing the scope and intensity of appeal scrutiny may lighten the burden on regulators, but by lowering the incentives on regulators to get their decisions right, it will increase the burdens on business*."[14]

[13] Government's 2012 Response to Consultation, "Growth, Competition and the Competition Regime", page 54.

[14] CAT response, paragraph 10.

5.3 We believe that the Consultation's proposals regarding costs do not properly align incentives and we do not agree with the proposal to depart from the usual costs approach presently adopted by the CAT:

- As it is, the costs of the present appeal system fall most heavily on appellants and interveners (a total of £16.86 million is incurred by appellants and interveners compared with £3.43 million which is incurred by regulators).[15] Moreover, there are a number of additional financial costs and commercial risks faced by appellants (such as tying up their business personnel from their usual day to day activities, often for significant amounts of time). This can put a significant amount of strain on a business, particularly on a small to medium sized business which is unlikely to have the resources to cover such absences. A further consideration pertains to expected recovery of costs. The CAT has particularly broad discretion when it comes to awarding costs and may do so on an issues basis. Accordingly, even where an appellant has had an overall successful outcome, if it has advanced multiple arguments and only some of those have been successful, it may be limited to recovering its costs in relation to the successful arguments only. For the various reasons set out above, we do not consider that it is fair or appropriate to further burden appellants in the manner suggested.
- We note that the Consultation does provide a carve out from its suggestion for exceptional circumstances, which it defines as "small business or consumer appellants who would otherwise be deterred by the cost of appeal". Whilst we welcome the Government's implicit recognition that the approach presented in the Consultation would unfairly deter such appellants from appealing regulatory decisions, we emphasise that such an approach would not only be unfair towards certain business or consumer appellants, but towards all appellants.
- Furthermore, we consider that adopting such an approach is likely to lead to an increase in the cost of litigation, and in a potential increase in unmeritorious actions or decision-making by regulators given that they will not be constrained by the risk of an adverse costs order if their decisions get appealed.
- The inclusion of in-house legal costs as a default is also inappropriate. We do not agree with the Government's proposal that regulators should be encouraged to claim their full costs. We consider that this will lead to an undesirable increase in the cost of proceedings, contrary to the government's stated objective. Furthermore, as appellants do not generally claim for internal legal costs, such an approach would result in a imbalance in the costs treatment afforded to the regulators as compared with appellants. As discussed above, appellants already bear the majority of the costs burden of the current appeal system and we do not support any further increase in that disparity. In any event, the CAT has sufficient discretion to grant in-house costs if appropriate in a particular case.

5.4 Finally, as set out above at Section 2 and 3, we do not consider that the Consultation has provided convincing evidence that changing the standard of review principles will lead to faster proceedings or save money.

[15] Impact Assessment accompanying the Consultation, page 4

6 Restrictions on the CAT procedures, powers and timetable

6.1 A number of the proposals in the Consultation relate to the CAT's procedures around admission of evidence, appointments and decision-making processes and timetable. These have already been addressed and commented on extensively by the CAT and we do not seek to provide specific comments on these proposals.

6.2 However, we note that the CAT is a specialist tribunal which has so far adopted a pragmatic and reasonable approach to evidence and speed with which it deals with cases and there is no evidence that its processes are unduly long.[16] In particular, we consider that the length of any process before the CAT will very much depend on the complexity of the case and the type of appeal. By their very nature, merger or market investigation review entails less complex issues and more focussed assessments whereas a CA 98 case will often entail more documentary evidence (in the form of larger administrative files involving multiple parties) and a requirement to cross-examine more witnesses.

[16] For example, in the Merger Action Group appeal of the Secretary of State's decision to approve the Lloyds/HBOS merger in 2008, the CAT heard the case within 2 weeks given the risk to UK financial stability if the matter was delayed.

Annex – specific questions in the Consultation

1 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?

Please see our response at Section 2 and 3 above.

2 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?

As set out above at Section 2 and 3 above, we disagree with the proposal to remove the existing full merits review and do not consider that convincing evidence for change has been provided.

Notwithstanding this, our key reservation in relation to the second principle set out in Box 4.1 pertains to the restriction of non-judicial review appeals to "material" errors of fact. We are concerned that restricting non-judicial review appeals in terms of materiality could have a number of unintended and unfair consequences for damages proceedings. One such example can be seen in relation to infringement proceeding brought pursuant to section 58 of the CA 98, which provides that in relation to findings of fact by Directors, a Director's finding which is relevant to an issue arising in Part I proceedings is binding on the parties if: (a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or (b) the decision of an appeal tribunal on such an appeal has confirmed the finding.

In this context we are concerned that there might be errors of fact made which are not material vis-a-vis the infringement proceedings, but which may very well be material in relation to the bringing of follow-on damages proceedings. In such circumstances appellants might be barred from bringing follow-on proceedings due to the error of fact not being deemed "material". Whilst some of these grounds are already in place for some regulatory appeals (e.g. aviation, energy licence modifications and energy code changes) we do not think that a case has been made for the grounds in Box 4.1 to become the standard of review for all appeals. With that reservation aside, we agree that focussing the grounds of appeal as provided in Box 4.1 (for example where only judicial review is available) would in principle be a useful change as it might increase certainty.

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

Please see our response at Section 2 and 3 above**.**

4 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?

We consider that the Consultation does not provide convincing arguments for a reform of the existing regime, which involves an administrative review by a single body requiring an independent review of the case on its merits.

In addition, as set out at Section 2 above, there is a level of precedent in the new regulatory appeal regimes which would be lost through reform of the system and any amendments would be likely to lead to further litigation to clarify consistency of the regime with, in particular, Article 4(1) of the Framework Directive, requiring an appropriate appeal on the merits.

5 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?

Please see our response at Section 2 above.

6 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?

Please see our response at Section 3 above.

7 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?

Please see our response at Section 3 above.

8 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?

We repeat the points made above at Section 2 with respect to the benefits of precedent that may be lost in implementing these reforms.

We also consider that, given the importance of these price control mechanisms to the functioning of a business, government should be slow to overhaul the standard of review process at this time without strong evidenced based reasoning.

9 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?

Please see our response at Section 2.

10 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?

No comment.

11 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?

No comment.

12 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?

Please see our response at Section 2 above.

13 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?

Please see our response at Section 2 above.

Chapter 5: Appeal bodies and routes of appeal

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

These have already been addressed and commented on extensively by the CAT[17] and we do not seek to provide specific comments on these proposals.

15 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?

Yes.

We welcome the proposed initiative. The present situation, whereby a CAT Chairman appointment can only be obtained after successfully obtaining a Judicial Appointments Commission appointment is undesirable and inefficient given that High Court judges or their Scottish and Northern Irish equivalents would already have obtained such an appointment. We endorse the Government's suggestion that this bureaucratic barrier be removed.

16 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.

No comment.

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

We agree with the proposal that the CAT be permitted to sit with a single judge in appropriate cases (and we note that the CAT is already able to do so in relation to certain

[17] CAT Response, paragraphs 45 - 52.

types of proceedings such as interim relief and case management issues, as provided for in Rule 62 of the CAT Rules 2003).

As the lay members of the tribunal tend to be drawn from a background of economics or accountancy, we consider that they could be dispensed with in cases involving points of law only or which do not involve complex factual or economic issues. However, we consider that the composition of the tribunal should be assessed on a case by case basis by the CAT itself rather than attempting to define the circumstances in which a single judge should hear appeals upfront.

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

Yes.

We consider that there is a case for the CC to hear all price control appeals given its experience in the water and energy sectors, and the fact that it hears of price controls under the Communications Act 2003 if referred by the CAT. This regime is both long-established and widely respected, and adopting it more widely would allow the CC, as a specialist review body, to exercise a consistent "overview" independent of Government, regulator and regulated companies.

A general shift away from that approach to a form of judicial review by one administrative body of another would create considerable uncertainty and would inevitably require judicial guidance to determine the legal parameters of such an untried regime.

19 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?

We can see some tangible benefit in simplifying the procedure with respect to these appeals, such that they are referred to the CC directly, in order to streamline the process. In particular, we note that the current regime is designed so that the CAT can determine if a matter relates to price control or not (and then refer it back to the CC if it does). In reality, and given the existing precedent, the parties would be reasonably well equipped to decide if a matter relates to price control and should be referred directly to the CC.

We have no specific objections to the model set out in the Civil Aviation Act 2012, although note that this process is relatively new and untested.

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

Whilst we think there might be some benefit in terms of precedent setting and efficiency if the same specialist body hears ex-ante regulatory appeals (and both the CAT and the CC would be well equipped given their expertise and processes), the CC already conducts inquisitorial reviews which might be more appropriate for appeals against ex-ante regulation.

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

No comment. We consider that a specialist body should hear these appeals. Whether it is the CAT or the CC is a policy decision though we note that the CC has dealt with one Energy Code modification appeal to date and the process was run smoothly and in a timely manner.

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

We agree with the comments made in the CAT's response to this question,[18] and suggest that a level of flexibility as regards approach would be desirable.

23 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?

No comment.

24 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?

No comment.

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

Please see our response at Section 1 above.

26 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?

Please see our response at Section 1 above.

[18] CAT Response, page 49.

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

As set out above, we do not agree that appeals of CA 98 infringement decisions should be on the basis of judicial review. However, we consider that the CAT would be well placed to hear procedural appeals under the CA 98 which are currently subject to judicial review only given the CAT's knowledge and expertise of the OFT's procedures under the CA 98.

Chapter 6: Getting decisions and incentives right

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

See Question 29.

29 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?

We respond to questions 28 and 29 together.

We endorse the proposal to increase the use of confidentiality rings at the administrative stage of decision making. We agree with the rationale presented for this change, namely that, given many regulatory and competition decisions are based on confidential data which cannot be disclosed directly to all the parties, many parties may not be able fully to understand the case against them, and therefore may be more likely to bring an appeal. Furthermore, it is possible that there would be time and cost savings for those companies which did decide to appeal. Presently many parties must seek permission to amend their pleadings before the CAT in light of information which is disclosed into a confidentiality ring at the appeal phase. This can be a source of delay during the proceedings which the use of confidentiality rings during the administrative stage may be able to reduce.

We consider that, as per the current approach taken by the CAT during the proceedings which come before it, the use of confidentiality rings would need to be adapted to the particular requirements of the parties in any particular set of proceedings, and that accordingly a "one size fits all" approach would be inappropriate. In some cases it may be appropriate to limit inclusion in the confidentiality ring to legal counsel only, whereas in others it may be necessary and desirable to also include non-legal appellant personnel. We consider that the CAT would be an appropriate body to supervise such confidentiality rings given its present role in supervising confidentiality rings in the proceedings which come before it. Any breach of a confidentiality order should cause the entity/person breaching to be found in contempt of court, and liable to pay a fine. As the damage which may be done by a breach of confidentiality may be difficult to quantify, it may also be appropriate for the parties to enter into a confidentiality agreement setting out liquidated damages in order to create an efficient deterrent against violations.

30 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?

We note that the CAT has responded in detail to these issues in its response and do not intend to comment further.

31 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?

We note that the CAT has responded in detail to these issues in its response, although note that the model set out in the Civil Aviation Act 2012 is relatively new and untested..

32 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?

Please see Section 5 above.

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

Please see Section 5 above.

34 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?

No comment.

35 Do you agree that the CAT [text missing in the consultation: s*hould have the power?*] to review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success.

This might be a helpful power for the CAT to have. However, we consider that there is a risk that any decision rejecting certain aspects of an appeal at an early stage would be made with the benefit of the full facts and evidence. Accordingly, such a proposal needs to be further explored to ensure that it is not possible to overturn or reject grounds which might otherwise have been successful.

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

Generally, we consider that this might ensure the impartiality and robustness of regulatory decisions, particularly in ex-post enforcement actions.

37 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?

Generally, early consultation, in particular in regulatory enforcement investigations, would increase transparency and full disclosure of the evidence. For example, there might be benefit in regulators engaging with companies when they are considering opening a particular investigation as by cooperating at such an early stage (before an investigation is launched) it might be possible to avoid a full investigation leading to significant costs and

resource for both the regulator and the company in question. We are of the view that any steps to increase transparency of the regulatory process can only be beneficial for the regulatory system and are likely to reduce the number of appeals.

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

Not for ex-ante regulatory decisions. For ex-post enforcement decisions, whilst this might be a helpful power to have, it should be further explored whether it is really needed given the context of such investigations (as opposed to CA 98 ones).

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

We see no reason for removing the right to appeal against non-infringement decisions; these can be equally flawed as infringement decisions and equally require a full merits appeal.

Removing the possibility of appealing non-infringement decisions removes a protection for complainants. Whilst in theory they could go to court directly to raise a challenge, two considerations are relevant if this proposal is to work: (i) in order not to be out of time, a complainant may find itself having to launch both a complaint to the OFT (or CMA) as well as proceedings before the court in case the OFT dismisses the complaint; (ii) a court should not be bound by the finding of the OFT on infringement.

Chapter 7: Minimising the length and cost of cases

40 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?

See Question 41.

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

We respond to Questions 40 and 41 together.

We do not consider that reducing the target limit for straightforward cases to 6 months or impose a time limit for other regulatory appeals of 12 months is necessary. There are no practical indications (and no evidence presented in the Consultation) that the current time taken by the CAT to dispose of appeals is influenced by delay or inefficiency. Instead, the timeframes will be determined by the complexity of the appeal under consideration and the amount of time required by the parties in order to properly prepare their cases. Accordingly, any such time limits would put undue constraints on the time available to the parties to prepare their cases. This could jeopardise the fairness of the trial, and such arbitrary time frames would in all likelihood fail to be met anyway given that the time taken in particular cases is predominantly influenced by the complexity of the appeal and the amount of time required by the parties to prepare their cases.

Furthermore, in particularly complex cases (in respect of which appellants are often represented by large firms with good capacity for dedicating additional resources to a case

if need be), the cost and undue constraints are likely to be borne by those with limited financial resources such as regulators and small to medium sized firms.

42 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?

We note that the 2003 Rules already make provision for the CAT to: (i) limit the amount of evidence and the number of expert witnesses; and (ii) exercise its case management powers with a view to saving expense and dealing with the case in a proportionate manner. These powers are set out in rules 19 to 22 and 44. We consider that these powers are sufficiently broad already, and are regularly exercised by the CAT in appropriate cases. We do not therefore think that there would be any benefit to be gained by extending or modifying these powers.

We further consider that it would be a mistake to impinge upon the present flexibility afforded to the CAT in determining appropriate procedures to be carried out in relation to the conduct of a particular case (including whether or not an appeal should be resolved on the papers or at an oral hearing). The CAT's existing practice is to ensure that it only makes provision for oral argument which is strictly necessary. We consider that this flexibility should be maintained going forwards.

43 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?

We welcome the proposal for a voluntary fast track procedure in which parties would themselves agree to limit the amount of evidence and/or cap costs. We do not see any down side to this proposal and consider that such a procedure, as well as reducing costs and the length of the proceedings, may result in increased party satisfaction in view of the increased control by the parties over the procedure.

44 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?

We note this would appear in line with the time limits in other price control appeals processes (e.g. in the water and energy sector). However, before a decision is made, the particular complexities of the communications sector should be explored to assess whether 6 months would be sufficient.

45 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?

We have no specific objections to this proposal, although note that the model set out in the Civil Aviation Act 2012 is relatively new and untested.

46 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?

We note that in practice the CC has generally issued its price control decisions in these sectors within the prescribed initial 6 months period. We do not consider that a reduction of any extensions from 6 to 2 months would make much of a difference.

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

No comment.

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

Generally, more transparent regulatory processes and access to documents and evidence at an early stage might assist in faster resolution of cases (e.g. by encouraging settlements or clarifications to be provided by regulated companies when they are being investigated).

Lloyds Banking Group plc

Group Legal Department

Paolo Palmigiano
Head of Competition Law

Lloyds Banking Group plc
25 Gresham Street
London
EC2V 7HN
020 7356 1239 direct
020 7 356 1808 facsimile
email: paolo.palmigiano@lloydsbanking.com

Regulatory and Competition Appeals Consultation
Consumer and Competition Policy Directorate
Department of Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

11 September 2013

Dear Sirs,

RESPONSE OF LLOYDS BANKING GROUP PLC TO "STREAMLINING REGULATORY AND COMPETITION APPEALS"

Introduction

Lloyds Banking Group ("**LBG**") welcomes the opportunity to respond to the consultation published by the Department for Business, Innovation and Skills in June 2013 on options for reform of regulatory and competition appeals (the "**Consultation Document**"). Rather than respond to every question in the Consultation Document, LBG has focused its comments on those areas which it feels are most significant in terms of effective operation of the appeals regime.

LBG supports the Government's objectives of achieving a regulatory and enforcement system which is efficient, predictable, consistent, fair, transparent and minimises costs and burden for those doing business in the UK. As the Consultation Document notes, this will give firms confidence to invest, innovate and compete in the UK.

However, LBG does not consider the case for change to the appeals process has been made out in the Consultation Document:

- there is no evidence that the current system has resulted in unmeritorious appeals, unduly lengthy proceedings or 'gaming' by appellants through withholding evidence in the administrative stage: and there are sufficient safeguards against this in the Competition Appeal Tribunal ("***CAT***") Rules and process; and
- what experience has shown is that regulators have been able successfully to defend a number of appeals when their decisions have been sound, but had decisions corrected when they have been wrong or badly made.

Indeed, regulators have expressly recognised that lessons learnt from cases before the appellate bodies have driven positive internal procedural changes designed to improve speed, robustness and engagement with parties involved.[1]

Moreover, LBG is concerned that certain proposals advanced in the Consultation Document (in particular those relating to the standard of review and the evidence which may be adduced in a competition appeal) give rise to a number of unintended consequences which will frustrate the achievement of these objectives, and consumers and the UK economy will ultimately bear the costs of these.

LBG would urge the Government to exercise caution before intervening in an appeals system which the Consultation Document acknowledges is, in many ways, performing well.

Judicial Review

LBG is concerned that judicial review (or, alternatively, defined grounds of appeal[2]) is not 'fit for purpose' as the standard of review of decisions made under the Competition Act 1998 (other than on the level of penalty).

- *First*, appeals are one of the critical checks and balances in the enforcement system. Infringement decisions carry severe consequences - both financial[3] and reputational - for defendant firms. It is essential, therefore, that the enforcement system results in the 'right' outcomes. The possibility of a full merits appeal provides an extremely powerful form of accountability. To allow poor decisional practice to continue by weakening the power of the CAT to intervene would result in worse outcomes for consumers, undermine investor confidence, risk increasing the costs of financing for UK businesses and hamper growth.

- *Second,* the introduction of judicial reviews could exacerbate the length and cost of proceedings (the very harm that the Government is seeking to address). In the event that an application for judicial review is successful, the only relief open to the CAT would be to make a quashing order and remit the case to the original decision-making body for the decision to be remade: an additional procedural step for both regulator and defendant firms. While the alternative proposal of introducing a substantive appeal limited to defined grounds could address these concerns, it would not lead to better outcomes. Judges would find themselves in a 'straight jacket': looking to decide whether or not to substitute their own decision in order to reach the 'right' outcome, but having considered evidence only on very limited and narrow arguments.

- *Third*, were a judicial review standard to be introduced, this would create incentives for regulators to spend time and public funds on 'JR-proofing' their procedures and decisions and risk losing sight of the 'right' outcome (a danger which the BIS consultation itself highlights). If regulators focus on achieving the 'right' outcomes, appeals on the merits should hold no fear.

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[1] See, for example, *Review of the OFT's investigation procedures in competition cases – a consultation paper* (OFT1263con2, March 2012).

[2] LBG notes that all of the defined grounds of appeal set out in Box 4.2 of the Consultation Document (i.e. error of law or fact; procedural irregularity; ultra vires; and irrationality) are already grounds for judicial review, but are less comprehensive (for example, Box 4.2 omits proportionality as a possible ground of appeal). Accordingly, this proposal cannot, in LBG's view, represent an improvement on either the current system or the alternative proposal to introduce a judicial review standard.

[3] The fine imposed by the Office of Fair Trading (or a concurrent sectoral regulator) can be up to 10% of a firm's turnover (and can include an uplift for recidivism); and, assuming the Consumer Rights Bill comes into force as currently drafted, firms may be exposed to significant damages in collective opt-out litigation based on the findings in the decision.

The removal of the safeguards that a full merits appeal provides would be particularly troubling if the Government were to award (concurrent) competition enforcement powers to new regulators (such as the FCA and/or payments regulator) who have no established track record of robust decision making and procedures in competition enforcement.

LBG notes that this proposal was considered (and, following consultation, rejected) when the Government was establishing the new Competition and Markets Authority. Moreover, we understand that the Government specifically decided not to adopt a prosecutorial model because rights of the parties would be protected by the full merits appeal. In its response to the consultation, the Government stated that:

> "[*T*]*he Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system*".[4]

LBG is not aware of any recent developments which would cause this decision to need to be revisited.

New evidence

LBG considers that the justification for the proposal to significantly restrict the situations in which new evidence may be adduced in an appeal is unclear; and is concerned that its consequences may have the opposite effect to the Government's intentions.

Rule 22 of the CAT's Rules of Procedure already gives the Tribunal discretion to admit, exclude or limit evidence in an appeal, whether or not the evidence was available at the time the disputed decision was taken. A party would therefore be ill-advised if it were to deliberately withhold evidence during the administrative stage only to be used tactically on appeal. The Consultation Document contains no examples of cases in which evidence has been withheld in this way, or to show that the current rules cannot adequately deal with such a situation.

Should the proposal to restrict by law the admissibility of new evidence be adopted, LBG anticipates that there will be considerable litigation around whether evidence is "new" and the parameters of the statutory criteria. There will be a number of difficult questions which will properly fall to the appellate courts to resolve, leading to more and/or longer appeals together with the associated costs and burden. To take just two examples by way of illustration:

- Are witness statements and oral testimony "new" and is there a "good reason" for admitting this evidence given that it could have been gathered during the administrative proceedings? As the Consultation Document notes, an administrative body is not in the same position as a court of first instance which will hear evidence from both sides and allow this evidence to be tested under cross-examination.

- If the regulator changes its argument between its interim position (whether in the form of a Statement of Objections, Provisional Findings or 'Minded To' paper) and its final determination (or even during the appeal, e.g. OFT in *Tobacco cartel*), are there any limitations on the evidence that may be put forward by defendant firms? Article 6(1) of the European Convention on Human Rights (and the Charter of Fundamental Rights) requires that parties must have the opportunity to be heard, but any evidence adduced at this stage will necessarily be "new".

Other proposals

- LBG agrees that regulators should be encouraged to seek the full costs of an appeal if they are successful. This will help to deter frivolous, opportunistic and unduly prolonged

[4] Government Response to Consultation on Growth, Competition and the Competition Regime, March 2012.

appeals. An equally important safeguard, however, is that a regulator must pay costs should they lose the appeal: this ensures that regulators have a disincentive to engage in poor decision-making and bad regulatory practice for the long-term benefit of companies and consumers alike. Should the losing party's costs be excessive, there is already the option of requesting a detailed assessment of reasonable costs by the court.

- LBG recognises the merits of proposals to simplify and make consistent the second phase review of regulatory decisions, particularly where there has already been considerable harmonisation between sectoral regulators such as price controls.

- LBG welcomes developments intended to increase engagement and transparency with firms that are main parties to the administrative proceedings, such as the possibility of greater use of confidentiality rings.[5] LBG would suggest that in addition to granting powers to impose sanctions for breach of confidentiality undertakings, parties whose confidential data is included should be given a direct right to claim for any loss suffered by breach of the undertakings given to the regulator.

- The jurisprudence on what is an "appealable" decision under the Competition Act 1998 has been developed over a number of decades and is now settled. Learning lessons from these cases, the OFT has recently introduced a procedure whereby it will publish "case closure summaries" as a low cost means of signalling to complainants and market participants how the OFT might approach similar cases. Reopening the debate would lead to uncertainty and further litigation.

Conclusion

When considered against the backdrop of other policy decisions which toughen the enforcement regime such as removal of dishonesty from the criminal cartel offence and the possible introduction of a collective opt-out litigation regime, it would be extremely concerning if Parliament were to legislate in such a way that curtails the rights of defendant firms to have a full and fair appeals process.

Yours sincerely

Paolo Palmigiano
Head of Competition Law, Group Legal
Lloyds Banking Group plc

[5] LBG would not expect the same rights to access confidential information would be granted to interested third parties.

Maclay Murray & Spens LLP

HMG Consultation – Streamlining Regulatory and Competition Appeals

Response of Maclay Murray & Spens LLP

Introduction

1. MMS is a commercial law firm with offices in Aberdeen, Edinburgh, Glasgow and London. MMS has an active regulatory and competition practice, acting for regulators in the energy and postal sectors and for regulated companies in other sectors such as water and transport. MMS:

   - has acted in appeals against regulatory action in the High Court and Court of Appeal,
   - has represented clients in merger investigations and market investigations by the Competition Commission, and
   - is one of the few law firms successfully to have appealed to the Competition Appeal Tribunal ("the CAT") against a decision of the Competition Commission ("the CC").

2. One of the partners in the Firm's competition practice, Catriona Munro is a member of the CAT user group. Representatives from MMS attended the Stakeholder Workshop held on 1 August 2013.

MMS's position on the aims and key proposals

Aims

3. MMS agrees with the economic aim of the Consultation.

   - Economic growth is necessary to maintain living standards.
   - Economic growth requires investment, which has to be attracted from competitive international financial markets.
   - The nature of a country's regulatory regime contributes to it being an attractive or unattractive place to invest.

   The starting point for judging the regulatory regime and the appeals process therefore is whether it facilitates, rather than hinders, inward investment and whether it makes UK business more competitive and dynamic. This means that it provides good, thorough, well informed and well reasoned decision making. The regulatory regime is not an end in itself.

4. MMS also agrees strongly with the objective of access to justice. We see this as so important that we think that it should come first in the list of objectives and not be subordinate to the much more vague objective of providing proportionate regulatory accountability. Access to justice also should take priority over concerns about the costs that the appeals framework might impose on regulators. The fact that a regulator is not discouraged from being radical or controversial, can "set a clear direction over time" and can argue that it is "proportionately accountable" will not make up for the respect for the framework that is lost, and the bitterness that is felt, if an unjust decision is not corrected.

5. MMS believes that irrespective of any merits in what is being proposed the timing is wrong – the creation of a body with enormous power and influence in the economy

and on business but which in its combined form is untested, is not the time to loosen judicial oversight.

Key proposals

6. MMS thinks that Consultation's proposal to move away from merits based appeals is by far the most important of the proposals, we are opposed to it. We deal with this issue first, in the next section. In our view, the other proposals are of less importance; they are dealt with in later sections and in our responses to those of the consultation questions we have answered.

Merits based appeals

The value of full merits appeals

7. The Consultation proposes moving from full merits appeals to an appeal process more akin to judicial review. It refers to striking "the right balance between providing a proper right of challenge and allowing regulators and competition authorities to make decisions in a timely way". This aspect of the Consultation is about timeliness in appeals rather than in the decision at first instance: its aim is quicker and more predictable appeals.

8. MMS thinks that the respect commanded by a regulatory system depends more, on the quality of decisions, than on their speed. Quality in decision making results from ensuring that issues are clear (i.e. that the law is well framed), that all relevant facts are ascertained, that all relevant arguments are well presented and fully considered and that the person or body considering the arguments has the necessary skill and experience to judge the issues and sufficient time to apply that skill and experience.

9. These requirements apply as much at the first administrative stage as at appeal. That stage ought to be as fair and transparent as possible and the OFT's procedural improvements ought to lead to better checks and balances at that stage so that there fewer initial bad decisions. Bad decisions may occur and the more thoroughly the first instance decision maker can expect to be held to account the more careful it is likely to be in taking its decision and in getting it right.

10. A full merits appeal has a strength that is absent from a judicial review process: it is focused on, and considers, the issue on which a decision is required. Judicial review considers a different question, which whether the first instance decision maker arrived at a decision that is so bad, or arrived at its decision through a process that is so bad, that the decision cannot be allowed to stand. Decisions which would be overturned in a full merits appeal could be upheld in judicial review. This quality of full merits appeals can contribute to the respect in which the regulatory system is held; the Consultation is proposing that it be traded off against speed of decision making.

11. This is not to say that the trade-off should not be considered: justice which is delayed may be poor justice, particularly in the competition field when delay in stopping anti-competitive activity can lead to the exit of a competitor, causing long term damage to consumers. But it is a trade-off that needs to be recognised and explained and the Consultation seems to give more emphasis to the disadvantages of full merits appeals than to their strengths.

Why MMS thinks full merits appeals should be retained

12. Regulatory and competition decisions can be decisions of national importance and of significant financial scale. Regulatory decisions relate to important infrastructure used by every business and individual; a price control can govern expenditure amounting to tens of billions of £s. Competition penalties can be in the order of tens of millions of £s and may be followed by damages actions. Individuals may suffer in terms of their career progression or their perceived fitness to be a director.

13. In MMS's experience the evidence on which such important decisions are taken needs to be tested very critically, with provision, if necessary, for cross examination. Regulatory and competition decisions are administrative decisions at first instance. Over the last decade the processes by which such decisions are taken have become more open than they used to be, with opportunities for oral hearings. But these administrative processes fall far short of allowing evidence to be tested in cross examination. A full merits appeal process makes good this deficiency.

14. This necessary opportunity for the critical testing of evidence can be provided either by changing administrative processes so that this testing can occur at that stage, or by retaining full merits appeals. In the interests of overall efficiency it is best guaranteed at the appeal stage. This will enable the majority cases where the regulated person is content with the decision to be dealt with expeditiously through an administrative process, without a full legal hearing permitting cross examination. The Government appeared to agree with this in it its response to the Consultation on Growth, Competition and the Competition Regime. Favouring an improved administrative process, the Government also acknowledged the importance of retaining a full-merits appeal: "The Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system". [1] We are unclear why the Government now appears to have changed its mind.

15. The strength of our opposition to the removal of full merits appeals derives not solely from our experience of an unsatisfactory administrative decision which was overturned at the CAT due to the facts not supporting conclusions; there is a human rights point. In the application of competition and regulatory sanctions, there is a determination of a person's civil rights and, if a financial penalty is imposed, there is a deprivation of possessions: Article 6 and Article 1 of Protocol 1 of the ECHR are engaged. There must be the involvement of a judicial body that has full jurisdiction and which an applicant can call upon "to undertake an exhaustive review of both the substantive findings of fact and the [administrative body's] legal appraisal of those facts"[2]. A full merits hearing meets this requirement, but it is not clear that a right of appeal on the basis of a "material error of fact" does so. Such an appeal process would allow decisions to stand even though they are based on established errors of fact where the appellant is unable to prove to the court that they are "material". If this is compliance with the ECHR, it is marginal compliance and in a system which aspires to be "world class", whatever that means, MMS regards this as not good enough.

16. In reaching our view, we have had in mind two other factors. The first is that the outcome of a competition or regulatory infringement is not limited to the sanctions

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1 March 2012, p54.

2 Schindler Holding Ltd v European Commission (Re Elevators and Escalators Cartel) (Case T-138/07) [2013] 4 C.M.L.R. 39.

imposed on the infringing company by the regulator. Follow on actions for damages are an increasing feature of the legal landscape and are being encouraged by regulators. Such actions are possible, in principle, following regulatory enforcement decisions. In such actions almost all the evidence rightly is capable of being tested in cross examination. But there is one exception to this: in competition follow on claims the claimant can rely on the regulator's finding of infringement[3]. Removing the ability of defendants to test the findings of fact underpinning that decision (except in cases of material error) may have serious repercussions in a subsequent follow-on action. For example, challenging a finding in relation to a director's involvement in pricing decisions relevant to cartel activity may not be attractive (or possible) under the proposed new judicial review standard, but it may be an issue which proves critical to a later follow-on claim. Had a full merits appeal been available, it may have been one of a number of important findings of fact that the defendant would have sought to overturn.

17. The proposed change therefore has serious implications outside the framework of the Consultation which is limited to the appeals process, without regard to subsequent processes. The European Commission has been conducting a consultation on package of draft legislation relating to private competition law damages actions[4]. If adopted, the package would widen the range of potential applicants to include indirect purchasers and introduce a rebuttable presumption of harm for cartel infringements. A national court in a competition law damages action would be prohibited from taking decisions running counter to a final infringement decision by a national competition authority. These and other EU proposals tilt the playing field in competition law damages claims in favour of the claimant. The Consultation needs to be seen against this background. Infringement findings that rightly might be quashed in a full merits appeal but which survive a judicial review process will be incapable of challenge in damages proceedings in all 28 Member States. Such a risk could deter inward investment in the UK. MMS therefore thinks that the effect of these anticipated EU changes should be assessed before any decision is taken on the mechanisms for competition and regulatory appeals.

18. The other factor which concerns us is the possibility, in competition cases, of criminal proceedings for the cartel offence[5]. Cartel offences are offences committed by individuals who, in the investigation of a company, may have little opportunity to explain their actions or to contest evidence which appears to implicate them. Whilst a finding of infringement cannot be relied on by the prosecutor of a cartel offence in the same way that it can be relied on by the claimant in a civil damages action, the documents leading to the establishment of the infringement and arising in any appeal might well be disclosed in the cartel prosecution and could be prejudicial to the defendant. In such a case, it would be preferable in the interests of justice for the finding of infringement to have been made following a testing of the evidence as rigorous as occurred had it been introduced in chief in a full merits hearing.

19. The consequence of an appeal process which is less rigorous than current processes is that there is a higher risk of wrong decision being taken. Whether a process which is quicker but riskier than current processes will attract or deter investment and stimulate or inhibit growth is an open question. But our assessment of the views expressed by the regulated companies attending the Stakeholder Workshop

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3 Competition Act 1998 section 47A.

4 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF.

5 Enterprise Act 2002 section 188.

on 31 July is that their preference is for a slightly longer but more thorough approach, as compared with a quicker approach which allows more bad decisions by regulators to stand. As far as we can see the cost of wrong judgments has not been factored into the Impact Assessment; in our view it should be: given that the estimated net present value of the proposed changes is so much less than the maximum levels of penalty that can be imposed by regulators and so much less than the impact of many price controls, including the cost of wrong judgments could wipe out that value completely.

20. Finally on this issue, regulators do make mistakes from time to time. That a number of appeals have occurred is not indicative of a problem; rather it is an indication that the system for holding regulators to account is working as intended. Such systems are particularly important at times of change such as is occurring now with the establishment of the CMA. This new organisation will have to learn its role and in the learning process it will make mistakes. It will learn most from those mistakes if it can be held to account effectively by a robust appeal process which allows full merits appeals. Now is not the right time to change the standard of review.

Access to Justice – a major shortcoming

21. As noted above, MMS agrees strongly with the aim of access to justice. However, access to a route of appeal is only one aspect of access to justice: an appeal is only possible if there is access first to a process that gives rise to decisions that can be appealed. In the UK this aspect of access to justice is severely limited in competition cases, as compared with access that is available in other countries, by the OFT being entitled to decline to investigate cases on the basis of administrative priority.

22. MMS understands that the UK competition regime investigates far fewer competition cases than its counterparts in France and Germany – around one tenth as many. France and Germany do not rule complaints out on the basis of administrative priority and resources which in the UK would be expended negatively in deciding that a case should not be undertaken there are expended positively in conducting investigations. Whilst we acknowledge that the number of decisions is not the only indicator of a regime's effectiveness, we think that the relatively low number of investigations makes the UK regime much less effective than portrayed in the Consultation. In terms of delivering access to justice, MMS regards the dismissal of complaints on the grounds of administrative priority as a much greater shortcoming than the shortcomings identified in the Consultation in the appeals framework, and the issue that should be addressed first.

Government's general approach – an underlying tension and its implications for the CC/CMA?

23. There appears to MMS to be an underlying tension between two elements of the Government's general approach. The Consultation discusses a move away from "full merits" appeals to an appeals process much more akin to judicial review, in the interests of efficiency and greater consistency of decision making. In the alternative approach discussed in the Consultation, review of the facts would take a lesser role than it does today. However the Consultation also discusses the role of specialised appeal bodies[6] and says that there is a good argument for retaining them.

[6] Paragraph 5.6.

24. MMS agrees with the Consultation that specialist panels such as the CC and CAT have economic as well as legal expertise[7] and that there is a stronger argument for having an appeal body with specialist expertise when a review of the facts is required.[8] It would appear to follow that in suggesting a move away from full merits appeals the Consultation is weakening the case for retaining specialist appeal bodies. The suggestion that the CAT should be able to sit with a single judge[9] can be seen as the ultimate consequence of moving away from merits based appeals. We understand from the Stakeholder Workshop that the circumstances in which it is envisaged this might occur are limited those where the issues under consideration are exclusively legal. We regard moving to a single judge as acceptable in these narrow situations, but we would be concerned about it in other situations because it could suggest a move away from full merits appeals

25. Regulatory certainty is recognised generally as being important for confidence and growth and MMS thinks that continuity of institutions is an important element of that certainty. The current merger of two institutions to create the CMA illustrates that institutional certainty cannot be assumed. Moving away from full merits appeals begs the question whether a body with specialist expertise for factual review is required at the appeal stage. In particular it suggests that the appeal function previously performed by the Competition Commission in relation to regulatory licence condition appeals should not be performed by its successor and would be better transferred to the CAT. To raise this doubt before the CMA has been established is damaging to regulatory certainty. MMS therefore thinks that this tension between two aspects of the Consultation needs to be thought through and resolved. In our view, full merits appeals with thee member CAT panels and specialist CMA panels generally should be retained.

The case for change

26. MMS is not convinced that a case for any major change is made out in the Consultation. MMS does not believe that the number of appeals is the result of regulated companies' "gaming tactics" (i.e. withholding arguments at first instance so as to put them at appeal) because the risks and costs involved are so great. These costs are not just legal costs: they also include the very great cost of diversion of management time and focus into regulatory, rather than productive, activity. Regulated companies will not risk getting a fair decision at first instance for the possibility of doing better on appeal – their main priority is getting on with their business without regulatory distractions; regulatory games have no priority.

27. MMS also questions whether reliable conclusions can be drawn from comparisons between the numbers of appeals in different sectors. The communications sector is a very fast moving sector in terms of innovation and market development compared to other sectors. Some of its most valuable services did not exist 20 years ago; businesses that seem unassailable can quickly be vulnerable. It is surely to be expected that communications will give rise to more regulatory challenges than sectors like water and energy in which the offer to the consumer is much slower to change.

28. In short, the appeals that are being observed and their distribution between sectors may well be precisely what would be expected in a well functioning appeals framework looking across sectors with different product and market characteristics.

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7 Paragraph 5.6.

8 Paragraph 5.5 bullet 1.

9 Paragraph 5.16.

29. MMS agrees with the Consultation that there is inconsistency between appeal routes. This is attributable to a large extent to the way in which regulation and competition law have evolved over the last 25 years. But regulated companies and practitioners in each sector have grown up with the appeal routes in their sector and are familiar with them. It does not appear to be suggested in the Consultation that they are calling for change. .

Getting decisions and incentives right

30. MMS is broadly supportive of changes proposed in Chapter 6 of the Consultation to improve the way in which the appeals framework operates. We note that most of them could be applied within the existing framework.

31. The extension of confidentiality rings to administrative processes is a logical extension of what has been developed in the courts. In the context of a court process there is a mechanism for disciplining those who breach undertakings of confidentiality and that mechanism would need to be replicated for there to be confidence that confidentiality would be observed.

32. MMS suggests that before burdening the CAT with this role, consideration should be given to whether the confidentiality obligations that apply under most regulatory regimes, including under the Competition Act, provide a sufficiently robust mechanism already. These obligations are backed by criminal sanctions. Routing information into the ring via the relevant regulator probably would bring it within the ambit of stringent confidentiality duties. Consideration would need to be given to whether the regulator in question had a "gateway" for outward disclosure of information to members of the ring.

33. MMS broadly agrees with the proposals in the Consultation for dealing with new evidence: the governing factor should be that new evidence should be admitted where the interests of justice demand it. However we think that the emphasis of the Consultation is questionable in two respects. First we think that the interests of justice should take precedence over one of the other requirements in paragraph 6.13, namely that the evidence could not reasonably have been expected to have been placed before the administrative authority. It is possible, particularly in administrative proceedings, where there may be a less clear picture of the evidence and the issues than there would be in judicial proceedings, for a party not to recognise the relevance or significance of evidence in its possession. For such a party to be denied the opportunity to present that evidence when its relevance or significance becomes clear would be an injustice.

34. Secondly we are concerned at the restrictions on new evidence proposed for judicial reviews. The Consultation proposes extending the scope of judicial review to include material error of fact. To prohibit the introduction of evidence that might go to the issue of material error reduces the effectiveness of the proposed process as a means of correcting regulators' errors and puts the interests of regulatory convenience above the interests of justice. This seems to MMS to get the balance very wrong and reinforces our concerns about moving away from full merits appeals.

35. We would ask the Department to keep in mind, when considering its policy on this point, that the parties may not know until quite late in the course of a regulator's consideration of an issue, which points the regulator sees as central to its case. As a result of not being fully aware of that case a party may not have put forward information that is relevant to it. To deny that party a right to introduce that information on appeal would be to deny it justice.

Minimising the length and cost of cases

36. The experience of the NHS demonstrates that over emphasis on targets and tightening of targets can have a disastrous effect on quality. The quality of decisions is one of the most important determinants of the respect in which the regulatory system is held and whilst it is true that allowing a long time for a decision does not guarantee that it will be a better decision it is equally true that rushing a decision increases the risk that it will be flawed.

37. The time taken to reach decisions should be monitored because that information is relevant to decisions taken by companies on how to respond to regulatory action. It contributes to transparency. But MMS finds it difficult to see how shaving time off existing targets, which already are demanding, is going to improve the appeals process. The case for running the risks associated with tighter targets is not made out in the Consultation.

The 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?

No – we disagree. If, contrary to this view, there is to be a move to a process akin to judicial review it should permit consideration of the reasonableness of findings of fact and the introduction of new evidence if necessary in the interests of justice.

Q2 Our strong preference is to retain full merits appeals. If there is to be a move towards "non-judicial review" appeals the principles set out in Box 4.1 should be enhanced by the addition of the principle "in the interests of justice". We are not clear how the suggestion under "unreasonable exercise of discretion" for decisions that are no longer reasonable at the time of appeal would operate, unless it is intended to allow new evidence.

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

It may reduce marginally the length and cost of the appeal process. If there is no opportunity for review of factual findings made at first instance there will be cases where appeals which would succeed in a full merits review are unsuccessful; this will not enhance the effectiveness of the overall framework.

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?

(i) See our response to question 3.

(ii) Any increase in the opportunity for review of factual findings made at first instance will help to address the risk identified in our response to question 3; that opportunity is greatest with full merits appeals.

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?

We are against moving away from the present appeals process. If a move is to be made it should be to a process that includes an opportunity for considering the reasonableness of factual findings.

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?

See our response to question 5.

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?

The complexity and scale of these decisions is such that in our view there should be no move from the current appeal process.

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?

We do not favour such changes but in the event that they are to be introduced please see our response to question 5.

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?

Any proposals coming out of the Northern Ireland consultation should not be changed to align with changes proposed following this consultation without further consultation in 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?

(i) we would expect the process to be quicker and to cost less;

(ii) we would expect the process to be quicker and cheaper, but not as quick and cheap as (i);

in both cases we would expect this to be at the cost of a poorer quality of decision.

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?

Please see paragraphs 7 to 20 above.

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?

See our response to question 5.

<u>Chapter 5: Appeal bodies and routes of appeal</u>

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?

Yes.

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.

MMS thinks that limiting appointments to 8 years is an undesirable waste of experience.

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

Yes, but only for procedural or minor hearings where the issues are purely legal.

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

The key requirement is for a thorough examination of the issues by a body which has the range of experience that is required for a well founded decision to be taken. At present this function is located in the CMA/CC. We see no reason to move it to another body

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?

Yes – there seems little purpose in routing Competition Commission references via the CAT.

There is a choice of models. It is not clear to MMS why the Consultation favours the approach used in post and aviation over those used in energy or in health. MMS would stress the importance of there being an opportunity for reasonably detailed consideration of the facts, given the scale and complexity of price control cases.

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

Not necessarily. The CAT probably is the most appropriate appeal body in relation to obligations that relate to competition, but some licence obligations in relation to which ex-ante regulatory decisions are taken relate to other issues (customer service standards and financial resources, for example). For these the general experience available in the High Court and Court of Session may be more relevant.

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

No. We think that the investigatory approach adopted by the Competition Commission probably is to be preferred over the adversarial approach prevailing in the CAT.

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

Not necessarily. Some regulatory licence conditions are concerned with issues that have no competition element, as is noted in our response to question 20.

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?

Our experience of the High Court as an appeal body for licence enforcement appeals has been positive. For appeals where the main issues are competition related the CAT might be the more appropriate forum.

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

Yes.

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?

MMS can see merit in the use of such rings.

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?

Please see paragraphs 31 and 32 above.

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.

No – what is proposed (in paragraph 6.13 of the Consultation) seems be more restrictive than has been decided by the CAT (as set out in paragraph 6.12) in a way that could be contrary to the interests of justice, as explained in paragraph 33 above.

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?

MMS thinks that the approach to new evidence in Schedule 2 to the Civil Aviation Act 2012 should not be extended further until it has been tested in practice. The reservations we have expressed in paragraph 33 apply.

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?

MMS sees no reason to make the express legislative provision that is proposed: the CAT's fact dependent exercise of a discretion in relation to the award of costs has a flexibility to respond to circumstances that might be restricted if there was specific legislative provision. The proposal set out in question 32 appears to MMS to tip the cost balance too much in the regulator's favour.

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

Yes, subject to two conditions:

(i) the reasons for on which an appeal can be said to "stand little chance of success" need to be made clear in the CAT's decision;

(ii) the CAT's rejection must be capable of being challenged. The pools of staff and panellists who serve the CAT, the OFT and the CC are not large. Many of them know each other and officials at the OFT. The CAT and the CC presently are co-located. The concentration of staff will increase with the creation of the CMA. Justice must be seen to be done and there should be no possibility of it ever appearing that CAT's rejection of an appeal against a decision of the CMA might have been influenced by contact from the CMA. An appeal mechanism would guard against this risk.

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

MMS thinks that this issue should be left to the regulators to consult upon. Some regulatory offices are smaller than the CMA will be and may not have sufficient numbers of staff or board members to separate decision making from investigation in the way proposed for anti-trust cases. Some of the decisions that sectoral regulators have to take can be relatively minor, so that the cost of running a separated process is disproportionately high.

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?

There are a number of very difficult issues associated with this question: sometimes an enforcement authority has to let an offence run in order to accumulate the evidence needed to overcome the presumption of innocence and prove the offence; confidentiality considerations may restrict the extent to which consultation can be transparent; administrative priority may initially discourage a regulator from taking action on a matter; the persons with whom a regulator needs to consult may not be clear at an early stage; a "consultation" may need to comply with a code of practice which would not apply to less formal research or investigation. In short it is difficult to generalise as to when a consultation should take place, or on how transparent it should be.

Whether earlier consultation might be expected to reduce the number of appeals is impossible to say: in some circumstance it might, but equally a badly conducted consultation could itself be a cause for challenge.

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

MMS is not persuaded that regulators do need more investigatory powers. The powers to ask for explanations of documents which all regulators have, coupled with their powers to enter premises and seize documents are extensive and well backed by sanctions such as section 42 of the Competition Act 1998. Investigatory powers are invasive and additional powers should be created only if existing powers have been found to be inadequate in use. The Consultation cites no evidence that this is the case.

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

The view of MMS is that non-infringement decisions should continue to be appealable. Our reasons are:

1 a non-infringement decision is potentially determinative of rights in a damages action and a potential claimant in a damages action ought to be able to challenge a decision affecting his rights;

2 it would be anomalous for such decisions to be appealable when made by the Commission in relation to Article 102 TFEU, but not appealable when made in

relation to the Chapter 2 prohibition (presumably, although we have not researched the matter, the same point arises in relation to Article 101 and the Chapter 1 prohibition);

3 it is consistent with the policy intent of making it easier to pursue private actions;

4 the possibility of judicial reviews of decisions of no grounds for action means that litigation will occur in any event; it would be preferable if that litigation related to clearly formulated decisions such as decisions of non-infringement.

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?

Please see paragraphs 36 and 37 above.

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

Please see paragraphs 36 and 37 above.

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?

MMS is not opposed to providing the CAT with this power, subject to that power being flexibly drafted so that the CAT has adequate discretion to ensure that justice is done. MMS is unclear how this power might be extended to regulatory appeals if it is to be implemented through changes to the CAT's Rules of procedure, or whether there is a practical justification for this extension.

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?

If parties are of equal standing in terms of the resources available to them MMS sees no issue in allowing them to agree on a voluntary fast track procedure.

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?

No – please see paragraphs 36 and 37 above.

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?

No – please see paragraphs 36 and 37 above.

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

MMS is not aware of any obvious or easy answers to this question.

Monitor

Monitor
Making the health sector work for patients

Wellington House
133-155 Waterloo Road
London SE1 8UG

T: 020 3747 0000
E: enquiries@monitor.gov.uk
W: www.monitor.gov.uk

11 September 2013

Department for Business, Innovation and Skills
Regulatory and Competition Appeals Consultation
Consumer and Competition Policy Directorate
1 Victoria Street
London
SW1H 0ET

Monitor's response to consultation on Streamlining Regulatory and Competition Appeals

We refer to the consultation on options for reform in relation to streamlining regulatory and competition appeals that was published on 19 June 2013 by the Department for Business, Innovation and Skills (the Consultation). We note that the Government is not proposing specific recommendations in relation to Monitor as part of the Consultation.

The Health and Social Care Act 2012 gave Monitor concurrent functions with the Office of Fair Trading under sections of the Competition Act 1998 and the Enterprise Act 2002 in relation to the provision of health care services in England. To the extent that the Consultation covers appeals of competition decisions made by sector regulators exercising concurrent competition powers, the outcome of the Consultation is of interest to Monitor.

We are supportive of the Government's aim to achieve better regulatory decisions and to support regulators to take decisions more quickly and efficiently. We are also supportive of the Government's overarching objectives for an appeals framework that supports independent, robust and predictable decision-making, provides proportionate regulatory accountability, minimises the end-to-end length and cost of decision-making, ensures access to justice is available to all firms and affected parties, and provides consistency, as far as possible, between appeal routes in different sectors.

However, as we have not yet exercised our concurrent competition powers we are not in a position to comment on the proposed options for reform at this time.

Yours sincerely

C. Davies

Catherine Davies
Executive Director
Cooperation and Competition

National Grid

National Grid House
Warwick Technology Park
Gallows Hill, Warwick
CV34 6DA

Regulatory and Competition Appeals Consultation
Consumer and Competition Policy Directorate
Department of Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Paul Whittaker
Director, UK Regulation

paul.whittaker@nationalgrid.com
Direct tel +44 (0)1926 653190

www.nationalgrid.com

10 September 2013

Dear Sir or Madam

HM Government consultation on Streamlining Regulatory and Competition Appeals

1. This is the response of National Grid in relation to BIS's consultation on Streamlining Regulatory and Competition Appeals. National Grid owns and operates the high voltage electricity transmission systems in England and Wales and operates the electricity transmission system throughout Great Britain and offshore. National Grid also owns and operates the gas transmission system throughout Great Britain and, through its low pressure gas distribution business, distributes gas in the heart of England to approximately eleven million businesses, schools and homes. In addition, National Grid owns and operates substantial electricity and gas assets in the US, operating in the states of New England and New York.

2. National Grid is subject to both the general requirements of competition law as well as the specific sectoral regulatory regimes for gas and electricity: the consultation impacts National Grid both in respect of competition law appeals and regulatory appeals from decisions made primarily by Ofgem (but potentially by other regulators such as the OFT).

3. This response sets out our general comments in response to the consultation. Responses to the individual questions set out in the consultation are set out in Annex A.

General comments

4. National Grid understands the need for decisions to be capable of being made and enforced in a timely manner. In particular, National Grid's own experience of the conduct of competition law appeals processes demonstrates that there is a need for appeals to be dealt with quickly and efficiently. We do not, however, consider that diluting parties' appeal rights through diminishing the grounds on which they can challenge decisions (especially to the very basic standard of judicial review) is either the most effective or appropriate method of achieving this aim.

5. The focus on any reform to the appeals process should be on ensuring that competition and regulatory authorities make the right decisions, and make them in a robust manner. The proposed 'flexible judicial review standard' could, dependent on how it is interpreted by the appeals bodies, provide immunity to the authorities from challenge to their decisions. This in turn may lead to decisions being made by those authorities without proper consideration, evidence or process. This is likely to lead to regulatory uncertainty and a lack of predictability which is key to the industry generally but can also have a profound effect on investment in the regulated industries. The present regime generally provides an appropriate level of balance between the regulators' decisional powers and the rigour imposed by the threat of challenge which ensures the quality and fairness of decision making. A move to a lesser standard for challenge can only diminish the incentive to make high quality decisions.

The consultation has not provided tangible evidence that reform is needed

6. The consultation, and subsequent discussions at the workshop on 1 August with BIS, acknowledges that the present system in many ways works well and has provided no evidence that regulators are being prevented from making decisions in a timely manner. Indeed, proposals similar to these were considered and rejected when the structure of the the new Competition and Markets Authority was being designed: the Government specifically decided not to adopt a prosecutorial model because rights of the parties would be protected by the full merits appeal[1]. Similarly, the consultation does not acknowledge that the appeal process may be lengthy because the issues in question are complex and difficult to resolve.

7. We are concerned that the emphasis of the consultation appears to be to reducing the number of appeals being made by restricting the grounds for appeal, rather than looking at why there are as many appeals as there are. There appears to be no consideration given to the type of decisions that are being appealed or the procedures and quality of the decisions being made by the regulators which give rise to them.

8. Companies do not decide to appeal regulatory decisions lightly. The decisions to which these proposals apply are often concerned with large amounts of money, criminal or quasi-criminal penalties and can have a considerable impact on reputation. There is always the risk, on an appeal on the merits, that the decision may go against the appellant and potentially increase fines, for example. As such, the decision to appeal is weighed against a range of factors, including, how robust the company considers the regulator's decision is, the precedent and financial values involved and the potential reputational risk of an unsuccessful appeal.

9. There has been no evidence provided, and National Grid has seen no examples, of a regulator being prevented from making necessary decisions due to its concern that an appeal will be brought or because an appeal is in progress. Indeed, the fact that appeals are being launched does suggest that regulators are making decisions that actively challenge the industries that they are responsible for overseeing.

There is no case for change: appeals on the merits (or specified grounds relating to the merits) should be the norm

10. Novel and controversial decisions need to be subject to review and the standard should be on the merits to ensure it receives the attention the decision is properly due. All industries want to see good regulatory decisions made "first time".

11. The current appeals process is an important aspect of keeping regulators in check and ensuring the quality of the decisions made. We consider that such appeal mechanisms are both required not only in the interests of justice (especially, but not only where financial penalties are imposed) but also in order to promote good quality decision making and robust regulatory decisions. Indeed, the prospect of a defeat in an appeal on the merits provides a strong reputational incentive for regulators to make good quality, well justified decisions, first time.

12. In particular, investors, when deciding where to place their investments, are very concerned that the regulatory and commercial regimes surrounding the industries in which they invest are stable and predictable. Where these factors are not present, costs of capital will likely be higher or investors will look elsewhere for investment opportunities. While these factors are always important, their importance is magnified in the case of network utilities such as energy, where the scale and duration of the investments means that investors are all the more concerned that the regulatory scheme recognises the need to, for example, recover the very significant sunk costs represented by their investments. Indeed, it is not that investors are seeking to avoid the application of regulatory rules to their investments: rather they welcome them as providing a stable backdrop against which to invest. Good and robust regulatory decisions therefore promote investment growth.

[1] In the Government Response to Consultation on Growth, Competition and the Competition Regime, March 2012, the Government stated that: "[*T*]*he Government accepts the strong consensus from the consultation that it would be wrong to reduce parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system*".

13. Any approach which led to investors taking the view that the value of their investment may be eroded by regulatory decisions which are insufficiently reasoned or simply wrong is likely to dissuade investors from placing their investments in Great Britain. As such, good quality regulatory decision making is also absolutely fundamental to the growth agenda for the GB economy. In this context, and given the value of the regulatory settlements for energy network price controls, it may be seen that the negative effect on growth and investment of even a single wrong decision may outweigh the very limited upside for the economy as a whole identified in BIS' cost benefit analysis.

14. While we consider that a merits-based approach is the most appropriate approach across both competition and regulatory decision making, we consider that the appeals mechanism in relation to energy licence modifications remains robust and appropriate because it does require regulatory decisions to be made in the light of robust criteria for appeal. Ideally, we should like to see such an approach extended to cases relating to regulatory enforcement decisions in relation to breaches of the Gas and Electricity Acts or licences, rather than the robustness of the existing licence modification appeals rules being eroded. We certainly do not consider that there is any need to apply a "one size fits all" approach to appeal mechanisms: each appeal mechanism needs to be viewed in the context of the industry and legislative background in which it is intended to operate. These are not the same either between competition and sectoral regulation, or between different sectoral regulatory regimes. As such, while a merits based approach is preferable for all appeals, we recognise that this is the "gold standard" and that other, more tailored approaches can also provide an appropriate level of protection (as is the approach in the energy sector).

15. There are however significant improvements that could still be made to these decision making processes which many of the suggestions around process provided later on in the consultation may well resolve.

<u>Inappropriateness of the judicial review standard</u>

16. National Grid does not consider that there is any justification for moving all appeal mechanisms to the "lowest common denominator" of a standard of judicial review, however flexible such a standard may be in its application. We consider that the issues raised in these cases are typically inappropriate for the judiciary to be able, with certainty and consistency, to exercise the flexibility in their inherent jurisdiction in a consistent manner in order to provide an appropriate check on regulatory decision making. It is for this reason that specific appeal mechanisms were adopted in the first place.

17. In particular, there often also tends to be judicial deference to regulators in judicial review cases. It is generally the case that the courts are reluctant to set aside the decision of a regulator preferring to defer to that regulator's particular expertise in the industry. This has not been a trend seen in merits based appeals cases. As such, there is a real risk that there is insufficient robust checking of decisions.

18. How a 'flexible' judicial review would work in practice also raises questions. It will be very difficult to incorporate any kind of meaningful merits-based decisional element into the existing judicial review framework. To do may, for example, require that the issues that are currently raised and considered under the merits based approach will simply be redefined and made to fit into the grounds of appeal being suggested as an alternative standard of appeal. The result of this is that there could be a lot of time and effort (and appellate court time) spent in changing the standard of review which consequently does not assist in resolving any of the concerns for which it was designed to resolve.

19. In any event, we consider that a move to this approach would lead to greater uncertainty and possibly more litigation over a very prolonged period while the courts sought to work through the issues raised. This would clearly be detrimental to investors' interests for the reasons outlined above.

Competition Law appeals

20. We consider that robust challenge of competition law decisions remains an essential part of the competition regime, especially given that authorities exercising competition law powers investigate, decide cases and impose penalties without external review. While competition authorities have undoubtedly improved their internal processes, natural "confirmation bias" renders these procedures an inevitable "second best" for an appeal right. Indeed, in the European context, the General Court has a role specifically to address this problem, despite the presence in the EU Commission's processes of a notionally independent hearing officer.

21. Furthermore, we find it strange that the government should be effectively proposing a higher standard of review to be applied in the case of an appeal against the level of a financial penalty than the standard that would be applied to an appeal as to whether any underlying breach of the competition rules had occurred. Especially given the established quasi-criminal nature of competition law breaches, this approach appears misaligned to the underlying issues under consideration in relation to each type of appeal.

Regulatory Appeals

22. The consultation makes no robust case for a change to the appeals mechanism in the energy sector, nor that there is any need for a "one size fits all" approach across regulatory regimes. The present energy licensing appeal regime was changed very recently as part of the implementation of the EU "Third Package" of energy legislation and an appeal standard (rather than the lower review test) is required in order to comply with the relevant EU Directives. Furthermore, this mechanism has not been used in practice (albeit that this does not mean it does not provide an effective check on regulatory decision making): as such, it appears to be difficult to justify further reform.

23. We do not consider that there is any real distinction between price control decisions (which provide for allowed revenues) and other regulatory decisions (which potentially impose costs on the affected businesses). In each case the decision can have a fundamental effect on the economics of the regulated business in question, either by affecting allowed revenues (price control decisions) or the costs of doing business (other regulatory decisions).

24. There have been very few appeals or challenges to regulatory decisions in the energy sector over the last few years, not least because regulated utilities are able to have a robust dialogue with Ofgem as a result of the availability of a strong appeal mechanism. As a result, it appears hard to draw the conclusion that the use of the appeal mechanism has led to excessive delays to regulatory action.

25. National Grid considers that, in the context of licence modification procedures, it would not be appropriate to move away from the present set of grounds against which a licence modification decision may be adjudged to be "wrong"[2]: it is essential that not only the substance of a decision, but the drafting used to implement it are challengeable. National Grid has significant experience of licence conditions being drafted in a manner that was confusing and/or did not correctly implement the policy in question. We have, on a number of occasions, used the regulatory scheme to drive significant improvements to the clarity and efficacy of policy delivery through being able to persuade GEMA to improve the drafting of its decisions so that they work correctly and can provide examples if needed. Without a specific ground for challenging poor quality drafting in decisions, regulated companies will be subject to greater uncertainty as to the true meaning of the regulatory rules affecting them.

[2] These are that: the decision is wrong in the context of the primary duty of the regulator in question (i.e. that the decision does not promote the interests of electricity consumers etc. set out in section 3B of the Electricity Act or its Gas Act 1986 equivalent), that the decision was based on an error of fact or law, or that the decision does not properly give effect to the policy in question.

26. Furthermore, we do not consider that a single test should be used to determine all regulatory challenges. This is because, for example:

- the regulatory regimes are seeking to achieve different objectives in different sectors;
- any test should either be on the merits, or at the very least, targetted at the question that the regulatory authority was seeking to address (which will vary from sector to sector); and
- different regulatory regimes relate to industries that raise different underlying issues that should be addressed in a different manner (for example, the issues that regulators seek to address will be different between competitive and network markets).

27. We note that the present standard of appeals does not consider that a change to the judicial review standard would be consistent with the requirements of the EU Third Package of energy legislation. This requires that regulators' decisions be subject to appeal: the present energy appeals regime was introduced very recently in order to implement these EU rules. A move away from these standards may expose the Government to challenge for failure to implement the EU rules adequately, as well as leading to greater uncertainty about the stability of the regulatory regime at a time when the Government is trying to encourage very large investments in energy infrastructure to be made in Great Britain rather than elsewhere.

<u>The effectiveness and importance of tests relating to the merits is demonstrated by National Grid's experience of using appeal mechanisms</u>

28. National Grid has taken decisions both to appeal regulatory decisions and not to appeal in relation to other regulatory decisions. Taking examples of each scenario in turn:

29. National Grid appealed the decision of Ofgem under the Competition Act 1998 that National Grid had abused a dominant position in relation to its metering business. While ultimately, National Grid's appeal was only partially successful, the ability to bring a full appeal "on the merits" did allow National Grid to ensure that Ofgem's decision and the process by which the decision was made were properly scrutinised. Indeed, as part of this, National Grid's fine for infringement of the Competition Act was reduced by more than half.

30. We consider that a full appeal on the merits allowed the CAT to consider the full range of issues raised by that case, including the conduct of Ofgem. National Grid does not consider that these issues would have been fully explored in the context of a judicial review type hearing, or even an enhanced review and, as such, could not have been adequately addressed in an appeal limited to the level of fine. In particular, the conduct of the Authority prior to the commencement of its investigation was a relevant factor, not only in relation to the consideration of whether there was a breach, but also the seriousness of such a breach.

31. As such, we consider that, if we were to attempt to appeal a future decision in similar circumstances, we would not have the same access to proper consideration of all the issues raised by such a case, and we would have been much less able to challenge the level of penalty imposed.

32. We also consider that the full consideration of the merits of the case and, in particular, the comments made by the appellate courts in relation to Ofgem's conduct, provide both an essential check on the conduct of authorities (who, it must be remembered, are acting as "judge, jury and executioner" in such cases), but also enable the courts to provide important guidance to those authorities in order to improve their practices, procedures and conduct in such cases. We believe that Ofgem has taken these concerns on board.

33. National Grid has considered launching, and decided not to launch, appeals in relation to regulatory decisions. In the context of regulatory decisions imposing licence conditions (including the new "RIIO" price controls), National Grid would be required, under section 11E of the Electricity Act 1989 (and its equivalent in the Gas Act 1986), to show that the decision made by the Authority was "wrong" on one of the grounds set out in those Acts. While we do consider that this is a test which is based on a similar standard to one purely based on the merits (and, importantly, refers back to the objectives that the Gas and Electricity Markets Authority must

pursue in making its decision), we consider that the test of "wrongness" in itself is likely to bring with it inherent materiality thresholds.

34. As such, we do not consider that there is any benefit to be gained in explicitly making any standard of challenge explicitly dependent on such issues of materiality. We certainly do not consider that there is merit in limiting the right to challenge decisions to those which meet the standard of judicial review.

35. Even if the courts were willing to explore the flexibilities of their inherent jurisdiction in relation to judicial review, we consider that this would be highly likely to lead to very frequent and extensive appeals of first instance judicial review decisions. As such, any perceived benefits in relation to speed and efficacy of decision making would be lost. Given the wide variety of regulatory decisions that would be the subject of challenge, we do not consider that the issue raised by such cases would be resolved by the courts without a very prolonged period of uncertainty while a large body of case law was developed.

36. We consider that appeals against regulatory decisions should be seen as being part of the normal regulatory landscape and the best way of holding both competition and sectoral regulators to the highest standards of regulation. Without the need to justify their decisions against a high standard of challenge, there would be no incentive for regulators to conduct rigorous and effective processes, with the consequences for investor confidence outlined above.

37. In any event, when taking decisions not to appeal particular regulatory decisions, we have considered the cases as a whole, even in "merits" based appeal processes as well as the time, costs, disruption and uncertainty of making any challenge. However, the most important consideration is whether, as a business, we can "live with" the decision in question, or whether it poses challenges for the business that can be overcome. As such, (and given the input of management time and general uncertainties inherent in appeal) we consider that there is already a high hurdle for businesses to get over before they will decide to appeal regulatory decisions, even where potentially large sums of money are at stake. We consider that most businesses would be likely to adopt a pragmatic approach in determining whether or not to launch appeal proceedings.

<u>The reform proposals could have a very significant impact on investment and growth</u>

38. We consider that the proposed changes could have very significant effects on our businesses. Diluting the ability of companies to appeal against regulatory decisions may expose them to very significant regulatory fines which, if they cannot adequately challenge through the appeal mechanism, they will bear, irrespective of the merits of the case.

39. For example, had the original level of the fine imposed in Ofgem's decision in relation to National Grid's metering business not been over turned, National Grid would not have had the funds in question available to it to invest in its businesses or return to shareholders and, as such, the effect of the fine would have been to impede growth.

40. Similarly, in the context of regulatory decisions in relation to energy sectoral regulation, National Grid considers that the removal or dilution of the right to challenge could lead to incremental degradation in the quality, robustness and coherence of the regulatory framework through the imposition of decisions which, although adequate to meet the judicial review standard, in fact are insufficiently well reasoned or justified.

41. We also consider that there is significant merit in the appeal body being able to substitute its decision for that of the regulatory body, which is a necessary part of a merits based, rather than review based appeal process. This approach enables the appellate body to put the issue in question to an end, rather than merely remitting it back to the regulator to make the decision afresh (which could lead to further rounds of challenge, with the inevitable delay and uncertainty that that would involve).

The benefits of the proposed reforms can be achieved through procedural reforms

42. In general we are supportive of many of the proposals to improve the procedures of both the appeals bodies as well as the regulators in their decision making process. These proposals most closely reflect the title of the consultation – 'streamlining regulatory and competition appeals'.

43. We consider that there may be benefits for indicative timetables for appeals. In relation to energy appeals, there are already statutory time limits for appeal processes which we consider are challenging in the context of the most complicated regulatory decisions (for example price controls).

44. We are, however, of the view that the better approach is to concentrate on giving the appeal bodies stronger case management tools in order to manage appeals effectively and expeditiously. We consider that the kinds of case management tools available to the Competition Commission in the context of energy regulatory appeals under the Gas and Electricity Acts are suitable and could be applied more generally. That said, it should be remembered that the CAT already has strong case management tools, for example in relation to the use of new evidence which act as a strong disincentive to parties withholding evidence at the administrative stage for tactical reasons. It is not clear to us, and the consultation does not provide evidence as to why, the current rules cannot adequately deal with such a situation[3].

45. In this light, while the CAT should be able to determine the circumstances in which it is appropriate to determine cases on the papers, or to limit the amount of evidence and expert witnesses which can be brought before it, these matters should remain part of the CAT's jurisdiction to determine, in the context of the whole case in the interests of justice.

If you would like to discuss any points National Grid has raised or have any other questions surrounding this response, please contact James Wynn-Evans on 01926 655448, or Zoe Morrissey on 01926 656151.

Yours faithfully

[By e-mail]

Paul Whittaker
Director, UK Regulation

[3] See Rule 22 of the CAT's Rules of Procedure, which gives the CAT discretion to admit, exclude or limit evidence in an appeal, whether or not the evidence was available at the time the disputed decision was taken.

ANNEX A: Response to Consultation Questions

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?

No: see paragraphs 16 to 19 above.

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?

National Grid does not agree that this more 'flexible' judicial review standard should be applied. See paragraphs 16 to 19 above.

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

Moving to a judicial review standard of appeal does not appear to guarantee shorter, cheaper and more effective decisions on appeal. The consultation does not provide any robust data comparing the length, cost and effectiveness of the appeals process applying a judicial review framework as against a merits based appeals framework. The evidence that is provided appears to suggest that CAT decisions on the merits (Figure D2) as against judicial review hearings (Table D4) do not substantially differ in length (11 versus 10 months).

See paragraph 19 above.

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?

No comment.

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' approach, or something different?

We do not consider that either grounds for review would necessarily lead to shorter, cheaper or more effective management of appeals if the standard were amended to that of judicial review. See paragraph 19 above. In any case, the key test for effectiveness of the appeals framework should be quality of decision making not expediency.

Challenges brought on more focussed specified grounds may be shorter, but only if the associated procedural rules required the appeals to be disposed of in a particular timeframe as is the case in relation to appeals to the Competition Commission in relation to licence modifications under the Gas and Electricity Acts. As such, it is the procedural rules, rather than the substantive test that should be the focus of any reform.

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?

We do not consider that a change is justified. See paragraphs 16 to 21 and 28 to 32 above.

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?

We do not consider that either grounds for review would necessarily lead to shorter, cheaper or more effective management of appeals. See paragraph 34 to 36 above.

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?

The energy sector already has moved to a standard of review based on specific grounds. We do not consider that any further change is needed, nor would it be consistent with the EU Third Package. See paragraph 22 above.

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) or focused specified grounds?

We do not consider that there is any real distinction between price control decisions and other regulatory decisions. See paragraph 23 above.

Challenges brought on more focussed specified grounds may be shorter, but only if the associated procedural rules required the appeals to be disposed of in a particular timeframe as is the case in relation to appeals to the Competition Commission in relation to licence modifications under the Gas and Electricity Acts. As such, it is the procedural rules, rather than the substantive test that should be the focus of any reform. See paragraphs 42 to 45 above.

Q9 and Q10

These questions do not relate to activities relevant to National Grid.

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, what decisions and why?

The key concern that seems to be driving this question is the lack of certainty and consistency where there are different standards of review in different sectors for the same, or similar decisions. The consultation document does not provide any examples as to where this has been a concern or why this might cause difficulties. The various regulatory regimes have clearly developed in accordance with the development of each industry and this has quite properly led to differences in the standards for appeals of decisions. However, the consultation document does not analyse the reasons for the differences (if there are any) and therefore it is not clear whether there are justifications for such differences.

As stated above, we consider that the starting point should be that regulatory decisions be subject to, merits based review. See paragraphs 10 to 27 above.

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?

We do not consider that either grounds for review would necessarily lead to shorter, cheaper or more effective management of appeals. See paragraphs 34 to 36 above.

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

See paragraphs 43 to 45 above.

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 Chairman of the CAT?

We consider that judges with the relevant skills, knowledge and experience should be available to hear all relevant cases.

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.

No comment.

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

Any change to the requirements of the panel should be tailored to the type of case under consideration and supported by clear statutory guidance which is consulted upon, for example, where the case concerns a point of law.

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

Yes. There does not appear to be any case for change, especially given that these cases raise the kinds of issues that the more inquisitorial style of the Competition Commission appears to be more suited to resolve.

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?

No comment.

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

No. There does not appear to be any case for change, at least in the energy sector, especially given that these cases raise the kinds of issues that the more inquisitorial style of the Competition Commission appears to be more suited to resolve. See paragraph 22 above.

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

No. There does not appear to be any case for change, especially given that these cases raise the kinds of economic issues (such as whether a particular modification promotes effective competition) that the more inquisitorial style of the Competition Commission appears to be more suited to resolve.

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

Paragraph 3.29 of the consultation notes that the use of different appeal routes may lead to the appeal body not being the one with the greatest expertise on those cases. We do not agree that these cases always involve less economic arguments than other cases, for example, in relation to questions that may arise as to whether a licensee's actions were "economic and efficient" (a question that can arise in enforcement proceedings under the Gas and Electricity Acts). As such, it is not necessarily the case that a single court should hear all such cases.

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?

While the High Court may be the most appropriate body to hear such cases where no complex economic issues are in issue, we consider that it might be appropriate for a transfer to the CAT to be available where those issues are in play, for example, in a case involving whether particular activities violated an obligation to be "economic and efficient".

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?

No comment.

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

See the answer to question 23 above.

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?

See the answer to question 23 above.

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

See the answer to question 23 above.

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

We agree that considerable benefits can arise from the use of confidentiality rings at the administration 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?

One of the limitations of confidentiality rings is often that only legal representatives are permitted to be in the ring. This limits the benefit that can be gained from confidentiality rings. Often, the information that is confidential is information of which the lawyers will not necessarily understand the significance. As such, particularly at the administrative stage, there could be a greater benefit to using confidentiality rings if non-lawyers from the relevant business are permitted access.

There is precedent for this. During the case before the CAT between National Grid and the Gas and Electricity Market Authority (Case: 1099/1/2/08) the CAT made an order dated 8 October 2008 permitting two non-lawyers from National Grid to be permitted into the confidentiality ring. Both individuals had to give a number of undertakings to ensure the effectiveness of the confidentiality ring.

We can see that there would be a benefit to having an independent body who oversees any sanctions that may be imposed should an individual breach any terms agreed to in relation to the confidentiality ring.

We consider that breaches of confidentiality rings should be enforceable in accordance with the ordinary contempt of court rules.

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?

We consider that it is important that any rules around admitting new evidence should be clearly articulated and binding. This could be done through statute. We agree with the factors proposed to be taken into consideration by the CAT when exercising its discretion to admit new evidence. If these factors are to be included in statute, we consider that there would be significant benefit in there also being a requirement to produce statutory guidance which provides additional detail as to how the CAT will interpret these factors and provide examples to assist parties.

A particular problem that we have identified is often that the relevant authority does not articulate its case clearly until the appeals stage is reached. Some of the proposals around improvements at the administrative stage should hopefully reduce these occurrences and hopefully therefore limit the need in some cases to introduce new evidence. However, there may still be cases going forwards where the scenario arises that the case is not sufficiently clear to the defending party until appeal. We consider this, along with other reasons, should be considered sufficient to support the introduction of new evidence at the appeals stage.

We do not consider that having transparency, through statute or any other supporting guidance, will lead to additional appeals on the CAT's decisions whether to allow new evidence in a case or not. If anything, transparency is likely to lead to parties feeling less inclined to challenge a decision where the CAT has followed statute and/or any guidance.

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?

While we are supportive of a rule restricting the bringing of new evidence at the appeal stage, we consider that this should be limited to excluding evidence that could have been, but was not, brought before the regulatory body before it made the appealed decision. This would not prevent new evidence, which comes to light later, being brought, although the appeal body should have a discretion as to whether to hear such evidence.

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? What in your opinion would constitute unfair or unreasonable behaviour or exceptional circumstances?

We do not understand what is driving this asymmetry in award of costs against regulators. In relation to appeals to the Competition Commission under the Gas and Electricity Acts, the Commission already has a discretion when to award costs or not and we would expect that, should an appeal have been brought with no merit in the arguments or the objective was to delay a decision, that costs would be awarded against that party.

We do not consider that a blanket rule prohibiting costs being ordered against a regulator will be effective in promoting better decision making and may even create a perverse incentive against thoroughness on the part of regulators.

We appreciate that in some industries, the award of costs essentially results in a 'money-go-round' between the regulator and the regulated companies. In these cases, there may be an argument for not awarding costs, but as a general rule, we cannot see what the proposals will achieve other than a financial disincentive to the regulated companies to appeal.

For regulated companies, the decision to appeal, as noted earlier, is not taken lightly and the estimated cost of such an appeal is often a key consideration weighed against the consequential cost of the decision not being appealed. On the other hand, we have no experience that financial considerations have any considerable weight in a regulator's decision making process. For regulators, the key consideration when making a decision, and considering how likely it is that it will be appealed will be reputational rather than financial.

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

It appears generally accepted that parties in litigation can now claim their internal legal costs and in theory there does not seem to be any reason to differentiate regulators. However, there is a question in practice, as to whether this is appropriate if the internal legal costs are already covered by licence fees. Where this is the case, there should arguably be a mechanism that requires the regulator to provide a discount to all the companies it regulates to take any costs it recovers as part of the case into account.

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?

See the answer to Q35.

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.

We do agree that there are benefits to this proposal, whether on the application of the administrative body appealed against, or of its own initiative. A proportionate approach will need to be taken to this however, as this is an area that could potentially lead to an increase in discussions at the earlier stages which may not reduce the time taken to hear the case or streamline the process. The approach used in energy licensing appeals may be helpful here, in making an appeal dependent on the grant of permission to appeal. This could weed out wholly unmeritorious cases at an early stage. However, given the importance, costs and reputational issues raised by a decision to launch an

appeal, we would consider that cases or unmeritorious appeals would be very rare indeed. See paragraph 37 above.

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

We wholly support the statement "that the main way of dis-incentivising avoidable appeals is for firms to have confidence in the decisions made by regulators and competition authorities." And that being open with reasoning and evidence to parties at the administrative stage will assist in building this confidence.

In its latest consultation on its enforcement guidance, Ofgem has essentially incorporated the principles proposed for decision-making in antitrust cases. Many regulatory decisions, such as enforcement decisions, can have significant impacts on regulated businesses, similar to the implications of antitrust cases. It therefore does seem appropriate that similar rules are applied to regulators for regulatory decision-making. Confirmation bias is a particular concern and we see considerable benefit in there being a separate group within the regulator that reviews the decisions from the case team that has worked up the decision in the first instance.

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?

Informal workshops, prior to the deadlines for responses to consultations have proven to be beneficial and improve the overall process. They enable responding parties to raise any queries they have and to understand more fully, what is really driving the consultation. As a result, responses tend to be more focussed which is more efficient both for the regulator and the respondents. The benefits are similar to 'state of play' meetings relating to the progress of investigations and discussions around key issues prior to the publication of a decision.

Having said that, regulated companies are subject to an enormous number of consultations annually and, therefore, are required to prioritise their responses to them. As such, it is still possible that the true implications of a proposed change is not appreciated until late in the process, with the result that appeals become more likely.

In addition, it would help to reduce the number of appeals if regulators ensured an open and transparent process of enforcement and decision making against licensees. Ofgem is already taking some steps towards this in its enforcement review. Increased availability of the option to reach a negotiated settlement with the regulator would also reduce the number of appeals, particularly if the process of reaching a settlement did not require the regulator to consult on the terms of settlement, as Ofgem currently does.

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

We do not consider that the regulators need further powers: regulators already have extensive powers to request information under either the relevant legislation or licences. For the purpose of regulatory decisions, it does not appear necessary for a regulator to have a power to require individuals to answer questions.

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

We consider that non-infringement decisions should continue to be appealable. Regulators already have the ability to decide not to take any action, or to end an investigation prior to making a decision, on grounds of administrative priorities. In these cases, complainants are limited to appealing the decision on judicial review grounds which is hard to prove due to the extent of discretion regulators have.

If a complainant considers that the correct information or issues have not been considered in making a decision, they should have the ability to appeal that decision on the merits. Non-infringement decisions can, for example, result in complainants exiting the market as a result of the alleged behaviour and so can be significant because the "losing" party may not have the resources to bring a private action.

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?

Target time limits can be beneficial but they also can create issues. The importance for parties to these cases is that the case is properly considered and that the correct decision is arrived at. If this means that the cases take 9 months, than all parties are likely to agree that this is appropriate. Imposing a target time limit may impose unnecessary pressure on the CAT to make the decision.

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

Our comments provided in relation to question 40 apply equally to these proposals. Care needs to be taken that the targets do not lead the CAT to stray into prioritising the time it takes to make a decision over making the correct decision.

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?

We can see the benefit in providing the CAT with this power, if it is used appropriately. It seems that the earlier suggestion, at Q35, that the CAT can consider the appeal and whether to reject certain grounds, may already focus the issues sufficiently so that the amount of evidence and expert witnesses is already reduced, thereby making this proposal unnecessary.

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?

If parties are able to reach agreement on these points with relatively little time required and resources required, there would be considerable benefits to this approach. However, care needs to be taken that attempts to reach agreement on these points does not create a diversion to the main hearing and thereby increase the overall time for the proceedings.

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?

No Comment.

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?

No Comment.

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?

No Comment.

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

No Comment.

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

The most important measures would be for regulators to ensure the individuals involved in making the decisions have the proper experience and understanding of the commercial, regulatory and competitive pressures to which firms are exposed.

In addition, regulators could increase the resources they allocate to reaching decisions to speed up the time taken and maintain an open and transparent approach to decision making so that the subject of the decision did not have concerns about the process used to reach the decision.

Network Rail

Tony Monblat
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Network Rail
Kings Place
90 York Way
London
N1 9AG

T: 0203 356 9160
E: paul.plummer@networkrail.co.uk

11 September 2013

Dear Tony

Streamlining Regulatory and Competition Appeals – consultation on options for reform

Network Rail welcomes the opportunity to respond the consultation issued by the Department for Business, Innovation and Skills concerning proposals to streamline regulatory and competition appeals. No part of this response is confidential and we are content for it to be published in full.

Network Rail is currently approaching the end of its most recent periodic review process. At the end of October, the Office of Rail Regulation (ORR) will publish its final determination in which it will set out the outputs that is expects Network Rail to deliver in the five year period from 1 April 2014 to 31 March 2019 and the funding that it will make available to deliver these outputs. Network Rail will then have to decide whether it is able to accept ORR's determination. If Network Rail were to reject the determination ORR can either reconsider its position or refer the matter to the Competition Commission.

At rail privatisation the possibility of references to the Competition Commission related only to licence modifications and did not apply to price control decisions. There was therefore no effective right of appeal against price control decisions. This was subsequently amended so that there was an effective right of appeal and greater confidence in the regulatory regime. Since this change, ORR and Network Rail have consistently supported the principle of such Competition Commission 'appeals' to provide appropriate checks and balances within the system.

Notwithstanding this, the corporate downside from a Competition Commission reference are so enormous in our circumstances that the effectiveness of this as an option is likely to be diminished. In particular, given our stated purpose of "delivering outstanding value for passengers and taxpayers" we would rightly be concerned about the potential disruption from

such a reference since this could be expected to delay investment and other progress for at least a year and probably two years before the conclusions are implemented. Moreover, the intense relationships in the rail sector and the fascination of the media means that such a reference would be likely to have dramatic ramifications for the business and the industry as a whole. These issues are compounded by the fact that it is very difficult in practice for the company to secure any limitation on the scope of a reference to the issues at dispute which means that it would be expected to become extremely distracting for all concerned.

In such circumstances the danger is that Network Rail is under pressure to accept a price control determination which it knows to be unrealistic in the sense that there would be very little chance of "success" (i.e. of achieving what was specified). Over time, the danger is that this creates an unhealthy relationship between the regulator and the business and that confidence in regulatory decisions gradually diminishes. This, in turn, could have wider implications for the credibility of the regulatory regime.

We would welcome the opportunity to discuss with you how we can enhance the credibility of the appeal mechanism through this consultation process or more generally.

Yours sincerely

Paul Plummer
Group Strategy Director

Northern Ireland Electricity Limited

Northern Ireland Electricity Limited

RESPONSE TO BIS CONSULTATION ON STREAMLINING REGULATORY AND COMPETITION APPEALS

10 September 2013

1. INTRODUCTION

1.1 This paper (**Response**) comprises the response of Northern Ireland Electricity Limited (**NIE**) to the BIS consultation entitled Streamlining Regulatory and Competition Appeals dated 19 June 2013 (**Consultation**).

1.2 NIE owns the electricity transmission and distribution network which provides supplies to all 840,000 customers in Northern Ireland.

1.3 This Response is structured as follow:

- In order to set the context in which NIE provides this Response, Section 2 summarises:
  - key features of the regulatory regime applicable to NIE; and
  - NIE's recent experience of appeals from regulatory decisions under that regime.
- Section 3 explains the importance of a stable regulatory regime for regulated network businesses such as NIE.
- Section 4 sets out NIE's response to certain of the questions raised in the Consultation. NIE has responded only to those questions in relation to which it has relevant knowledge or experience.

2. NIE'S REGULATORY REGIME AND EXPERIENCE OF APPEALS

Regulatory regime applicable to NIE

2.1 NIE is subject to economic and customer service regulation by the Northern Ireland Authority for Utility Regulation (**Utility Regulator**).

2.2 Features of the regulatory regime applicable to NIE that are relevant to this Response include:

- NIE has a statutory duty to develop and maintain an efficient, co-ordinated and economical system of electricity distribution which has the long-term ability to meet reasonable demands for the distribution of electricity. It is subject to a similar duty in relation to electricity transmission.
- NIE holds both a distribution licence and a transmission licence. Each licence is granted subject to conditions which impose a series of obligations on NIE and restrict the manner in which it conducts its business. In particular:

- NIE is required to offer terms for connection to, and use of, NIE's distribution system; and

- The charges which NIE may levy for use of its transmission and distribution (T&D) network are restricted by a charge restriction condition. This charge restriction takes the form of a cap on revenues.

- Generally speaking [1], the Utility Regulator may modify NIE's licence conditions (including the charge restriction condition) in one of two ways:

  - with NIE's consent; or

  - following a reference to the Competition Commission (**CC**) on public interest grounds. Where the CC concludes that any matters specified in the reference operate against the public interest, the Utility Regulator has the power (subject to review by the CC) to modify NIE's licence conditions to remedy the effects adverse to the public interest identified by the CC. This is referred to in the Consultation as the "**regulatory reference model**".

- NIE's charge restriction condition is subject to periodic review, currently on a five-yearly basis. A price control review culminates in a proposal by the Utility Regulator to modify NIE's licence so as to give effect to its price control determination. If NIE declines to consent to the modification, the Utility Regulator has little option but to refer the matter to the CC.

- If NIE fails to comply with any licence condition or with certain statutory obligations, it may be subject to enforcement action by the Utility Regulator, including:

  - a statutory enforcement order; and/or

  - financial penalties of such amount as is reasonable in all the circumstances of the case (not to exceed 10% of turnover).

[1] In a narrow range of exceptional circumstances and to achieve a particular objective – for example the separation of NIE's original licence into a distribution and transmission licence – the UR is empowered by statute to make licence modifications without requiring NIE's consent or proceeding by way of a CC reference.

NIE's experience of appeals from regulatory decisions

2.3 The Utility Regulator concluded its most recent price control review by publishing its final determination and licence modification proposals on 23 October 2012. A month later, NIE rejected the final determination and declined to consent to the modification of its licence. On 30 April 2013, the Utility Regulator referred the matter of NIE's next price control to the CC. Following the recent grant of a 6 month extension, the CC has until 29 April 2014 in which to make its report. At the date of this Response therefore, the CC's investigation into NIE's price control is on-going.

2.4 The present investigation is not NIE's first price control reference to the CC. NIE's first price control review following privatisation also resulted in a reference – in that case to the Monopolies and Mergers Commission (the predecessor body to the CC).

2.5 The MMC reported in March 1997 but the Utility Regulator did not accept the outcome of the referral. The price control was not settled until two years later following a judicial review in the High Court of Northern Ireland, judgment by the Court of Appeal in Northern Ireland upholding the MMC's conclusions as binding on the Utility Regulator and refusal by the House of Lords to grant the Utility Regulator permission to appeal.

2.6 In view of its on-going and earlier experience, NIE believes it is particularly well placed to comment on the proposals raised in the Consultation. NIE submits that its experience is also relevant to the weight that should be attached to the views expressed in this Response.

3. IMPORTANCE OF A STABLE REGULATORY REGIME

3.1 The Consultation notes the importance of a stable regulatory regime to provide firms with confidence to invest, innovate and compete. While this is doubtless the case for firms generally, it is difficult to overstate the importance of a stable regulatory regime for NIE and other monopoly network businesses subject to economic regulation (regulated network businesses or **RNBs**).

3.2 RNBs such as NIE are generally subject to statutory and licence obligations which govern the conduct of their business, including by imposing restrictions on their ability to charge for services. At the same time, most if not all RNBs are required to deliver very substantial capital investment programmes to maintain and upgrade their networks. In the electricity sector, much of the demand for capital investment in networks is driven by EU and UK Government targets associated with decarbonisation, which involves the de-centralisation of electricity generation and

the integration of renewables onto the distribution network. Different drivers exist in other sectors.

3.3 NIE and other RNBs will be unable to deliver the required level of capital investment on a cost effective basis unless investors (whether of debt or equity) have confidence in the stability of the regulatory regime to which it is subject. The availability of an effective right of appeal against regulatory decisions is an essential component of a stable regulatory regime.

3.4 Any change to the regulatory environment which is perceived by investors as damaging regulatory stability or increasing regulatory risk will result in an increase in the cost of capital of the RNBs. That will lead directly to an increase in the cost of delivering a unit of network investment – an additional cost that will be borne by customers for no additional benefit.

3.5 This creates a strong presumption against modifying the regulatory regime applicable to RNBs unless there is a clear case for change supported by persuasive evidence. Many of the proposals for change contained in the Consultation fall well short of satisfying this threshold.

3.6 The executive summary to the Consultation acknowledges the need for firms to have an effective right of challenge where they are materially affected by regulatory decisions but the proposals set out in the Consultation are not apt to meet that need.

4. RESPONSE TO CONSULTATION QUESTIONS

NIE wishes to respond only to those Consultations questions in relation to which it has relevant knowledge or experience. NIE has no comments in relation to Q33 to Q48.

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?

- NIE is strongly opposed to a presumption that appeals from decisions of economic regulators should be heard on a judicial review standard. Judicial review cannot provide an effective right of challenge for decisions involving complex commercial and economic assessments.

- NIE's opposition to such a presumption reflects in particular its view that a judicial review standard is not appropriate for appeals from ex ante regulatory decisions relating to licence modifications and price control reviews. We do not see there is

any case for changing the current "full merits" standard of review for such decisions. In particular:

- Licence modification and price control decisions are generally of great operational and/or commercial significance for regulated network businesses (RNBs) such as NIE. Price control decisions in particular will have significant implications for the conduct and overall profitability of the business for at least the next price control period (a period of between 5 to 8 years). They include judgements as to the funding which the RNB requires to meet its statutory and licence obligations for that period, including in relation to safety-related matters for which the RNB and its management may be criminally liable.

- Price control decisions (and many licence modification decisions) involve complex economic and technical assessments, and the exercise of considerable judgment and discretion.

It is therefore essential that, on an appeal, there can be proper scrutiny of the regulator's analysis and assessment of the facts, and the exercise of its judgment. A judicial review standard would not provide a sufficient level of scrutiny. Specifically, it is not sufficient that the regulator makes its decision in accordance with the law and follows a proper process: that can still result in poor decision-making. Neither is it sufficient that the regulator does not behave irrationally, in the sense of making a decision that no reasonable regulator would have made. As noted above, price control and licence modification decisions are complex and involve the exercise of considerable judgment and discretion. Irrationality is a high threshold and, except in an extreme case, it will be exceedingly difficult for an RNB to demonstrate that no reasonable regulator would have made a particular decision, notwithstanding that the decision is based on flawed analysis and demonstrates poor judgment. The application of a judicial review standard to appeals from licence modification and price control decisions would effectively leave RNBs with no form of legal redress in such a case.

- As explained in Section 3 above, any change to the regulatory environment which is perceived by investors as damaging regulatory stability or increasing regulatory risk will result in an increase in the cost of capital of the RNBs. That would lead directly to an increase in the costs borne by customers for no additional benefit. NIE confidently expects that a move to a judicial review standard for appeals from licence modification and price control decisions would be perceived by the capital markets as giving rise to a material increase in regulatory risk and therefore result in additional costs for customers at a time of economic hardship when many can ill afford it. This is of particular concern in Northern Ireland where 42% of domestic customers are in fuel poverty[2].

[2] Source: Annual Report on Fuel Poverty Statistics 2013, DECC, May 2013 (available here).

- The knowledge that their decisions may be subject to a full merits appeal provides regulators with an incentive to make robust decisions based on a thorough analysis which takes account of all the available evidence. If a regulator's substantive analysis is subject only to review on judicial review grounds, there is a real risk that the quality of decision-making will be impaired as it will not have the same incentive to pursue a robust process. Assertions in the Consultation to the effect that a reduction in the standard of review will not reduce the accountability of the regulator do not withstand scrutiny. If BIS believes that a change to the standard of review will reduce the incidence, content, time and cost of appeals, by necessity this must be through a reduction in the ability of the parties to challenge decisions which may be incorrect or flawed.

- Moreover, a move to a judicial review standard may lead the regulator to focus on processes to make its decisions "judicial review proof", rather than improving their quality.

- NIE does not consider that the Consultation has identified any issues with the current standard of review which warrants a change to a judicial review standard. While the Consultation raises concerns about the number of appeals, in fact there have been very few appeals from decisions of economic regulators outside of the communications sector. It would be entirely wrong to make changes to the appeals framework applicable to other regulated sectors on the basis only of perceived deficiencies in the regime applicable to communications.

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?

- NIE does not agree with the Government's principles for non-judicial review appeals. This is because the principles set out in Box 4.1 do not differ significantly from those generally applied in judicial review cases. In particular

    - Material errors of law, material errors of fact, and material procedural irregularities appear to mirror the judicial review grounds of illegality and procedural impropriety.

    - Appeals on the ground of unreasonable exercise of discretion, or unreasonable judgments or predictions are stated to be possible only where the regulator has acted in a way that no reasonable regulator would act. That is the same standard of review applied in a judicial review challenge on the basis of irrationality.

- Taken as a whole, the principles set out in Box 4.1 do not represent an appropriate standard for non-judicial review appeals. In particular, the application of those principles would severely limit the ability of an appeal body to scrutinise the quality

of the analysis and assessment conducted by the regulator, and the exercise of its discretion and judgment. They should not therefore be substituted for any existing merits appeal currently available.

- As explained in Section 2 above, for the purposes of licence modification and price control decisions, NIE currently benefits from a full merits appeal under the so-called regulatory reference model. In the event that it is necessary to move away from this model in order to comply with the Internal Markets in Electricity (**IME3**) Directive, NIE would support the adoption of the principles applicable to appeals from licence modification and price controls decisions by Ofgem in the gas and electricity sector in Great Britain. The application of those principles would permit an appeal to be allowed in circumstances where the decision subject to appeal was wrong on one or more of the following grounds:

    - that the regulator failed properly to have regard to any matter to which it is required to have regard pursuant to its statutory general duties;

    - that the regulator failed to give the appropriate weight to any such matter;

    - that the decision was based, wholly or partly, on an error of fact;

    - that the licence modifications made by the regulator fail to achieve, in whole or in part, the effect stated by the regulator in the statutory notice announcing its decision to make the modifications; or

    - that the decision was wrong in law.

In addition to the above, NIE proposes a further ground of appeal, namely:

- that the licence modification made by the regulator has the effect of deviating from what is considered to be best regulatory practice in other jurisdictions (particularly Great Britain).

In NIE's submission, there are compelling reasons to justify this further ground, particularly in the circumstances of electricity regulation in Northern Ireland, to prevent potential misuse of the regulator's power to make binding licence modifications. It would minimise the scope for the regulatory regime in Northern Ireland to differ from that in Great Britain, thereby promoting confidence in the Northern Ireland regulatory regime and reducing the risk that NIE's cost of capital will be higher than it needs to be, which would be to the detriment of customers.

NIE submits that, taken as a whole, these principles better achieve the objectives of a full merits appeal than those proposed in Box 4.1 of the Consultation. In particular, they permit the appeal body effectively to scrutinise the regulator's analysis and assessment of the facts, together with the exercise of its discretion and judgment.

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

- As explained in response to Q1 above, the move to a judicial standard would not be appropriate in the context of appeals from licence modification and price control decisions. The move would therefore jeopardise the effectiveness of the appeals framework.

- In relation to length and costs, we do not believe that a move to a judicial review standard will result in a significant reduction in the time taken in the majority of cases. In the context of a licence modification and price control decisions, it is likely that the appeal body will be asked to adjudicate on substantially the same issues whichever standard of appeal applies. Moreover, if the outcome of the judicial review is that the matter is remitted back to the regulator (rather than the appeal body substituting its own decision under a merits appeal), that is likely to result in a significant extension in the overall time taken to resolve the matter.

- As a matter of principle, shorter and cheaper appeals do not mean more effective appeals, and shorter and cheaper appeals should not be an end in itself.

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?

- NIE wishes to comment only to the extent of noting that different considerations apply in different sectors and any decision to change the standard of review in the communications sector should have no necessary implications for the standard of review in other sectors.

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?

- NIE opposes any change in the existing merits based standard of review for Competition Act decisions. Such decisions can result in significant and punitive fines being imposed and it is important that these decisions are scrutinised to the highest standard. The Consultation does not make out any case for reform.

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?

- NIE strongly opposes any change in the standard of review for price control decisions in the energy sector in particular. NIE does not consider that the Consultation has identified any issues with the current standard of review in that sector that warrants such a change.

- Consistency between the sectors should not be seen as an end in itself. Given the recent changes to the regime for implementing licence modifications and price control decisions in the energy sector in Great Britain (replacing the regulatory reference model with an appeal on specified grounds pursuant to the IME3 Directive), it would be more appropriate for these changes to "bed in" before considering whether any further changes need to be made. Moreover, any perceived benefits of achieving consistency between the sectors needs to be weighed against the negative effects of implementing a change to the regulatory environment which may well be perceived by investors as damaging regulatory stability or increasing regulatory risk. As noted in Section 3 above, an increase in regulatory risk is likely to lead to an increase in the cost of capital of regulated network businesses in that sector, and consequently an increase in costs borne by customers.

- The reasons for NIE's opposition to a move to a judicial review standard for price control decisions are set out in our response to Q1 above.

- The reasons for NIE's opposition to a move to a "focused and consistent specific grounds approach" derived from the principles set out in Box 4.1 of the Consultation are set out in response to Q2 above. That response also sets out NIE's position in the event that, in order to comply with the IME3 Directive, it is necessary to move away from the regulatory reference model currently applicable to NIE for appeals from licence modification and price control decisions.

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?

- See our response to Q3 above.

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?

- See our response to Q8 above with respect to NIE's concerns with the changes proposed in the Consultation, in particular as regards the energy sector.

- That response also sets out NIE's position in the event that, in order to comply with the IME3 Directive, it is necessary to move away from the regulatory reference model currently applicable to NIE for appeals from licence modification and price control 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?

- This section of the Consultation fails to distinguish between licence modification decisions and other regulatory decisions such as licence enforcement decisions. It is important to distinguish between them as different considerations apply to each category of decision. The failure of Q12 to draw a distinction between the different categories of decision potentially undermines the value that can be attached to responses BIS receives from this question.

- For the reasons set out in response to Q1 and Q8, NIE strongly opposes any move to a judicial standard for appeals from decisions relating to licence modifications. Like price control decisions, licence modification decisions are potentially of great operational and/or commercial significance for regulated network businesses such as NIE. They may involve complex economic and technical assessment and will generally always involve the exercise of judgement and discretion. NIE does not see that there is any case for changing the current "full merits" standard of review for such decisions.

- Different considerations apply to other regulatory decisions, most of which are presently subject to a judicial review standard, or a modified form of judicial review standard. With one exception, NIE's preference is to preserve the status quo in these cases rather than implement a change for change sake.

- The exception relates to appeals against the imposition of financial penalties (of up to 10% of turnover) for contravention of relevant statutory and licence obligations. NIE submits that such decisions should be subject to a full merits appeal to bring it into line with appeals against infringement decisions under the Competition Act 1998. The introduction of a full merits appeal for financial penalty decisions would go beyond the existing proposal by DETI in relation to Northern Ireland to provide for "a full right of appeal" in such cases (see paragraph 5.36 of the Consultation).

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?

- As regards appeals from licence modification decisions, see our response to Q3.

Chapter 5: Appeal bodies and routes of appeal

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

- Yes. The Competition Commission has extensive relevant experience in undertaking the type of detailed analysis required in appeals from licence modification and price control decisions. Moreover, the Competition Commission's approach to investigations (inquisitorial rather than adversarial) is better suited to hearing appeals against such decisions.

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

- NIE agrees that, because of its experience and expertise, the CAT is the most appropriate appeal body to hear appeals against ex-ante regulatory decisions (other than price control and licence modification decisions).

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

- See the response to Q23 below.

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?

- NIE considers that there should be a single appeal body provided that that appeal body is the CAT. The experience and expertise of the CAT make it better suited to discharge this role.

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?

- NIE submits that financial penalty decisions should be subject to a full merits appeal to bring it into line with appeals against infringement decisions under the Competition Act 1998. The introduction of a full merits appeal for financial penalty decisions would go beyond the existing proposal by DETI in relation to Northern Ireland to provide for "a full right of appeal" in such cases (see paragraph 5.36 of the Consultation).

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

- See the response to Q26 below.

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?

- NIE agrees that there should be a single appeal body hearing dispute resolution appeals. In relation to dispute resolution appeals involving NIE, the most appropriate appeal body is the High Court of Northern Ireland.

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?

- Yes, NIE agrees with this proposal. In cases involving confidential information that cannot be disclosed more widely without redaction, the disclosure of such information within a confidentiality ring facilitates the making of representations on behalf of interested parties which, in turn, should lead to better decision making and reduce the need for appeals.

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?

- The involvement of the CAT in supervising confidentiality rings is likely to increase trust in the effectiveness of the rings and therefore promote their use.

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?

- No, NIE does not agree with this proposal. The Consultation explains that paragraph 23 of Schedule 2 to the Civil Aviation Act 2012 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.
- In many cases, parts of a regulator's final price control decision will be based on facts, analysis or an approach that have not previously been consulted on or otherwise put to the parties affected by the decision. This may be, for example, because the regulator has changed its position in the light of representations made in response to consultation at an earlier stage in the process. In those circumstances, a party wishing to appeal the decision may have had no prior opportunity to challenge the decision, or the facts, analysis or approach on which it is based. Moreover, it may not be until publication of the final decision that it becomes apparent that it was necessary to adduce a certain piece of evidence. In either case, it would be wrong to impose any limitation on the ability of that party to make its case on an appeal from that decision. The approach to new evidence in Schedule 2 would appear to impose such a limitation and is for that reason objectionable.
- The regime introduced by Schedule 2 has only recently been introduced and is largely untested. BIS should therefore be cautious about adopting it as a model to 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?

- NIE does not agree. There is no justification for an asymmetry where the appellant which is in the wrong is exposed to costs liability but the regulator which is in the wrong is protected from costs liability. It may unfairly deter parties from appealing regulator's decisions even where there are good grounds for believing that an appeal would be successful.

Northern Powergrid

Lloyds Court
78 Grey Street
Newcastle Upon Tyne
NE1 6AF

Consumer and Competition Policy Directorate
Department of Business Innovation and Skills
1 Victoria Street
London
SW1H 0ET

18 September 2013

Dear Sir or Madam

STREAMLINING REGULATORY AND COMPETITION APPEALS - CONSULTATION

I am writing to express our concern about the proposals set out in your recent consultation: *Streamlining Regulatory and Competition Appeals*.

Northern Powergrid is the licensed electricity distributor for the north east of England and Yorkshire. We therefore have a particular interest in the proposals you set out in respect of appeals of price control decisions in the energy sector.

Northern Powergrid is a member of the Electricity Networks Association (ENA) and we have seen, and fully support, the response to your consultation submitted by the ENA. Our particular purpose in writing today is to let you know how strongly we feel that any move towards an essentially Judicial Review (JR) standard of appeal would be a retrograde step. These concerns apply both to a formal move to a JR standard and to a move to a non-JR standard such as that described in Box 4.1 of the consultation.

The literature on the value of appeals in civil law is extensive. The (uncontentious) conclusions are that the key benefits and costs of appeals are:

- the *benefits* of reducing errors by the initial decision maker; and
- the associated *costs* of the appeal process (including the cost of any delay to the implementation of a sound decision).

It is easy to overlook the value of a merits-based appeal system in the economic regulation of utilities because it is tempting to presume that an independent regulator will have the necessary expertise to make good decisions and no reason to make poor ones. Provided the regulatory body acts within its legal powers – and a JR standard of appeal should be sufficient to secure that outcome – it is therefore easy to see why it might appear to be an attractive option to remove, or limit, the opportunity for the *merits* of the regulator's decision to be challenged and heard by an independent body such as the Competition Commission (CC).

Such an analysis is incomplete because it fails to take account of the incentive effect on the initial decision maker that is present if that decision maker knows that it may be called to justify its position to a superior authority. So the benefits of a merits-based appeal system are not felt only when a poor decision is overturned on appeal; regulatory decisions will be better in the first place if the regulator faces the prospect of an appeal. Regulatory bodies have a certain institutional pride which means that they do not like to lose appeals. The virtuous

element of that consideration would be lost, or diminished, to the extent that the regulator's initial decision was made immune to challenge on its merits.

Moreover, it is also easy to forget that customers benefit from the presence of a merits-based appeal mechanism. They do so in two ways. The first is very clear because it is written into the present statutes where consumer bodies are given a merits-based appeal right over the decisions made by regulators.

The second benefit for consumers is perhaps less clear because it arises from the rights that the licensee has under the present arrangements to challenge the decisions of a regulator.

A regulator's ability to modify a licence in order to impose a new price control amounts to a right to interfere with the property of the licence holder. That interference is fully justified where it is in the public interest for the change to be made. That much is obvious. What is perhaps less well understood is that respect for property rights also performs a *functional* role in securing the public interest. Without secure property rights incentives are harmed. In the extreme, investors would not invest the sums necessary to secure the continuing provision of the service. Short of that extreme, investors will demand a higher return if they are to risk their capital.

The protection that the regulatory regime gives to the property holder in the form of constraints on the ability of the regulator to make licence modifications did not arise by accident. It was conceived to be an essential part of the regulatory regime whose purpose was to secure the public interest. In the original privatisation statutes that purpose was secured by giving licensees a power of veto over proposed licence modifications. The exercise of that veto could force a reference of the matter in dispute to the CC. In the present arrangements, following the introduction of the changes to the statutes to implement the EU Third Package, it is secured by conferring on licensees and other specified parties a statutory right to appeal regulatory decisions.

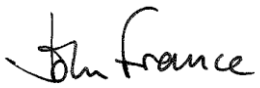
In Britain we are apt to forget that respect for property rights is fundamental to a good regulatory system. Perhaps this is because the very success of our incentive-based regime has enabled us to avoid the litigation that characterises the approach in the USA. Much of the case law of regulation in the USA proceeds from the takings clause of the Fifth Amendment to the Constitution that commands: 'Nor shall private property be taken for public use, without just compensation.' This gives property rights a more prominent place in the regulatory discourse in the USA than they have in Britain. Nevertheless, they remain fundamental to good regulatory practice here just as much as in the USA. Any move away from a merits-based appeal mechanism will erode the property rights of the investors on whom the continued provision of the service depends and it will be harmful for that reason.

I will conclude by reciting DECC's position when it conferred appeal rights on third parties in the implementation of the Third Package. DECC's lawyers told us that an appeal right that was limited to the JR standard would not meet the requirements of the EU directive. Accordingly DECC's consultation stated that parties should have:

> '…access to an appeal process which is capable of scrutinising factual issues of an economic/ technical nature to ensure the regulator is held to account for their decisions. We therefore consider that a mechanism over and above an ability to bring a claim for Judicial Review is required in these circumstances.'

We agree with DECC and we think that the Department of Business Innovation and Skills should align itself with DECC's view of the value of merits-based appeals in regulatory decision making.

Yours sincerely



John France
Regulation Director

Northumbrian Water Limited

The Northumbrian Water Limited response to the BIS **Streamlining Regulatory and Competition Appeals consultation.**

We welcome the opportunity to respond to the **Streamlining Regulatory and Competition Appeals consultation.** We are aware that Water Uk has responded on behalf of the water industry, and we support that response. Our response covers the main points that we think are worthy of consideration.

The appeals regime for the water sector has been in place since 1991 and since then there have been very few appeals against regulatory decisions in the sector. The consultation refers to only five cases in the period from 2008 to 2012, two relating to price controls, two challenges to inset appointments and the final case, a Competition Act margin squeeze case.

As regards the period taken for appeals, the two price control cases in the water sector are both recorded as having been completed within six months and we are not aware of any complaints having been made by any of the parties either in relation to the substance or in relation to the time taken for the appeal.

The numbers of appeals are notably higher in some other sectors. There could be many reasons accounting for these disparities. Examples would include inadequacies in the underlying legislation, the range of parties potentially affected by regulatory decisions and the quality of regulatory decision making. Whatever the cause of the differences between sectors, it would seem more appropriate to identify why numbers of appeals are higher in certain sectors and if necessary address issues identified in those sectors rather than relying on that fact to justify changes in sectors where no particular problems have been identified.

In our view there is no obvious necessity for consistency between sectors when consistency over time within a sector is more important for regulatory stability and maintaining investor confidence. While the different sectors under review are all regulated, circumstances vary significantly between the sectors, both in relation to market structure and in relation to the degree of competition. The water sector, for example, is differentiated by the degree of vertical integration that exists. This will continue to exist even after the introduction of business retail competition. This reduces the number of parties who might have a direct interest in challenging regulatory decisions in the sector. We would suggest that such differences make it difficult to make an assumption that consistency between sectors is necessary or even desirable.

We support the proposal to continue to have price control and licence modification appeals heard in the Competition Commission/CMA as the inquisitorial and more flexible nature of these hearings is in our view appropriate for these fundamental issues.

Paragraph 5.33 of the consultation refers to the possibility of appeals against code modifications being heard in the CAT and raises the question of whether such appeals are in fact closer to licence modifications. We believe that this is an appropriate analogy as while code issues could appear to be purely technical in nature, they may involve balancing a complex range of factors including a detailed consideration of the impact of a change on companies' finances. We are not convinced that the more adversarial approach of CAT proceedings is the right way to approach such issues and in the absence of convincing evidence to the contrary, would prefer that these kinds of appeals be heard by the CC/CMA.

Northumbrian Water
27 August 2013

Norton Rose Fulbright LLP

11 September 2013

NORTON ROSE FULBRIGHT

Streamlining regulatory and competition appeals

This is the response of Norton Rose Fulbright LLP to the Government's consultation on options for "streamlining regulatory and competition appeals" (the Consultation Paper).

We welcome the opportunity to comment on the Consultation Paper. We have experience acting on large and complex competition and regulatory cases in the United Kingdom and across our global network[1].

We have seen the response of the Competition Law Committee of the City of London Law Society of which Michael Grenfell - a Partner in the Antitrust and Competition group at Norton Rose Fulbright LLP – is an author. We support the position adopted by the City of London Law Society and, on this basis, we have not sought to answer each of the consultation questions in detail. However, we wish to record our own position on this important matter, which is that we strongly oppose the proposed reform to move to a judicial review standard of appeal against competition law infringement decisions[2] and we strongly favour retention of the current regime which allows for a full merits appeal against such decisions.

In our view, preserving a full merits right of appeal against regulatory infringement decisions is an important safeguard in ensuring that the UK's competition regime remains fair, efficient and well-respected in both the UK and across the world. We summarise below why we take this position and why the justifications presented in support of the proposed reforms in the Consultation Paper are not persuasive.

1 Fairness requires that those affected by an infringement decision have a full right of appeal

1.1 It is clear that an infringement decision by a regulator can have a very significant financial and reputational effect on a company and any individuals involved. In particular, an infringing party can be subject to substantial fines and now faces the real risk of follow-on damages litigation. Individuals face possible disqualification from directorships and, with the proposed reforms of the cartel offence, an increased risk of criminal charges. In this context, it is important that infringement decisions are properly reasoned and subject to a rigorous standard of review.

1.2 The recent successful appeals against infringement decisions demonstrate that a "full merits review" has in fact proved necessary to ensuring that mistakes made by a regulator are corrected and justice is done.[3] There is a real risk that judicial review or other statutory standard of review would not identify fundamental errors in a regulator's reasoning.

1.3 For example, last year the addressees of the OFT's infringement decision in the tobacco industry successfully appealed this decision.[4] The errors made by the OFT were only identified following: (i) detailed consideration of the evidence upon which the OFT reached its decision; and (ii) cross-examination of witnesses. In a judicial review process, the court does not have the power to conduct a detailed review of the evidence relied upon and the substantive analysis

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1 Norton Rose Fulbright is a leading international legal practice operating from over 50 offices across Europe, North America, Asia, Australia, Africa, the Middle East and Latin America.

2 The Consultation Paper proposes moving away from a "full merits" standard of review to either a "flexible judicial review standard" or limited grounds of appeal defined by statute.

3 For example, in the *Tobacco* and *Construction* appeals (see footnotes 4 and 8 respectively).

4 *Imperial Tobacco and others v OFT* [2011] CAT 41.

conducted by the regulator.[5] It is very possible that this appeal would not have been successful - and justice would, therefore, not have been done - in the absence of a "full merits" review process.

1.4 This position has effectively been recognised by the Government in its response to the recent consultation on reforms to the UK competition landscape[6]. It concluded that "*a full-merits appeal would be maintained in any strengthened administrative system*". We do not consider that any evidence has been presented to justify a change from this approach.

2 The right of a full merits appeal incentivises the regulator to raise standards of decision-making

2.1 The CMA has indicated that it is resolved to ensuring that its procedures are fair, transparent and rigorous[7]. The prospect of a full merits appeal against any infringement decision has the positive effect of increasing the incentives on regulators, including the CMA, to reach robust and properly reasoned decisions and to engage with the evidence presented.

2.2 Indeed, we consider that a move to a lower standard of review would give rise to an increased risk of incorrect and unpredictable decisions which might not be remedied on appeal. This would have a negative impact on business confidence in the enforcement of competition law and regulation in the UK. Furthermore, it would risk damaging the standing of the UK competition regulators across the world.

3 A judicial review standard would not create the claimed improvement in efficiency

3.1 The Consultation Paper suggests: (i) that the duration of the appeal process is currently too long; and (ii) that moving away from a "full merits" standard of review would result in a more streamlined process. We believe that ensuring the appeal process results in a fair outcome, rather than the speed of the process, is the more important determinant of the appropriate regime. Notwithstanding this position, we do not believe that there is any evidence to support the assertion that either the current regime produces unacceptable levels of delay or inefficiency, or that changing the standard of review would make any material change to the length of the appeal process.

3.2 Although some CAT appeals have been resource intensive and time consuming, there is no evidence that such appeals have led to unacceptable levels of delay. For example, the *Tobacco* appeal referred to above was concluded in under 18 months. The Consultation Paper presents no evidence that appeals decided by reference to a judicial review or other standard would be resolved more quickly. For example, the CAT's judicial review of the Competition Commission's BAA market investigation decision took ten months.

3.3 In addition, in our experience, application of a judicial review standard is not straightforward. A significant amount of time can be spent in hearings assessing whether a claim meets the criteria of judicial review, which is irrelevant to the merits of the case. It is possible that introducing a

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5 In paragraph 85 of its judgment in *Tobacco* the CAT found that "*the significance of the gaps in … the statement only really became apparent when those gaps were filled by answers …[given] in the witness box*".

6 The Government Response to its consultation - A Competition Regime for Growth: A Consultation on Options for Reform – March 2012.

7 See Alex Chisholm's response to questions in the Westminster Business Forum conference on 10 September 2013, a transcript of which is not currently available.

judicial review standard could have the effect of complicating rather than simplifying appeals as it would introduce another layer of legal debate.

3.4 The Consultation Paper suggests that the full merits review procedure currently carried out by appeal bodies results in the appeal body acting "as a second regulator waiting in the wings". This does not reflect our experience of dealing with the CAT and fails to recognise that the CAT is itself held to account by potential recourse to the Court of Appeal.

3.5 Also, we do not consider that lessening the standard of review will have any impact on access to justice for smaller parties. Smaller companies have demonstrated that they are capable of taking advantage of "full merits" appeals.[8]

For these reasons, we strongly support the current appeals regime and oppose the proposed reform.

Peter Scott
Partner, Antitrust & Competition team
Norton Rose Fulbright LLP
020 7444 3834
peter.scott@nortonrosefulbright.com

[8] For example in the appeals against a decision of the OFT dated 21 September 2009 entitled "Bid rigging in the construction industry in England".

Ofcom

Ofcom response to BIS Consultation on regulatory appeals reform

Introduction

1. Ofcom is the sectoral regulator for the communications sector in the UK. Communications are a significant area for economic growth and investment in the UK economy. As set out in our most recent Communications Market Report[1], total UK revenues from telecoms, TV, radio, and post in 2012 amounted to £59.5bn. Almost everyone in the UK interacts with one or other of the communications services regulated by Ofcom on a daily basis. Communications is a fast moving environment with rapidly changing technology and constantly evolving markets.

2. Parliament has set Ofcom the principal duty of furthering the interests of citizens and consumers, where appropriate by promoting competition. Our principal duty determines where we focus our resources and activities.

3. Consumers typically benefit most where markets are characterised by choice, innovation, and strong, vigorous competition between firms. In many areas communications markets, citizens and consumers have a wide range of choice in the products and services on offer, with prices reducing year on year. But there are also important areas, particularly in light of the rapidly changing technology which characterises this sector, in which more needs to be done in the consumer interest. In many cases, the underlying market structures mean that this will require some form of regulatory intervention. Ofcom plays a critical role in ensuring competition in communications markets works in the consumer interest, through the policy decisions and regulatory judgments that we make in fulfilling our duties.

4. Ofcom's policy decisions and regulatory judgments are currently subject to an appeal on the merits under section 195 of the Communications Act 2003, a standard that the Government has long accepted goes beyond (or gold-plates) the requirements of EU law and which in accordance with its stated policy objective of removing gold-plating, has pledged to reform.

5. The nature of this gold-plated appeal on the merits and the experience of its operation over the last ten years is that all the incentives are for well-resourced companies (particularly incumbent operators) to appeal in order to seek outcomes that better meet their commercial objectives. Accordingly, Ofcom spends significant time and resource managing litigation risk, both at the administrative stage and during the appeal stage, if it wants its policy decisions to be sustained. The current appeals regime is hindering Ofcom's ability to make effective and timely policy decisions to increase competition in the interests of citizens and consumers in accordance with the duties given to Ofcom by Parliament.

6. We therefore welcome the Government's review of the regulatory appeals regime under the Communications Act, and its recognition of the case for reform. Ofcom considers that that case for change is strong and is made out in the Consultation. The Government proposes to ensure that Ofcom's decisions may be effectively reviewed on appeal, whilst removing the current

[1] http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/2013_UK_CMR.pdf

gold-plated appeal on the merits. We consider that the changes proposed by Government would enable Ofcom to regulate more effectively in the interests of citizens and consumers and the UK economy more generally, and should be implemented.

7. We have confined our response to the proposals relating to regulatory appeals as these account for the vast majority of the appeals which are brought against Ofcom's decisions.

The importance of an appeals regime

8. Ofcom supports the rights of parties to have appropriate access to justice. However, just as the right to appeal is an important element of any regulatory regime, so too is the need for the regulator to be able to act effectively in the public interest in accordance with its duties. There is therefore an important balance to be struck between timely decision-making, and appropriate checks and balances.

9. The Ofcom decisions most often subject to appeal are regulatory policy decisions to introduce competition or make markets more effectively competitive. They typically require Ofcom to make forward looking judgments, based on the available evidence and its expertise as the specialist sectoral regulator, as to how markets are likely to develop. In respect of every decision there will be companies who will benefit (often new entrants), and other companies who may consider a decision to be contrary to their existing commercial interests (often incumbents).

10. Ofcom conducts an extensive process of information-gathering with affected companies and public consultation on its proposals before reaching its decisions. There is rarely if ever a single "right" answer, or even one answer which is clearly "more right" than, or clearly to be preferred to, another. This is equally true of decisions relating to the setting of price controls as it is of more general policy decisions. They are classically the types of decision in which regulatory discretion has to be reasonably exercised in balancing competing interests and regulatory objectives, a task Parliament has ascribed to Ofcom in legislation. This has been recognised in a series of judgments from the Court of Appeal[2].

11. Nevertheless, appellants before both the CAT and the Competition Commission consistently argue that each and every element of Ofcom's decisions, including in particular where Ofcom is exercising its regulatory judgment, should be subject to a detailed review and the appeal bodies should find Ofcom to be in error on the basis that they should prefer a different "right" or "more right" answer to that decided upon by Ofcom, even if Ofcom's answer was itself within a range of reasonableness.

12. Ofcom considers that the balance between appropriate review on appeal and the ability to take decisions in an effective manner in the interests of citizens and consumers needs to be revisited. The decision as to where this balance should be drawn is fundamentally a question of policy.

[2] See the judgments of Lord Justice Jacob in [2008] EWCA Civ 1373, Lord Justice Lloyd in [2012] EWCA Civ 1002, and Lord Justice Moses in [2013] EWCA Civ 154.

13. As the Consultation notes, Ofcom's decisions have not regularly been overturned on appeal; however, the nature of the appeal process and the regularity of appeals means that appeals take up significant amounts of Ofcom resource, including in particular senior resource, which could be otherwise deployed. The Consultation sets out some good examples of this in support of its proposal for change.

14. The increasing diversion of Ofcom's resources towards litigation, and away from day-to-day regulation in a rapidly evolving market has stifled Ofcom's ability effectively to carry out the tasks that Parliament has set for it in the public interest. We therefore strongly agree that the case for change as articulated in the Consultation is made out. We go on below to consider a number of the Government's specific proposals for change, and provide our views as to the effects that we consider should result if the proposals are introduced, as we think they should be.

Standard of Review in Regulatory Appeals

15. In light of our view that the case for change in the appeals system for ex ante regulatory appeals is strong, we have considered the specific proposals made in the Consultation to effect that change. Key amongst these is the proposal to change the current standard of review to be applied in appeals of Ofcom's decisions under the Communications Act 2003. This is, as the Consultation notes, not an entirely new proposal, as DCMS consulted on a similar change in August 2011.

16. Ofcom strongly supports the Government's proposal to change the standard of review in Communications Act 2003 appeals.

17. The standard of review in appeals of Ofcom's regulatory decisions is in part affected by the requirements of Article 4 of the Framework Directive[3], and in other respects purely a question of domestic choice:

    - Article 4 applies to appeals of decisions which are subject to the European common regulatory framework for electronic communications (the CRF). In summary, these are regulatory telecoms and spectrum management decisions. Article 4 requires an appeals system which is effective, and in which the merits of the case are duly taken into account. Provided that Article 4 is met, the precise standard of review to apply in appeals of decisions which are subject to the CRF is a policy matter for Government and Parliament to determine.

    - Other Ofcom regulatory decisions, such as ex ante broadcasting competition decisions, are not subject to the CRF, and are therefore also not subject to Article 4. As a result, the standard of review to apply in appeals of these decisions is entirely a policy matter for Government and Parliament.

18. As is clear from the Consultation (and DCMS' previous consultation[4]) the current merits appeals regime provided for in the Communications Act 2003, as conducted in the UK, goes beyond and hence gold-plates what is required

[3] Directive 2002/21/EC as amended by Directive 2009/140/EC

[4] See paragraph 30 of the DCMS consultation of August 2011 entitled "Implementing the revised EU Electronic Communications Framework – Appeals" paragraph 4.26 of the Consultation.

by Article 4. The Consultation clearly reflects the Government's view of the legal position, with which we agree. Indeed, we note that already under Schedule 8 of the Communications Act 2003, certain of Ofcom's decisions to which Article 4 applies, are not covered by the appeal on the merits under section 195 but are instead subject to judicial review in the High Court. Lord Justice Jacob has confirmed in relation to this that a judicial review of a decision by Ofcom under Schedule 8 is entirely capable of ensuring that Article 4 is met.

19. We understand that some parties have suggested that if the proposals in the Consultation were implemented there would in practice be little difference between the nature of the review that is conducted under the current merits review, and that which would be conducted in a judicial review (or statutory appeal) which was compliant with Article 4. We are surprised by this suggestion, and do not believe it to be correct.

20. The starting point in any appeal would be the requirements of the domestic legislation[5]. Currently, the starting point in any appeal brought under the Communications Act 2003 is that the appeal is to be decided on the merits[6]. Under the proposals in the Consultation, the domestic legislation would either provide for the appeal to be decided applying (i) the principles applicable on an application for judicial review, or (ii) the specified requirements of a statutory appeal. So the starting point under BIS' proposals would be different to the current position. In our view this should have a material impact on the nature of the review conducted in any given case.

21. Clearly, the appeal body in question (whether the CAT or the Competition Commission/CMA) would have to consider, as it considers appropriate in any given case, the extent to which the domestic legal position needed to take account of and be applied consistent with any relevant European law, such as Article 4 of the Framework Directive.

22. It does not in our view however automatically follow that a judicial review or statutory appeal, which duly takes account of the merits, would result in the same review as would be applied in an appeal on the merits as currently provided for under section 195 of the Communications Act 2003. It would be for the appeal body to determine the extent to which it considered it was appropriate for it to adapt the standard domestic principles of judicial review, or those set out in a statutory appeal, *duly* to take account of the merits in any individual case.

23. In practice, we would expect the Government's proposals to have a significant effect on the manner in which appeals are heard, resulting in a reduction in the amount of time that would be required of all parties involved in terms of preparation, time in court, and the overall end-to-end timeframes involved. We particularly consider that the current position whereby appellants introduce extensive new evidence and expert reports at the appellate stage, requiring lengthy consideration including under cross-examination, should be significantly reduced.

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[5] This is consistent with the CAT's judgment in T-Mobile v Ofcom and Telefonica v Ofcom, [2008] CAT 15, see paragraph 30.

[6] See section 195(2) Communications Act 2003.

24. In addition, we understand that some parties have suggested that BIS' proposals should not be implemented because changing the standard of review would result in the loss of the existing body of case law in relation to appeals under the Communications Act 2003, resulting in years of uncertainty and possibly an increase in satellite litigation. We consider there is an element of scaremongering in this suggestion, and do not agree.

25. First, whilst it may be true that some of the existing CAT and Competition Commission precedents would have less relevance in the future, the same would not in our view be true of the Court of Appeal jurisprudence in this area. The judgments of Lords Justice Jacob[7], Toulson[8], Lloyd[9] and Moses[10] all address what is required by Article 4 of the Framework Directive. Those judgments remain equally valid in that respect regardless of the domestic law, and will continue to provide guidance to both the litigating parties and the appeal courts. In any event, we do not accept that there is currently a settled position since appellants continue to argue about the correct standard of review, as is the case in the four appeals against Ofcom decisions that are being heard in the CAT and the Competition Commission in the period before Christmas this year.

26. Second, we accept (as does the Consultation) that any change is likely to result in an initial period in which the new regime is tested by parties in appeals. We do not however see why this should result in many years of uncertainty. Judicial review is a well understood appeals process, and to the extent that further guidance from the Court of Appeal as to how the CAT or Competition Commission should take account of Article 4 proves necessary, we would expect a case to reach it relatively quickly. Indeed, we consider that there is likely to be such a case in any event in relation to an Ofcom decision to which the existing provisions of Schedule 8 of the Communications Act 2003 apply, and which is therefore subject to a judicial review which takes account of Article 4. Therefore no new or unnecessary uncertainty would be introduced by bringing Ofcom's other decisions into line with these existing Schedule 8 decisions, as proposed in the Consultation.

27. We also understand that arguments have been made that moving to a judicial review standard would risk increasing the overall appeal timeframe because decisions that were overturned would have to be remitted back to Ofcom rather than being cured by the appeal bodies. We think this concern is both mischaracterised and overstated.

28. In cases where the error found is fundamental to Ofcom's policy (as was the case in the mobile number portability case brought by Vodafone), the CAT's current practice under the merits regime is to remit to Ofcom for Ofcom to reconsider its position. The position would be the same under BIS' proposals.

29. Where the error found is limited to a particular part of Ofcom's decisions (most often the case in price control decisions reviewed by the Competition Commission where the Competition Commission decides that an aspect of the price control methodology should be changed), the current practice is for the Competition Commission to hold a remedies stage as part of its process in which it seeks to determine how Ofcom should best effect that change.

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[7] [2008] EWCA Civ 1373
[8] [2011] EWCA Civ 245
[9] [2012] EWCA Civ 1002
[10] [2013] EWCA Civ 154

Under BIS' proposals there would be no need for that part of the process; rather, that time would be used by Ofcom itself to decide how to correct the error identified. There is no reason why this would take any longer.

30. Further, we note that under the Government's proposals for price control appeals to go straight to the Competition Commission without involvement of the CAT, the time that is currently taken at the end of the Competition Commission process for the CAT to determine the appeal following the Competition Commission's report would no longer be required.

31. Accordingly, we think that there would be little impact on the timeframe for any further decision-making by Ofcom as a result of the Government's proposals to change the standard of review.

Judicial Review or Focused Specified Grounds?

32. Taking account of the above, we have no strong preference in terms of the Government's proposals for reform: (i) judicial review, or (ii) a statutory appeal in which the grounds are specified in the legislation. We consider that either would be (a) a significant improvement on the current position, and (b) consistent with the requirements of Article 4 of the Framework Directive. We agree with the Government's view that under either option, the courts would retain the ability to hold Ofcom properly and appropriately to account for its decisions.

33. We consider that if the statutory appeal route is adopted, it is important that the grounds explicitly refer to materiality, as currently drafted, in order to ensure that appellants are restricted to pleading only material points.

Price Control Appeals

34. Ofcom considers that the standard of review in price control appeals should be the same as for other regulatory appeals to avoid having two different standards of review in relation to different aspects of the same Ofcom decision.

35. As such, we consider that Government should apply the same standard of review as it decides to adopt in respect of Communications Act 2003 appeals. We consider that it would be desirable for this to be expressly reflected in section 193 of the Communications Act 2003.

Appeal Routes

36. Ofcom agrees with the proposal that price control appeals in the communications sector should be brought directly to the Competition Commission in place of the current process which involves a reference from the CAT. Ofcom has no experience of the process under the Civil Aviation Act 2012; we note that the Competition Commission would need to be given appropriate powers to enable it to conduct price control appeals effectively, and we would be happy to work with BIS and the Competition Commission in determining the precise scope and nature of such powers, in light of our practical experience of such appeals in the past.

Getting Decisions and Incentives Right

37. We agree with the Government's articulation at paragraph 6.3 of the Consultation of the principles that should underpin an effective regulatory system. We also recognise that there will always be incentives for stakeholders to appeal regulatory decisions, regardless of the way the system, including the appeals system operates, because some regulatory decisions are by their nature of high value and significance to the parties concerned. However we consider there would be a significant rebalancing of incentives to appeal under BIS' proposals.

38. In broad terms, we consider that the administrative regulatory system in communications works well. Stakeholders have significant opportunities to engage in Ofcom's decision-making processes, and they predominantly do so in an open and constructive manner.

Confidentiality Rings

39. We recognise that stakeholders will always desire to see as much of the underlying information on which decisions are being based as possible. We take transparency of decision-making very seriously, and we typically take a robust line on what is, and is not confidential, regularly pushing back where parties seek to keep material confidential when in our view it does not merit redaction. We do not consider that there is much, if any, evidence of appeals being brought because parties simply have insufficient information about the regulator's decision.

40. While stakeholders are typically keen to see others' data, they are generally reluctant for their own data to be disseminated, particularly where they consider it to be commercially sensitive. This is in our view understandable; it does however need to be factored in to any consideration of whether, and if so how, decision-making can be made more transparent.

41. In principle, we can see the attraction of using confidentiality rings in administrative, pre-judicial processes. In our experience confidentiality rings are successfully used in the CAT. However, there are some important distinctions between administrative and judicial processes..

42. At the administrative stage, particularly in ex ante regulatory processes, stakeholders tend to conduct engagement with the regulator themselves, through their internal regulatory, legal, commercial and economic functions. It is relatively rare for parties openly to instruct external legal advisors or to conduct correspondence through them. This is in marked contrast to judicial processes, in which stakeholders are much more likely to instruct external legal advisors.

43. This distinction is important in the context of confidentiality rings, because it goes (a) to who may be able to become a party to such a ring, and (b) to the heart of what the purpose of such a ring should be. Taking the latter first, the purpose of the ring is to enable stakeholders to see some of their competitors', suppliers' or customers' confidential information which would otherwise be withheld by the regulator because of its confidential nature. If that is the case, then the question of who can be a member of a confidentiality ring becomes both key and contentious.

44. Stakeholders will usually want their business people (who are likely to be making the commercial decision affecting how their business operates) to see the information, yet these are precisely the individuals from whom the information is likely to be most confidential and with whom the sharing of such information may well be prohibited by ex post competition law. If confidentiality rings are therefore limited to internal legal advisors and possibly external consultants (as we consider they should be), they may not achieve the Government's policy intention.

45. On a practical level, we consider that the use of confidentiality rings at the administrative stage may well engage the same arguments that we see with rings in the CAT, where there are serious disagreements between stakeholders as to whether, for example, stakeholders' heads of regulatory affairs, who are both lawyers and have involvement in business decisions, should be permitted to be members. There is in our view therefore a real likelihood that parties may feel compelled to instruct external advisors at an earlier stage in order to be able to gain access to information provided to the confidentiality ring. Similarly, decisions on membership of the ring, and enforcement of its terms, will presumably need to be subject to appeal (indeed the Government proposes a possible role for the CAT in this context). We are concerned that the process of setting up rings, determining their membership, and enforcing them strictly, may risk introducing procedural delay into the administrative process without sufficient off-setting benefits in terms of significantly increased effective transparency.

New Evidence

46. Ofcom agrees with the Government's proposal to set out in statute the scope of the CAT's discretion in Competition Act and Communications Act cases to admit evidence that was not put before the competition authority or regulator at the administrative stage and before the decision which is being appealed was made.

47. The factors set out at paragraph 6.13 of the Consultation reflect the judgment of Lord Justice Toulson in the tiered termination rates case, and we agree that they are appropriate. In our view the Government's proposals would provide the appeal bodies with an appropriate level of discretion to be exercised in the interests of justice in any particular case, whilst at the same time making it clear to all concerned the bounds of that discretion.

48. In our view, it should be for the party seeking to admit the new evidence to have to apply for permission to do so, as opposed to the evidence being admitted unless another party makes an application objecting to it. This would be consistent with the principle noted in the Consultation and taken from the judgment of Lord Justice Toulson, that no party has an unfettered right to adduce fresh evidence on appeal.

49. We would suggest that the same statutory clarification should apply to the admission of new evidence in price control appeals to the Competition Commission, and hence to the Competition Commission's discretion to admit the same.

Costs

50. The costs of regulatory appeals can be considerable, and appear to be increasing. Many of the appeals of Ofcom's ex ante regulatory policy decisions are akin to large-scale commercial litigation, with multiple parties each with extensive solicitor and counsel teams, as well as scores of expert witnesses.

51. The effect of a costs award against a regulator such as Ofcom if it loses an appeal can have a significant chilling effect on its future policy decision-making, in particular complex and controversial decisions that are in the consumer interest but not necessarily in the commercial interests of incumbent operators.

52. We therefore welcome the Government's proposal that costs should only be awarded against a regulator in limited circumstances. The Consultation suggests that those circumstances should be where the regulator's conduct can be characterised as having been unfair or unreasonable or there are other exceptional circumstances.

Decision-Making Processes

53. As the Government notes, discussions are ongoing as to the governance process of making ex post competition law decisions. All important ex ante decisions that Ofcom takes already pass through its Policy Executive board, and some go on to the Ofcom Board. As such, Ofcom already effectively conducts collective decision-making in respect of such decisions. We do not consider that it is necessary to require in statute that regulators must ensure there are any further separations between decision-makers in ex ante policy decisions. Ex ante decisions are different in nature from ex post investigations into infringements of the Competition Act 1998, which are per se unlawful and can carry with them quasi-criminal sanctions.

Ofgem

OFGEM Response

Chris Jenkins
Consumer and Competition Policy
Directorate
Department of Business,
Innovation and Skills

Your Ref:
Our Ref:
Direct Dial: 020 7901 7277
Email: sarah.harrison@ofgem.gov.uk

Date: 17 September 2013

Dear Chris

Consultation on Streamlining Regulatory and Competition Appeals

Thank you for the opportunity to contribute to the review of regulatory appeals mechanisms, both through this consultation and through the workshops you have hosted and other engagement. We welcome the open and collaborative approach which BIS has taken to this review.

We have considered the proposals as currently set out. You will recall from our discussions around the evidence base for reform that there are relatively few appeals in the energy sector. It is important to contextualise this by saying that a number of our key appeals routes, those relating to licence modifications and price controls, are untested, as they were introduced in November 2011 as part of implementation of the Third Package. Prior to this, some of our decisions were not directly appealable. This has made it difficult for us to draw firm conclusions on the likelihood of appeals in the future and therefore to form a view on the approach to reform best suited to protect the interests of consumers.

It is not immediately apparent from the evidence base that there is a pressing case for change in the energy sector. However, we appreciate this opportunity to consider the structure of legal challenge to our decisions. The fact that there are few appeals in our sector does not mean there is no potential for improvement to current mechanisms.

We fully appreciate the government's intentions in this review and support the aim to contain costs and speed up decision making. We agree that regulatory accountability should be proportionate. We are subject to statutory duties to consider the proportionality and targeted focus of our interventions.

To consider the standard of review, the consultation presents a presumption that appeals should be heard on a judicial review standard unless there are specific legal or policy reasons for a different approach. The consultation states 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 provide clarity and certainty. We support the aspiration that clarity and certainty should be guiding principles in constructing standards for challenge to regulatory decisions.

For us, a core aspect of these reforms is to establish an effective balance between the rights of regulated bodies to challenge our decisions, and the need to deliver the predictable, authoritative decision making which investors in our sector value and which ultimately underpins consumer protection. You will be aware, for example, that in the

legislation for our licence modification and price controls appeals procedures, the Competition Commission must have regard, to the same extent as is required of GEMA, to the matters to which GEMA must have regard. The CC may have regard to other matters, but must not have regard to any matter which GEMA would not have been entitled to have regard to in reaching its decision, had it had the opportunity to do so. We think this is a fair and reasonable approach, as it means that the CC must seek to understand our decision, having regard to the parameters within which that decision was taken. This is reflected in guidance adopted by the CC to illustrate how it puts this legislation into practice and has been demonstrated in CC decisions.

A further illustration of this approach is in the case of ex post enforcement cases, where a full investigation and hearing on non-compliance may already have taken place. We do not think it would be satisfactory for consumers or for investors if potentially significant delays were introduced as a consequence of, in effect, rerunning the investigation at appeal.

In our view, appeals mechanisms should allow a reasoned and thoroughgoing review of the decision taken, in context of the statutory and policy constraints placed on the regulator inherent in reaching that particular decision. It is not the role of appeals bodies to reach a judgement based on different terms to those which faced the regulator, or a judgement which the appeals body perceives as more satisfactory on other-than regulatory criteria. We think that ensuring the proper parameters of discretion is as significant a matter as the standard of review.

The importance we attach to achievement of an effective balance between the legitimacy of challenge on the substance of decisions and our ability to ensure clear, authoritative decision making is illustrated in the core principles for effective appeals mechanisms which we articulated at an earlier stage of the review. These include:

- Where a regulator has approved a package of measures, the regulator should be entitled to defend its position on the basis of the package of measures as a whole
- Appeals bodies should take account of constraints placed on regulators. There should be a general presumption against the presentation of evidence not provided at the administrative stage
- Appeals bodies should function according to clear principles
- Appeals bodies should not, in general, substitute their own decisions.

Our preferred approach to appeals mechanisms means, therefore, that we support the government's proposals on clear rules for the admissibility of new evidence that could have been brought at administrative stage. It is right to establish clear parameters around this, to ensure that appellants are able to bring forward new evidence where this is essential, whilst providing assurance that appeals bodies will not become, in effect, the first line decision making body.

In relation to costs, there is a legitimate question of the limits of liability of public bodies acting in good faith. Regulators should not be exposed to the risk of large costs which might inhibit decision making and we agree that the way costs are awarded should be consistent with the aim of focusing appeals on significant matters.

In general, we have no strong views on institutional change, as we have had comparatively little exposure to the appeals bodies. We do, however, favour consistency in appeals routes. For this reason, our preference is for code modification appeals to be heard by the CC/CMA as, in our view, these appeals should be treated in the same way as licence modifications. We would also encourage BIS to consider the risk that in certain

The Office of Gas and Electricity Markets
9 Millbank London SW1P 3GE **Tel** 020 7901 7000 **Fax** 020 7901 7066 **www.ofgem.gov.uk**

circumstances it may be possible for the same petitioner to bring actions on related topics in separate fora.

We are broadly supportive of additional powers for regulators to impose confidentiality rings, to assist earlier and improved disclosure which could lead to better decision making. We would observe that where rings are used, they should be sufficiently flexible to include the right mix of expertise, with appropriate and enforceable sanctions for breaches of confidentiality rings.

We are interested to learn more about how any reforms will be implemented and whether further, bespoke analysis will be undertaken concerning impacts on different sectors. We look forward to continued engagement with you on the review. If you have any questions on this response please contact Mark Wagstaff mark.wagstaff@ofgem.gov.uk

Sarah Harrison
Senior Partner, Sustainable Development

The Office of Gas and Electricity Markets
9 Millbank London SW1P 3GE **Tel** 020 7901 7000 **Fax** 020 7901 7066 **www.ofgem.gov.uk**

Office of Fair Trading (OFT)

OFFICE OF FAIR TRADING

Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

The OFT's response to the Government's Consultation

September 2013

OFT 1504

This publication is also available on our website at: www.oft.gov.uk

Any enquiries regarding this publication should be sent to us at: Marketing, Office of Fair Trading, Fleetbank House, 2-6 Salisbury Square, London EC4Y 8JX, or email: marketing@oft.gsi.gov.uk.

1. Introduction and Executive Summary

Introduction

1.1. As the UK's competition and consumer authority, the Office of Fair Trading (OFT) welcomes the opportunity to respond to the Government's consultation on streamlining regulatory and competition appeals (the Consultation).

1.2. The views in this response are based on our experience of investigations and appeals and therefore address only the proposals relating to competition investigations and appeals against competition decisions under the Competition Act 1998 (CA98) and the Enterprise Act 2002 (EA02), in particular CA98 decisions[1].

1.3. As the Consultation document acknowledges, appeals form a vital part of the competition and regulatory decision-making framework. The possibility to appeal OFT CA98 and EA02 decisions is an integral and essential part of the competition regime, providing parties with a route to challenge decisions they perceive to be wrong. Nevertheless, it is essential for the effective functioning of the competition regime that the incentives to appeal are suitably balanced in order not to discourage well-founded appeals but equally not to encourage ill-founded ones. It is also vital that appeals are dealt with as efficiently as possible to minimise delays, uncertainty and use of staff and management time and costs – for both appellants and the OFT. We therefore welcome the Government's consideration of options for streamlining competition appeals.

Executive summary

Standard of review

1.4. We support strongly objectives to ensure appeals are focused, faster and more efficient whilst also allowing for robust decision-making and proportionate regulatory accountability. We recognise the possibility that changing the standard of review for CA98 decisions from 'full merits' to judicial review or focused and specified grounds of appeal could contribute to the overall aims of the Consultation proposals in focusing appeals on material issues and reducing the length and costs of appeals. This should be balanced, however, against the

[1] The views in this response reflect the experience of the OFT, in particular in relation to CA98 decisions. We also note that the proposals set out in the Consultation document would apply to all sectoral regulators who have concurrent powers to apply and enforce the CA98 within their respective regulated sectors.

benefits of the current full merits review procedure where the substance of relevant issues is considered by an independent and expert body.

1.5. We note that there are also potential drawbacks with the alternatives compared to the status quo. For example, judicial review would not allow the CAT to consider new evidence or substitute its own decision for the decision of the authorities.

1.6. Whilst we consider that the proposals relating to more specified grounds of appeal could potentially be beneficial in focussing appeals to a greater extent, on balance we think that the Government should consider whether its objectives could, in fact, be met through the measures relating to case management and the conduct of the appeals rather than a change to the standard of review. We therefore welcome, as discussed below, some of the proposals in relation to streamlining decisions to make them as quick and efficient as possible.

Facilitating robust administrative phase decisions and getting appeal incentives right

1.7. We broadly support the proposals in this area. As regards confidentiality rings, we consider that it would in certain circumstances be helpful to have the power to impose confidentiality rings in cases to help resolve confidentiality issues in the access to file process and to be able to impose sanctions such as fines for breach of the rules of the ring. That said, we do not think that they would necessarily improve engagement with parties or increase transparency of the OFT's case given the wide range of measures already in place which assist parties to understand the case against them throughout the administrative process.

1.8. We welcome the proposed framework for dealing with the submission of new evidence on appeal. Authorities require access to all available evidence in order to reach good decisions. We consider that the proposals contribute to creating better incentives for parties not to withhold until the appeal stage evidence they could have submitted at the administrative stage and thereby 'game the system'. Regime costs could be saved if evidence can be considered by the authority at the administrative stage rather than only at the appeal stage. We also recognise that it will be in the interests of justice to admit such evidence on appeal in appropriate circumstances. We consider that the Consultation proposals strike an appropriate balance between these two objectives. We agree that it is important for there to be costs consequences where new evidence is submitted at the appeal stage when it could and should have been introduced at the administrative stage.

1.9. We think that the proposals to limit an authority's costs exposure for appeals should be given further consideration. While there may be some benefit to the possibility of authorities facing a reduced cost burden that must not, in our view, be at the expense of access to justice in meritorious appeals. On balance, therefore, we consider that the current CAT discretion to determine costs liability on a case-by-case basis should be retained for appeals on liability. However, in relation to appeals on penalty, we think that consideration should be given to providing that an authority pays only its own costs where the CAT finds that the authority did not make a material error in setting a penalty but nevertheless reduces the penalty in the exercise of its discretion.

1.10. Finally, we recognise the potential benefits around the proposals to remove the right to appeal CA98 non-infringement decisions on the merits. We also consider that such decisions can help provide clarity to businesses and advisors on behaviour authorities consider does not infringe CA98, and judicial clarity by appeal plays a part in that. However, we think that in many cases – though not necessarily all – the possibility of judicial review would be able to provide a degree of clarity even if the right to appeal on the merits is removed. We therefore cautiously support the proposal. However, we think that it will be particularly important for Government to consider carefully Consultation responses from businesses and advisors on this issue before taking a final view.

Minimising the length and cost of cases

1.11. We support strongly measures to streamline appeals and make their governance more efficient. In that context, the additional flexibility of the CAT being able to sit with a single judge in appropriate cases may be helpful and may reduce time and costs in some cases. We also agree that there may be merit in more active scrutiny of grounds of appeal as well as the striking out of appeals that had little prospect of success. More broadly, we welcome the proposed consideration of whether CAT case management could be enhanced, perhaps drawing inspiration from instances where the CAT has followed the strict High Court approach on various issues including the possibility for streamlining the actual conduct of appeals, for example in relation to pleading and hearing length. Finally we note that there may also be merit in increasing consistency between CAT panels when they hear cases raising the same or similar issues, in order to increase legal certainty.

2. Standard of Review of the Competition Appeal Tribunal (CAT) in competition cases

2.1. We support strongly objectives to ensure appeals are focused, faster and more efficient whilst also allowing for robust decision-making and proportionate regulatory accountability. The current system of full merits review of CA98 decisions provides for a consideration of the substance of relevant issues by an independent and expert body and is clearly compatible with Article 6 of the European Convention on Human Rights (ECHR). We also recognise that there are some potential benefits in appeals of CA98 decisions being conducted under a judicial review or specified grounds of appeal standard to achieve some of these objectives in particular in focusing appeals on material issues and reducing the length and costs of appeals. There are also potential drawbacks which may mean the alternatives proposed may not in practice provide significant savings compared to the status quo.

Judicial review

2.2. We note the potential benefits of moving to a judicial review standard set out in the Consultation in producing more focused and shorter appeals. We also note the flexibility that the CAT would have in applying the judicial review framework to appeals and that this is crucial in the assessment of whether a judicial review standard would be compatible with Article 6 of the ECHR. On the other hand, given this flexibility, there is a question of whether, in practice, the type of judicial review envisaged would lead to significantly shorter appeals and achieve the Government's streamlining objectives. Moreover, the proposal for penalties to remain subject to full merits review will be likely to have an impact on whether, overall, a change of standard would achieve significant savings. First, an appeal involving a challenge to both liability and penalty may not be very much shorter than under full merits review of CA98 decisions. Also, in practice, appeals on liability alone are likely to be relatively rare and appeals on penalty alone will be no different than at present. It should also be noted that there are likely to be short term 'transition costs' with moving to a revised standard of review, which might include further appeals to the Court of Appeal to establish how the revised standard will work in practice in this specialist area. In the particular circumstances of this proposal, they might outweigh any resource and time benefits that might otherwise accrue from changing the standard of review.

2.3. The Consultation recognises that challenges to decisions by way of judicial review do not allow for the admission of new evidence. Whilst we consider that careful consideration must be given to the admission of new evidence, we

recognise that it will be in the interests of justice to do so in certain circumstances (we address this point further at paragraphs 3.8 to 3.11 below). Finally, we think that consideration should also be given to the fact that under judicial review the CAT would not be able to substitute its own decision for that of the competition authority. The CAT's ability to substitute its own decision is in our view a useful part of the regime toolkit in appropriate cases and can shorten the overall end to end length of the decision-making process, although we recognise that to date the CAT has only done this in a small number of cases.[2]

Focused and specified grounds of appeal

2.4. We recognise the potential benefits of this option in terms of focusing appeals on material errors and unreasonable judgements by the authority to a greater extent whilst still providing for independent and robust review of an authority's CA98 decisions. This option could also provide greater clarity and certainty on the scope and level of scrutiny applied for appeals. We note it would have to be appropriately controlled to ensure that grounds of appeal are in practice focused on the substance of the concern with the authority's decision. However, some of the potential drawbacks and limitations to judicial review might also apply here. There will likely be 'transition costs' and a period of uncertainty as the new system beds in and continued full merits reviews of penalty decisions (without specified grounds) may limit the overall savings of this approach.

2.5. On balance, we consider that the Government should consider whether its objectives could, in fact, be met through the measures relating to case management and the conduct of the appeals rather than a change to the standard of review for CA98 decisions. In our view, irrespective of whether Government decides to change the standard of review, it is crucial to consider in parallel other measures to speed up and streamline the actual conduct of appeals themselves. We say more on such issues in section 4 below.

3. Facilitating robust administrative phase decisions and getting appeal incentives right in competition cases

3.1. We support strongly the overall aim of the proposals in this area to facilitate efficient and robust decision-making. We think it is important for parties and the authority both to engage as fully and constructively as possible so that the authority has access to all relevant information before it takes a decision on whether the law has been infringed. In that way, appeals can focus on material issues that a party considers the authority has got wrong, rather than having, to

[2] For example, *M.E. Burgess, J.J. Burgess and S.J. Burgess v. OFT and Others* [2005] CAT 25.

some extent, a rehearing of an administrative stage case before the CAT by debating issues that are not determinative of the substance or introducing new evidence that could and should have been disclosed at that stage.

Confidentiality rings

3.2. We support the introduction of greater powers to facilitate the use of confidentiality rings at the administrative stage in appropriate cases. The OFT has had some CA98 cases in which confidentiality rings have worked well in practice. We have also encountered cases where we did not use confidentiality rings but could usefully have done so if we had had the additional powers proposed in the Consultation.

3.3. Based on our current experience, we think a key benefit of confidentiality rings is their potential to speed up or otherwise help resolve the assessment of whether certain targeted or specific confidential information should be disclosed to one or more parties under investigation. As recognised in the Consultation, confidentiality rings can also be used to streamline the access to file process in appropriate CA98 cases. For example a confidentiality ring can expedite access to file where there is a large amount of documents on the case file that are not key documents referred to in a Statement of Objections. In these circumstances a confidentiality ring can allow the relevant advisors to identify more quickly any further documents on the file to which a party would seek access to on a non-confidential basis.

3.4. Therefore, we can see potential advantages of having an explicit discretion in legislation to impose a confidentiality ring on certain terms in appropriate circumstances. For example, it would likely reduce some of the issues encountered when trying to set up confidentiality rings (for example as to the rules of the ring or the scope of documents to be included). This would make the process more efficient and faster. However, in our view it is important for the power to be discretionary. Authorities need some flexibility about how precisely they run the access to file process in a given case and may decide that confidentiality rings would not be appropriate in a particular case. To give parties a right to use that tool could lead to time-consuming and expensive processes if the right was exercised where a confidentiality ring was not the best solution.

3.5. Further, we recognise the merits in being able to fine persons who breach the rules of the confidentiality ring to ensure parties have more confidence in the process and to minimise the risk of unauthorised disclosure of material shared in the ring. That said, we note that in practice there may be difficulties in detecting

breaches. Consultation responses the Government receives may shed further light on such issues.

3.6. We also note the view in the Consultation that confidentiality rings might facilitate earlier and improved disclosure to parties of the case against them, thereby ensuring they understand the case fully. In our view, there are already a number of measures in place to assist parties understand the case against them throughout the administrative process. As well as access to file and the Statement of Objections setting out the OFT case, under the CA98 procedures guidance which sets out key elements of how the OFT carries out its CA98 investigations,[3] the OFT has regular dialogue with parties, shares its thinking on the case through case updates and 'state of play' meetings and holds more interactive oral hearings which provide improved access to the decision-makers in the case. It is expected that this approach will continue when the CMA takes over the OFT's functions and powers from 1 April 2014.

3.7. Finally, we note the potential role envisaged for the CAT in supervising confidentiality rings. Given the considerable volume of material that may be involved in some cases, introducing a formal court scrutiny role may risk adding considerable time, resources and complexity to the process, and would therefore be inconsistent with the objective of speeding up consideration of confidentiality issues. It should be noted that in CA98 cases, the Procedural Adjudicator – an OFT official independent of the case team who parties may approach to challenge a case team's decision on procedural issues – would be able to consider procedural issues relating to confidentiality rings.

Admission of new evidence on appeal

3.8. We support strongly measures which create incentives for parties to engage fully with the case at administrative stage in order to facilitate robust and efficient decision-making and reduce the incidence and length of appeals.

3.9. We note the specific proposal to limit the CAT's jurisdiction to admit written or oral evidence that was not before the authority at the administrative stage to only when the following criteria are met: it can be shown that there is good reason to admit new evidence; it is not reasonable to expect the evidence to have been placed before the administrative authority; the evidence will have an important

[3] OFT 1263rev, *A guide to the OFT's investigation procedures in competition cases* (October 2012). Available at http://www.oft.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act/.

effect on outcome of appeal; and it is in the interest of justice that the evidence be admitted. We consider that this would be an improvement on the current situation for appeals of CA98 decisions whereby appellants may introduce such new evidence at the CAT while the OFT may only do so to rebut a case made by the appellant. We consider that the current situation risks creating poor incentives for parties and an inefficient outcome for the regime as a whole. At present, this will create situations where had the evidence from the appellants been adduced at the administrative stage, the OFT could have addressed the issues raised in its original decision and this may have reduced the risk of appeal. Also, the status quo results in specific risks for the public purse. The OFT may face losing a CAT appeal if the new evidence significantly affects the conclusions that could have been reached at administrative phase and the OFT is unable to rebut the new evidence on appeal.

3.10. We recognise there may be arguments that the Consultation proposal merely reflects what the CAT already has discretion to do under the CAT Rules. However, we consider that giving that discretion a firm statutory footing might increase incentives on parties to engage properly at the administrative stage as well as focusing and reducing the scope and length of appeals, while still giving sufficient flexibility to ensure that justice is served.

3.11. We consider that it is also crucial for a party's approach to submitting new evidence on appeal to be reflected in costs. For example, new evidence that should have been presented to the OFT may be admitted because it has a significant bearing on the determination of the issues on appeal. That would in our view be right in the interests of justice. However, we consider that the party submitting the new evidence in those circumstances should suffer costs consequences, for example by having to pay some or all the authority's costs relating to that portion of the appeal as well as its own costs, irrespective of the outcome of the appeal. We say more on costs generally at paragraphs 3.12 to 3.15 below.

Costs

3.12. We recognise that striking the appropriate balance between disincentivising unmeritorious appeals or delaying tactics and avoiding unfairness to appellants will be crucial to the success of the Government's Consultation proposals. We consider that for appeals on liability, the CAT is well placed to continue making assessments of costs on a case-by-case basis. This is subject to the qualification that no party should be entitled to recover costs unreasonably incurred, in particular where a party, without good reason, unilaterally decides to discontinue

appeal proceedings or produces new evidence at appeal which it could have reasonably adduced at the administrative stage.

3.13. On this latter point, in the context of a full merits review under CA98, we support measures which incentivise parties to engage fully in the administrative phase and provide all relevant evidence to enable robust and efficient decision-making. It is also important to note that failure by the parties to do this in our view would usually lead to unreasonably incurred appeal costs. To dissuade such conduct, this should be reflected in costs awarded on appeal, particularly as there are (as identified in paragraph 3.9 above) specific risks for the public purse if the authority loses a CAT appeal because the new evidence significantly affects the conclusions that would have been reached at the administrative phase and is unable to rebut the new evidence on appeal.

3.14. We think that consideration should be given to providing that where a penalty set by an authority is reduced on appeal each party should bear its own costs unless the authority made a material error in calculating the penalty. In our view such an approach is reasonable where the authority has not made an error and a penalty has been reduced because the CAT reached a different figure in the exercise of its discretion than the OFT did. We think that a distinction can be made between the approach to penalties and to liability because the latter relates more to substantive issues that are 'right or wrong' rather than the exercise of discretion on a penalty, on which (in the absence of a material error by the authority) reasonable people could reasonably disagree.

3.15. In terms of the Consultation suggestion that authorities should claim their full costs, including in-house legal costs, we note that the OFT generally includes in any costs claim its in-house legal costs and we consider that it is appropriate for it to do so.

Appeal of non-infringement decisions in competition cases

3.16. We support measures to improve the efficiency of decision-making and reduce appropriately the burden on authorities in reaching and defending decisions. We recognise that removing the ability for CA98 non-infringement decisions to be appealed on the merits could contribute to this and therefore cautiously support it.

3.17. That said, we note that non-infringement decisions can help to clarify the law and provide a degree of legal and economic certainty wider than just the specific case they relate to – the possibility of judicial clarification of issues by way of a full

merits appeal can be part of that. However, on balance, we consider that a similar degree of clarification could be provided even if non-infringement decisions were no longer appealable on the merits. As the Consultation notes, the OFT has issued a number of detailed no grounds for action (NGFA) decisions to provide certainty and help to clarify the law in particular scenarios, for example in the *Flybe* and *IDEXX* cases. [4]

3.18. In the absence of a full merits appeal, a NGFA or non-infringement decision could in principle still be challenged by judicial review, for example on the basis that the decision involved manifest errors of law or fact. This would still allow for some helpful judicial clarification of the law. However, this may also have its limits since the CAT, as noted above, in a judicial review would not be able to substitute its own decision for that of the competition authority to provide any further clarity. Moreover, we agree with the Consultation that another potential route to judicial clarification where a party disagrees with a NGFA or non-infringement decision is a standalone private action in the CAT or the High Court. Overall, therefore, we cautiously support the proposal subject to Government's careful consideration of views on the issue from the legal and business communities on whether this is likely to be a significant issue in practice.

4. Minimising the length and cost of appeals

Review of CAT governance and Rules

4.1. We support strongly measures to ensure that the CAT is in line with relevant best practices so that the appeal system is as streamlined and efficient as possible, focuses on dealing with material errors and minimises incentives to 'game' the system.

4.2. We agree that allowing the CAT to sit with a single judge may be appropriate in more straightforward cases which raise primarily legal rather than economic issues and could contribute to greater throughput of cases and swifter hearing of appeals.

4.3. We note the proposals for a greater focus on weeding out appeal grounds that stand little chance of success at a preliminary stage. As regards the suggestion that authorities whose decisions are challenged should be more active in challenging grounds of appeal, our experience is that grounds of appeal are

[4] Case CE/9322/10, *IDEXX Laboratories Limited: alleged abuse of a dominant position* and case MPINF-PSWA001 *Flybe Limited: alleged abuse of a dominant position.* The decisions are available on the OFT website at http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/.

challenged vigorously in preliminary pleadings. That said, we recognise that there may be more scope in appropriate cases for authorities to go further and suggest that particular grounds of appeal should be rejected or 'struck out' at a preliminary stage, for example because there is little prospect of success or because they do not constitute a sufficiently material issue. Also, we welcome the complementary proposal for the CAT to be able to review appeals to identify and, where appropriate, reject appeal grounds that stand little prospect of success. In our view, consideration should be given to putting this power on an explicit legislative basis (which may strengthen the likelihood and ability that the power will in practice be used in appropriate cases) and to whether the CAT should have a duty to reject appeal grounds that are ill-founded and / or have little prospect of success.

4.4. As already alluded to, we consider that tight scrutiny and management of all aspects of appeals – including grounds of appeal, pleadings, witnesses, time allocation for hearings and costs – is a crucial complement to some of the more substantive changes Government is considering. The CAT Rules already grant the CAT case management powers but we think that consideration should be given to whether there is scope for the CAT case management approach to be more like the strict High Court approach, which would likely lead to time and cost savings. One recent example that might be considered is the new rules in relation to costs management brought in by the Jackson reforms to the civil justice system which, for example, require costs budgets to be filed and prepared at an early stage of the litigation.[5]

4.5. Another area which may merit consideration is whether there should be procedures to ensure consistency of approach between different CAT panels on the same or similar issues. In circumstances where, for administrative efficiency reasons, different CAT panels work across the same or related infringement decisions in parallel and consider the same or similar issues, we consider that there may be a real risk of inconsistent decisions. This would create a lack of clarity about how the CAT is likely to treat those issues in future, which is sub-optimal for authorities, businesses and their advisors. Consideration should be given to providing in legislation that, in those circumstances, the different CAT panels are required to reach a single unified position on the common issues. We recognise that in doing so, each CAT panel would have to properly take account of the arguments and information put before them.

[5] See CPR Rule 3, available at http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part03#3.13.

Aligning jurisdiction for competition appeals and judicial reviews of the same decision

4.6. The Consultation proposes to extend the CAT's jurisdiction to enable it to consider applications for judicial review in CA98 cases. We recognise that there may be time and resource savings with such an approach as different courts would not need to familiarise themselves with the same case. However, we think it is important to balance that against the risk of losing the benefit of the strict and robust approach to dealing with judicial review applications that the High Court has developed over the years. In this respect measures relating to case management and conduct of appeals would also need to be considered.

Streamlined processes to speed up competition appeals

4.7. We support measures that will result in more effective case management and control of procedure in competition appeals whilst still ensuring that appeals are robust. In this context, we think that the power for the CAT to limit the amount of evidence and expert witnesses in competition cases may be useful, although whether in practice it leads to shorter and more focused appeals will of course depend on the extent to which the CAT uses the power strictly. As noted elsewhere in this response, more generally we strongly support measures to ensure that appeals are appropriately focused on the core issues.

Olswang LLP

OLSWANG

STREAMLINING REGULATORY AND COMPETITION APPEALS

RESPONSE OF OLSWANG LLP

1. INTRODUCTION

1.1 This paper is submitted by Olswang LLP ("**Olswang**") in response to the Department of Business, Innovation and Skills consultation paper, "Streamlining Regulatory and Competition Appeals" ("**Consultation Paper**"), published on 19 June 2013.

1.2 Olswang is a UK-based, limited liability partnership registered in England and Wales and regulated by the Solicitors Regulation Authority. It has 117 partners, and over 600 other lawyers and support staff, who are divided between the firm's offices in London, Reading, Brussels, Berlin, Madrid, Paris, Munich and Singapore.

1.3 Olswang is a full-service firm with strong practices in corporate, commercial, regulatory and competition, litigation, arbitration and intellectual property. The firm's lawyers act for clients across business sectors such as telecommunications, technology, life sciences, film and broadcasting, advertising and marketing, publishing, financial services, music, sport and real estate.

1.4 Olswang welcomes the opportunity to comment on the Consultation Paper. Broadly, we are in support of a number of proposals put forward in the Consultation Paper. However, it should be noted that we consider it important to draw a distinction between regulatory and competition appeals and would caution against any broad-brush amendments which do not take in consideration the particularities of each regime and the requirements of their respective appeal systems.

1.5 Should you wish to discuss anything in this response please contact Dan Tench (0207 067 3518 or Dan.Tench@olswang.com), Partner in Olswang's Litigation and Arbitration group or Howard Cartlidge (0207 067 3146 or Howard.Cartlidge@olswang.com), Partner in Olswang's Competition & Regulatory group.

2. RESPONSE TO THE CONSULTATION PAPER

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?

2.1 We broadly welcome the use of a judicial review standard for regulatory appeals. As is noted in the Consultation Paper, regulatory appeals are required pursuant to the Framework Directive. The Directive requires that regulatory appeals duly consider the merits of a case. We consider that a judicial review standard is sufficiently flexible to discharge the requirements of the Framework Directive whilst also offering appellants a suitable standard of redress that functions to prevent regulatory appeals from becoming *de novo* hearings unnecessarily. A well-documented positive aspect of judicial review is that cases are resolved in a much shorter timeframe than merits-based appeals. Whilst brevity in itself is not a reason for selecting one standard of review over another, the lower costs associated with a shorter timeframe would benefit appellants and could ultimately improve access to justice.

2.2 In contrast, we are of the view that a full merits-based appeal process should be maintained for competition appeals. Competition decisions are inherently invasive into commercial freedom by the state and are almost invariably the result of finely balanced judgments which take into consideration both legal and economic tests. To that end, we believe that it is important to maintain a broader scope of appeal for appellants as such decisions are less obviously capable of a judicial 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?

2.3 We note that the Government's principles for non-judicial review appeals are in essence codified grounds for bringing a judicial review, as noted in paragraph 2.1 we consider this appropriate for appeals brought in the regulatory sector.

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

2.4 In the short term moving to a judicial review standard could lead to satellite litigation whilst the new framework is tested. However, in the long run we note that the benefits of a judicial review standard would be a reduction in the time for resolving appeals. In turn this would result in a reduction in costs for appellants.

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?

2.5 We believe that in the communications sector judicial review would be the appropriate standard of review. Please refer to our comments in paragraph 2.1 for more details.

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?

2.6 Please refer to comments made in paragraph 2.4 above.

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?

2.7 As discussed in paragraphs 2.2, we do not agree that there should be a change in the standard of review for decisions under the Competition Act 1998.

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?

2.8 As noted above, the benefits of a judicial review framework is a reduction in the length of appeal and consequently a reduction in cost for litigants. However, these benefits should not be considered to outweigh the importance of ensuring that decisions are subject to an adequate level of review. We are not aware of any evidence indicating that the present appeals framework for competition decisions is not working. Indeed, the evidence is that such a framework is necessary to improve competition decision-making whilst the "administrative" model of competition enforcement remains in place.

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?

2.9 No comment.

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?

2.10 No comment.

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?

2.11 No comment.

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?

2.12 No comment.

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?

2.13 We believe that dispute resolution appeals should be brought on a basis similar to that of the Court of Appeal, namely for an error of law or a manifest error of fact. Furthermore, we would advocate that regulators should consider whether they need to play a role in dispute resolution appeals, whether they should drop out of the proceedings altogether or whether they should adopt an *amicus* role on appeal. (Although in the interests of justice, the hearing body should be granted discretion to permit or require the participation of the regulator where necessary.)

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?

2.14 No comment.

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?

2.15 We would suggest that consideration be given to whether the CAT would be better equipped to achieve the objectives set out in paragraph 5.9 of the Consultation Paper if a series of amendments were made to its procedures and powers, namely: (i) the introduction of a permission stage for all appeal hearings at the CAT; (ii) amending the rules so that where appropriate the Chairman of the CAT can sit without the panel; and (iii) granting the CAT disclosure powers, including for third parties. In this way, the CAT process would be more akin to traditional judicial review.

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?

2.16 Given that High Court judges have already completed a Judicial Appointments commission recruitment competition we would 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.

2.17 We would agree that the term of these judicial office holders should not be limited to 8 years. Such a change would put the CAT on an equal footing with the other courts, and would prevent the Tribunal from routinely losing expertise built up by individual judges over an eight year period.

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

2.18 As mentioned above in paragraph 2.15, where appropriate, we agree that the CAT should be permitted to sit with a single judge. Such a decision should be made on a case-by-case basis.

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

2.19 We agree that the Competition Commission ("**CC**") should continue to hear appeals against price control and licence modification given its expertise and its unique position to undertake both economic and legal analysis.

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?

2.20 We agree that it would be more efficient for price control decisions in the communications sector to be directly appealed to the CC.

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

2.21 Other than price control and licence modification decisions (see paragraph 2.19 above) we believe the CAT, as a specialised tribunal, 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?

2.22 No comment.

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

2.23 We agree that there is an advantage to having a single appeal body hearing enforcement appeals, as such a move would improve efficiency and create precedent.

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?

2.24 Subject to the suggested procedural amendments made in paragraph 2.15, we consider that the CAT is the most appropriate 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?

2.25 No comment.

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

2.26 We 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?

2.27 Subject to the suggested procedural changes (see paragraphs 2.13 and 2.15) we consider that the CAT is the most appropriate 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?

2.28 We agree that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998, if judicial review were to be the selected process.

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?

2.29 Where appropriate, we agree that increasing the use of confidentiality rings at the administrative stage of decision-making would be helpful.

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?

2.30 To ensure that confidentiality rings used in the administrative stage of decision-making function as an effective tool, we suggest enabling parties to make submissions in relation to the operation of the confidentiality ring prior to enforcement. Further, we do not consider it necessary for the CAT to be involved in the supervision. Rather, we think that confidentiality rings could be supervised by a suitable lawyer at the regulator.

2.31 Such confidentiality rings should be enforced by the High Court, as other obligations in confidentiality are enforced. The High Court can draw on a vast array of remedies and experience to enforce the confidentiality rings. These include injunctive relief and contempt sanctions. In addition, there may be professional disciplinary consequences for solicitors and other regulated professions for breach of confidentiality obligations.

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?

2.32 As it stands the CAT Rules already give the CAT discretion to control the admission and use of evidence. We do not consider it necessary to amend the rules as proposed given that the CAT's decisional practice suggests that it deals with admitting new evidence effectively and pragmatically.

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?

2.33 No comment.

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?

2.34 We believe that as with any other case before a court, the starting point for any costs award should be that the losing party pays. Beyond that, the CAT should have discretion to adjust the costs award. We do not believe that a regulator should be immune from costs liability. Such a move could deter parties from bringing claims against a regulator and generally prevent access to justice.

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

2.35 A feature of litigation in the regulatory sector is that parties significantly use their own legal and expert resources. This applies to operator and regulator alike. We therefore consider that it should be open for both the operator and regulator to recover 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?

2.36 Please refer to our comments in paragraph 2.15 above. We suggest that consideration be given to whether a permission stage should be introduced for appeals heard by the CAT. Such a stage would allow the CAT to determine whether the appeal before it should progress to a hearing. A permission stage would allow administrative bodies to be more active in scrutinising appeal grounds and would provide a (limited) opportunity for the administrative bodies to challenge the appeal at the CAT.

Q35 Do you agree that 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.

2.37 Please refer to paragraph 2.36.

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

2.38 The changes introduced by the Enterprise and Regulatory Reform Act 2013 in respect of antitrust decision-making *prima facie* appear to introduce a robust decision-making process. However, as yet it remains wholly untested and it is too early to consider whether it is appropriate to apply the same principles 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?

2.39 No comment.

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

2.40 No comment.

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

2.41 In our view it is essential to regulatory effectiveness that non-infringement decisions remain subject to appeal by interested third parties. Removing this possibility will inevitably introduce an incentive for regulators in finely balanced cases to select a (non-

appealable) non-infringement decision in favour of an (appealable) infringement decision, irrespective of the merits.

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?

2.42 Given that a third of CAT cases between 2008 and 2012 took longer than 12 months to resolve, we consider that setting a target time limit of 6 months is ambitious. However, a goal to reduce the length of time for cases is a positive step and if successful could result in reduced costs for all parties involved in appeals.

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

2.43 As stated in paragraph 2.42 above we consider any (realistic) target which seeks to reduce the length of time during which a case is resolved is a positive step.

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?

2.44 As mentioned above (paragraph 2.15), we believe that the experience of hearing a case in the CAT could be greatly improved with certain procedural amendments. We consider that where appropriate the CAT should be able to use its discretion to limit the amount of evidence and expert witnesses, with a view to resolving the case expeditiously.

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?

2.45 We have no objection to the introduction of a voluntary fast-track procedure, as described above.

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?

2.46 No comment.

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?

2.47 No comment.

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?

2.48 No comment.

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

2.49 Please refer to paragraph 2.15 above for our comments on the CAT's case management procedures.

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

2.50 No comment.

Office of Rail Regulation (ORR)

OFFICE OF **RAIL REGULATION**

Daniel Brown
Director, Strategy
Office of Rail Regulation
One Kemble Street
London WC2B 4AN
Telephone 020 7282 3824
Daniel.brown@orr.gsi.gov.uk

Sean Browne, Policy Adviser
Regulation & Competition Appeals Consultation
Consumer & Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

11 September 2013

Dear Sean

Thank you for the opportunity to comment on these proposals. ORR is supportive of moves to increase the effectiveness of regulatory decision-making by removing red-tape and to streamline the appeal processes. We do, however, have some specific concerns around the current proposals which we set out below.

As you set out in the consultation document, ORR has regulatory functions in a variety of different areas – from access disputes to price controls – and the appeals mechanisms in relation to each type of decision are different. Notwithstanding this, there have been very few appeals against ORR decisions. ORR makes significant effort to ensure rigour and robustness of our decision-making processes and takes steps to ensure that all of our stakeholders are kept informed and appropriately consulted whenever we take regulatory decisions.

In those circumstances, we do not think that the effectiveness of decision-making will be improved, or appeals processes streamlined, by applying the same process to each category of decision. Nor do we consider consistency across all regulated sectors would necessarily be an effective approach given the diversity in the types of sectors which are regulated.

We are sympathetic that there may be existing issues within regulated sectors such as communications which could benefit from reform, however in assessing the

proposals and based on our experiences to date, we are not persuaded that the case for change from our current appeal arrangements has been made.

In relation to standards of appeal, we consider that the breadth and complexity of price control decisions in itself merits (our current) wide appeal process. The regulator's determination is a package of measures with significant reach both in time and impact on the regulated businesses – a wider, merits based appeal is therefore appropriate for the Rail industry.

In relation to proposals for direct appeals, under licence conditions and modifications, our existing arrangements to work with the industry to reach an agreement, and failing that make a referral to the Competition Commission, has been effective. We are not convinced that there would be real tangible benefits for the Rail industry to make changes, other than give equal rights to appeal, as the time taken to confirm decisions and the potential regulatory uncertainty from potential appeals could outweigh any time saved in making the original decisions.

With regard to the proposed changes that would impact on the appeal processes associated with the enforcement of the Competition Act, ORR's experience of the current arrangements is limited and we are not therefore in a position to provide any quantitative evidence. We would however support any moves that would streamline the appeals process, particularly where this would reduce the burden on enforcers, while maintaining appropriate checks and balances and protecting the rights of the parties involved. In this regard we note that some of the proposed changes cannot be viewed in isolation but as part of the wider reforms to the enforcement of competition law, including those to strengthen decision making processes in competition cases.

We would welcome further consideration and evaluation of the impact of the current regimes within the sectors and the problems which the reforms seeks to overcome. A greater understanding of the wider reform landscape and clarity of the role this review has in it would also be beneficial in considering these issues further.

I would be happy to discuss any elements of this response with you if it would be of use to you.

Daniel Brown

Oxera

Streamlining regulatory and competition appeals

Oxera's response to the BIS Consultation on options for reform

September 2013

1 Introduction

In June 2013, BIS launched a consultation on the future of regulatory and competition appeals in the UK.[1] The thrust of the proposals is that substantial changes are needed and, in particular, a streamlining of the appeals process. The consultation has generated a great deal of interest and diverse commentary. The response issued by the Competition Appeal Tribunal (CAT) endorses a number of the proposed reforms—in particular, in relation to streamlining processes—but criticises the proposed reform of the standard of review, from appeals on the merits to judicial review.[2] The variety of the comments received reflects the fact that an appeals process forms a vital part of holding regulatory and competition authorities to account for their judgments.

Oxera, a leading economics consultancy in Europe, has been involved in a large number of regulatory and competition law inquiries over the past 30 years. This extensive experience covers many litigation cases in the UK before the CAT, the High Court, the VAT Tribunal and the Court of Session in Scotland. Oxera's economists have acted as experts for claimants, defendants and courts.

Our advice has included working with companies to assess whether to appeal a decision, and, if so, on what grounds, as well as advising on the appeals themselves, including in proceedings before the CAT and the Competition Commission (CC). We have also provided advice from the other perspective, supporting regulators and the Office of Fair Trading (OFT) and CC directly. Oxera is therefore well placed to offer some input into this consultation.

This response makes three points, as follows.

– As the consultation makes clear, 'appeals form a vital part of the regulatory decision-making framework'.[3] Making judicial processes more efficient and harmonising the

[1] Department for Business, Innovation and Skills (2013), 'Streamlining regulatory and competition appeals: Consultation on options for reform', June 19th.
[2] Competition Appeal Tribunal (2013), 'Streamlining regulatory and competition appeals: Response of the Competition Appeal Tribunal', available at http://www.catribunal.org.uk/.
[3] BIS (2013), op. cit., para 1.9.

approaches in different appeals bodies and across different sectors are both sensible objectives, in principle.

– However, there are questions about the proposed move from appeals on the merits to judicial reviews. This raises concerns that an important check and balance in the system is being weakened, which could lead to poorer decision-making. Appeals on the merits allow for more thorough testing of the evidence and reasoning of the decision, including the economic aspects of the case. The consultation contains limited analysis of whether appeals on the merits are currently problematic, especially as regards competition law appeals (there is somewhat more discussion on regulatory appeals).

– At the same time, it is unclear whether the costs of appeals are currently as high as suggested in the consultation, and this weakens one of the reasons for the proposed reform. The data indicates that there are fewer than ten appeal cases every year and they are generally completed within a year. They represent a very small fraction of all commercial litigation in the UK, and their costs are less than 0.1% of regulators' budgets and regulated firms' investments each year (see section 4 for the quantification).

The discussion in the following three sections sets out these points in more detail.

2 Appeals form a vital part of the regulatory decision-making framework

The route of appeal against regulatory and competition decisions is vital as part of a system of checks and balances on decisions by regulators and competition authorities. This involves reviewing decisions for any errors, but also assessing the reasonableness of judgments that have been made (discussed further below). As shown in Table D5 of the consultation, six appeals against a regulator/competition authority have been upheld and a further 18 have a mixed or ongoing nature.

Where errors or questionable judgments occur, it is important to be able to address them. Not doing so could harm not only the wronged parties, but also the credibility of the system. If a company receives an unduly stringent regulatory settlement, without the ability to overturn this and obtain a fairer settlement, it may find itself in financial difficulties. Such an outcome is likely to be even more detrimental to consumers than a less stringent but more appropriate regulatory settlement that should have been the original conclusion of the regulator.

Additionally, regulators, like the companies they oversee, respond to incentives. Having a robust and effective appeals mechanism, which is sufficiently well used, acts as a strong incentive for regulators to get things right first time. Regulators are aware that being taken to appeal and losing can be financially costly and damaging to their credibility. The threat of appeal in itself acts as an incentive on authorities to ensure that their analysis and findings are robust.[4]

The consultation has highlighted (in para 3.28 and Figure 3.5) the range of different appeal routes available to different sectors. Harmonisation of these routes is likely to be beneficial in principle, to help ensure that the most relevant expertise is available to deal with each level

[4] It is worth noting that there is a potential unintended consequence of the threat of appeal. Regulators may attempt to make their decisions appeal-proof by simplifying them, which runs the risk that the decisions may be less accurate. While this may happen, simpler decisions themselves have some advantages in terms of providing better precedent since they can be more easily drawn upon in other contexts.

of appeal. Sectors will have the same access to entities that can assess on-the-merit appeals. Additionally, harmonisation will support a consistent and fair approach across sectors, with no one sector having a weaker or stronger appeals regime. A further benefit will come from the greater clarity and understanding of the process that will be gained by parties not typically involved in the intricacies of the appeal process.

One recent example of a movement towards harmonisation has been in the airports sector. Previously the airport price control reviews of the Civil Aviation Authority (CAA) were automatically referred to the CC—a process that was out of line with other regulated sectors (as described in para 4.84 of the consultation document).

Critics had suggested that this process was unhelpful since it duplicated a substantial administrative burden and added time and cost to the process.[5] In a way, the CC was effectively replacing the CAA as the economic regulator of airports. Moreover, they argued that the CAA, as an industry specialist, ought to be better placed to conduct the regulatory review than the more generalist CC. There is therefore a trade-off between ensuring that the CAA is accountable to passengers and avoiding unnecessary costs from unnecessary automatic appeals.

The Chairman of the Better Regulation Commission had previously given evidence to the Select Committee on Transport. In this, he described the automatic referral as an 'odd situation' and that one of its disadvantages was that it effectively removed a route of appeal from the regulated community.[6] The Civil Aviation Act 2012 has now removed the automatic referral, helping to bring consistency with other sectors and allowing any appeals to focus on specific issues, rather than involving a review of the entire price control.

The discussion so far has focused on the role of appeals in correcting errors. However, while important, this is not the only aspect of the appeals process. Competition authority decisions typically involve a degree of judgement, without always a clear-cut answer being available. As the CAT has put it: 'competition law is not an area of law in which there is much scope for absolute concepts or sharp edges.'[7] The same holds for many regulatory determinations. So appeals are not always about correcting errors or mistakes.

Indeed, this lies at the heart of the debate behind appeals on the merits: a critical viewpoint on appeals on the merits is that the process just replaces the judgement of one authority with that of another. Against this, however, it can be said that the first authority plays the role of prosecutor and adjudicator simultaneously, and that a second, fully independent, body is therefore required. This argument comes close to a call for a proper prosecutorial system such as that in a number of other jurisdictions, a proposal that the BIS rejected in a 2011 BIS consultation.[8]

[5] See, for example, House of Commons (2006), 'Select Committee on Transport—Thirteenth Report', October.

[6] House of Commons (2006), 'Select Committee on Transport—Minutes of Evidence, 25 January 2006', Q482.

[7] Cases 1035/1/1/04 and 1041/2/1/04, *Racecourse Association and British Horseracing Board v OFT* [2005] CAT, para 167.

[8] See Oxera (2011), 'Merging the merger authorities', *Agenda*, July. While BIS has rejected the move to a prosecutorial system, in the current consultation it recognises that authorities have multiple roles: 'Economic regulators and competition authorities have considerable power because they combine the roles of investigator, prosecutor and adjudicator. To balance this, it is essential that an effective appeals mechanism is available for firms and consumers that are materially affected by a regulatory decision.' BIS (2013), op. cit., page 8.

3 Appeal on the merits or judicial review

The consultation proposes to move away from appeal on the merits towards a judicial review standard. These two alternative approaches have significant differences in terms of not only process, but also the question that is posed to the court:

– the **timeline** for a judicial review is generally significantly shorter than an appeal to the CC, although there have been regulatory appeals with a constraint on the appellant body to complete a review within a particular timeframe, generally where the appellant is a sectoral regulator;

– the **question** examined during a judicial review is different—it focuses on whether the regulator acted appropriately within its powers, and does not seek to repeat the regulator's role in applying judgement in assessing the evidence;

– the **remedies** will be different—under a successful judicial review, the regulator will be required to repeat its process, whereas, following a successful appeal to the CC/CAT, the regulator will generally be provided with specific proposals for an alternative response (which it will usually be expected to accept or face further challenge).

These differences are fundamental and illustrate that the aims and outcomes of the two processes will be different. The merits appeal can be seen as a review of whether the conclusions made by the regulator are appropriate, and therefore a review of its economic judgement. The judicial review is intended to provide a constraint on the regulator's process, to ensure that it complies with all relevant legislation and best practice. At present, both options are open to the regulated companies.

The risk of moving to a judicial review-only process would therefore be that an important check and balance in the system is being weakened, which could lead to poorer decision-making (given the incentive issues highlighted in the previous section).

By contrast, the potential advantages of a move to a judicial review-only system are largely that it could help to avoid costly and time-consuming appeals on the merits being made that are not warranted from a public policy perspective by the changes (if any) that the appellate body makes to the decision.

The evidence from the BIS consultation as to the nature of existing appeals indicates that this issue is currently largely limited to those sectors (specifically under the Communications Act 2003) where narrow appeals are possible. By contrast, if there is a concern in other sectors, such as energy, it is arguably more that there has been very limited use of the current system.

Furthermore, there is little analysis in the BIS consultation document on appeals under competition law. Several competition cases in the last decade saw a substantive review of the merits in the CAT, and by and large this has created some substantive case law, the importance of which is likely to exceed the costs of preparing and reviewing the meritorious evidence.

BIS itself acknowledges the potential systemic cost of removing appeals on the merits, although it has not quantified this cost.

> The main ongoing cost of this option is to firms who would want a more detailed appeal in order to challenge regulatory decisions which they disagree with. We are clear that

> the new appeals standard should still allow for decisions to be appealed and for the factual and legal basis of the regulators' decisions to be scrutinised effectively. However, there may be a risk that reducing the level of scrutiny that regulatory decisions are subject to may increase the likelihood of an incorrect regulatory decision not being overturned by an appeal body. We have not attempted to monetise this cost, but intend to use the consultation to test views on the extent to which there is a material risk, and to consider the potential costs for different types of regulatory and competition decisions.[9]

Is there an alternative solution available?

An interesting question is whether an intermediate option, in between a full on-the-merit review and judicial review, may provide the suitable balance between these concerns. Such an option could be an on-the merit appeal on the basis of broadly self-contained aspects of a regulatory decision. This could be broader than the current Communications Act 2003 appeals (which can focus on very narrow issues), but would be narrower than referring a whole price control to the CC (which essentially involves repeating the whole price control process).

For example, a regulator may take an approach to incentives, or to the longer-term framework for rewarding investments, as part of a particular price control decision, and this may have longer-term consequences for investors. Arguably, this aspect of a decision should be appealable on the merits, given its importance to investors and the long-term future of the business, without undermining other aspects of the decision on operating costs and capital investment for a single period, for example.

In practical terms, this intermediate option could be achieved by making it clear that narrowly focused Communications Act-style appeals should generally be extended to include associated issues. This would allow a whole issue, such as the cost of capital, to be considered in the round, rather than focusing only on, say, one coefficient within the cost of capital calculation.[10] This would help to ensure that any decision is taken on issues in the round, and will give greater clarity to appellant bodies that they would be expected to resolve issues within their wider context.

While this may increase the number of appeals in some sectors, it is reasonable to expect that it could result in a reduction in the number of Communications Act appeals, and therefore that the impact on the costs outlined in the BIS consultation would be limited.

4 The costs of the current system

The consultation highlights the costs of the current system, noting in particular that:

> Appeals can also impose significant costs on firms, regulators and appeal bodies. The impact assessment accompanying this consultation estimates that the current appeal

[9] BIS (2013), op. cit., page 17.

[10] For example, BT's appeal to the CAT (referred to the CC) of the Ofcom 2011 wholesale broadband access (WBA) decision focused on how gearing was applied within the cost of capital calculation. See Competition Commission (2012), *British Telecommunications Plc (and others) v Office of Communications*, Determination, Case 1180/3/3/11, February 9th.

system costs £21.8m per annum (£16.9m incurred by businesses, £3.4m by regulators and £1.5m by the courts and tribunal services).[11]

While £21.8m may seem a large absolute cost, it needs to be considered in the context of the value of the issues at stake in these appeals, and the extent of the regulated services provided by the firms that are (or could) make these appeals.

It is difficult to estimate the size of the issues at stake across the range of appeals considered by the consultation. However, it could be argued that the £16.9m incurred by businesses will be justified in terms of the issues at stake, since these are commercially oriented entities. Furthermore, in at least some of the appeals, material errors have been made by regulators. Expending resource on correcting these is not really the key issue, since even relatively minor errors can cost consumers or businesses many millions of pounds.

More generally, in terms of the size of the regulated services, the £21.8m cost per year is equal to less than 0.1% of the investment budget of the regulated sectors.[12] In this context, £21.8m seems a relatively small price to pay for the benefits associated with ensuring robust regulatory decisions.

The £3.4m incurred by the regulators and £1.5m incurred by courts and tribunals should be seen in the context of the budgets of these organisations.

– Regulators—the total budget of Ofcom, ORR, Ofwat, and Ofgem and the CAA is around £350m.[13] The £3.4m equals less than 1% of the total. Arguably, the total budgets of these regulators include functions other than those directly related to economic regulation. However, even if only one-third of the total budgets of the regulators relates to economic regulation, the £3.4m equates to around 3% of the relevant budget. (The ORR's accounts indicate that it had an approximate 60/40% split between its safety and economic regulation functions in 2011/12 and 2012/13.)[14]

– Courts and tribunals—the budget of the CAT is around £4m per annum.[15] It is more difficult to identify an appropriate benchmark budget for the wider courts and tribunals service since these encompass a wide range of litigation cases that are different from regulatory and competition appeals. Nevertheless, any cost savings from a move away from appeals on the merits—BIS estimates these at around £5m, of which £350,000 are savings to the CAT budget[16]—would seem small both in absolute terms and when compared with the issues at stake in these appeals, and the importance of ensuring the robustness of regulatory and competition decisions.

[11] BIS (2013), op. cit., para 3.12.

[12] Calculated using an approximate investment budget per year of around £20 billion. The £20 billion is estimated using the £200 billion value provided in BIS (2011), 'Principles for Economic Regulation', April, page 1; this £200 billion includes some unregulated sectors, and covers five years, so Oxera has conservatively assumed that 50% relates to the regulated sectors. (The BIS document notes that the 'majority' relates to the regulated sectors.)

[13] The budgets are £348m for 2011/12 and £360m for 2012/13. See http://www.ofcom.org.uk/about/annual-reports-and-plans/tariff-tables/tariff-tables-2012-13/; http://www.ofwat.gov.uk/aboutofwat/reports/annualreports/rpt_ar2012-13.pdf; https://www.ofgem.gov.uk/ofgem-publications/74220/ofgem-arr-201213final.pdf; http://www.caa.co.uk/docs/2474/CAA_AR2012.pdf; http://www.official-documents.gov.uk/document/hc1314/hc00/0004/0004.pdf

[14] http://www.official-documents.gov.uk/document/hc1314/hc00/0004/0004.pdf.

[15] Competition Appeal Tribunal and Competition Service Accounts 2011-12, page 87.

[16] BIS (2013), op. cit., page 5.

Pennon Group plc on behalf of South West Water Limited

PENNON
GROUP PLC

Peninsula House, Rydon Lane, Exeter, Devon, England EX2 7HR Telephone 01392 446677

Regulatory and Competition Appeals Consultation
Consumer and Competition Policy Directorate
Department of Business, Innovations + Skills
1 Victoria Street
LONDON
SW1 0ET

Direct Line: (01392) 443405
DX No: 119850 EXETER 10
Direct Fax: (01392) 420083
Your Ref:
Our Ref: LEG/JCJ/1109

Kenneth D Woodier
Company Solicitor

11 September 2013

By email : regulatory.appeals@bis.gsi.gov.uk

Dear Sir/Madam

CONSULTATION ON STREAMLINING REGULATORY AND COMPETITION APPEALS: OPTIONS FOR REFORM

1. The views and opinions set out in this letter are set out on behalf of South West Water Limited, the water and sewerage undertaker for Devon and Cornwall. The Company is grateful for the opportunity to comment on the proposals. It is accepted that this Consultation aims to make improvements to the existing appeals systems, as described in Chapter 1 of the document.

2. The Company believes that, as regards the water sector, the existing appeals system generally works well. If the Company believe that a price control set by Ofwat is wrong the Company is able to appeal knowing that not only does the Competition Commission have the knowledge and expertise to review the entire decision but that it can do so in the light of any extra evidence the Company decides to obtain having seen Ofwats original decision. The decision would also normally be dealt with reasonably quickly bearing in mind the major task the Competition Commission would be undertaking. These points will be expanded upon later in this response.

3. The Company is not against change to the existing system if that change is necessary and sensible in the light of past experience. This letter will look at how the existing system operates and concludes that with fairly minor amendments the existing system works well.

4. The existing regulatory appeals system has assisted in reaching a situation where it is generally accepted that a great deal has been achieved by the water sector in terms of improvements to both drinking water and the environment.

5. It is clear that much of the Consultation document is directed at other regulated industries, although it seems that some aspects of the proposals could impact on the water sector if unchallenged. It is assumed that the fact that the Consultation does not focus on appeals involving water companies may be because Defra is carrying out a separate review into the licence modification process and how it works in the water sector.

6. The early parts of the Consultation make it clear that 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 not acted reasonably. It also acknowledges that in many

Registered Office: Peninsula House, Rydon Lane, Exeter, Devon, England EX2 7HR. Registered in England No. 2366640
www.pennon-group.co.uk

ways the various appeal regimes work well. It then hints at, or expressly suggests, a number of changes which might be said to damage or reduce those broad rights to appeal. Many of these do not appear to relate to the water sector.

7. The Consultation looks at the various types of review on appeal. It draws a distinction between first Judicial Review type appeals, second, those where there is an appeal on limited grounds and, third, those where an appeal body can consider all aspects of the case afresh. This latter process is the way an appeal against a Price Review works in the water sector and works well.

8. We note that the authors of the Consultation do not seem to want companies being able to appeal parts of decisions regarding this as likely to lead to more appeals. The Consultation describes this as "cherry-picking". However, the Consultation does admit that such appeals might be more focused in themselves. SWW agrees that they would be more focussed. We therefore invite the Department to consider the possibility of allowing this type of approach on an appeal in respect of price controls.

9. The existing appeals regime for the water sector has been in place since privatisation of the water industry in 1989. The Consultation acknowledges there have, in fact, been very few appeals by water companies. This is undoubtedly correct. There have been very few appeals on price controls which we believe confirms our opinion that there is little reason to change the system. Not only is there a risk that prices can be reduced as well as increased on an appeal to the Competition Commission, but huge amounts of valuable management time and costs are inevitably incurred in running such appeals. There is therefore no incentive to appeal unless the Company concerned genuinely believes it has been treated unfairly. South West Water's own prices were, in fact, reduced following an appeal to the Competition Commission by the Company in respect of prices set by Ofwat back in 2005. There is definitely no incentive to appeal a Price Review in the water sector unless a company feels, on good grounds, genuinely aggrieved by Ofwat's Price Determination.

10. A further, rare, example of an appeal was when Bristol Water appealed their price determination at the last periodic review and the Competition Commission decided that overall prices should stay as originally determined by Ofwat. The knowledge that such decisions exist undoubtedly deter appeals unless there is a genuine sense that the Company has been badly treated.

11. The few water sector appeals that there have been suggests that the water sector has been very reluctant to appeal price controls, undoubtedly because although the case is reconsidered on its merits by the Competition Commission, prices can be reduced as well as increased. This is because the Competition Commission will balance a number of factors in the same way that the Regulator is required to do so when reaching its decision.

12. The relatively few cases that exist in respect of water companies do not suggest the system is encouraging appeals or causing any real problems.

13. There is a suggestion in the Consultation that the so-called "Judicial Review" standard should apply to certain types of appeals. We firmly believe that Judicial Review is less appropriate for the circumstance as a mechanism to review Ofwat's decisions, for example, on pricing. A Judicial Review will only overturn the decision of a Public Authority where the decision is regarded by the court as "Wednesbury" unreasonable. This means that on a Judicial Review, the decision reviewed will only be overturned in very limited situations. These situations are where the decision has not been made in accordance with the applicable law, where the Regulator acted in a way in which no reasonable Regulator would have acted, or where there is a procedural error.

14. The Consultation suggests that cases heard on Judicial Review grounds appear to be resolved more quickly than a full merits appeal. That may well be true, but in our view that is not really relevant. Judicial Review standards of enquiry can never be a substitute for a full appeal afresh on the merits.

15. The Consultation calls for greater consistency in approach, however, there are many diverging aspects to the differing regulated sectors, and the gains from uniformity may not outweigh any unintended consequences that may arise.

16. The Consultation proposes to reduce the time taken to resolve cases. The water, rail and aviation sectors have a six month time limit to complete a regulatory reference review. This can be extended by the Competition Commission by a further six months in special circumstances. The Consultation's evidence suggests that the Competition Commission can, and do usually, complete these reviews in the allotted time. If there are complex cases, or where additional issues are raised, then a short extension should be sufficient to provide adequate time for consideration.

17. The Government, therefore, proposes to reduce the extension available for regulatory references in the water, rail and aviation sectors from six months to two months. This would mean that these reviews would be completed within a maximum of eight months. This would assist water companies to know outcomes more quickly, but since most appeals have been completed in the six month period, or at most with a short extension of two months, this might be unnecessarily restrictive.

18. The Consultation indicates that the Government is considering making express legislative provision that in a case in which the regulatory body is successful, the Regulator should be awarded its' costs unless there are exceptional circumstances. It also suggests that where the Regulator is unsuccessful, costs should not be awarded against it unless the Regulator's conduct can be characterised as having been unfair, unreasonable or there are exceptional circumstances. It is certainly not unreasonable that a regulatory body that is successful recovers its costs but it seems unreasonable that where they are unsuccessful costs should not be awarded against them.

19. The Consultation looks at the question of which venue should hear appeals. The options are the Competition Commission or the Competition Appeals Tribunal. We believe the Competition Commission should continue to determine Price Control Appeals in the water sector. It has the experience to determine that type of appeal and matters should be looked at afresh as described above. The Competition Commission is inquisitorial in approach, which is what is needed in this scenario. The venue should not be the Competition Appeal Tribunal which, as a proper court, is adversarial in nature, and does not suit the circumstances of the Appeal.

20. Licence modifications should also be determined by the Competition Commission, not the Competition Appeal Tribunal for the same reasons stated in the previous paragraph.

21. The Consultation also suggests there should be limits on the evidence that can be called on appeal if it was not submitted prior to the original decision. It may only be after the initial decision that the organisation in question gets the necessary legal advice, which points to the necessity of obtaining and submitting the vital piece of evidence. On the other hand it may only be after seeing the written decision that it becomes clear what evidence should be submitted to the appeal.

22. To conclude, we feel that changing the existing appeals system for the water sector could risk damaging a process that has served the industry and its customers well for more than twenty years. Any new system would also bring with it a number of uncertainties that could take many years to clarify.

23. We are aware that Water UK on behalf of the Water industry has written a response to this Consultation. We, therefore, wish to make it clear that we support the comments that Water UK have made in that response.

Yours faithfully

J C JELLEY
Legal Manager (Utility)

Pinsent Masons LLP

Pinsent Masons

BY POST

For the attention of Tony Monblat
Regulatory and Competition Appeals
Consultation
Consumer and Competition Policy Directorate
Department of Business Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Our Ref 46645781.3\JB45\ABD001.000001

11 September 2013

Dear Sirs

STREAMLINING REGULATORY AND COMPETITION APPEALS – CONSULTATION ON OPTIONS FOR REFORM

This response is made on behalf of the EU & Competition Group of Pinsent Masons LLP. The comments made in this paper are those of Pinsent Masons LLP and do not necessarily represent the views of any of our individual clients or of individual partners of Pinsent Masons LLP. We are content for this response to be published on the Department of Business, Innovation and Skills' website. This response does not contain any confidential information.

1. EXECUTIVE SUMMARY

1.1 We welcome the opportunity to comment on the matters discussed in this consultation which raise a number of fundamental issues of principle and practice. We do not comment on every question but highlight key issues.

1.2 While superficially there are a number of aspects of the proposals that seem constructive, there are many aspects that give rise to considerable concern. In particular, we question whether it is appropriate for the Government to consider reviewing the appeals framework in mergers, markets and competition cases, in a process distinct from that of changing the underlying legislative framework for competition law enforcement. We also consider that it would be premature to make such changes before the new framework put in place by the Enterprise and Regulatory Reform Act 2013 ("ERRA13") has had any opportunity to bed down. It is particularly surprising to see the Government consider revising the standard of review in competition cases after reaching a firm view, less than two years ago, that this was not appropriate and would not be done at the time the new CMA was established and new procedures put in place.

1.3 In our view, the primary focus for the next few years should be to ensure that the new procedural regime applicable in competition cases is bedded down and that decisions

taken to accelerated timetables (and with parties under threat of administrative penalties on procedural matters), are robust with thorough investigations being properly undertaken respecting the rights of the parties concerned. It does not seem appropriate, at the same time as seeking to ensure that the CMA gets these underlying processes right, to seek to limit parties' ability to review decisions of the new CMA in the manner proposed.

1.4 No system is perfect and no doubt there are improvements that could be made. Nevertheless, some of the examples that have been put forward to demonstrate weaknesses in the current system to varying degrees are not necessarily representative or indicative of how appeals might be brought in future. Arguably, in many instances, they simply reflect a testing of the boundaries of what is in reality itself a relatively new system established under the Competition Act 1998 ("CA98") and the Enterprise Act 2002 ("EA02"). It is highly likely that any substantial changes to the competition law appeals regime in particular would lead to a similar period of bedding down with questions on scope and interpretation being tested further in the courts, and with no material impact on reducing the extent or duration of litigation and its associated cost. We see similar issues arising in the context of regulatory appeals.

1.5 With the appropriate resources, we consider that the Competition Appeal Tribunal ("CAT") can be trusted to achieve effective and efficient management of cases without the need for any change to the legal basis on which regulatory, EA02 or CA98 appeals can be made to it, whether this be through statutory changes to appeals mechanisms or intervention in the CAT's current Rules.

2. OBJECTIVES

2.1 We agree with the broad objectives for appeals mechanisms set out in the consultation. However, we do not accept that the current appeal system is 'broken' as the consultation appears to suggest, particularly in competition related matters. While we have not undertaken a detailed assessment of the various statistics upon which BIS relies, we are deeply concerned with the critique of these statistics put forward by the CAT itself. Further, while there does seem to be scope for rationalising and streamlining the approach that is taken in regulatory cases and making this more consistent across the various sectors subject to economic regulation, we are concerned that this is being considered so soon after introducing new and different rules in the energy sector which are untested (as indeed is the case in relation to the appeal mechanisms under the Postal Services Act 2011 and the Civil Aviation Act 2012).

2.2 In order to remain a good and necessary discipline on the exercise of regulators' powers, and on their decisions in enforcement matters, the ability to review a decision must have credibility and bite. The system should, as far as possible, focus on material issues and be accessible to all those who have a sufficient interest in the outcome. It should also seek to minimise the ability of parties to "game" the regulatory system (both regulator and regulated), but this must be achieved without impacting adversely on parties' ability to challenge in appropriate cases. However, we do not believe the consultation makes out a case for change and it pays insufficient regard to the interests of private parties to protect their legitimate interests by challenging the robustness of regulatory decisions that can have very substantial investment and operational implications. The present system already gives ample scope for issues of materiality, for example, to be managed by appeal or review bodies in a balanced way and there are considerable risks of change simply leading to further cost and delay.

3. STANDARD OF REVIEW

3.1 In our view, there is no basis to have a common standard of appeal or review across the board in relation to all categories of decision and many reasons why different

standards are appropriate, including by reference to the nature of the decision, the penalties or sanctions that are at issue, the business impact concerned (which is relevant in the context of mergers, market inquiries and licence modification appeals as well as CA98 cases).

3.2 We are particularly concerned that the Government has put forward proposals in the regulatory and competition sphere while apparently independently and not quite in parallel, clearly contemplating changes to the judicial review system to narrow the scope for bringing such proceedings. While policy issues in relation to judicial review have a wider scope, the matters raised in the present consultation cannot be considered without understanding the Government's likely approach in relation to judicial review.

3.3 If we are to assume that the starting point is a wish to achieve more flexibility in the communications framework, in order to accommodate the requirements of the underlying Framework Directive, it has to be sufficiently clear that the grounds of appeal permit the merits to be assessed and therefore involve a degree of scrutiny that goes beyond that in a standard judicial review. We do not agree with the argument that in principle, the judicial review standard is sufficiently 'flexible' to accommodate this. Among other reasons, this does not provide the right degree of legal certainty that parties should legitimately be able to expect in relation to decisions that have profound impacts on their businesses. We consider there are strong legal and policy reasons for a standard of review that is wider than judicial review in a number of other types of regulatory appeal as well, again given that decisions frequently go to matters that are fundamental to the structure and operation of regulated markets.

3.4 In regulatory appeals to the CC, it might be argued that the role of the Competition Commission is similar to that in mergers and markets cases, i.e. to the Phase II review body, whose role is to act as the first independent review of the underlying regulatory decision, and it is therefore vital that it is able to test such decisions thoroughly. There is no doubt that there is as much a risk of confirmation bias in the regulatory process as there is in the prosecution of CA98 and mergers and markets cases and we believe there is a real need for the first review body to be able to exercise a considerable degree of oversight. By and large, we think it is already the case that the Competition Commission in such cases approaches appeals and reviews in a way that focuses upon the key issues of contention and that in fact no narrowing of the grounds of review is necessary.

3.5 In terms of the principles set out for non-judicial review appeals in Box 4.1, we would make the following observations:

- We note that the proposed changes in Box 4.2 do not fully reflect the principles set out in Box 4.1, in particular, in relation to the threshold at which the relevant body or tribunal would intervene, or to take account of material changes in circumstances.

- As noted above, we question the need to introduce an express materiality criterion on a statutory basis. Both review bodies such as the Competition Commission and the courts would not allow an appeal where an error was sufficiently trivial that it would or could have had no bearing on the outcome. Either the proposed change is intended to introduce a higher bar as appears to be the case from the consultation, which we do not consider appropriate, or it is unnecessary.

- Any new statutory grounds would have to ensure at minimum that there was due regard for the merits of the case but the boundaries between what can be challenged as giving rise to a material error of fact, for example, and what

amounts to a judgement in the exercise of regulatory discretion is far from clear. Were the categories of 'unreasonable exercise of discretion' or 'unreasonable judgements or predictions' to be cast too widely, they may well render meaningless any scrutiny of the merits of a case.

- In principle, we consider that a court should be entitled to take into account whether there has been a material change in circumstances since a decision was taken. However, where a regulator's decision can only be challenged on a judicial review basis, we consider that a regulator should be expected to be able to justify its decision by reference to the data and considerations prevailing at the time of its decision. We also query whether the ability to challenge on the basis of a material change in circumstances would be a realistic safeguard in practice in the time usually permitted for parties to bring an appeal.

3.6 We also believe there is little doubt that changing regulatory appeal mechanisms in the manner envisaged and indeed materially changing the standard of review in competition cases would have a substantial adverse effect on the costs and time taken to resolve both kinds of cases as the boundaries of the new regime were tested.

4. COMPETITION ACT DECISIONS

4.1 We do not agree that the standard of review for Competition Act decisions should be changed in any way, let alone that it should be changed to a judicial review standard which we consider would fall far short of the standard expected at EU level and by reference to ECHR jurisprudence. It is also in our view incorrect to imply that this is effectively endorsed by current European Court jurisprudence, and indeed we consider the debate on this issue at the European level is far from settled.

4.2 From a purely UK perspective, the policy was debated at length in the context of consultations on the new competition framework and the Government made a clear commitment in its decision less than two years ago not to change the standard of review. The CMA has not even begun to operate and its revised procedures have not really been tested, and we see no justification for moving away from the current standard. If, as anticipated, the improvements to the decision making process that are being put in place for the new CMA are effective, then it should follow, as a matter of course, that there is less scope for parties to question both process and outcome. Further, we consider the CAT is already sufficiently well equipped to exercise its case management functions to minimise the risk of unmeritorious claims being made.

4.3 It is not appropriate in our view to introduce an additional anomaly with respect to follow on actions which, according to the consultation, would be subject to a more circumscribed right of review, by contrast to a stand-alone action.

5. REGULATORY APPEALS

5.1 In many respects, decisions in relation to licence modifications and price control matters carry as much significance for the companies concerned as decisions in competition law proceedings. They go to the heart of the way in which a market operates and impact on investment and pricing decisions of the companies concerned over an extended period. Nevertheless, we would accept that these processes are somewhat different in character from those in competition law infringement proceedings in that they do not carry sanctions or have a 'quasi-criminal' dimension.

5.2 In relation to other types of regulatory appeal, it is difficult to be categorical about a single solution. The appeal mechanism cannot be considered in isolation from the underlying regulatory mechanism to which it relates. There are a number of different types of processes that have just as significant a potential impact on the parties

concerned and yet which have been constructed as dispute determinations rather than pro-active regulatory intervention as such. It is not clear that this different mechanism, which can equally draw into play matters of regulatory judgment or principle, should be treated differently.

5.3 Our principal observation in this context is that we agree as a matter of principle that where there is commonality in terms of the issues or principles at stake, common principles should be applied as far as possible. We also agree that there should be no change to current processes that are already underway.

6. APPEAL BODIES AND ROUTES OF APPEAL

6.1 In relation to issues arising under the CA98 (judicial reviews under the Act), we believe there is logic in bringing these matters before the CAT.

6.2 On the regulatory side, we believe strongly that the panel system within the Competition Commission and soon to be the CMA is valuable in price control and licence modification appeals. There is no doubt that it will be more rational to bring communications price control appeals directly to the Competition Commission/CMA, rather than them being routed through the CAT. To the extent that there may be some complexity in terms of the interaction between the price control and other aspects of such appeals, we see no reason why this cannot be managed effectively. It is less clear to us that energy code modification appeals should be moved from the CMA to the CAT.

6.3 In relation to ex ante regulatory decisions where it is suggested that appeals should go to the High Court, in our view in many cases the underlying issues arguably again lend themselves to adjudication by a body that can draw upon the expertise of a wider panel. Also, in many cases the matter at issue is similar to issues decided by the CAT in CA98 cases (market power determinations). We recognise that this is not universally the case, however.

6.4 As for enforcement appeals, again there may be some common sense in rationalising this, but it has to be recognised that such decisions can cover a very wide range of circumstances. They very often relate to issues in which the CAT has particular expertise, for example, in relation to enforcement action with respect to price control conditions or licence conditions that relate to fair and effective competition. On balance, therefore it would seem to make sense for such cases to be heard by the CAT. In this respect, we note that at the same time as BIS is consulting on the issue of regulatory appeals, a consultation has been initiated on enforcement guidance from the Groceries Code Adjudicator, which would see appeals on its decisions being made to the High Court rather than to the CAT. Particularly given the background, if there is to be any action to try and achieve consistency on appeals, we consider that it should extend to appeals from the Adjudicator's decisions.

6.5 While there may be circumstances in which it is appropriate for the CAT to sit with a single judge and not panel members, this should be strictly limited and not apply to substantive hearings. The panel member system was put in place to ensure that relevant expertise was available to the appeal body and it is important that these benefits are not lost.

7. REVIEW OF CAT PROCEDURAL RULES

7.1 It is not clear that Government intervention is required to make improvements in the appeals process before the CAT. A significant number of the issues identified by the Government in the consultation are within the remit of the CAT itself under its current Rules and could be addressed directly where the Tribunal felt this was warranted in any given case. This goes in particular to suggestions for statutory mechanisms

relating to the ability of parties to adduce new evidence before the court, and we query whether it is necessary to intervene further through secondary legislation to encourage administrative bodies or the CAT to manage cases to exclude grounds of challenge that lack merit. The CAT already has the tools to limit the amount of evidence and expert witnesses in cases that come before it.

7.2 We very much agree with the comments of the CAT in relation to awards of costs. While regulators should possibly be more pro-active in seeking costs awards in appropriate cases, it is another matter to introduce a system that is specifically in favour of the regulator in this respect and it may be a significant deterrent to appeals, particularly on the part of smaller businesses, which seems contrary to one of the aims of the consultation. Discouraging appeals through changes to the award of costs would also appear unlikely to improve the quality of decision-making by regulators

7.3 We are supportive of the principle of the CAT and other bodies dealing with the cases before them efficiently but do not consider there is sufficient evidence to suggest that further intervention is necessary. Nor should meeting targets of this kind come at the expense of getting to the right answer.

8. GETTING DECISIONS AND INCENTIVES RIGHT

8.1 This is the heart of the issue: the underlying decision-making must be sound with a suitable appeal process ready and fully equipped to step in if it is not. In a number of respects the changes proposed to the appeals mechanisms appear to proceed on the assumption that there is little to correct in the underlying regulatory or enforcement system, or that recent statutory changes are sufficient in themselves to reduce risks in this respect. It is not at all clear this is correct.

8.2 In relation to the application of competition law, the changes that the Government has set in train through the establishment of the CMA and the OFT's review of its procedures, as well as having regard to the new powers that the CMA will be able to deploy, go a considerable way to addressing some of the issues which have been identified with OFT (and CC) procedures in the past. Nevertheless, we see scope for further improvement in the degree of transparency of a number of procedures currently before the OFT and the CC in competition cases, as well as merger and markets cases, and we would encourage the new CMA to address these issues through its new procedures. It is not clear that further statutory intervention is required in this respect, subject to the point below.

8.3 For example, we would strongly encourage a greater use of confidentiality rings in the course of Competition Act proceedings and in other competition cases. It cannot be right for evidence that is material and relevant to the case at first instance only to be made available to parties on appeal. The issue is particularly acute when key evidence, withheld on the grounds that it is confidential, is only disclosed on appeal where the standard of appeal is only by way of judicial review, such that arguments cannot then be made on the merits of the information disclosed and the weight that should properly be attached to it.

8.4 The mechanisms used for operating confidentiality rings under the CAT's jurisdiction appear sufficient broadly speaking, although we see no need for the CAT to have a role in supervising such a ring when operated by the CMA. If administered by the CMA (or by a regulator), appropriate safeguards would have to be in place and in particular a mechanism to sanction breach effectively, under threat of financial sanction.

8.5 We believe that CMA non-infringement decisions should be subject to the same right of review as infringement decisions. We do not consider the various features that the Government suggests might distinguish these cases are material in this context. It is not the case that access through the courts provides an appropriate substitute for the

vast majority of complainants. The argument that such decisions are not a "proper" decision because the CMA cannot formally make a non-infringement finding under EU competition law is not a sufficient basis to change the current position, particularly when EU law may not always be at issue. In circumstances where the decision is made on the grounds of administrative priority, we would accept that the judicial review standard is appropriate.

8.6 In terms of the management of regulatory decision making, we do believe there is a strong case for ensuring that these processes are brought into line with those adopted by the CMA, particularly when the regulator is handling a matter on which it has concurrent jurisdiction under competition law. Further, the underlying concern which the new ERRA13 regime seeks to address, including confirmation bias, seem equally applicable in a context where regulatory / policy decisions are made that will have a profound impact on firms' investment and other strategic decisions and impact on the structure and operation of regulated markets for an extended period. Therefore even though these decisions raise complex issues that are matters of policy and judgment, it might be argued that the risk of confirmation bias is more acute in a regulatory context. Any steps that can be taken to introduce a second pair of eyes at key points in the decision making process would be helpful in ensuring robust decision making. The same is true in relation to any other forms of enforcement action taken by a regulator and to which penalties attach. That is why we would favour a broader right of review of such regulatory decisions.

We trust that BIS finds these comments helpful and urge a very careful reconsideration of the proposals set out in this consultation.

Yours faithfully

Pinsent Masons

Pinsent Masons LLP

Power NI Energy – Power Procurement Business (PPB)

Power NI Energy Limited
Power Procurement Business
Unit 2,
Forestgrove Business Park,
Newtownbreda Road,
Belfast.
BT8 6AW
Tel 028 9069 0521
Fax 028 9069 0539

Our ref. T4972rfmh

Tony Monblat
Consumer and Competition Policy Directive
Department of Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

11 September 2013

Dear Mr Monblat,

Streamlining Regulatory and Competition Appeals:

Consultation on Options for Reform

Power NI Energy – Power Procurement Business ("PPB") welcomes the opportunity to respond to the Department of Business Innovation and Skills (BIS) consultation on options for streamlining regulatory and competition appeals. PPB is a regulated business in Northern Ireland that manages long term contracts (put in place at privatisation of the electricity supply industry in Northern Ireland) for the benefit of Northern Ireland consumers.

PPB is a member of the Electricity Association of Ireland (EAI) which is an all-island representative body and we fully endorse the EAI response to this consultation. Our major concern is the presumption of the Government in the consultation paper that *"…judicial review should provide appropriate and proportionate appeal rights…"* We have significant concerns that this is wholly inappropriate for regulatory licensed activities in Northern Ireland.

Bearing in mind the Third Energy Directive and the nature of energy matters more generally, we believe that reliance on a judicial review process in inappropriate and could place prohibitive and undue burdens on small regulated companies. This is particularly the case in Northern Ireland where licensees are typically much smaller than counterparts in GB, and there are also significantly fewer licence holders.

In addition, judicial reviews generally apply to process and offer limited scope to challenge poor decision making. We therefore consider there to be justification to provide for a wider standard of review than currently exists which the judicial process does not and cannot provide. This should be available, on reasonably qualified grounds, to challenge *all* regulatory decisions and not just those specific to price controls and licence modifications. This is also particularly relevant for Northern Ireland given the cross-jurisdictional nature of the Single Electricity Market (SEM).

We also highlight our concern that the small number of lightly resourced licence holders in Northern Ireland, means that in relation to consultations undertaken by the regulatory authority, the range and scope of responses received to such consultations will inevitably be narrower than would be the case in GB with its larger number of more deeply resourced licensees. This lesser input could result in less balanced decision making in Northern Ireland and as a consequence encourage or result in less rigour being applied by the regulator which would be an unsatisfactory outcome, particularly where the only recourse of judicial review may not actually provide a viable forum to challenge such decisions.

These range of differences highlight that Northern Ireland is different to GB and that there are features that mean the approach applied in GB is not appropriate for Northern Ireland.

I trust these views will be fully taken into account in your considerations.

Yours sincerely,

Roy Foreman

General Manager, Power Procurement Business

RBB Economics

RBB Economics

Streamlining regulatory and competition appeals: A response to the BIS consultation by RBB Economics

RBB Economics, 11 September 2013

Summary

- RBB Economics welcomes the opportunity to respond to the BIS consultation document '*Streamlining Regulatory and Competition Appeals'*. We do so from an economic perspective.

- We do not believe that the consultation has established the case for adopting more limited appeals processes for regulatory and competition matters. Simplistic comparisons of appeals experience across sectors, based on high level summary data, cannot provide a foundation for rigorous evaluation of the complex issues involved. Symmetry in appeals institutions and in the number of appeals should not be regarded as an end in itself.

- The decisions of the economic regulators have potentially far-reaching consequences, both for the business affected, the customers they serve, and the performance of the wider economy. It is therefore entirely appropriate that those interventions are subject to a high degree of scrutiny. The benefits and costs of good regulatory decision-making, including the costs of an effective appeals process, should be evaluated in that context.

- We firmly believe that the prospect of rigorous scrutiny has a positive impact on regulatory decision-making. (Even unsuccessful appeals can contribute positively in this respect.) To achieve this, it is essential that any appeals process is capable of providing substantive review of relevant economic analyses and assessments. We do not believe that a judicial review standard for appeals would allow this.

- An evaluation of the performance of the appeals regime should also consider the regulatory decision-making that feeds into those processes. We believe that further improvements in the transparency of regulator decisions would have a positive impact on the efficiency of the appeals process too.

1. Introduction

RBB Economics welcomes the opportunity to respond to the BIS consultation document '*Streamlining Regulatory and Competition Appeals'*. In doing so, the perspective we offer is necessarily an economic rather than a legal one. However, we would observe that the appeals processes that are the subject of this review are concerned with decisions made by economic regulators that draw on assessments which utilise economic principles, methods, and evaluation criteria. It is essential that these appeal processes are capable of providing appropriate, substantive scrutiny of economic decision-making by regulators.

In responding to this consultation, we have drawn on our experience of decision-making by specialist competition authorities and sectoral regulators, as well as appeals of both types of decision to the Competition Appeal Tribunal.

2. The appropriate standard of scrutiny

Economic regulators have considerable powers to intervene in the affairs of the businesses they oversee. Those interventions have potentially far-reaching consequences, both for the business concerned, the customers they serve, and the performance of the wider economy. It is entirely appropriate in that context that regulatory decisions are subject to meaningful scrutiny including scrutiny of the authority's substantive analysis.

We welcome the emphasis placed in the consultation on the importance of evidence-based regulatory decisions. Economic evidence, specifically, is central to these decisions. It is, therefore, essential that:

- the base of facts and assumptions upon which economic analysis is grounded is soundly established;

- the methodologies adopted for economic analysis are fit for purpose;

- the inferences that are drawn from those analyses are transparent and robust; and

- any subsequent interventions by the regulating authority are justified given the conclusions of the economic analysis and a rigorous assessment of the likely impact of those interventions.

Irrespective of the formal designation of the standard of review, what is essential is that each of these steps in the economic assessment can be properly scrutinised. It is vital that legal interpretation and precedent does not prevent rigorous consideration of the reasonableness of the economic decision-making process in this context.

We are concerned that the judicial review standard, which it appears is being put forward as the default standard for these appeals, will not allow the required degree of scrutiny. Our experience suggests that the 'irrationality' test applied within the 'traditional' judicial review framework imposes too high a threshold for challenging the reasonableness of a regulator's economic decisions and, as a result, effectively removes material scrutiny of the regulator's substantive analysis in practice. Specifically, we believe it likely that regulatory decisions based on an economically unreasonable interpretation of economic evidence would fail to meet the threshold for successful judicial review. Contrary to the suggestion in the consultation document, we are not persuaded that the judicial review framework would provide sufficient flexibility, given the thresholds for intervention have been established in the case law, though this is obviously a matter for legal opinion.

Our experience suggests that application of a 'merits' standard:

- does not require a full re-consideration of the case as decided by the regulator; and
- allows necessary scrutiny of the economic analyses that underpin most regulatory decisions;
- provides a level of necessary scrutiny of economic assessment that does not seem possible within the judicial review framework that has been applied, for example, to appeals of CC merger decisions.

3. The basis for change

There are three potential justifications for reforming the current appeals structures, namely that they:

- deliver bad outcomes;
- are excessively costly; or
- take too long.

3.1. Appeal decisions

As with any decision-making process involving complex issues and incomplete/imperfect information, appeals bodies are likely to make mistakes from time to time. These will include both decisions to reject legitimate appeals and decisions to accept unfounded appeals. However, the evidence presented as part of the consultation does not suggest that the existing appeals institutions deliver systematically bad decisions.

The purpose of the appeals processes under consideration is to scrutinise regulatory decisions and to correct those decisions where mistakes are made. We believe that rigorous scrutiny of regulatory decisions should be viewed positively, even in cases where appeals are ultimately unsuccessful.

3.2. Costs (and benefits)

In setting out the case for change, the consultation document suggests that there may be a case for reforming the appeals framework in order to make better use of resources and to ensure processes are as efficient and cost effective as possible.

The consultation appears to imply that, at least in some sectors, there are too many appeals. However, a careful cost-benefit analysis is required before such a conclusion can be drawn. Such an analysis cannot be robustly based on the proportion of unsuccessful appeals alone, nor by making simple comparisons of the number of appeals across sectors.

Appeals processes necessarily involve direct resource costs, for appellant(s), respondent(s), and the appeal body itself, as well as interveners. In this context, there should be no objection to a desire for efficiency, where this means that the same substantive outcomes can be achieved at lower resource cost. It is plausible (though by no means certain) that truncating appeals processes would result in fewer resources being expended. However, this does not imply that such truncated procedures would be efficient or desirable. In the extreme, if there were no entitlement to appeal, there would be no appeal costs. Nevertheless, the lack of an effective appeals process would not then be costless. In particular, the costs associated with bad regulatory decisions being sustained, as well as the threat of such bad decisions, are liable to be substantial. Any assessment of the costs and benefits of a more (or less) intensive review process must therefore take account of these broader consequences.

3.3. Timeframes

It is also suggested that the length of some appeals impedes effective regulatory decision-making and increases regulatory uncertainties. Clearly, it will be desirable to complete appeals as quickly as possible. However, unless additional resources are committed, a requirement to speed up appeals is likely to result, all else equal, in a less intensive standard of review. For the reasons given above, we see no reason to suppose that a shift to less intense scrutiny of regulatory decisions would deliver more desirable or efficient outcomes in the round.

4. Validity of cross-sector comparisons

The consultation document appears to regard variation in the number of appeals between sectors as problematic *per se*. In this respect, much is made of the wide variety of appeal arrangements deployed across the different regulatory regimes, including different standards of review.

It is entirely sensible to ensure that the implications of differences in appeal institutions are as fully understood as possible, and that best practice is extended across all appeal regimes. In this context, it is also sensible that differences in appeals procedures are grounded in substantive differences in the nature of the regulatory decisions being taken. However, institutional symmetry should not be promoted on purely aesthetic grounds, nor should such symmetry be regarded as an end in itself.

Whilst there are significant commonalities across regulatory regimes, there are also significant differences, which may justify substantially different approaches to appeals. Most obviously, there are fundamental differences between scenarios which contemplate:

- *ex post* interventions which may impose substantial penalties for past conduct;
- *ex ante* interventions which may impose radical changes in the way businesses are operated (e.g. market investigations; price controls); and
- *ex ante* interventions which may prevent significant consolidations in industry structure, but which have less impact on 'business as usual' (e.g. most merger reviews).

Most importantly, each of the regulatory institutions has its own personality and dynamic which is liable to influence the quality of decision-making and, therefore, the need for and outcomes of appeals.

Simplistic comparisons based on high level summary data cannot provide a basis for rigorous evaluation of these complex issues.

5. Who should hear appeals?

As explained above, it is essential that the bodies hearing appeals in an economic regulation/ competition law setting are capable of reviewing potentially complex economic evidence. However, those reviews will typically not require full re-consideration of the economic case as decided by the regulator. Moreover, we recognise that appeals involving appraisal of economic evidence are also likely to involve legal considerations. Effective review of those cases will then require legal and case management expertise. Our experience indicates that the CAT is capable of dealing with such matters.

6. Appropriate discretion

The consultation contemplates the imposition of additional constraints on:

- the extent of appeals;
- the admissibility of new evidence; and
- appeal timescales.

However, the merits of admitting new evidence or considering an issue in greater detail are liable to vary on a case-by-case basis. We believe it is therefore desirable to allow these issues to be decided on a case-by-case basis too by the appeal body.

Moreover, the time required to address the issues raised by an appeal is liable to depend on the extent and complexity of the decision being appealed and the evidence considered by the regulator. As such, it is difficult to see how a fair appeals process can operate within timescales which are unable to respond to the context imposed by the scope of the original regulatory decision. In this respect, an appeal of a regulatory decision to the CAT, say, is fundamentally different to the investigations typically undertaken by the Competition Commission.

7. Relationship with the decision-making processes of the regulators

Any evaluation of the performance of an appeals process must also take proper account of the decision-making that feeds into that process. For example, if it is felt that too many appeals are being brought, it will be appropriate to consider whether changes are required to the decision-making processes that give rise to those appeals, as well as the way that the appeals themselves are handled.

In our experience, for example, there remain important deficiencies in the transparency of many regulatory decisions. From an economic perspective, it is essential, for instance, that any quantitative analyses that are relied on by regulators can be scrutinised and replicated. Access to confidential information, including that provided by third parties, is likely to be vital for such an exercise to be effective. At the same time, it is essential that the confidentiality of such information is fully respected. We therefore strongly support measures to enable enhanced scrutiny of confidential materials at the regulatory decision-making stage through the greater use of confidentiality rings. We believe that this development could have a significant bearing on the nature and extent of subsequent appeals.

In evaluating the costs and benefits of an appeals process, it is also important to have due regard for the impact that an effective appeals process has on the quality of regulatory decisions. We firmly believe that the prospect of rigorous scrutiny has a positive impact in this respect. In that context, it would be wrong to conclude that unsuccessful appeals represent an inefficient use of resources, for example.

Appendix: 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?

No. See Section 2 above. In general we do not believe that the judicial review standard provides for adequate scrutiny of important and economics-based regulatory decisions.

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?

We believe it is essential that economic analysis and assessment can be rigorously and comprehensively scrutinised. It is not clear to us that the principles set out would achieve this.

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

We believe that adopting a judicial review standard will have an adverse effect, as described in the main body of our response.

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?

No specific comment, but see general comments above.

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?

No specific comment, but see general comments above.

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?

See response to Q1 above.

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?

No specific comment, but see general comments above.

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?

No specific comment, but see general comments above.

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?

No specific comment, but see general comments above.

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?

No comment.

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?

No specific comment, but see general comments above.

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?

No specific comment, but see general comments above

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?

No specific comment, but see general comments above

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]?

No comment.

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?

No comment.

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.

No comment.

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

No comment.

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

No comment.

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?

No specific comment, but see general comments above.

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?

No comment.

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

No comment.

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?

No comment.

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?

No comment.

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

No comment.

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?

No comment.

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

No comment.

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?

Yes. See Section 7 above. The use of confidentiality rings to enhance transparency at the administrative stage of decision-making would improve the quality of that decision-making and would, we believe, have a positive impact on the use of the appeals regime.

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?

No comment.

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?

No. We believe that the CAT has demonstrated an ability to use its discretion appropriately in this regard and this delivered benefits for the appeals process

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?

No comment

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

No comment.

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?

Active and early scrutiny from all sides is to be encouraged to maximise the efficiency of the appeals process.

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.

Yes.

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?

See response to Q28 above

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?

Yes. Symmetry considerations suggest that regulatory decisions should be subject to effective scrutiny irrespective of what those decisions are.

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?

In general, desirable that appeals are shorter rather than longer, and that undue delays are avoided, but this should not come at the expense of inadequate scrutiny.

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

See previous response

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?

No comment.

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?

No comment.

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?

No comment.

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?

No comment.

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?

No comment.

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

No comment.

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

Rail Freight Group

Regulatory and Competition Appeals Consultation,
Consumer and Competition Policy Directorate,
Dept. of Business, Innovation and Skills,
1 Victoria Street,
London
SW1H 0ET

Rail Freight Group

7 Bury Place
London WC1A 2LA

T +44 (0)203 116 0007
F +44 (0)203 116 0008
W www.rfg.org.uk

Dear Sir/Madam

Streamlining Regulatory and Competition Appeals Consultation

Thank you for the opportunity to respond to the consultation on streamlining regulatory and competition appeals.

Rail Freight Group is a trade association representing the rail freight sector in the UK. We have over 100 member companies including rail operators, ports, end customers, terminal operators and developers, equipment suppliers and support businesses. Our aim is to increase the volume of goods transported by rail to deliver economic and environmental benefits for the UK.

Our member companies are affected directly or indirectly by decisions taken by the Office of Rail Regulation. This includes decisions over track access rights, licence conditions, and most importantly in the structure and level of charges for access to the network. Such charges have a direct impact on the affordability of rail freight compared to road freight. Regulatory decisions also influence confidence over rail investment, and modal choice. Experience from the recent price control review for 2014-19 has highlighted these issues and their importance to the freight sector.

The level of access charges is particularly critical in the freight sector because, for the majority of the rail passenger sector, Government holds the train operators neutral to any change through the franchise agreement. This means that any increase in track access charges will not affect the operating business for passenger services, but will directly impact freight companies and their customers.

Under the current appeals regime, only Network Rail (and HS1) have right of appeal to the Competition Commission over price control decisions. Other affected parties can appeal through judicial review. As track access charges are determined as part of the price control review, this split is somewhat strange.

As such, and reference Q11, we can see merit in moving to a direct appeal approach in the rail sector, to enable those operators and customers directly affected by price control decisions to appeal through the Competition Commission, particularly where the defined grounds for appeal go further than those presently applicable under judicial review.

Yours sincerely,

Maggie Simpson
Executive Director

Regulatory Policy Institute (RPI)

Regulatory Policy Institute rpi

STREAMLINING REGULATORY AND COMPETITION APPEALS

Response to the BIS consultation of 19 June 2013

Introduction

In 2012, supported by a secretariat at the Commonwealth Department of Resources, Energy and Tourism and by Dr Chris Decker, then of the Regulatory Policy Institute, Oxford, we conducted a review for the Australian federal and state governments of the Limited Merits Review regime (the "LMR") in Australia for appeals of energy network decisions made by the relevant regulator. The LMR regime had been introduced in 2008 with an intention to streamline appeals procedures. Our Review extended over a six month period and was based upon: written submissions, mostly in response to two 'Issues Papers' (consultation documents) that we published; an extensive series of meetings we held with interested parties, including consumer representative bodies, companies, regulators and government departments; detailed analysis of the *substance* of the individual cases that had passed through the new system; a study of appeals systems in overseas jurisdictions; and a study of the role and scope of Australian administrative tribunals in reviewing other types of administrative decisions 'on the merits' . In consequence, we collected a considerable body of evidence.

The relevance of this material to BIS is that, in an institutional context which is about as close to the UK's as it is possible to find in an overseas jurisdiction, policy makers had wrestled with the very same trade-offs that underlie BIS's consultation document, had alighted on a set of arrangements intended to 'limit' the amount of resources, including time, devoted to merits review (hence "LMR"), and had subsequently observed an unexpected surge in the number of appeals, and hence of the level of review/assessment activity. That is, *what happened was almost exactly the opposite of what was intended to happen*. It was the fact of this observed, substantial increase in appeals activity, coupled with the fact that appeal outcomes consistently led either to no change in network charges or to increases in those charges (and hence, ultimately, to significantly higher retail prices for electricity and gas), that led to the commissioning of our review.

Looking at matters in retrospect, with the benefit of the evidence before our eyes, it was not difficult for us to understand how these unintended consequences had come about. We, therefore, make this brief submission in the hope that it will help BIS avoid making some of the same mistakes and then subsequently finding, as the economic evidence on the effects of regulation so regularly finds, that outcomes are radically different from those intended. The submission is focused on a relatively small number of skeletal points.

More specifically, whilst noting that the consultation document makes explicit reference to our review at paragraphs 4.12 and 4.13, and whilst the reference to our concern about neglect of consumer interests in the Australian appeals process (at paragraph 4.12) is a correct one so far as it goes, this short summary is misleading in that it fails to draw attention to the fact that our own key

findings directly contradict some of the main propositions set out in the consultation document, upon which BIS's subsequent reasoning and conclusions are based.

The purposes of merits appeal

Merits review is a well-established feature of the Australian system of government. It is focused on providing supervision of administrative decisions via recourse to non-judicial tribunals because, as noted in the 1971 Kerr Committee Report, *"the vast majority of administrative decisions involve the exercise of a discretion by reference to criteria which do not give rise to a justiciable issue. It follows that for constitutional reasons there can be no review by a court on the merits of these decisions unless those criteria are changed appropriately so as to raise justiciable issues"*.

The function of the various administrative (non-judicial) tribunals has been described by Justice Garry Downes, a former President of the Administrative Appeals Tribunal, the top-level administrative tribunal in the Australian system, as follows:

> *They reconsider the decision under review and determine whether it is the correct or preferable decision. Correct, when there is only one decision; preferable, when a range of decisions is available.*

We consider the implicit distinction between different types of decision to be relevant here. When dealing with, say, a question of whether or not a particular supplier or group of suppliers has infringed competition law, the decision is primarily binary in nature – is there an infringement or not? In Downes's sense, there is only one primary decision, even though there may also be consequential questions about the seriousness of the infringement, for example when determining financial penalties, which involve assessment of a range of possible alternatives. Although it was not central to our own remit, we did to some extent consider issues surrounding binary decisions and did not find any substantive evidence that the relevant appeals body, the Australian Competition Tribunal (the "ACT"), faced significant difficulties in assessing decisions of this (binary) type.

Our own task was to examine cases where the relevant regulator could potentially have come to a range of potential decisions, exemplified by, but not restricted to, price control decisions. It was for such decisions that we found there existed major defects in the newly established LMR regime.

The judicial-review-only option

In response to these identified defects – the most important of which will be summarised below – we considered the possibility of recommending the abolition of merits review altogether and, instead, relying only on judicial review to provide checks and balances on administrative decisions. In the event, we rejected that particular option.

Judicial review focuses on identifying major defects in the process of arriving at an overall decision, but it will only tend to improve the decision from a public policy perspective where there is some correlation between the defects in process and the 'quality' of the eventual decision (i.e. fewer defects are associated with better decisions) measured in terms of its contribution to the relevant policy objectives. Such a correlation exists in some circumstances, but it does not in others.

One way of looking at the matter is to say that judicial review is focused on the *inputs* to the decision, not the decision's *outputs* (its implications for public policy). A reliance on assessing inputs alone is only warranted if there are very rigid links between inputs and outputs (as there might be, for example, between the inputs and outputs of a particular *physical* process – e.g. a version of the internal combustion engine), but such rigidity is not a characteristic of decision making processes. Devoting sufficient resources to reduce the threat of adverse judicial review to low levels, by exploring every imagined possibility and ticking every conceivable box, is likely to lead only to protracted, inefficient and burdensome (on others) regulatory processes, and hence to bad decisions (not necessarily wrong decisions, although there is no guarantee of higher quality from ever increasing input levels (see 'too many cooks spoil the broth'), but rather egregiously inefficient decisions). This is not how parliaments intended price cap regulation to be, either in Australia or in the UK.

Since judicial review is ever present – the only question facing us was whether merits review should also be available as well – it seemed to us difficult to see any good reason why, in establishing arrangements for supervising the decisions of administrative agencies, Australian governments should wish to forgo the opportunity of assessing the actual quality/merits of the decisions themselves. Such forbearance would, in effect, be equivalent to a decision to turn a blind eye to relevant information on outputs or outcomes of decision processes. Moreover, to shift back to 'input-focused regulation' would be out of step with contemporary regulatory developments and practice in other areas of economic and social life.

Precisely because it does not focus on the merits of the actual, relevant decision, we were also concerned that reliance on judicial review only implies that in those cases where the original decision is held to be defective the matter is remitted back to the relevant regulator. Whilst this has some potential advantages in that it ensures the eventual decision is taken by the institution where most specialist expertise is likely to be concentrated, it does mean extra delay, possibly of considerable duration (depending on the nature of the defects found). In any event, we noted that this is not an argument against merits review since (a) merits review encompasses the possibility that the appeals body can remit matters back to the regulator (as well as the possibility of substituting its own decision in those cases where it believes that matters are sufficiently clear cut for it to be able to do so without major risk), and (b), if substitution of the appeal body's decision for that of the primary regulator is a major concern, it is possible to establish a merits review system which *requires* that matters be remitted to the primary regulator, as a matter of course, when the decision is found wanting. We pointed to the Aviation Appeals Panel in the Republic of Ireland as an example of this latter approach.

During the course of the review there were some complaints from interested parties about the length of time the ACT took to complete some (though far from all) cases. However, judicial review cases can themselves take many months to complete, and there appeared to us to be no obvious advantage in terms of length of the review period. Moreover, as already indicated, the fact that judicial review can only block decisions, and cannot end a case by substituting a preferable decision as administrative tribunals can, is a feature that can be expected to increase the average time taken to reach final, lawful decisions.

Problems with the notion of 'error correction'

Returning to the defects we found in the attempt to limit the scope of merits appeal decisions, the most important of these were connected with a focus on error-correction in the appeals process. We therefore note the potential for repetition of the same mistake in the UK context, since in the summary of the case for change made at the beginning of Chapter 3 there is an indication that the Government is contemplating making appeals "more focused on identifying material errors."

For decisions that are determined by the combined effects of potentially numerous sub-decisions and judgments – and again price controls are the most obvious example – it is likely that, in very many cases, more than one 'error' will be made along the way. Indeed, and we speak with practical experience of large, administrative organisations, the errors/biases will likely be in sufficient numbers that, if there is absence of overall organisational bias (and that can be a big 'if'), there will often be a certain amount of self-cancelling in terms of directional influences on the final, overall decision. An analogue here is measurement error in scientific experiments: multiple random errors lead to a small, overall average errors. It is a tendency recognised in price control determinations themselves, where 'swings and roundabouts' judgments are frequently made in the interests of administrative expediency and to lighten the regulatory burden.

It can be conjectured that the LMR regime's focus on correction of errors made in the process of making regulatory determinations, whether they be errors be errors of fact, law, reasoning, judgment or whatever, reflects an attempt by the drafters of the legislation to make relevant matters justiciable (see the Kerr Report citation above). That is, at least implicitly, the LMR might be said to have changed the relevant decision criteria so as to make appeals capable of being handled by an existing institution (the ACT). Put another way, policy substance (to arrive at the best or most preferable decision, judged on the basis of policy objectives) was, to at least a degree, subordinated to process considerations (that the decision be free from material errors).

It is also likely that those responsible for including a focus on error correction in the legislation operated on the basis of the view that, if errors are reduced, it can be expected that the decision will generally be improved in consequence. We found this fallacy to be widely held among interested parties, perhaps because it can be true in some specific circumstances, even though it is false in general. For example if all errors were eliminated, or if the appeals process randomly eliminated the most significant of the random errors made by an unbiased organisation, it might be reasonable to expect that decisions will be improved. We suspect, however, that such circumstances are very rare, and they were certainly remote from the Australian energy sector context, where we found that attempted 'error correction' via the appeals options had been subject to strong bias (see below).

In general, there should be no general expectation that simply correcting some errors will lead to a better overall decision; particularly when the error-correction processes are very far from random (and see further below on why they are not).

Strategic influence and biased incentives

One of the two main defects that we found in the error correction approach was that it allowed appellants to influence appeals outcomes, giving rise to a form of bias that is very familiar in the economics of regulation. By focusing on a particular error or defect in the decision making, and because the ACT had difficulties in taking account of issues other than those raised in the appeal (because the merits review was intended to be 'limited'), an appellant was able to influence the scope of the subsequent review. In so doing, the review could be so managed that the ACT focused on those errors whose correction would favour the appellant, but was not able to take account of other possible errors whose correction would have had exactly the opposite effect.

We say "appellants", but in practice the appellants were typically the monopoly network operators, who not only had much more at stake in particular decisions than individual customers or consumers, but also had the resources to be able to cope with the complexities of lodging appeals within the relatively short time windows allowed by the LMR arrangements following an initial decision. Thus, whilst the bias toward excessive appeals activity was inherent in the LMR regime itself, the anti-consumer bias was more specifically the result of an imbalance in resources that was leveraged by tight time constraints. In consequence, the reviews conducted by the ACT were dominated by the agendas of one set of interested parties (the network companies), argued out in adversarial ways by lawyers, with little or no consideration given to the interests of consumers (which are the high-level purpose specified in the Australian National Electricity Objective and National Gas Objective). Notwithstanding the clear legislative specification of these consumer-focused objectives, which are intended to govern not only the decision making of the primary regulators but also of the ACT when it is making merits review decisions, they got very little look in during the review process: they were simply not a major concern of that process.

This is the finding correctly noted by the BIS consultation document at paragraph 4.38, but what is more important is the underlying causality: *it was the attempt to limit the grounds of appeal and the scope of reviews that caused the problem*, and we are concerned that BIS may inadvertently promote similar outcomes in the UK if the importance of having the possibility for *unconstrained* 'second looks' at significant problems is not recognised. It is the existence of constraints on review processes that gives rise to strategic manipulation of such processes – in the Australian case leading to excessive appeals activity that gave inadequate attention to the interests of consumers – and our own proposals were therefore aimed at reducing those constraints, not increasing them.

Cumulative effects of multiplicities of judgments

The second major defect we found with the error correction philosophy underlying the LMR regime (and also with the 'judicial review only' alternative), at least in relation to the complex, non-binary decisions with which we were concerned, is its weakness in addressing bad decisions that are built up from, or justified on the basis of, a whole set of subsidiary decisions and judgments which are influenced by systematic (rather than random) errors and biases. Most usually the problematic biases are caused by common factors such as particular features of organisational behaviour and organisational culture in the relevant decision-making context. That is, organisations develop ways of seeing the world which can be self-sustaining over quite longer periods of time, and relatively

insensitive to the evidence around them, even when, and sometimes perhaps because, these perspectives are quite misguided.

Examples in the Australian context included (a) a firm belief by the Australian Energy Regulator that it was constrained to an assessment approach that required final judgments about price controls to be mechanistically derived from simple adding up of line-by-line or component-by-component estimates of costs, which encouraged challenge on the basis of detail rather that the overall merits of decisions and was not, in fact, explicitly mandated in the National Electricity and Gas Laws, and (b) an unwillingness of the ACT to consider the policy implications of what it was doing when, having found that a particular decision was defective on specified, narrow grounds, it went on to substitute its own 'top-level' decision – an administrative decision that should properly be a reflection of a wide range of factors, not just those considered in a highly limited/constrained review process – for that of the primary regulator.

Common cultures and common views of the world can, of course, serve useful co-ordination functions in economic systems, but they can also render them blind to certain obvious features of the decision contexts in which they may find themselves operating. The blind-spots tend to be increased in size, and conduct rendered more stubborn in nature, by the fact that, in making decisions, regulators themselves are typically exercising substantial market power: for example, a regulator making a price determination is, in setting a monopoly price or price cap, substituting public monopoly for a private monopoly. In general, we can expect that monopolies (of all types) have, for want of strong incentives to stay focused on the interests of those they serve (whether customers or the public), tendencies to see things in ways that suit their own interests or prejudices. It is for this reason that recourse to a second, independent pair of eyes, expert enough and with sufficient resources to conduct a relatively unconstrained 'decision audit' on the necessary scale, is an important component of a well-functioning policy system. In its absence, blind spots and stubbornness can proliferate.

It is intrinsic to judicial review that it cannot easily address decision making failings that are the result of systematic cumulations of small biases. In major decisions such as price controls regulators exercise discretion in relation to each of a large number of 'judgment calls' about factors that are relevant to the overall, or 'top-level' decision. None of the individual judgment calls may have a material effect on the top-level decision, but a biasing influence that is common to the sub-decisions on which a top-level decision will be based can nevertheless lead to manifestly poor decisions.

Merits review is intended to avoid this problem by focusing on what actually matters, the quality of the overall/top-level regulatory decision. We concluded that, in Australia, the problem had not been avoided because the constraints placed on the review process, with the intention of streamlining it or reducing the resources (including time) allocated to appeals, had *in effect*, subverted review on the merits, by redirecting assessment away from the merits of regulatory decisions themselves and toward assessment of possible errors in the many *inputs* to those decisions. As indicated above, the result was a bias toward excessive appeal activity on the part of regulated energy network businesses, since the limitations placed on reviewers meant that these expert and well resourced appellants could exert some degree of control over the matters that would be considered, and could

search among the many components of the regulatory decision making process to find those matters that, if re-considered, could lead to maximum expected benefits for the appellant.

A few detailed comments on the BIS document in the light of the above

In the Foreword to the consultation document the Minister says that:

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.

The Australian experience confirms the importance of avoiding an appeals structure that can lead to incentive structures that approximate 'one-way bets', and we agree that this is a major issue. However, the Minister's specific reference to communications is, we think, important. The evidence does not support the view that the potential problem identified goes any wider than communications.

During the course of our review, we naturally compared the LMR regime in Australia with approaches in other countries, including continental EU member states, Ireland, the United States and the United Kingdom, giving particular attention to the UK because of the background similarities in regulatory approaches. This particular attention involved looking at other sectors, as well as the energy sector to which the LMR applies. We noted the much lower level of appeals activity in the UK than under the LMR regime, not only in energy but in other sectors, *with the exception of telecoms*.

This inter-sectoral pattern is consistent with our conclusion that it is *constraints* on reviewers – which have the effect of limiting reviewers' ability to examine potentially important aspects of relevant decisions (what we referred to as 'no go areas') – that are central to establishing 'one-way bet' incentives, and hence encouraging excessive levels of appeal activity. Given that the effect of the communications appeals processes in the UK has been to constrain the freedom of the Competition Commission to assess Ofcom price control decisions – matters being filtered through the Competition Appeal Tribunal, according to a prescriptive/constraining process – a higher level of appeals activity for communications sector price control decisions is exactly what we would expect to find. Moreover, it is only in relation to telecoms price controls that the frequency of appeals (reported as seven out of nine, or about 77%) gets anywhere close to the LMR level for Australian energy networks (100% for the principal decisions with which we were concerned): in all other cases, appeal frequencies in the UK are much, much lower. Indeed, there are some strong arguments, for which the evidence in the consultation document provides *prima facie* support, that the level of appeals activity may in the past have been too low from a public policy viewpoint, rather than too high; although recent reforms to align with EU requirements may change that position in the future.

The low levels of appeals activity is manifest in Figure 3.2. The vast majority of decisions (well over 90% of the total), including Ofcom decisions, are not appealed, and Figure D5 indicates that a higher proportion of appealed decisions have not been over-turned than have been over-turned. Bearing in mind the scope for error in complex decisions, there appears to be nothing disproportionately large in these numbers and there is no sign of the existence of 'one-way bet' incentives or of eventuation

of the risk that the appeal body may become the second or *de facto* regulator 'waiting in the wings' (as it is put at paragraph 3.18 of the consultation document).

Although the consultation document notes that CAT judicial review decisions are on average taken significantly more quickly than its other decisions (paragraph 3.15), it also rightly recognises that the relevant types of decisions tend to be rather different in nature (e.g. a significant proportion of the JR decisions relate to merger activity where time is of the essence), and hence not necessarily closely comparable. The 'Other JRs' figure in Figure 3.3 is not noticeably lower than the merits review numbers shown, and our own investigations in Australia suggested that JR was not generally a quicker alternative, even ignoring the fact that in cases where the appellant succeeds matters are then remitted back to the regulator, leading to a potentially major extension of the time involved. Remembering also that merits appeals not infrequently involve consideration of novel or difficult issues, the six-month average length of appeal achieved by the CAT appears to us to be a level of performance that should not, at least by and of itself, give rise to major concerns.

Whereas the level of appeal activity in Australia increased significantly when the LMR regime was introduced, Figure 3.1 indicates that appeals activity in the UK has been relatively subdued in 2010-12 compared with the previous two years.

At 3.14 it is stated that:

"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."

We are very strongly of the view this is the exact reverse of what both the Australian evidence and basic economic reasoning suggest is the case. It is also inconsistent with evidence on the frequency of appeals in UK telecoms price control cases, where the Competition Commission's assessment capacity has been more restricted than in other sectors. If the statement were right, it is to be expected that we would have seen (a) rather lower levels of appeals activity in UK communications than in other regulated sectors, and (b) much less appeal activity than has in fact occurred under the limited, error-based approach to merits review in Australian energy networks.

Similarly, we believe that the first conclusion at paragraph 3.32, to the effect that regulatory and competition appeals should be more focused on identifying material errors is directly and quite plainly contradicted by the Australian evidence, again for reasons that are readily explicable in terms of the relevant economics.

In conclusion

On the basis of our experience, we sense a danger in the consultation document that BIS might introduce measures that will systematically introduce the very problems that it says it is seeking to avoid and which, to the extent that they exist at all in current arrangements, occur in relatively narrow and easily identifiable areas of activities (e.g. telecoms price control cases), and are therefore readily addressable via targeted adjustments rather than across-the-board institutional change.

The Australian evidence indicates that it is the putting of undue constraints on those responsible for reviewing appealed decisions which causes a bias towards excessive levels of appeals activity. UK evidence appears to us to be consistent with this in that it is in precisely that area of activity (regulatory cases in communications) where the appeals process is most constrained that the statistics in the consultation document point to a problem (see Annex E for example).

There is also a rather fundamental issue underlying much of the detail, which we identified in our Reports and which requires some rather more radical thinking. As should be clear, we favour merits review because in its absence executive agencies (including regulators) are, in effect, able to exercise substantial market (monopoly) power without adequate checks and balances. It has not yet been possible to establish effective competition in the supply of regulatory decisions, and the best approximation to the disciplining effects of competition available is the possibility of challenge and adjudication. It is a relatively weak constraint, but valuable nonetheless, at least if the goal is better regulation.

Merits review sits on a fault line between executive decisions and judicial supervision, as indicated by the fact that in Australia the ACT is an *administrative* tribunal whereas in the UK the CAT is part of the judicial system – although we noted in our Reports that, in practice, the ACT operated very much like a court. When a merits review body substitutes its own decision for that of a primary regulator in a context where a number of decisions are possible (i.e. the issue is not binary) it is, in effect, making an executive (policy) decision. The judgment we came to was that the merits of decisions in such cases (non-binary) were best reviewed by another, independent administrative body, not by a judicial or quasi-judicial body.

In Australia we found three types of problems with the latter (judicial or quasi-judicial bodies dealing with complex cases that can lead to a range of possible decisions): inadequate resources for the assessment tasks; excessive focus on narrow legal issues that tended both to create one-way-bet incentives and to exclude due consideration of consumer interests and of policy objectives more generally; and potential vulnerability to undue influence by particular reviewers who could have rather fixed opinions about some relevant matters (e.g. about particular economic theories) and who, because of the small numbers involved in review, could introduce unwanted bias into decisions across a range of cases. To the extent that similar problems might exist in the UK they no doubt deserve some attention; but these are not matters that would be improved by the type of measures contemplated in the consultation document.

Hon. Michael Egan
Dr John Tamblyn
Professor George Yarrow

11 September 2013

Notes

The Regulatory Policy Institute (RPI) is an educational and research charity dedicated to the promotion of the study of regulation for the public benefit. The views and opinions expressed in its documents are those of the named authors, not those of the RPI or of any other organisation.

The Hon. Michael Egan is Chancellor of Macquarie University, Chairman of Newcastle Coal Infrastructure Group Pty Ltd, Chairman of the Australian Fisheries Management Authority Commission, and Chairman of the Centenary Institute of Cancer Medicine and Cell Biology. He is a former Treasurer of New South Wales.

Dr John Tamblyn is former Chair of the Australian Energy Market Commission and of the Victoria Essential Services Commission.

Professor George Yarrow is Chair of the Regulatory Policy Institute and was Chair of the Panel established in 2012 to assess the performance of the Limited Merits Review regime for Australian energy networks.

ScottishPower

Rupert Steele OBE
Director of Regulation

Tony Monblat
Regulatory and Competition Appeals Consultation
Consumer and Competition Directorate
Department for Business Innovation and Skills
1 Victoria Street
London
SW1H 0ET

11 September 2013

Dear Tony

STREAMLINING REGULATORY AND COMPETITION APPEALS - CONSULTATION ON OPTIONS FOR REFORM

Thank you for the opportunity to comment on the above consultation. This response is submitted on behalf of all ScottishPower's businesses, and reflects our assessment of the implications of the proposed changes for the energy sector.

Although we understand the Government's wish to avoid a regulatory appeals process which leads to lengthy and expensive litigation and delayed decision making, we do not support the proposed changes for the energy sector and believe they will ultimately be detrimental to consumer interests.

We are particularly concerned about the proposed changes to the standard of review for appeals of licence modifications and price controls. In the energy sector, such appeals are currently subject to a standard of review which is broadly equivalent to a merits review, but under BIS's proposals this would be reduced to either a judicial review (JR) standard or focussed specified grounds (FSG). We consider this is inappropriate for the following reasons:

- **Investor confidence:** DECC has estimated that £110 billion needs to be invested in GB energy infrastructure by 2020 including transmission and generation assets. The UK competes with other jurisdictions for investment capital, and perceived regulatory risk is a key input to investors' decision making. The UK regulatory regime is currently regarded as one of the most stable for investors (with Ofgem's wide powers subject to appropriate checks and balances) and it is vital that this position is maintained if required levels of investment are to be achieved. Decisions on price controls and licence modifications are critical to investor confidence and weakening the right of appeal could jeopardise this confidence.

- **Consistency of Government position**: In the context of implementing the EU Third Package, DECC stated in September 2010 that grounds of appeal should be "...capable of scrutinising factual issues of an economic/technical nature to ensure the regulator is held to account for their decisions" and thus "...we consider a mechanism over and above an ability to bring a claim for Judicial Review is required...". The need for merits based review was restated in the January 2011

ScottishPower London Office, 4th Floor, 1 Tudor Street, London EC4Y 0AH
Telephone +44 (0)141 614 2000, Fax +44 (0)141 614 2001, Direct +44 (0)141 614 2012
rupert.steele@scottishpower.com www.scottishpower.com

decision document (wrongly dated on the gov.uk website) and reflected in the November 2011 amendments to the Gas and Electricity Acts which retained an essentially merits-based framework for appeals. Given that less than 2 years have elapsed, with no evidence of problems, it seems premature for the Government to be changing its position.

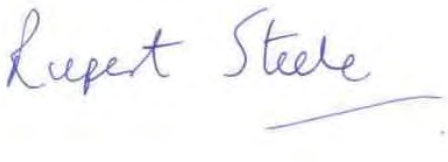
- **No case for change** –The regulatory framework, including the possibility of appeals, has in most cases led to predictable and reasoned regulatory decision making by Ofgem, without the volume of appeals seen in other sectors, and has stimulated significant investment since privatisation. Although BIS's impact assessment purports to show a positive benefit case (using assumed cost savings from shorter appeals), this is largely because no value is ascribed to the better quality decisions that result from a merits based appeal regime (either as a result of a successful appeal or simply the prospect that a decision might be appealed). Given the economic impact of such decisions, even a small improvement in quality is likely to dominate the assessment.

We have similar concerns about BIS's proposal to change the standard of review for competition law decisions and regulatory enforcement decisions. In each case the current standard of review is essentially merits based, and we see no case for reducing the standard of review.

Annex 1 contains a more detailed discussion of our main points regarding this consultation. Annex 2 set out our responses to the questions raised in the consultation.

If you have any questions regarding any aspect of this response please don't hesitate to contact me.

Yours sincerely,



Rupert Steele
Director of Regulation

Annex 1

STREAMLINING REGULATORY AND COMPETITION APPEALS
- CONSULTATION ON OPTIONS FOR REFORM

SCOTTISHPOWER RESPONSE

1. Introduction

This response focuses on the implications for the energy sector of BIS's proposals for reforming regulatory and competition appeals. We understand the wish to achieve greater consistency between different sectors, but do not believe this should be an over-riding consideration. As is clear from BIS's consultation, there are significant differences between each of the sectors – in terms of history, industry structure and propensity to appeal the regulator's decisions – and the primary consideration should be to achieve the most appropriate appeals regime for each sector. It should also be borne in mind that any changes to the appeals regime will come at the cost of additional uncertainty, as new provisions 'bed-down' and their meaning is tested in the Courts.

Two of the main areas where BIS is proposing changes are in the standard of review and the appeal body. Where the standard of review is currently on the merits, BIS is generally proposing to replace it with either judicial review (JR) or 'focussed specified grounds' (FSG). Potential changes which will affect the energy sector are summarised in the table below.

Type of decision	**Standard of Review**		**Appeal Body**	
	Now	**Proposed**	**Now**	**Proposed**
Licence modifications (including price controls)	Merits	JR/FSG	CC	No change
Industry code modifications	Merits	JR/FSG	CC	CAT
Licence condition enforcement - All except TCLC[1] - TCLC	 Merits Merits	 JR/FSG JR/FSG	 High Court CAT	 HC/CAT HC/CAT
Competition Act - Infringement/ interim measures - Penalty decision	 Merits Merits	 JR/FSG no change	 CAT CAT	 No change No change

We are particularly concerned about the proposals to change the standard of review, which we believe will be harmful to investor confidence and contrary to the interests of consumers. We explain our specific concerns for each category of decision in sections 2 to 5 below.

DECC estimates that around £110 billion of capital investment will be required over the coming decade due to generation plant closures and the need to replace and upgrade the UK's electricity infrastructure.[2] Substantial investment will also be required in gas infrastructure. The UK competes with other jurisdictions for investment capital, and perceived regulatory risk is a key input to investors' decision making. The UK regulatory regime is currently regarded as one of the most stable for investors (with appropriate checks and balances) and it is vital that this position is maintained if required levels of investment are to be achieved.

[1] Transmission Constraint Licence Condition in Generation Licences.
[2] https://www.gov.uk/government/policies/maintaining-uk-energy-security--2/supporting-pages/electricity-market-reform

Decisions on price controls and licence modifications can be critical to investors' return on capital and Ofgem has exceptionally broad powers to make such modifications. It was a fundamental part of the privatisation settlement for the energy utilities that these broad powers were balanced by a merits-based review of proposals to change the rules. Weakening the right of appeal could therefore severely harm investor confidence. This in turn may jeopardise the achievement of the necessary infrastructure upgrades. Higher risk premiums and more expensive capital may also feed through to higher consumer prices.

Although BIS cites problems with the appeals regime in other sectors – the number and length of appeals, and the consequential impact on decision making – there is no evidence of such problems in the energy sector. In the period of BIS's analysis, 2008-12, there were only four appeals in the energy sector, three judicial reviews and one Competition Act appeal (subsequently appealed from the CAT to the Court of Appeal). Over the last ten years there have been only nine appeals (one of which was withdrawn) as shown in the table below. The regulatory framework including appeals has in most cases led to predictable and reasoned regulatory decision making by Ofgem and its predecessors and has stimulated significant investment in the 20-25 years since privatisation.

Appeals against Ofgem decisions[3]

#	Year of appeal decision	Body hearing appeal/JR	Appellant/Claimant	Nature of decision appealed
1	2011	Court of Appeal (from Admin Court)	Infinis plc & Infinis (Re-gen) Ltd	Other JRs
2a	2010	Court of Appeal (from CAT)	National Grid plc	*Ex post* Competition
2b	2008	CAT		
3	2008	High Court	Teesside Power Ltd & others	Other JRs
4	2008	High Court	Excelerate Energy Limited Partnership & Seal Sands Gas Transportation Ltd	Other JRs
5	2007	Competition Commission	EON UK plc	Code modification
6*	2006	Competition Commission	Utitlta Electricity Limited	Code modification
7	2005	High Court	Scottish Power Energy Management	Code mod (Charging)
8	2003	High Court	Exoteric Gas Solutions Ltd	Other JRs
9	2003	High Court	Drax Power Limited, ScottishPower Generation Ltd & Teesside Power Ltd	Other JRs

* Appeal subsequently withdrawn

Although BIS's impact assessment purports to show a positive benefit case (using assumed cost savings from shorter appeals), we believe this is largely because no value is ascribed to the better quality decisions that result from a merits based appeal regime (either as a result of a successful appeal or simply the prospect that a decision might be appealed). Given the economic impact of such decisions, even a small improvement in quality is likely to dominate the assessment.

[3] Source: http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenergy/554/554we14.htm.

2. Licence Modifications including Price Controls

Current standard of review and reasons for retaining it

Merits based review of licence modifications has been available in the energy sector since privatisation. The regulatory reference regime which existed prior to 2011 involved a public interest test, and the current direct appeals regime introduced as a result of the EU Third Package is also essentially merits based.

Under the current regime, the Competition Commission 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 following grounds:

a) that the Authority failed properly to have regard to any [of its statutory objectives and duties];
b) that the Authority failed to give the appropriate weight to any [of its statutory objectives and duties];
c) that the decision was based, wholly or partly, on an error of fact;
d) that the modifications fail to achieve, in whole or in part, the effect stated by the Authority;
e) that the decision was wrong in law.[4]

The tests (a), (b) and (d) give the appeal its "width". If an appeal body can consider the regard given to Ofgem's statutory duties and the weight placed on each, as well as whether the proposed modification is effective, it can consider all aspects and factors involved in Ofgem's decision, ie the merits of the decision. This is vital for complex decisions such as price controls because it enables the appeal body to consider each individual element of a decision in depth, but also their impact on the balance of the overall decision.

This analysis is supported by DECC's September 2010 consultation, which referred to the above grounds as "a carefully defined appeal on the merits"[5] and explained that grounds of appeal should be "...capable of scrutinising factual issues of an economic/technical nature to ensure the regulator is held to account for their decisions"[6] and thus "...we consider a mechanism over and above an ability to bring a claim for Judicial Review is required...". DECC also noted that it was emulating the appeals process in place for industry code modifications set out in the Energy Act 2004 which it considered to be merits based.[7]

DECC's January 2011 decision document concluded that a merits-based appeal process is merited for licence modification decisions and reiterated its satisfaction with the way the Competition Commission undertook a merits based review of Ofgem's decision on Energy Code Modification UNC116 following an appeal by E.ON UK Ltd. It concluded that on appeal the Commission could confirm, quash or remit the issue back to the regulator and give binding directions on ordinary licence modifications. For price control cases, the Commission could also substitute the decision in relation to the matter appealed against.

We do not therefore agree with the statement at paragraph 4.85 of the consultation document that "the legislation broadly follows the principles set out for non-judicial review appeals". The principles set out by BIS in Boxes 4.1 and 4.2 for non-judicial review appeals (also referred to as 'focused specified grounds' (FSG)) provide for a much lower standard of

[4] Electricity Act 1989 s11E and Gas Act 1986 s23D as inserted by Regulations 41-45 of The Electricity and Gas (Internal Markets) Regulations 2011 (SI 2011 No. 2704) made on 9 November 2011
[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/43240/586-eu-third-package-condoc2.pdf paragraph 2.10
[6] Ibid paragraph 1.5
[7] Ibid paragraph 2.11

review, approaching the *Wednesbury* reasonableness test and also incorporating a "materiality" requirement whose meaning is unclear. For example, rather than considering whether the regulator failed to have regard to or give appropriate weight to each of its statutory duties and objectives, BIS's proposed FSG test is essentially whether the regulator exercised its discretion in a way in which no reasonable regulator would act.

Existing grounds of appeal vs proposed focused specified grounds

Ground	**Existing grounds of appeal in energy sector** (EA89 s11E & GA86 s23D)	**Proposed 'focused specified grounds'** (see Box 4.2 of consultation)
Procedure	In practice subsumed within (e) "wrong in law"	(c) Decision involved material procedural irregularity
Fact	(c) Decision based on error of fact	(a) Decision based on a material error of fact
Law	(e) Decision wrong in law	(b) Decision based on a material error of law
Judgement/ discretion	(a) Decision failed to have regard to Ofgem's statutory duties (b) Decision failed to give appropriate weight to Ofgem's statutory duties	(d) Decision outside the limit of what Ofgem could reasonably decide in the exercise of a discretion (e) Decision based on a judgment or a prediction which Ofgem could not reasonably make
Effect	(d) Modifications fail to achieve stated effect	

In the case of a price control, where values have to be assigned to key parameters such as cost of capital, there may be a wide band of values which would satisfy the 'no reasonable regulator' test, but which may nevertheless be significantly sub-optimal for the licensee and consumers. A merits-based appeal assessing whether each of Ofgem's statutory duties have been given appropriate weight, would examine the underlying analysis and judgments and could re-determine the value of the cost of capital if appropriate[8] or indeed any other aspect of the price control. It is difficult to understand how the quality of these decisions – which are of huge importance to both the licensee and consumers – could be maintained by effectively absolving the regulator's economic case from detailed scrutiny. Similar considerations may also apply to non-price control licence modifications which can also have significant economic effects.

A second problem with the proposed FSG test is that it omits the existing ground of appeal that the modifications fail to achieve the effect stated by the authority. This is an important test to include as it can be the case that licence condition drafting fails to reflect the policy intent or introduces unintended consequences. Normally such drafting issues will be picked up at the consultation stage, but it is an important safeguard to retain this as a ground of appeal.

Finally, we would note any departure from the current grounds of appeal would need to be compatible with Third Package requirements. DECC observed that "it is important to ensure that the requirement for the regulator to have regard to its European obligations in order to be compliant with the Third Package, is included in the test applied by the appeal body."[9] By allowing consideration of Ofgem's statutory duties, the existing grounds of appeal ensure compliance with the Third Package. This raises the question as to whether BIS's proposed

[8] As happened in the water sector in Bristol Water's appeal against Ofwat
[9] Ibid para 2.9

FSG tests would allow for sufficient intensity of review of the regulator's decision having regard to European obligations.

Proposed changes - Judicial Review ("JR") or Focused Specified Grounds ("FSG")

As noted above, we are strongly opposed to any dilution of the standard of review for licence modifications and price controls, and see no reason to change current regime for energy. Such changes would be harmful to investment and consumer interests, and go against the position set out by the current Government less than 2 years ago. Indeed, those changes made in 2011, which subtly changed both the basis and process of review, should be given time to bed down before any further change is considered.

Nevertheless, the consultation document invites us to consider the relative merits of the JR and FSG standards. In our view, whatever standard was considered needs to embrace the concept of proportionality. A decision which is disproportionate, even if it does not meet the *Wednesbury* test of unreasonableness, is highly unlikely to be in the public interest. It is possible that a revised FSG test could include proportionality or that in the years to come a proportionality test could enter JR jurisprudence. This has already happened for cases involving potential infringement of human rights under the ECHR/Human Rights Act[10] and it is possible that this could be extended when an appropriate test case goes before the Supreme Court.[11] Given that energy appeals may in any event engage ECHR issues (for example, the Article 1 Protocol 1 right to property), it seems quite possible that appeals on the JR standard would need to have regard to the doctrine of proportionality.

However, investors would be likely to be concerned by the lack of certainty on something as fundamental to the stability of the regulatory regime as this, so explicit provision ensuring that proportionality had to be considered would be essential whether the JR or FSG model was followed. Even so, there is a real question of whether an as yet untested proportionality ground would provide the necessary investor certainty and assurance of good decisions. We are therefore strongly of the view that the current grounds of appeal in the Electricity and Gas Acts are the most appropriate and we see no case for change.

Appellate body

BIS states at paragraph 5.26 that "The Government's view is that the Competition Commission should continue to hear all appeals on price control and licence modification decisions." We welcome this position and would be opposed to any proposal to change the appellate body from the Competition Commission to the CAT.

The Competition Commission (soon to become the Competition and Markets Authority) is acknowledged to have the right mix of legal, economic and technical expertise to carry out the detailed analysis required for such cases. Further, its inquisitorial approach is much better suited to price control/licence modification cases than the CAT's adversarial approach. Indeed the CAT itself acknowledges that the Competition Commission is the suitable body for handling complex price assessments.

[10] Eg R v Secretary of State for Home Department ex parte Daly (2001) UKHL 2623

[11] In Somerville v Scottish Ministers (2007) UKHL 44, the House of Lords was asked to consider whether proportionality was a ground of review at common law. Lord Hope declined to decide on this point, as it was not necessary in that case, but observed that "*All these factors indicate that this is not the occasion to embark on an examination of this issue, which is plainly one of considerable importance and difficulty*" (para 56). This was widely regarded as inviting the argument in future.
http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071024/somerv-1.htm

Many broader licence condition or Code modifications also engage similar economic scrutiny. There is no evidence of dissatisfaction of the way the Commission handled the E.ON appeal.

Admissibility of new evidence

The existing appeals legislation contains the following provisions regarding admissibility of new evidence:

> "(3) In determining the appeal the Commission—
> a) may have regard to any matter to which the Authority was not able to have regard in relation to the decision which is the subject of the appeal; but
> b) must not, in the exercise of that power, have regard to any matter to which the Authority would not have been entitled to have regard in reaching its decision had it had the opportunity of doing so."[12]

BIS is proposing a more restrictive test that:

> "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."[13]

Again, this issue was carefully considered in the consultations in 2010-2011. The argument put by the industry at the time was that it was inefficient for companies to be required to submit their full appeal case to the regulator at the Statutory Consultation stage (including engaging legal representatives) when Ofgem might well be persuaded by the arguments made and vary or drop their proposals. In addition, Ofgem frequently took a significant time to digest the consultation responses before making a decision and it was reasonable that additional evidence could be prepared during that process if it is relevant to the appeal. It is also possible that Ofgem might include statements in its final decision statement which could be rebutted only wth new evidence. In the January 2011 Consultation response (paragraph 2.22) Government agreed with the need to allow relevant new evidence and this was duly included in the Regulations.

We cannot understand why energy companies would deliberately hold back evidence for the appeal stage. From our perspective, if the Regulator were to bring forward a misconceived proposal, we would want it abandoned or revised at the earliest possible stage. The idea that we would hold back arguments for appeal when they could equally well be used earlier with less fuss, publicity and expense does not seem rational behaviour.

In any event, the purpose of an appeal mechanism is to allow the appeal body to come to the best possible decision, even if this means considering relevant new evidence that could have previously been raised with the regulator. We are not convinced that constraints on the admissibility of new evidence would improve the speed of handling appeals, and are concerned that this is suggested as a further means to limit the standard of review.

[12] Electricity Act 1989 s11E(3) and Gas Act 1986 s23D(3)
[13] Condoc chapter 6, page 58

3. Industry code modifications

Current standard of review and reasons for retaining it

Appeals of Industry code modification decisions are covered by the Energy Act 2004, which sets out virtually the same grounds of appeal as for licence modification decisions.

a) that GEMA failed properly to have regard to the matters [set out in its statutory objective and duties];
b) that GEMA failed properly to have regard to the purposes for which the relevant condition has effect;
c) that GEMA failed to give the appropriate weight to one or more of those matters or purposes;
d) that the decision was based, wholly or partly, on an error of fact;
e) that the decision was wrong in law.[14]

As discussed in section 2 above and in DECC's 2010 and 2011 documents, these grounds of appeal are broadly equivalent to a review on the merits (see also EON case study below).

Case study: EON v GEMA Exit Reform

DECC's opinion that the Energy Act 2004 (EA04) provisions allow a merits based appeal for industry code modification was referenced to the 2007 appeal brought by EON of Ofgem's decision not to veto Mod 116V of the Uniform Network Code (UNC)[15]. The modification proposed changes to the gas transmission exit (off-take) capacity arrangements; Ofgem's impact assessment underlying its decision not to veto Mod 116V estimated total implementation costs at circa £126 million and a net benefit of circa £8m. EON appealed Ofgem's non-veto decision to the Competition Commission. EON cited a number of grounds including that Ofgem failed to have regard to its statutory duties and had erred in fact. The CC commented that the effect of the provisions in EA04 which gave it jurisdiction "...is to subject GEMA to a greater level of accountability than would be the case in judicial review."[16]

Accordingly the CC reviewed all the elements of Mod 116V and found that Ofgem had failed to properly assess certain benefits and identified errors in the impact assessment. Based on these findings, the CC upheld the appeal but it made clear that it was only persuaded to do so against the clauses relating to proportionality, ie that Ofgem had failed to have regard for its statutory duties and relevant objectives of the UNC[17]. The impact of overturning Ofgem's decision was substantial: in addition to the implementation costs the distributional effects of Mod 116V would have seen certain companies incurring costs of hundreds of £millions. Given the CC reliance on proportionality, it is unlikely that the same result could have been achieved under JR *Wednesbury* grounds. An appeal on the current FSG grounds would almost certainly have failed given their similarity to the *Wednesbury* test.

The economic impact on licensees of industry code modifications can be at least as significant as licence modifications. For example, Ofgem's Project TransmiT, which is looking at the way generators are charged for transmission infrastructure, involves complex economic trade-offs and will potentially impact generators' costs to the tune of hundreds of £ millions over a ten year period and materially affect the deployment of renewable energy.[18] The outcome of this process will be modifications to the Connection and Use of System

[14] Energy Act 2004, s175(4)
[15] http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/appeals/energy/eon_final_decision.pdf
[16] Ibid para 5.3
[17] Ibid p55-57
[18] 'Project TransmiT: Impact Assessment of industry's proposals (CMP213) to change the electricity transmission charging methodology', Ofgem, 1 August 2013, www.ofgem.gov.uk/ofgem-publications/82538/projecttransmitimpactassessmentofcmp213options.pdf

Code (CUSC) which must be approved by Ofgem. The ability to appeal decisions of this nature on the merits will be equally important to investors as licence condition modifications. For the same reasons as given above for licence modification appeals, we would strongly object to any proposal to dilute the standard of appeal to JR or FSG.

Appellate body

Appeals are currently heard by the Competition Commission, but BIS is considering whether they should be moved to the CAT. We think that on balance the Competition Commission is better qualified to hear energy code modification appeals than the CAT. This is because code modification appeals in the energy sector often involve complex economic analysis and trade-offs, which are better suited to an in-depth inquisitorial style of review than an adversarial style. However, the most important consideration is that the standard of review continues to be full merits as set out in sections 173 to 175 of the Energy Act 2004.

4. Licence condition enforcement

Current standard of review and reasons for retaining it

The basis for appeals of Ofgem's licence condition enforcement decisions is set out in the Electricity Act 1989 s27E and the Gas Act 1986 s30E. These provisions were put in place by the Utilities Act 2000. They allow a court to consider an appeal against a penalty imposed by Ofgem's enforcement of a licence condition on the following grounds:

a) that the imposition of the penalty was not within the power of the Authority;

b) that the [relevant procedural] requirements 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

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.

During the Lords Report stage of the Utilities Bill on 5 July 2000 (col 1535), Lord McIntosh of Haringey stated why the above provisions provide for an intensity of review which goes beyond judicial review standards[19]. (This followed up on a similar exchange in Committee on 21 June 2000.) Under the precedent set by *Pepper v Hart*, parliamentary statements can be used to interpret primary legislation where there is ambiguity. This was the case here as Lord McIntosh was rebutting the need to amend these provisions and formally reading a lengthy interpretative statement. In his statement he noted that:

> 'Under Section 27A of the Electricity Act and Section 30A of the Gas Act, the authority only has power to impose a penalty,
>
> > "of such amount as is reasonable in all the circumstances of the case."
>
> 'If the amount of a penalty is not reasonable in all the circumstances of a case, it follows that the imposition of the penalty would not be within the power of the authority under that section and an application could therefore be made to the court under new Section 27E(4)(a) of the Electricity Act and new Section 30E(4)(a) of the Gas Act.

[19] http://www.publications.parliament.uk/pa/ld199900/ldhansrd/vo000705/text/00705-17.htm#00705-17_spnew2

‘Accordingly, if a company challenges the amount of a penalty on the grounds that the imposition of it was not within the authority's power under Section 27A of the Electricity Act or Section 30A of the Gas Act, the questions the court will have to consider will include whether the penalty was indeed reasonable in all the circumstances. If it does not think this is the case, it may quash or lower the penalty as it thinks appropriate.

‘In Committee, the noble Lord, Lord Kingsland, acknowledged that "reasonable in all the circumstances" is the test in the Bill. But, he said,

> "the test in law, the test for an authority acting outside or beyond its authority, requires an action to be so unreasonable that no reasonable person would ever entertain it".--[Official Report, 21/6/00; col. 335.]

‘The latter test, however, applies on judicial review, whereas we have provided an express and specific right of review on the face of the Bill. The use of the word "reasonable" in this context has the same meaning as when used expressly in any legislation; that is, its ordinary English meaning of "appropriate or fit in all the circumstances". The two tests are distinct. ’[20]

and

’As we have said, the court can and should look at the facts to determine whether the authority acted within its power by imposing a penalty that was reasonable in all the circumstances of the case. Those circumstances must on any reading include the extent of the contravention or failure in question. It is improbable that the authority would be satisfied that there was a contravention or failure where there was none. However, in that unlikely event, the question whether there had been a contravention or failure would be part of the question whether the authority had acted within its power to impose a penalty’[21]

In other words any court considering an appeal against a penalty on the grounds of a) above, specifically that the amount was not reasonable in all circumstances, would have to consider all the circumstances or merits of that case. On this basis Lord McIntosh concluded “the Utilities Bill is appropriate and provides an equivalent degree of protection to licence holders as that provided by the Telecommunications (Appeals) Regulations 1999 as well as going beyond that provided by judicial review.”[22]

Based on Lord McIntosh’s statement we consider that the present standard of review for regulatory enforcement decisions in energy is wider than BIS is proposing for FSG and wider than the strict *Wednesbury* reasonableness form of JR.

We would be strongly opposed to moving from the current standard of review. As with licence modifications, the assurance of an essentially merits based review of penalty decisions contributes to investor confidence in the UK regulatory regime. Although no penalty under these sections has been challenged, the existence of an effective right of review is essential to protect investors from potentially arbitrary exercise of power.

In the context of Competition Act appeals, BIS cites ‘the potential size of these fines’ as a reason for retaining effective appeal rights in relation to decisions on the level of penalty (paragraph 4.60). Financial penalties for licence breaches are subject to the same 10% of

[20] Ibid column 1536
[21] Ibid column 1536-7
[22] Ibid

turnover cap as Competition Act penalties[23], and we would therefore expect similar considerations to apply to licence breaches.

Appellate Body

At present appeals of all enforcement decisions are heard by the High Court with the exception of TCLC appeals which are heard by the CAT. BIS is proposing that all regulatory enforcement appeals should be heard in one appeal body, either the High Court (or its counterparts in Scotland and Northern Ireland) or the CAT.

If this proposal is to be adopted, our preference would be for the CAT to have jurisdiction over all regulatory enforcement appeals. DECC's rationale for bringing TCLC appeals to the CAT was that "[the CAT] is better placed to consider complex questions of competition law, compared to the courts"[24]. We think that the CAT may also be better placed to consider complex regulatory matters relating to enforcement decisions, which will often have an economic or competition dimension.

Admissibility of new evidence

In the context of an appeal against the imposition of a potentially large financial penalty, or against the amount of that penalty, we cannot see how justice can be served by prohibiting the appeal body from considering all evidence that is relevant to whether the proposed penalty is appropriate and fit in all the circumstances (to quote Lord McIntosh). We see no reason to change the existing statutory position here.

5. Competition Act decisions

Current standard of review and reasons for retaining it

Schedule 8 of the Competition Act 1998 (CA98) states simply that for CA98 decisions, "The [Competition Appeals] tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal."

BIS is proposing that Competition Act decisions which do not relate to the imposition or level of penalties will move from the current merits based appeal to either a judicial review standard or new focused grounds of appeal. This JR/FSG proposal would therefore apply to infringement decisions, decisions as to interim measures, and other decisions listed in section 46 of the Act.

We agree with BISs' conclusion that there should be no change to the standard for review for penalty-related decisions, where it is appropriate to retain a merits-based standard of review. However, we disagree with the proposals to reduce the standard of review for infringement and other decisions. A finding of infringement is binding for the purposes of any follow-on action for damages (under section 58A of the Act) and could therefore expose the company in question to very substantial financial costs. We therefore think that similar principles should apply as in the case of penalty decisions.

[23] Albeit with some differences in the way that turnover is measured.

[24] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/42855/3737-transmission-constraint-cons-ia.pdf para 30

Annex 2

STREAMLINING REGULATORY AND COMPETITION APPEALS - CONSULTATION ON OPTIONS FOR REFORM

SCOTTISHPOWER RESPONSE TO QUESTIONS

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?

No, we do not agree with this, at least for appeals in the energy sector. As explained in Annex 1 above, the majority of appeals are currently on the merits, and this is one of the reasons why the UK regulatory regime for energy is regarded as one of the most stable for investors, with appropriate checks and balances. Given the huge levels of investment needed over the next decade, we consider it would be very unwise to weaken the standard of review that is currently available. The need for merits based reviews of licence modification decisions was affirmed by the present Government less than 2 years ago, when implementing the EU Third Package provisions in UK legislation. There is no evidence that the current appeals regime in energy is giving rise to the issues that are cited in other sectors.

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?

The proposals for 'non-judicial' review appeals are narrowly focused on "material" errors, procedural matters and the 'no reasonable regulator' test. As such, we think this is broadly equivalent to the *Wednesbury* reasonableness test in JR, and falls far short of the standard of review currently provided for regulatory and competition appeals in the energy sector.

We think that the addition of "material" could be problematic in practice. A tribunal or court would be unlikely to set aside a decision if the defect is not material. But the explicit addition of that word may cause confusion as to whether some higher threshold is intended.

If BIS wishes to adopt a consistent set of principles for non-judicial review appeals, we would suggest that it bases them on the current energy sector grounds of appeal, ie:

- Decision based on error of fact
- Decision wrong in law (we think this includes decisions based on procedural irregularity but, if not, that should be added as a separate ground)
- Decision failed to have regard to each of the regulator's statutory duties
- Decision failed to give appropriate weight to each of the regulator's statutory duties (ie that in weighing up the conflicting considerations, the wrong balance was struck)
- [modification decisions only] Modifications fail to achieve the stated effect

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

We believe restricting the standard of review to JR would have a detrimental impact on the effectiveness of appeals of licence modifications (including price controls) and industry code modifications. JR does not allow for a full merits review and therefore may not provide for sufficient scrutiny of substantive decisions such as price controls and changes to industry and market arrangements.

Although there are relatively few appeals in the energy sector, this does not mean that the standard of review is not important. The possibility that decisions may be challenged acts as an important check on Ofgem's decision making process, encouraging intensive industry engagement and consultation and supporting analysis so that impacts of decisions can be properly understood and unforeseen consequences avoided. Should the standard of review be reduced, this could have a detrimental impact on the quality of Ofgem's decision making. We believe this consideration should outweigh any impact on the length and cost of appeals (particularly given the small number of appeals in the energy sector).

We are not convinced that it is correct to assume that there will be cost and time savings with judicial review procedures, as successful appeals will result in the decision maker having to reconsider its decision. It is unclear to us that JR will ultimately be any swifter on an end to end basis than a focussed merits-based review.

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?

We are not in a position to comment on this.

Q5 [In the communications sector] 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?

We are not in a position to comment on this.

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?

No, we do not agree that there should be a change in the standard of review. (Please see Annex 1, section 5 above).

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

We recognise that a change to a JR or FSG standard may appear to reduce the length and cost of appeals, but this may not be the case if we consider the total time and costs associated with successful judicial reviews, where the regulator is required to reconsider a decision, or with JR challenges that are appealed themselves to higher courts. In any event,

there would be significant issues relating to the effectiveness of CA appeals in this case as set out in Annex 1 above. Overall we do not see a case for a change from the current position.

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?

No, we do not agree there should be a change in the standard of review. We see no case in the energy sector to depart from current arrangements that allow a form of merits based review of licence modifications and associated price control decisions. (Please see Annex 1, section 2 above and our response to question 1).

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?

We are not convinced that attempting to undertake price control appeals according to the FSG or judicial review standard would necessarily lead to shorter appeals. The absence of a definitive economic examination of the case could actually prolong the litigation, as the sums involved could justify seeking to appeal, if necessary to the Supreme Court. The proceedings could also be extended if a successful appeal under FSG or judicial review did not lead to the appeal body substituting its own judgement but rather remitting the matter back to the regulator, potentially for the matter to start again.

More importantly, we would expect a JR or FSG appeal standard to lead to less effective appeals (as measured by the quality of the resulting decision). We have set out in detail in Annex 1 why we believe a change in the existing appeals standard in the energy sector is not justified, and would risk undermining the quality of regulatory decision making and investor confidence.

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?

We are not in a position to comment on this.

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?

We are not in a position to comment on this.

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?

From the perspective of the energy sector, the 'other regulatory decisions' referred to in the question include:

- enforcement decisions (eg relating to breach of licence conditions)
- other administrative decisions taken by Ofgem

As explained above (Annex 1, section 4), the standard of review for appeals of enforcement decisions is currently on the merits and we see no case for changing this. BIS acknowledges that the potential magnitude of fines in Competition Act cases is sufficient justification for a merits based appeal, and we do not see why licence condition enforcement decisions should be treated differently.

Other administrative decisions taken by Ofgem may currently be challenged by means of JR, and we see no reason to change this either.

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?

We do not believe that FSG or judicial review are appropriate for other regulatory appeals for the reasons set out in Annex 1.

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

We are not aware of any concerns about the CAT's rules. We would note that the objectives set out in paragraph 5.9 are focussed on the efficiency and despatch of processing cases and do not include any balancing objectives concerning the quality of review undertaken by the CAT. Clearly, in reviewing any service or body, quality must be considered along with speed and cost if a soundly based conclusion is to be reached.

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?

Yes.

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.

Yes we agree judicial office holders should not be limited to a term of 8 years and BIS's rationale that this will retain regulatory expertise accumulated by these persons.

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

BIS's proposals are that a single judge could replace the panel for "cases concerned with points of law only or more straightforward cases". We would like to see greater definition around this and examples of such cases before passing comment. This should be included in the review of the CAT Rules.

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

Yes.

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?

We are not in a position to comment on this.

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

As far as we are aware there are few if any provisions for appeal to the CAT against ex ante regulatory decisions in the energy sector, other than appeals against enforcement decisions relating to the Transmission Constraint Licence Condition (TCLC). We agree that the CAT is the most appropriate body to hear appeals against TCLC decisions.

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

No, as explained above (Annex 1, section 3) we think that on balance the Competition Commission is better qualified to hear energy code modification appeals than the CAT. This is because code modification appeals in the energy sector often involve complex economic analysis and trade-offs, which are better suited to an in-depth inquisitorial style of review than an adversarial style. However, the most important consideration is that the standard of review continues to be full merits as set out in sections 173 to 175 of the Energy Act 2004.

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

We would envisage some limited benefits in terms of consistency of across decisions. However, the benefits are not obviously significant, so we would not support a change that would be detrimental in the energy sector just for the sake of having a single body.

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?

We believe the CAT would be most appropriate as it has the greatest experience and knowledge of the regulatory context for such 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?

We are not in a position to comment on this.

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

There could be limited advantages in terms of achieving consistency across decisions. But this should not over-ride any sectoral considerations.

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?

Given the above choice, we would prefer the CAT given its greater depth of experience and understanding of the regulatory context of such cases.

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

We assume this question refers to Competition Act appeals relating to matters of process, which are currently heard in the High Court with a JR standard of review. Given that other Competition Act appeals are heard by the CAT, we can see some advantages in focusing all Competition Act appeals in a single body.

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

In most cases, it is possible for stakeholders to make their arguments using public domain information; at ScottishPower, we rarely need to use confidential information when responding to consultations. As a result, our ideas can normally be discussed freely with other stakeholders.

It is also the case that confidentiality rings, if drawn too narrowly, may prevent companies from providing the information to the persons with the necessary skills to analyse it. They can also be administratively burdensome.

Accordingly, while we think that there may be more scope to use confidentiality rings than at present, we think they should be used very sparingly in order to foster open debate. There should be powers to operate them once stakeholders opt in, in a particular case, but they should not be imposed on stakeholders.

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?

We agree that it would be beneficial for a body such as the CAT to supervise the operation of any confidentiality rings. Appropriate sanctions would include financial penalties.

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?

We do not see any need to fetter the CAT's discretion in this regard.

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?

We do not agree with this proposal as it could limit the presentation of evidence that was reasonably held back previously. Given the potential economic significance of licence modifications for affected parties, we consider the primary objective should be to allow the appeal body to come to the best possible decision, even if this means considering new evidence that could have previously been raised with the regulator.

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?

We believe the approach to awarding costs should be in line with the position for licence modification appeals set out in Schedule 5A(12) of the Electricity Act 1989 and Schedule 4A(12) of the Gas Act 1986 The Commission should continue to have discretion to require one party to pay costs to another party.

The proposed rule set out in question 32 is asymmetric and therefore unfair. A regulator taking a bad decision imposes costs on a company just as much, perhaps more so, than a company mounting a poorly justified appeal.

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

Any rules on costs should be symmetric and capable of unambiguous measurement. Internal legal costs should only be claimable by regulators in the event of an unsuccessful appeal if they are claimable by companies in the event of a successful appeal.

Existing provisions already enable the Competition Commission to make an order about recovery of its own costs, based on its discretion taking account of the conduct of the parties and the strength of their respective cases. This is appropriate and in accordance with the normal principles of justice.

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?

Given the small number of appeals in the energy sector, it is difficult to comment on whether there is scope for Ofgem to be more active in scrutinising appeal grounds.

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.

As per our response to Question 34, the small number of appeals in the energy sectors suggests that there is no need for CAT to be more rigorous in rejecting energy appeals without hearing them.

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

We consider that the principles proposed for anti-trust investigations (collective decision making, change in decision makers between investigation and final decision, state of play meetings, greater opportunity of company to comment on draft penalty statement) are all positive. Many of these ideas are already used by Ofgem in their decision making in other areas of enforcement such as licence condition and consumer protection law. We would welcome putting these on a more formal basis.

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?

In the energy sector, consultation at an early stage, particularly where there are substantive policy issues with material impacts on industry parties, is normal. We believe that this is buttressed by existing standards of appeal, as argued elsewhere in this response.

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

No, we see no need to give sectoral regulators additional investigatory powers.

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

This relates to non-infringement antitrust decisions. If such decisions were non-appealable, interested parties would need to challenge the relevant competition authority under judicial review. Arguably, the CAT is better placed to hear such challenges.

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?

Yes, subject to seeing a definition of what is considered “straightforward”.

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

Yes.

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?

We think the voluntary fast track procedure may be a more proportionate option.

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?

We believe this would be a useful procedure.

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?

We are not in a position to comment on this, other than to note that in energy such appeals are already limited to 6 months and a one 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?

We are not in a position to comment on this.

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?

We are not in a position to comment on this.

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

We are not aware of any problems as respects how these bodies manage cases in the energy field.

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

Particularly in the energy sector, we are not aware of material concerns over the speed of regulatory decision making or of appeals. It is important that appeal decisions are soundly based and reflect the evidence.

ScottishPower
11 September 2013

Severn Trent Water

Response to HM Government consultation on Streamlining Regulatory and Competition Appeals

Severn Trent Water
11 September 2013

Executive Summary

Severn Trent Water shares the Government's aims of an effective, pro-growth regulatory environment, within which there is an effective appeals mechanism for handling regulatory appeals. The system of appeals in the water industry appears to work well. This could be improved by introducing a mechanism, where appropriate, to narrow the issues between the parties. We do not see, from our experience, or from the consultation document, evidence of the need for extensive change. Within the water sector, any extensive change is likely to result in more appeals, creating uncertainty. Any uncertainty damages growth by deterring investment. We also believe that there may be merit in appeals against financial penalties being to the Competition and Markets Authority, rather than to the High Court, and that regulators should set out in a policy document their approach to the imposition of financial penalties.

Detail of response

1. We note that 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. The consultation also considers ways that appeals might be streamlined.

2. With regard to the appeals regime, we note and welcome the stated objectives of:
   - having independent, robust, predictable decision-making, minimising uncertainty;
   - providing proportionate regulatory accountability in which 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

3. However, we do not understand, and do not believe the consultation document has evidenced, the need for consistency between appeal routes in different sectors. We consider that it is far more important for regulated water companies and for investors, to have consistency and certainty within a sector. This point was made clear by all water companies as part of the recent licence modification process. Indeed the consultation document acknowledges that, "it is important that regulatory frameworks avoid adding undue uncertainty to the business environment".

4. From the consultation, it appears that there are particular issues which require resolution within the communications sector. This appears to be the driver for many of the proposed reforms. That being the case, it may well be that reforms need to be made to the system of regulatory appeals in that sector.

5. Furthermore, the need or driver for consistency between sectors is not obvious. While the different sectors under review are all regulated, circumstances vary significantly between the sectors, both in relation to market structure and in relation to the degree of competition. The water sector, for example, has a large degree of vertical integration. This will continue to exist even after the introduction of business retail competition in the water market. This

affects the number of parties who might have a direct interest in challenging regulatory decisions in the sector. We would suggest that such differences make it difficult to make an assumption that consistency between sectors is necessary or even desirable.

6. The appeals regime for the water sector has been in place since 1991 and, as the consultation acknowledges, in the period since then there have been very few appeals against regulatory decisions in the sector. We do not see any evidence that where appeals are currently heard “on the merits”, these appeals should now be determined on a judicial review basis. We can see that there may be merit in seeking to narrow down the issues between the parties (where they agree to do so), as happens already in judicial review cases. It may therefore be sensible to explore whether an interim step could be introduced into regulatory appeals in order to seek to narrow the issues between the parties and where directions could also be given for the conduct of the case, as in commercial litigation or arbitration cases.

7. With regard to the period taken for appeals, the consultation acknowledges that timescales in the UK are similar to other countries. We would also suggest that the quality of decision-making is as important as speed. Unless there is evidence of harm having been caused by delay, we do not, therefore, consider delay to be a factor which might justify changes. In relation to the water sector, no evidence of delay is presented. In relation to the two price control cases referred to in the consultation, these were both completed within six months.

8. If changes are made to the system of regulatory appeals, we consider that such a review should also include the system for imposing fines on regulated companies. In the water industry, Ofwat have power under section 22A(1) of the Water Industry Act to impose on a company "a penalty of such amount as is reasonable in all the circumstances of the case". The Act then provides for a right of appeal to the High Court against the amount of a penalty. Courts are generally not inclined to interfere with what is, in effect, the exercise of a regulator's discretion and will defer to a regulator's expertise. This tends to mean that there is no effective check that a regulator is taking into account the appropriate factors in determining the level of any financial penalty. We therefore believe that consideration should be given to appeals against a financial penalty being to the new Competition and Markets Authority, who will be the centre of competition expertise and better able to review whether any financial penalty is set at the appropriate level. In addition, we consider that there should be a requirement on the sector regulator to set out clearly the starting point and reasons for the imposition of a financial penalty. In many regulated industries, regulators are required to publish a statement of policy with respect to the criteria for the imposition of penalties and the determination of the amount of a penalty.

Responses to specific questions, not otherwise addressed above

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?

The proposal is that the regulator would be permitted to make an error of law, an error of fact and an error in procedure, yet a company would still not be able to appeal, unless the grounds fell within specific defined grounds. We do not consider that this is fair to the regulated community, as the grounds for appeal would be too narrow, nor would there be sufficient incentives on the regulatory body to ensure that its processes and skills were of the required standard to properly consider appeals.

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

We support the proposal to continue to have price control and licence modification appeals heard in the Competition Commission (new Competition & Markets Authority (CMA) from 1st April 2014). The more inquisitorial and flexible nature of these type of hearings is more appropriate for these fundamental issues.

Paragraph 5.33 of the consultation refers to the possibility of appeals against code modifications being heard in the Competition Appeals Tribunal (CAT) and raises the question of whether such appeals are in fact closer to licence modifications. We consider this to be correct, as while code issues could appear to be purely technical in nature, they may involve balancing a complex range of factors including a detailed consideration of the impact of a change on companies' finances. The more adversarial approach of CAT proceedings is not the appropriate way to consider such issues and it is our view that these kinds of appeals would be better heard by the CC/CMA.

As regards other types of regulatory appeal, we are not convinced of the need to move these from the High Court to the CAT. As the consultation notes, these decisions are taken on the basis of judicial review principles and it is not clear why the CAT would be the more appropriate forum for such cases. The limited grounds of appeal available in such cases would not seem to merit the attention of a specialist tribunal and it would be more beneficial if reviews could be conducted by the tribunal with the greatest experience of judicial review, namely, the High Court.

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

Paragraph 7.22 raises the prospect of a reduction in the supplementary period allowed for CC/CMA cases from 6 months to 2 months. While we could appreciate the rationale for change if there were evidence of extensions having had to be granted frequently, this is not the case and we therefore do not consider that there is evidence warranting a change from the current arrangements. The CC/CMA is very conscious of the need to limit the period of its reviews and while a 6 month extension may only be needed in rare cases, we see no reason to limit the ability of the CC/CMA to be granted such extensions in cases where it considers it necessary.

Severn Trent Water

Contact: julian.wildsmith@severntrent.co.uk

Simmons & Simmons LLP

RESPONSE TO THE CONSULTATION ON

STREAMLINING REGULATORY AND COMPETITION APPEALS

11 September 2013

Simmons & Simmons

Simmons & Simmons LLP CityPoint One Ropemaker Street London EC2Y 9SS United Kingdom
T +44 20 7628 2020 F +44 20 7628 2070 DX Box No 12

www.simmons-simmons.com

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Simmons & Simmons

COMMENTS ON THE BIS CONSULTATION ON STREAMLIMING REGULATORY AND COMPETITION APPEALS

The Simmons & Simmons LLP EU, Competition & Regulatory Group welcomes the opportunity to respond to the BIS consultation on streamlining regulatory and competition appeals: options for reform.

General comments

Our response is primarily focused on the proposals relating to competition enforcement appeals.

We agree with the Government's aim of standardising the patchwork of appeal routes in regulatory appeals and to some extent harmonising appeal procedures (though see our comments below on Communications Act appeals). However, we do not believe that regulatory decisions and competition enforcement decisions are sufficiently comparable to justify harmonising the standard of review across these types of appeal. Competition law constitutes a high level policy exception to laissez faire approaches to market regulation, with quasi-criminal penalties, potentially directors' disqualification, loss of reputation, identification as a recidivist in any future competition investigations (with a resulting uplift in any fines imposed) and damages actions consequent upon a finding of infringement which is binding in court. It is therefore crucial that the competition authority makes infringement decisions that are right, not simply ones in which procedures have been followed – otherwise, competition itself will be chilled, with adverse effects for consumers and for the economy. The prospect of a party being penalised without adequate redress through the appeal process – both because the degree of scrutiny has been curtailed and the ability to defend itself through additional evidence withdrawn - and then facing actions for damages based on a faulty infringement finding is in our view unconscionable, quite apart from raising issues under Article 6 ECHR.

We note that the shift towards a lesser standard of review in competition cases runs counter to the trend evolving in Europe. We further query why, when the CAT is to receive increased powers to hear *inter partes* disputes in private actions for damages, it should have its powers curtailed in relation to the infringement decisions on which those actions will in many cases be based. There appears at least inconsistency in this.

In brief:

- we believe that the standard of review should not be amended
- we agree in principle that streamlining the appeal routes from decisions by sectoral regulators is a sensible way forward, but only where it is justified. However there is insufficient analysis in the consultation of the specific characteristics of each sector to be sure that the move towards consistency is justified.
- we contend that the CAT's procedures in relation to the presentation of "new" evidence, the appropriate number of expert witnesses and unmeritorious appeals are sufficiently robust and not in need of statutory prescription
- we disagree fundamentally with the proposals on asymmetrical costs
- we found the statistics presented as evidence of the government's case for reform to be fundamentally incapable of supporting the proposals put forward.

Specific comments and suggestions for amendment

We have addressed our responses to the following topics:

1. **Standard of review**

1.1 Question 1

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 wider standard of review?

We recognise the attraction of a system in which all appeals against regulatory and enforcement decisions are judged against the same public law standard. However, there are fundamental differences between ex-ante regulatory decisions and ex-post infringement decisions which call into question the simplicity of that approach, and there are indeed both legal and policy reasons for a wider standard of review (which, in our view, should be merits-based) for Competition Act decisions. In describing regulatory and competition decisions as "somewhat different", BIS recognises, but in our view significantly underestimates, their differences. Competition infringement decisions carry fundamentally different consequences to ex-ante regulatory decisions: quasi-criminal penalties, loss of reputation, loss of share value, directors' disqualification, categorisation as a "recidivist" in any future enforcement procedures and liability to follow-on damages claims. All of these mean that the proposal to equate them with ex-ante regulatory decisions is flawed. The severity of those consequences means that infringement decisions merit a significant degree of scrutiny to ensure that miscarriages of justice do not arise. We therefore reject the proposal that judicial review should be, even presumptively, the applicable standard of review.

Appropriate degree of scrutiny

The focus of a competition enforcement appeal is to test alleged flaws in the thinking, assumptions, "theory of harm" and assessment of the facts that have been applied in the decision. The grounds of judicial review do not in our view offer a sufficient degree of scrutiny to guarantee this. Further, at the point at which the infringement decision is made, the procedure is not Article 6 ECHR compliant – it is only at the appeal stage that an Article 6 tribunal comes into play, and must, as *Menarini*[1] confirms, have "full jurisdiction" to review the quality of the decision made. Decision makers should therefore be interrogated by an expert and experienced appeal body, and not be permitted to hide behind deference to expertise and reluctance to second guess "expert" decision-makers - characteristics that traditionally mark a judicial review procedure. Such an approach only makes sense in a context where the appeal court knows less than the decision-makers, which, where the specialist CAT is concerned, is not the case.

It is further the case, as the KME[2] and Chalkor[3] cases indicate, that at European level, there are increasing concerns about the limited scope of the General Court's review powers. Consequently, analogies with the General Court's standard of review should be made with the greatest of caution.

Quality of decision-making

We are unconvinced that changing the standard of review will contribute to independent, robust, predictable decision-making, and that that it will minimise uncertainty. We are certainly not of the view that the CAT waits in the wings to provide a second finding from

[1] ECtHR A. Menarini Diagnostics srl v Italy
[2] Case C-272/09P KME Germany and others v. Commission
[3] Case C-386/10P Chalkor AE Epexergasias Metallon v. Commission

scratch, and any suggestion that the credibility of the regulator/competition authority could be undermined by an intense degree of scrutiny can be rebutted easily: if the decision maker takes sound, robust decisions, its credibility will rest on that. If not, then there is every reason to have a stringent system in place to scrutinise inadequate decision-making.

Length of end to end decision-making

We are not convinced by the arguments that lengthy appeal procedures are necessarily a result of merits-based rather than judicial review appeals. Our assessment of the statistics provided suggests that they are far from capable of demonstrating the assertions that they are intended to support. In particular:

- Reviews of mergers which are subject to judicial review are generally conducted on an expedited basis, meaning that the length of time is generally short. This is not due to the standard of review, but to the specific circumstances of a review of a merger decision. It is also important to note that in merger cases, generally all parties are heavily incentivised to complete the review process as fast as possible.

- The statistics consider the appeals against the OFT's decision in the Construction case as a single appeal. However, in reality these were heard as 25 separate appeals, each proceeding on a full merits review and each being completed within a relatively short (0.5-5 day) period.

- Given the relatively small number of cases heard by the CAT to date, it is not clear that any robust conclusions can be drawn from the data. A comparison of the length of other judicial review cases would also be instructive since this would give a considerably larger sample size less likely to be distorted by individual cases.

In addition the forms of redress available under judicial review procedures may themselves contribute to the overall length of decision-making, given that the appeal judges are unable to make a finding themselves and must remit to the regulatory body to reconsider and issue a decision anew.

Inconsistent developments

Under the forthcoming Consumer Rights Bill, the CAT is likely to be given increased powers across the board to hear *inter partes* competition disputes. It is therefore odd to rein back its powers in respect of regulatory and competition appeals, the more so after the Government confirmed in its May 2012 response to the BIS consultation *A Competition regime for growth: options for reform* that it would not create a prosecutorial system, but instead would maintain on the merits appeals in any strengthened administrative system. We do not understand the basis for the U-turn on this point, nor find any support for it in the consultation.

1.2 Question 2

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?

We are in favour of retaining the on the merits appeals under the Competition Act. Further, given Article 4 of the Directive on a common regulatory framework for electronic communications networks and services requiring the merits of the case to be duly taken into account, on appeal, we remain sceptical that anything other than an on the merits standard would be appropriate in Communications Act appeals either. We therefore

suggest that there should be no change to the standard of review in either type of decision. In relation to price control decisions, we note that the approach to date by the Competition Commission has been inquisitorial in nature, in the form of the CC taking a second look at the data. Moving to a "consistent and focussed ground of appeal" approach would shift the procedure into an adversarial format, which we believe is less appropriate.

Our particular concern with establishing "focused specified grounds of appeal" is that these are a set of criteria applied to competition and regulatory appeals in isolation. Opting for an "on the merits" approach (or for that matter a judicial review approach) adopts a standard that is well understood in the broader context of English law. Indeed, as BIS itself notes at paragraph 4.19, the judicial review standard is a flexible standard as it is not defined in statute but is based on case law. We consider that any attempt to set out specific grounds of review in statute risks the review process being unable to respond to changing requirements of review and, specifically, to the growing importance of human rights protection in the competition sphere. The move is also liable to generate satellite litigation as to whether the grounds have been made out.

1.3 Question 3

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

Our initial concern is with the prospect of a number of years of uncertainty and litigation. This is to be expected with any reform, but the stakes in this particular reform are particularly high. The impact on the length of the procedures is unclear, given that the statistics provided do not contribute significantly to the debate. The costs, if the proposals for asymmetrical costs awards are adopted, could put the appeal route outside the reach of small and medium sized enterprises altogether.

We also question whether the standard of appeal has the impact on the length of proceedings and the associated costs which BIS believes it has. As BIS concedes, the judicial review standard is flexible. Recent developments in cases such as *Menarini* have emphasised this, suggesting that an "intense" level of judicial review can satisfy the requirements of the ECHR. In practice, we consider that a specialist tribunal such as the CAT will apply a level of scrutiny appropriate to the impact of the decision on the appellant. Thus, whether the standard of review is described as "on the merits" or as "judicial review", a reviewing body will apply a standard of scrutiny that is appropriate in all the circumstances of the case. In practice, gains in efficiency are unlikely to be realised by BIS' proposed reform. We accept that the "lacuna" where an intense judicial review standard cannot overturn an incorrect decision, but an "on the merits" appeal standard could do so, is small. However, the risk of a miscarriage of justice resulting in such cases is unacceptable, even were efficiency gains to be achieved.

In terms of effectiveness, judicial review ensures that the process of decision-making is not unfair or irrational, but leaves out of account the substantive analysis giving rise to the decision, and whether the decision is sound (indeed correct) in light of the evidence. The paring back of the review standard therefore risks inferior decision making on two grounds. First, the decision maker will be held to a lower standard, and not subject to scrutiny of its substantive analysis. Second, it will have a real incentive to expend energy "jr-proofing" the decision in terms of procedure rather than reaching a rigorous and robust substantive decision.

1.4 Question 4

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?

We are not convinced that there are cogent reasons for withdrawing a merits-based standard from Communications Act appeals. We note in particular the requirements of Article 4 of the Directive on a common regulatory framework for electronic communications networks and services (the Framework Directive), which explicitly requires the merits of a case to be considered on appeal, and wonder how the Government's proposals are to be reconciled with this.

1.5 Question 6

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?

We do not agree that there should be a change to the standard of review for Competition Act decisions (see above the answer to Question 1). Our concerns in particular are with the consequences of an infringement finding for the parties found to have infringed the rules and with the role that an infringement decision plays in subsequent follow on actions for damages. The risk that an ill-founded decision could then be relied upon in subsequent damages actions heightens the importance of stringent scrutiny at the appeal level.

Of the three options, "focused specified grounds" are the least attractive. Judicial review at least has the merit of a rich underlying body of case law developed over time.

1.6 Question 7

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?

See our response to question 3. We have seen no evidence that a narrower standard of review (of either type) would result in a shorter and less costly appeal process.

2. <u>Appeal bodies and routes of appeal</u>

2.1 Question 15

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?

This seems to us an eminently sensible proposal.

2.2 Question 16

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.

We see no particular benefits flowing from the 8 year term limit, either for judicial officers or for Chairmen that do not hold another judicial office, and definite disadvantages in terms of losing expertise build up through experience on the CAT bench. We are therefore in favour of the limit being abolished and provisions for CAT judges being harmonised with those for other judges.

2.3 Question 17

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

We note that the President or a Chairman acting alone is already able to sit alone when dealing with matters such as interim relief and case management. However, we are not in favour of this being extended further. The proposal is that a single judge should be able to sit rather than the panel of three – "particularly" (but clearly not only) "for cases which are concerned with points of law or more straightforward cases". The suggested rationale for this is that it "may" allow some cases to be completed more quickly and more efficiently.

In our view, one of the CAT's prime strengths is its panel structure – it can respond quickly and effectively as a panel, providing decisions that are solid and sound. If it sits solely with a single judge, the strengths of the panel structure are diluted, and its specialist skills (and possibly its rationale as a specialist tribunal) diminished. If it sits as do all other courts, this then raises the question as to why a specialist tribunal is necessary at all. We do not believe that the goal of allowing "some" cases (possibly) to be completed more quickly outweighs the potential disadvantages of disenfranchising panels. There is also a real issue as to the mechanics of how cases that are concerned only with points of law, or gauged to be "more straightforward" will be identified, and by whom, and whether those decisions will give rise to satellite litigation. For all of these reasons, we would prefer the CAT to continue to sit as a panel except in those limited cases in which it is already permitted to sit with a single judge.

2.4 Question 27

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

Yes: In our view there is little sense in requiring a party to commence judicial review proceedings in the High Court in relation to procedural issues and in the CAT in relation to substantive issues (the *Cityhook* conundrum), and would therefore welcome this aspect of streamlining.

3. Getting decisions and incentives right

3.1 Questions 28 and 29

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

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?

There may be significant benefits in an increased use of confidentiality rings during the administrative phase, in particular in reducing the need to introduce "new" evidence at the appeal stage. However, those benefits must not be achieved at the expense of the solicitor's duty to act in the best interests of the client and the client's right fully to understand the case against them. We also have concerns about the CAT taking on a supervisory role in the CMA procedure and would prefer the appellate body to be ring-fenced from the administrative proceeding entirely.

3.2 Question 30

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?

We disagree fundamentally with the proposal to circumscribe in statute the evidence that parties are allowed to put forward at the appeal stage, which we believe to be unjustified.

The Consultation does not suggest that evidence that could have been provided during the administrative stage is being deliberately withheld pending an appeal but does suggest that the "*unfettered ability to adduce new evidence on appeal might […] weaken the incentives on parties to put their best foot forward and engage fully during the administrative phase*." Certainly, in the context of a competition decision, the negative consequences of an adverse decision are too significant for the defendants to be likely to be dragging their feet. Also, the competition authority is entitled to bring its case efficiently during the administrative procedure and parties are entitled to defend themselves against the case put. In our experience, they are likely to be putting their best foot forward to do that. They are not required to answer a case not put against them, but where arguments and evidence subsequently appear relevant or evidence only comes to light at the appeal stage, it is only just that the appellant should be able to adduce them or it. If the CAT is unconvinced that it is in the interests of justice to admit the evidence, it has at its disposal the power to exclude or limit it[4], and the extent of its discretion and procedures for doing so have been considered and approved by the Court of Appeal. We therefore see no need for the Government to intervene and impose restrictions.

3.3 Question 31

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?

No – we see no reason why an as yet insufficiently tried and tested set of criteria should be applied to all price control appeals when the CAT has discretion – and adequate procedures in place – to permit evidence to be introduced or excluded as appropriate.

[4] Rules 19(2)(e) and 22 of The Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372)

3.4 Question 32

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?

We consider that there is no reason to vary the standard "loser-pays" rule in competition and regulatory appeals. In particular, we strongly oppose the proposal to introduce asymmetry of costs which we consider creates a penalty for appealing undertakings even where they successfully overturn a decision and may well encourage less rigorous decision-making at the administrative stage. There is also a real risk that SMEs will be deterred from appealing an incorrect decision, rather than gaining greater access to justice (one of the aims of the consultations). We consider that the current rules applied by the CAT, which ensure that successful appellants are entitled to recover only those costs which were proportionate, is sufficient to protect the regulator from having to pay excessive or unreasonable costs incurred by parties.

3.5 Question 33

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

We believe that the "loser-pays" rule should apply to competition and regulatory appeals in the normal way. We see no major reason in principle that regulators should not claim, and be awarded, their full costs. We consider that if regulators are to recover their internal legal costs, then there would need to be a clear statement on how these are calculated and that they should be required to justify the costs in the same way that they are required to justify external legal costs. However, this should only be on the basis, that, likewise, appellants should also be entitled to claim their internal costs.

3.6 Question 34

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?

Regulators and the competition authority have every reason to challenge appeals that have no merit, and we find it hard to believe that, faced with unmeritorious grounds of appeal, they would choose not to do so. Whether there is a need to encourage administrative bodies to address appeal grounds more attentively, therefore, remains moot.

What must not happen as a result of Government intervention, however, is that such challenges are in future made as a matter of course and thus become unmeritorious in turn. This will do little to streamline the appeal process and reduce costs. If a ground of appeal is unmeritorious, then of course the defendant should seek to have it struck out. If, however, it is a ground that could justify overturning a bad decision, then it is unconscionable for the appellant to be prevented from bringing that ground of appeal. We have every faith in the CAT's abilities to weigh the competing claims of appellant and respondent, but trust that the steps proposed now will not result in this process having to be undertaken unnecessarily.

3.7 Question 35

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

The CAT already has the power to reject unmeritorious grounds of appeal and unmeritorious appeals[5]. We have no reason to believe that the CAT is shirking its obligation to consider the merit of the appeals put to it – on the contrary - and nor do we find evidence to that effect in the consultation document. We can therefore see no particular value in requiring a further layer of review. Whilst it is true that strike out applications and striking out of appeals and appeal grounds are rare, this is likely to stem from the fact that, contrary to the Government's view few appeals are in fact devoid of merit.

We therefore believe that this proposal is unnecessary.

3.8 Question 39

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

We see no reason why Chapter I and Chapter II Competition Act 1998 non-infringement decisions should not continue to be appealable and reviewable on the merits, while case closure decisions continue to be appealable by way of judicial review. Those adversely affected by a flawed non-infringement decision will have every incentive to continue to challenge the basis of the decision.

4. Minimising the length and cost of cases

4.1 Question 40

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?

We are not entirely sure how "straightforward" and "not straightforward" cases are to be distinguished and suspect that the distinction may prove contentious. In any event, in our experience, the CAT as a matter of course moves cases forward swiftly through efficient case management and flexibility. We see no benefit in artificially shortening the target time.

4.2 Question 41

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

We do not see the merit in doing so.

[5] Rule 10, The Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372)

4.3 Question 42

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?

No. See our comments in response to question 30. As case law demonstrates (BAA Limited v Competition Commission, BT Telecommunications v OFCOM (Ethernet Determinations), the CAT is more than capable of refusing consent for expert evidence to be adduced where it believes it to be unnecessary.

4.4 Question 47

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

We regard the CAT's case management competences as laudable, though there is room to constrain the Competition Commission's timetables more effectively.

4.5 Question 48

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

Measures should be aimed not at the appeal regime, but at the decision making stage. Probably the greatest contribution that the Government could make to robust decision making would be to ensure that the Regulators are adequately resourced and able to appoint and retain experienced and competent staff, and indeed, sufficient senior officials to address all aspects of the investigation and decision-making process on a timely basis.

Simmons & Simmons LLP
EU, Competition & Regulatory Group **11 September 1013**

Southern Water

Southern Water

Tony Monblat
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Date
13 September 2013
Contact
Simon Oates
Tel 01903 272383
Fax 01903 272444

Dear Mr Monblat

I am writing in response to the consultation Streamlining Regulatory and Competition Appeals.

The consultation document is explicit that it is not making any reccomendations to change the current basis for appeals in the Water sector. Given this, the points made in this response, from Southern Water, are kept brief and are restricted to:

- the grounds for regulatory appeal; and
- the importance of cross-sectoral consistency.

I would be very happy to discuss any of the comments made in further detail.

Grounds for appeal

Southern Water believes that the materiality of regulators' decisions in relation to price controls and licence modifications require a more intensive standard of review than would be applied by a standard appeal on judicial review grounds which focusses only on the process of decision making not the quality and appropriateness of the decision. For this reason, we would not support any future moves to replace the current grounds for appealing regulatory decisions by reference to the Competition Commission (which enables a full review and re-determination of the regulator's decision on the merits including, in particular, the public interest) with a right of appeal on the grounds of judicial review alone.

However, it is clear, in large part evidenced by the very small number of price review references to the Competition Commission, that the grounds for reviewing price control decisions in the Water Sector (and across the utility sectors more broadly) is worthy of review and reform.

Typically, references of price control decisions to the Competition Commission are thought of as a "nuclear option" by companies on the grounds that:

- they are expensive and consume significant senior management time;
- the grounds for appeal cannot be specified by the company and are instead specified by the regulator; and
- individual elements of the regulatory decision cannot be appealed; rather, the Competition Commission is required to look at the whole decision afresh, taking into account the public interest.

The lack of resultant appeals is unlikely to maximise the incentives for high quality regulatory decision making.

Souther Water would therefore support reform of the current grounds for regulatory appeals and the move to a direct right of appeal for companies of individual elements of price control decisions, on focussed specified grounds, in line with recent Government legislation in the Airports Act 2012. It would be essential that the focussed specified grounds for direct appeal extend beyond judicial review as they do in the Airports Act to cover, as a minimum, material or unreasonable:

- errors of fact;
- errors of law;
- procedural irregularities;
- regulatory discretion; and
- errors of judgement

Consistency across regulatory sectors

The consultation also seeks views on the desirability of consistency across regulatory sectors where direct rights of appeal are being considered, namely airports, energy, rail, communications, and postal services.

Southern Water would support a move to consistency across-sectors, including the water sector, were Government to consider legislating to harmonise on the direct right of appeal.

As the consultation document states, consistency across sectors would provide a greater focus to appeals and promote regulatory certainty. This would have wider benefits for the growth and productivity of the UK utility sectors which have a substantially similar investor base. Improved regulatory certainty will give companies greater confidence to invest and innovate to the benefit of their customers.

I would be happy to discuss any of the points raised in more detail.

Yours sincerely

Simon Oates

Simon Oates
Director of Strategy and Regulation

SSE plc

BIS
Consumer and Competition Policy
1 Victoria Street
London
SW1H 0ET

Inveralmond House
200 Dunkeld Road
Perth
PH1 3AQ

11 September 2013
lesley.gray@sse.com
01738 516854

Dear BIS

Streamlining Regulatory and Competition Appeals

SSE has engaged with its relevant trade associations in relation to the proposals made by BIS. We refer to the responses by Energy UK, Energy Networks Association and UK Competitive Telecommunications Association, all of which give voice to the concerns of the industries of which SSE is a part. SSE echoes the concerns expressed by others in the industry and strongly opposes any narrowing of the rights of appeal in relation to regulatory and competition decisions. SSE considers that the fundamental question posed in this consultation is whether it is appropriate to move to a judicial review standard of appeal. SSE has therefore chosen to respond on this issue alone (covered in Question 1 of the consultation) but would refer BIS to the responses of the aforementioned bodies which reflect SSE's views regarding the wider questions posed in this consultation.

Question 1: 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?

No. SSE supports continuing the current standard of review, where appeals are heard "on the merits" for both regulatory and competition appeals. SSE considers that merits appeals play a valuable role by providing a check on the decisions of regulators, where more restricted judicial review grounds would not have assisted in reaching the right outcome.

SSE has had the benefit of reviewing the response of the Competition Appeals Tribunal, which provides valuable insight into the "case for change" noting that "*it is difficult to identify any clear principled or evidential basis*"[1] supporting a presumption that appeals should be heard on a judicial review standard. SSE agrees with the thrust of what the CAT has to say on the "case for change" relating to the standard of review. This is particularly true in relation to energy appeals, for which BIS has failed

[1] See CAT Response, page 22

to provide any evidence suggesting that there is a problem that requires to be addressed.

Yours sincerely

Lesley Gray
Regulation Manager

Telefónica UK Ltd (O2)

Telefónica UK's response to:

Streamlining Regulatory and Competition Appeals
Consultation on Options for Reform

A consultation by the Department for Business Innovation & Skills dated 19 June 2013.

11 SEPTEMBER 2013

Telefónica UK Limited
260 Bath Road
Slough
Berkshire
SL1 4DX
T +44 (0)113 272 2000
www.telefonica.com

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Executive summary

1. Telefónica UK Ltd ("**O2**") welcomes the opportunity to respond to the Government's consultation on options for reforming regulatory and competition appeals (the "Consultation")[1].

2. O2 is a leading communications provider in the UK with over 23 million customers. O2 runs 2G and 3G networks and, after acquiring spectrum at a cost of £550m earlier this year, launched its 4G service on 29 August 2013, with plans to expand geographical coverage rapidly. O2 invests approximately £1.5m per day, on average, in its network infrastructure. O2 provides corporate customers with a broader range of communications, IT and consultancy services. It also operates O2 Wifi and provides other products and services such as the O2 Wallet.

3. O2 employs approximately eight thousand people in the UK, has 450 retail stores and sponsors The O2, O2 Academy venues and the England rugby team. O2 forms part of Telefónica Europe plc., which uses O2 as its commercial brand in the UK, Slovakia, Germany and the Czech Republic and which is a business division of Telefónica SA[2].

4. We are deeply concerned about the premise of the Government's proposed intervention in this area. In her foreword, the Minister for Employment Relations and Consumer Affairs writes:

> "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."

5. O2 is strongly of the view that the present appeals mechanism is not a "one-way bet". Launching an appeal against a decision made by Ofcom is a time consuming and expensive undertaking. It absorbs a significant amount of senior management time, diverting attention away from running the business. It is something that O2 never enters into lightly.

6. Further, it is simply wrong to suggest that appeals are seen as a "chance to re-open regulatory decisions". There is now plenty of case-law that the appeals bodies should be slow to overturn a decision made by Ofcom in exercise of its regulatory

[1] Streamlining Regulatory and Competition Appeals, Consultation on Options for Reform, 19 June 2013.
[2] Read more about O2 at www.o2.co.uk/news.

discretion[3]. Launching an appeal in the hope that an appeals body will "retake a regulator's decision" is, therefore, completely untenable.

7. We recognise that litigation can be lengthy and expensive for all concerned, including regulators as well as appellants. However:

- to a significant extent, the Common Regulatory Framework requirement, that Member States must provide for an appeals mechanism that takes due account of the merits of a case, necessitates hearings that can consider relevant evidence and to do this properly and fairly in some cases inevitably takes time;
- apart from in exceptional circumstances, cases are generally dealt with reasonably quickly and there is no reason to believe that a change in the standard of review would improve efficiency and good reason to think the opposite, in the medium term at least; and
- most importantly, the principal objective of an appeals mechanism, to uphold good decisions and weed out bad ones, must not be compromised. O2 is concerned that the Government's proposed changes would do just that. The wider cost to society of allowing bad decisions to stand would dwarf the relatively trivial savings the Government believes its reforms would realise (which putative savings O2 disputes).

8. Neither do we agree with the Government's case that a change to the standard of review would result in speedier appeals and hearings. A proper analysis of the data reveals that there is no evidence to support this.

9. As regards the concern that appeals hold back decision making, Ofcom's decisions stand unless and until they are struck down by appeal. Much is made in the Consultation of the 2.6GHz case, but Ofcom's withdrawal of its original decision in that matter (rather than defending the appeal) is, we would suggest, pertinent. Indeed, we would suggest that the 2.6 GHz case is an example of the importance of rigorous scrutiny of Ofcom's decisions, exposing the flaws where the regulator has made mistakes. In our view, the reference to this case in the Consultation is highly misleading, for reasons we set out later in this response.

10. We do, however, accept that procedural changes may be made that might improve the efficiency of the current regime and, indeed, we were part of the industry group that proposed many of the measures which feature in the Consultation. In fact, over the course of the last two years, O2 has sought dialogue with the Government regarding its proposed reforms to the appeals framework, repeatedly voicing its concerns.

[3] Indeed, the Consultation quotes two such cases, at paragraphs 4.9 and 4.42.

11. In summary, then, we do not agree with the justification for reform, as set out in the Consultation. Further, there is a danger that in seeking to change an important part of the regulatory framework, the Government could undermine regulatory certainty. We agree with the Minister that the ultimate aim of regulatory appeals 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."

12. The danger with narrowing the scope for appealing Ofcom's decisions in the way the Government proposes is that it increases the possibility that bad decisions both are made in the first place (because lower judicial scrutiny reduces incentives for the regulator) and are left standing; decisions that are inconsistent with the general regulatory duties determined by Parliament. This would work against the interests of consumers:

- bad decisions result in costs greater than the benefits generated. In competitive markets (such as those in which O2 operates), such increased costs would be passed through to consumers in higher prices; and

- poorer decision making would create regulatory uncertainty, leading to an increase in risk and the cost of capital. This would deter investment and services would suffer as a result.

13. Thus, the reforms the Government is proposing run counter to their stated objectives.

14. As the Government notes in this Consultation, the UK communications regulatory system has much to commend it[4]. Rightly, it is widely regarded, internationally, as a model regime. The present appeals mechanism has not prevented Ofcom from implementing innovative regulatory solutions to various problems in the ten years it has been in existence. Poor decisions have been weeded out and the appeals mechanism imposes a discipline on Ofcom that the Government would be wise to retain.

15. We are firmly of the view that the current appeals mechanism is part and parcel of the current, successful system. Ofcom is able to exercise its regulatory discretion within the terms of its general duties, as established by Parliament. At

[4] In paragraph 3.1 of the Consultation.

the same time, Ofcom's decisions are exposed to full, independent scrutiny. O2 strongly believes that the present regime strikes the right balance and that this balance is likely to be undermined by narrowing the scope of the appeals mechanism in the way the Government proposes. Careful thought needs to be given to these very real and significant downsides before any reform is attempted.

16. On a simple weighing of costs and benefits, the proposals in the Government's Consultation, if implemented, would incur real and substantial costs (lesser scrutiny of regulatory decisions, a poorer quality of decision-making, a larger number of bad decisions, legal and regulatory uncertainty, litigation and the consequent costs of all of these for consumers and citizens) for the sake of putative benefits which are unsupported by evidence and are likely to prove illusory. We are firmly of the view that the proposed changes would in fact undermine the Government's growth agenda. The above does not provide a compelling case for foreign owners of UK communications companies to choose the UK over other jurisdictions to get a return on their capital investment. The reality in the modern age of global businesses such as Telefonica is that the UK is just one jurisdiction amongst many competing for capital investment and shareholders will naturally look to invest in jurisdictions where the return on their investment is greatest and most certain. With respect, our view is that the proposals will not help O2 make its case for increased investment to its shareholders. This would adversely affect consumers who would lose out on the benefits of investment not carried out as a result of the proposed reforms.

17. O2 believes that the current "full merits" standard of review serves businesses, consumers, markets and the industry well and should be retained.

18. In this response, we focus on those aspects of the reforms which are of most concern. You will see that the remainder follows the structure of the Consultation. We have answered some of the specific questions in the attached Annex.

A. Growth and the Appeals Framework

Government's vision for regulatory decision-making

19. In the Consultation,[5] the point is made that a regulator needs to be able to exercise regulatory judgement in balancing conflicting effects. O2 agrees and it is established law that the appeals bodies should be slow to overturn decisions Ofcom has reached in circumstances where there is no single "correct" answer, and Ofcom has used an appropriate methodological approach[6].

What is the appeals framework for?

20. The Government then proceeds to ask the pertinent question: "What is the appeals framework for?" and then seeks to answer that question.[7] O2 agrees with the points made about accountability and consistency across sectors[8], but it seems to us that the principal function of an appeals framework is to uphold good decisions and weed out bad ones. By "good" decisions, we mean those that (a) further the statutory duties, as determined by Parliament, to which each of the sectoral regulators is subject and (b) are evidence-based and adopt sound methodologies. This is, we believe, a fundamental point; failure to acknowledge its significance when considering the appeals framework is likely to result in proposals that undermine, not strengthen, regulatory decisions making.

21. The Government writes:[9]

> "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."

22. This assertion is repeated at various points in the Consultation. However, O2 cannot reconcile it with established law in the context of appeals under the Communications Act 2003. For example, in the recent appeal against a CAT judgement in the 0845/0870 case, the Court of Appeal held that:

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[5] See paragraph 1.8.
[6] As the Government appears to accept: see paragraphs 4.9 and 4.42, for example.
[7] See page 11 of the Consultation.
[8] In the context of the specific section in the Consultation
[9] See paragraph 1.12.

"if the regulator has addressed the right question by reference to relevant material, any value judgment on its part, as between different relevant considerations, must carry great weight."[10]

23. The Consultation refers to two other judgments espousing the same principle.[11] Accordingly, the Government's apparent concern, that appeals bodies are being asked to become a second regulator, is entirely misplaced. As far as the communications regulatory regime goes, they are manifestly not.

Objectives for the appeals regime

24. The Consultation lists a number of objectives that, in the Government's view, an appeals framework should meet.[12] In O2's view, for the reason we describe above, this should be amended to make clear that appeals mechanisms should:

- uphold good decisions, in the sense that they are likely to generate net benefits in the context of the general statutory duties, as determined by Parliament, and weed out bad decisions. The Government suggests that appeals should support robust decision-making, but it is unclear what this means. If a "robust" decision is one which is evidenced-based, properly worked through, and generates net benefits in the context of the regulator's statutory duties, O2 would not disagree: the current system encourages such decision-making. But if "robust" means "decisive" or "firm in its opinions", it is possible for decisions to be bad and robust, which is clearly undesirable;
- enable the appeals body to test the robustness of a regulator's analysis (otherwise there is a risk that opaque and ultimately, incorrect decisions might be made); and
- ensure that the interests of justice are served.

25. In addition, the domestic regulatory regime must comply with any relevant European law including, in this context, Article 4 of the Framework Directive, and Article 6 of the European Convention on Human Rights.

[10] Case Nos: C3/2011/3121, 3124, 3315, 3316 and 2012/0692, http://www.catribunal.org.uk/237-6794/1169-3-3-10--British-Telecommunications-PLC--.html
[11] See paragraph 4.9 and 4.42.
[12] See paragraph 1.13.

B. The Case For Change

Summary

26. O2 fundamentally disagrees with the case for change that the Government has put together.

27. In the summary at the start of Chapter 3, the Government suggests that there appear to be strong incentives on parties to appeal decisions, particularly in the communications sector. The Government speculates that this may be down to the standard of review and that appellants face a limited downside to appealing.

28. The Government's concerns are misplaced. Decisions made by Ofcom can have profound effects on communication markets, influencing the way in which providers compete, set prices and make investments. It is vitally important that Ofcom's decisions are capable of being properly scrutinised; poor decisions can have a detrimental affect which, ultimately, adversely affects consumers.

29. For example, Ofcom's cost benefit analysis supporting its 2007 decision to reform number portability was found, on closer inspection by the CAT, to be flawed. Consequently, whilst ostensibly a "pro-consumer" reform, if the decision had been implemented, there was a risk that it would have imposed more costs than benefits generated. Those net costs would have been borne by consumers (given the competitive nature of the market), either in the form of higher prices or reduced investment. Ofcom's subsequent consideration of the matter resulted in a decision not to proceed.

30. Other examples of the detrimental effects of bad decisions are set out in the Towerhouse Consulting Paper on the associated Impact Assessment, also submitted to BIS in response to this Consultation[13].

Standard of review

31. Under the current appeals mechanism, ten years of case law has established that Ofcom's decisions must be capable of "withstanding profound and rigorous scrutiny"[14]. Elsewhere in the Consultation, the Government describes this as "amorphous"[15]. In O2's view, that is incorrect; it merely requires Ofcom's analysis to be "robust":

[13] O2 is one of the industry stakeholders that participated in the submission of this document.
[14] See, for example, Case 1094/3/3/08.
[15] See paragraph 4.9.

> "Whatever linguistic label is applied to the legal standard to be adopted, we do not find in practice there to be a meaningful distinction between a "robust" analysis and one that would withstand "profound and rigorous" scrutiny."[16]

32. As far as O2 is aware, Ofcom appreciates the meaning of "robust" analysis, having used the term in its guidelines on impact assessments[17]. Indeed, in these guidelines, Ofcom says that sensitivity analysis "should help ensure that the Impact Assessment and the final policy decision are more robust" (emphasis added).[18]

33. As the Government notes, it is also the case that appeals bodies should be slow to overturn decisions made by Ofcom which are arrived at by an appropriate methodology. The Government appears to suggest that there is a contradiction here. In O2's view, there is not: case law is clear that Ofcom's analysis must be robust, but that it has a degree of discretion, so long as its approach is sound.

34. O2 is firmly of the view that this scheme is entirely reasonable, given the repercussions of Ofcom's decisions. For example, Ofcom's decision, in 2011, to adopt the "pure LRIC" cost standard for mobile voice call termination regulation, rather than the "LRIC+" approach that had historically been used, had an impact on O2's net revenue of tens of millions of pounds per annum. That decision rested on a complex (and disputed) analysis of efficiency, competition and distribution effects. It was the subject of several appeals (two from mobile operators , supported by O2, advocating the retention of the LRIC+ standard on the basis that this was, overall, in the best interests of consumers, and two other appeals arguing, broadly, for lower costs and a quicker convergence of charges to costs). In the event, BT's appeal succeeded, with the result that charges were reduced more sharply than under Ofcom's original decision. The other appeals failed: Ofcom had sufficient discretion to adopt the pure LRIC cost standard.

35. The Government's contention that appellants "face a limited downside to appealing"[19] does not correspond with O2's experience. First, this claim suggests

[16] See paragraph 47 of the judgment in Case Number: 1094/3/3/08.
[17] Better Policy Making: OFCOM's approach to Impact Assessment", issued on 21 July 2005. See: http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better_Policy_Making.pdf
[18] See paragraph 5.30.
[19] Summary, page 18. Elsewhere, the Government uses the phrase "*one way bet*".

a presumption that unmeritorious appeals are being brought by parties. There is no evidence in the Consultation of such unmeritorious appeals being brought[20].

36. Secondly, the Consultation does not appreciate the significant cost implications for businesses in bringing appeals. Instigating an appeal is very time consuming for senior regulatory and legal staff and places a demand on the time of senior management within the company, diverting their attention from managing the business. There is no incentive to bring unmerited claims. Indeed, the CAT Rules already dissuade unmeritorious appeals.[21] Under the CAT's rules, these can be struck out without the need for a substantive hearing and O2 is keen to ensure that its reputation with Ofcom and appeals bodies is not damaged by seeking to make frivolous appeals. The CAT also has wide powers to impose costs orders against parties that bring unmeritorious appeals.

37. Thirdly, a decision on whether to launch an appeal is made in the context of established and well understood law, that the CAT:

> "may, whilst conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause."[22]

38. Accordingly, it is recognised that an appeal against a decision made by Ofcom under the existing Communications Act regime does not allow the appellant to have "another bite of the cherry". An appeal will not succeed if it cannot be demonstrated that Ofcom has erred. There is, therefore, no "one way bet" or "limited downside to appealing".

39. The Government sets out its concerns in more detail at paragraph 3.2:

[20] Indeed, O2 is unaware of any appeal in the communications sector being said by the CAT to be "*wholly without merit*"; in the ordinary business of judicial review in the Administrative Court, by contrast, such judicial observations are commonplace.

[21] On this point, O2 notes the CAT's comments at paragraph 40 of their response to the Consultation: http://www.catribunal.org.uk/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html

[22] See paragraph 82 of the judgment in *T-Mobile (UK) Limited and others v Office of Communications* [2008] CAT 12.

- 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.

40. As a general observation, O2 recognises that appeals inevitably take time and that costs are incurred. However, this must be seen in context. First, the appeals process is only one part of what can be a very long end-to-end decision-making process. The administrative decision-making process is generally significantly longer than the appeals process and therefore any reduction to the appeals process may not actually impact significantly the timing of the end-to-end decision making process. We would certainly not expect it to, if there is the same rigour applied to Ofcom's decision making as there is currently. This is one of the reasons O2 considers that Government should focus on improving the administrative decision-making process.

41. Second, the function of an appeals mechanism is to make sure that regulatory decisions, which can be of immense importance in terms of their effects on consumers, costs and revenues and the way markets function, may be properly scrutinised, and that bad decisions can be weeded out. In O2's view, the current Communications Act framework achieves these objectives, and any attempt at reform should not 'throw the baby out with the bathwater', in the sense that the core objective of the appeals mechanism must not be compromised.

42. Thirdly, we have seen no evidence that the UK regime is out of kilter in terms of time and cost with other jurisdictions.

43. In short, we do not see that there is a problem to solve.

Variation in number of appeals between sectors

44. In this section,[23] the Government asserts that different "appeal routes" have, in part, led to a variation in the number of appeals heard against different types of regulatory decisions. However, no evidence is provided to support this assertion. Indeed, the Government concedes there may be other factors that affect the

[23] See paragraph 3.3.

volume of appeals in different sectors (which must be the case given that each appeal is very fact specific and can give rise to a range of varying factual and legal issues).[24] More importantly, it is not clear what conclusions the Government draws from the data presented. For example, is it the Government's case that there exists a "right" number of appeals (regardless of the appreciation of the factual and legal issues raised in each of those cases)? If so, how is this to be determined?

Length of appeals/Impact of standard of review

45. In O2's view, it is difficult to draw any firm conclusion from the array of data presented in paragraphs 3.9 – 3.18. Presenting average times to pursue appeals and average length of hearings suffers from the problem of failing to take into account either those cases where particular circumstances distort the distribution of appeal and hearing lengths[25] or particular case timetabling issues, for example, the time taken between a full hearing and a decision, which is not in the parties' control. O2 notes the CAT's evidence about such cases[26] and supports the CAT's conclusion that, in practice, there is little distinction in average time to pursue a merits appeal and a judicial review application, or in average hearing lengths.

46. In any event, whilst we see merit in measures that might improve the efficiency of the appeals procedure, the key issue for O2 is that the procedure performs its principal function, which is to uphold good decisions and weed out bad ones. We are firmly of the view that any victory brought about by reform, in the sense of shorter hearings (and we do not believe that changing the standard of review would achieve this, anyway; see our comments below regarding judicial review and focused specified grounds[27]), would be entirely Pyrrhic in nature, if (as we think likely) it would result in poorer decision making. Worryingly, the Government does not appear to have recognised this potential disadvantage of reforming the standard of appeal, notwithstanding that this consequence has consistently been drawn to their attention by industry stakeholders over the last couple of years.[28]

[24] See paragraph 3.7.
[25] See figures 3.3 and 3.4.
[26] On pages 24 and 25 of its response.
[27] See paragraphs 80-96
[28] See, for example, para 19 of O2's response to the related 2011 consultation by DCMS "*Implementing the revised EU Electronic Communications Framework – Appeals*": http://old.culture.gov.uk/images/consultation_responses/FWAPP2011-Telefonica.pdf

47. The Government then repeats the incorrect implication that under the current system, an appeals body may "retake a regulator's decision".[29] For the reasons set out above, that is simply not true and accordingly, in O2's view, is no basis to amend the appeals mechanism.

48. Similarly, the Consultation also airs a concern that "the appeal body could act as a second regulator 'waiting in the wings', and in turn negatively affect regulatory certainty".[30] This concern is repeated elsewhere in the Consultation.[31] If there is any such concern, it would be entirely misplaced because, as we have described above, that is not how the present system operates. Furthermore, as we set out below, if the standard of review is amended in the way the Government proposes, it is likely to undermine regulatory certainty. This is because regulatory decisions would not be subject to the same degree of scrutiny on appeal as they are now and this is likely to lead to poorer decision-making, greater uncertainty and risk, and a consequential increase in the cost of capital which would deter investment, the opposite of the Government's stated objectives.

Incentives to appeal

49. The Government's data reveal that around one in eight of Ofcom's 160 decisions made within the five year period from 2008 to 2012 have been appealed. The fact that the vast majority of decisions have not been appealed demonstrates that appealing is not a "one way bet". If it were, then a greater proportion of Ofcom's decisions would have been appealed.

50. In this section, the Government sets out the argument that parties "cherry pick" parts of a decisions for appeal.[32] This is an unfair characterisation of how the system operates. In practice, parties focus attention on particular aspects of the decision-making process where they believe regulatory analysis is unsound. It is, frankly, naïve to believe that an appeal would be launched that would ultimately arrive at a commercially unattractive outcome for a particular party. Presumably, advocates of the "cherry-picking" argument believe that errors in analysis net out, but, in O2's view, there is no basis for such a belief and such an

[29] See paragraph 3.14.
[30] See paragraph 3.18.
[31] See paragraph 4.18, for example.
[32] See paragraph 3.20.

approach to regulatory decision-making would undermine regulatory certainty and would, therefore, be undesirable.

51. The Government also puts forward its view that parties are more likely to appeal if the effect of the decision is significant.[33] It would be surprising if very many appeals were launched where the effect of the decision is trivial. More importantly, however, the fact remains that under the current Communications Act regime, the appeals body is slow to overturn a decision made by Ofcom in circumstances where it has adopted an appropriate methodological approach.

52. On the issue of new evidence,[34] we note that the Government has not seen (or put forward) any evidence of disingenuous behaviour on the part of the parties. The Consultation does not record the important fact that under the present rules, the CAT is able to admit, exclude or limit evidence where it is in the interests of justice to do so. Furthermore, there is a danger that proposals to restrict admission of new material could result in longer and more appeals (the opposite of the Government's stated objectives), as parties are likely to litigate the meaning of new statutory provisions.

53. It is not clear that the Government's concern about appeals delaying the effect of regulatory decisions applies in the communications sector.[35] O2 assumes not, since the regime expressly provides for Ofcom's decisions to stand unless they are struck down.

54. Much is made in this Consultation document of the 2.6MHz appeal, including in relation to the Government's concern about the speed of decision making[36].

55. Firstly, we note and endorse what the CAT has said about the matter in its response.

56. In this particular case, Ofcom chose not to implement its decision and hold the auction whilst the appeal was pending. That was a matter for Ofcom; in other cases, such as price controls decisions, Ofcom has implemented its decisions even in circumstances where an appeal is made.

[33] See paragraph 3.21.
[34] See paragraphs 3.22 and 3.23.
[35] See paragraph 3.24.
[36] See paragraphs 3.25 and 4.28 for example.

57. It is totally within Ofcom's discretion whether or not to follow through with its decision pending an appeal. It is of course very expensive, embarrassing and difficult to unwind a spectrum auction once it has taken place, not least because lots of confidential information about demand and prices are revealed during the process. So it is understandable that Ofcom decided in this case to await the outcome of the litigation.

58. Under the present regime, where a decision taken by Ofcom is subsequently appealed, Ofcom is nevertheless free to implement that decision (as it has done) pending resolution of the appeal. If parties wish to stop Ofcom from implementing a decision whilst an appeal is ongoing, they can either attempt to persuade Ofcom not to implement or else they must apply for interim relief (suspending the effect of Ofcom's decision) before the CAT. We note that in those circumstances, the CAT will only grant interim relief in limited circumstances, i.e. in order to prevent serious, irreparable damage to a particular person or category of person, or to protect the public interest

59. In Figure 1 below, we discuss the 2.6GHz appeal, 4G liberalisation and spectrum auction cases more fully and explain why the Government's references to those matters are a misleading and inaccurate basis to justify proposals for regulatory reform.

Figure 1

The 2.6GHz appeal, 4G liberalisation and the spectrum auction

We note what the Government says on page 12 of its Impact Assessment about the 2.6 GHz spectrum auction case and alleged delays to the spectrum auction process generally. We broadly agree with the timeline of events and the indication that the reason for the challenge to the proposed 2.6GHz auction was concern about an auction taking place while a decision on 3G liberalisation was still pending (including the possibility of O2 losing some of its sub 1GHz spectrum) . However, importantly, it should be noted that there was also concern about the inefficiency and cost to communications providers and consumers alike of having a separate 2.6GHz auction in advance of an auction for sub 1GHz 4G spectrum.

Ofcom subsequently withdrew its 2.6GHz auction decision, ostensibly because of the Government's proposal to hold a double auction award for 800MHz and 2.6GHz (as a consequence of which, the Government directed Ofcom not to pursue the 2.6GHz only auction). By the stage Ofcom withdrew its decision, however, O2 expected to succeed at the hearing because it had (in its view) established serious errors in certain crucial assumptions and evidence upon which Ofcom had relied. In light of this, O2 strongly rejects the characterisation of this particular case leading to delay and being a basis for reform to the appeals framework

Incidentally, it was, perhaps, fortuitous that the release of the 2.6GHz band was delayed until 2012. It was only after the withdrawal of Ofcom's decision that it discovered that emissions in the 2.6GHz band caused interference problems with adjacent aviation radars at 2.7GHz. Whilst the spectrum has now been auctioned, its use is restricted until 2014 due to a programme of work to protect these radars.

Rather than supporting the case for reform, we believe that the 2.6GHz appeal is a good example of the present regime working effectively. A decision by Ofcom was rescinded due, in no small part, to the scrutiny it would have been subject to in an appeal. A better result was ultimately achieved and, importantly, there was no delay in the provision of 4G services to consumers.

Similarly, the threat of litigation following Ofcom's EE 1800MHz spectrum liberalisation decision was the catalyst for discussions that ultimately led to quicker clearance of 800MHz spectrum and, therefore, earlier access to 4G services than would otherwise have been the case.

60. In addition, O2 is not sure what the Government is referring to in paragraph 3.26 regarding mobile telephony price controls. Ofcom has traditionally set *four* year charge controls for wholesale mobile voice call termination[37]. Ofcom's decision of

[37] Even though the current one features a three year "glidepath" to costs. Ironically, the three year glidepath was set following an appeal; Ofcom's original four year glidepath having been overturned.

March 2011 was appealed.[38] The Competition Commission report was delivered in February 2012 and Vodafone's and Everything Everywhere's judicial review applications were dismissed in May 2012. At the time of writing, Ofcom has yet to start the market review that might ultimately lead to further charge controls after the end of the current ones.[39]

Inconsistency of appeal routes

61. The current appeals route in the communications sector, in which the CAT plays a prominent role, is desirable and should be retained. The CAT is an expert body and has built up significant expertise in its understanding of the sector and of the regulatory regime, and this has contributed to an effective and efficient appeals mechanism.

62. O2 notes the concern that the Government expresses in this section, namely that investors across sectors may have less certainty about how the regime operates because of differences in appeal routes.[40] However, we see no evidence of this and it does not accord with our experience.

Impact on regulatory decision making

63. O2 does not recognise the reported concern that the cumulative effect of regulatory appeals can be to make regulators overly risk-averse.[41] For instance, Ofcom's recent approach on reforming non geographic numbers and its decision to make 80% one-off cuts to fixed termination rates[42] do not appear to O2 to be the proposals of a timid regulator. This example clearly demonstrates that Ofcom is able to take bold regulatory decisions even where those decisions are subject to a full merits review.

64. In summary, then, O2 is firmly of the view that a case has not been made to reform the appeals mechanism in the Communications Act 2003. Under the current system, Ofcom's decision making must be robust, yet it is afforded ample flexibility to exercise its regulatory discretion, so long as the methodological

[38] In May 2011.
[39] In March 2015.
[40] See paragraph 3.30.
[41] See paragraph 3.31.
[42] Subject to consultation with the European Commission

approach it adopts in any particular matter is appropriate. The current system is best designed to ensure that good decisions (i.e. those that are most likely to meet Ofcom's statutory duties, as set out be Parliament) are upheld and bad decisions overturned, and that must be the principal objective of an appeals mechanism.

65. For completeness, we set out below why we think the Government's proposals for reform would lead to a worse outcome than under the current system.

C. Standard of review

Summary

66. In the summary to this chapter, the Government talks of "*effective regulatory decision-making*", but it is not clear what is meant by this. In O2's view, an appeals mechanism must support *good* decision-making. By that, we mean decisions that give effect to statutory duties as set out by Parliament.

67. The Government's aim, that appeals should focus on errors that are material, is already met by the current system – the CAT is required to identify whether Ofcom "*got something materially wrong*"[43]. As we explain below, the danger of setting out the term "*material*" in legislation is that it would spawn litigation on its meaning in the circumstances of individual cases – the very opposite of what the Government intends.

Standard of review principles

68. We agree that the principle of proportionality is an important one.[44] In O2's view, in the context of changes to the appeals mechanism, proportionality means making the least intrusive amendments to the present regime, which we believe is fundamentally sound, to achieve the desired outcome (more efficient appeals).

69. The Government sets out its broad approach for reform in this section.[45] It has a preference for a judicial review-based system for appeals, except where there are legal or policy reasons supporting another approach. In these circumstances, a review should be determined by clear grounds of appeal, focused on identifying material errors or unreasonable judgments.

Communications Act 2003

70. In the case of electronic communications, as the Government recognises[46], Article 4 of the Framework Directive requires that Member States provide for an

[43] *T-Mobile (UK) Ltd v Ofcom (Termination Rate Disputes)* [2008] EWCA Civ 1373 at [31].
[44] See paragraph 4.17.
[45] See paragraphs 4.19- 4.21.
[46] See paragraph 4.25.

appeal mechanism that takes into account the merits of the case. Accordingly, we assume that the Government's preference in this sector is that appeals should be determined by clear grounds of appeal, rather than by a judicial review based system. This appears to be borne out in the Consultation;[47] the Government says it believes that an approach based on focused specified grounds would provide greater clarity and certainty (compared to a judicial review-based system).

71. The Government states its argument in favour of amending the present Communication Act regime:[48]

- the current provisions "*gold-plate*" European law;
- significant time and cost is spent on appeals; and
- the threat of appeal is having an impact on the speed of decision making

72. In our view, the current standard of review is the right standard for the purposes of meeting Article 4's requirements. In addition, it meets the Government's stated objectives to a greater extent than either judicial review or the proposed focused specified grounds. We therefore disagree with the following assertions by the Government regarding the current standard of review:

(a) that it gold plates the requirements of the Framework Directive;
(b) that time and costs are overly problematic;
(c) that speed of decision-making is of primary importance (over substance);
(d) that the current appeals framework should be modified to a judicial review model;
(e) that, failing (d), the current appeals framework could be modified to contain statutory focused grounds of appeal;

73. Each of these points above is discussed in turn below.

(a) Gold-plating

74. O2 disagrees that the current regime goes beyond what is required under European law. Article 4 of the Framework Directive requires that there must be an affective appeal right and that the merits are duly taken into account. We believe that this means that an appeal must be capable (where the case requires it) of analysing potentially complex evidence, including cross examining

[47] See paragraphs 4.29- 4.32 and paragraph 4.41.
[48] See paragraphs 4.25 – 4.28.

witnesses. Many appeals are however dealt with without witness evidence or indeed any material time spent on factual issues. The key, as is clear from the *T-Mobile* case, is that the CAT needs to adapt the procedure to meet the case. As set out above, under the present regime, the CAT is able to assess whether Ofcom's analysis is sufficiently robust. But the CAT also respects Ofcom's discretion and judgement in balancing its regulatory duties.

75. O2 is firmly of the view that the present regime does not "*gold-plate*" European law[49]. There is an effective appeals mechanism where the merits are duly taken onto account. We believe that any narrowing of the current regime risks failing to comply with European law.

(b) Time and costs

76. Government data reveal that only around one in eight of all Ofcom decisions, and less than ten per cent of non- price control decisions, are appealed. Appeal lengths are not particularly remarkable and, once exceptional cases are excluded, appeal and hearing lengths of full merits reviews and judicial review applications do not differ greatly. Whilst greater efficiencies would be no bad thing, in O2's view, the Government must not lose sight of the principal objective of the appeals mechanism: to ensure that good decisions are upheld and bad decisions weeded out. The current system works, and if it is amended in such a way as to allow bad decisions to stand, the additional costs to consumers would dwarf any efficiency savings[50].

(c) Speed of decision making

77. The obvious response to this concern is that, under the current regime, it is established law that appeal bodies are slow to overturn decisions made by Ofcom so long as it has employed an appropriate methodological approach to the issue it is considering. Presumably the Government does not advocate the taking of short cuts in important regulatory decision-making; that would undermine certainty, increase the cost of capital and deter investment.

78. The Government again refers to the 2.6MHz case in the context of quick decision making; please see our comments on that, above at Figure 1.

[49] See O2's response to the related 2011 DCMS consultation document cited at footnote 26,
[50] See the Towerhouse report on the Impact Assessment, submitted in response to this Consultation

79. The Consultation proposes two options for reform to the standard of review. Option 1 is judicial review and option 2 is focused, specified grounds as set out at box 4.2 of the Consultation. Neither of these options will achieve the Government's objectives of creating regulatory certainty and consistency for the reasons that we go on to explain below.

(d) Judicial review

80. Judicial review is a legal process used for the purpose of assessing whether Government bodies have taken decisions in accordance with the law. It is part of the UK's system of constitutional checks and balances. It is not therefore correct to label judicial review as a "standard of review" *per se*. Instead, as the Government notes, judicial review is flexible and adapts to work with the legal context in which it operates. Hence, the level of scrutiny applied by the judiciary may expand or contract depending on the legal context of the decision that is subject to judicial review.

81. It is in that context that we consider the Government's suggestion that statute should apply a "*judicial review standard*" to appeals under section 192 of the Communications Act 2003 is seriously flawed: it will not create regulatory certainty by either promoting better regulatory decisions, nor will it be faster than the current regime and, most importantly, it is not clear that it would fulfil the requirements of Article 4 of the Framework Directive.

82. The effect of a statute requiring the CAT to apply established principles of judicial review would be, on the face of it to require the CAT to apply the ordinary principles employed by the Administrative Court in judicial reviews: cf. *IBA Health*,[51] where the Court of Appeal explained the meaning of 'principles' of 'judicial review' in section 120 of the Enterprise Act 2002. But on the ordinary principles of judicial review, the merits of a regulatory decision are out of bounds.

83. Judicial review is concerned with the process of decision making rather than the substance. An appeal on the merits can look at the decision itself, subject always to a regulator's value judgment. There are risks therefore that if judicial review was adopted to apply to Communications Act appeals bad decisions made in accordance with a regulator's powers will be allowed to stand. Conversely, good decisions may be remitted back to the regulator where the correct process for

[51] *IBA Health Ltd* [2004] EWCA Civ 142, [88]-[89].

making that decision has been followed. This remittal, which is the usual remedy available to the courts in judicial reviews, requires the regulator to step through the decision making hoops again – this is invariably not a quick process. In contrast, a merits approach can allow a good decision taken using incorrect procedure to stand without the need for a remittal. Accordingly, neither of these outcomes gives rise to regulatory certainty or the efficiencies in end-to-end decision making that the Government is seeking to achieve.

84. On any view of the requirement of Article 4 of the Framework Directive: '*Member States shall ensure that the merits of the case are duly taken into account'*, that requirement would not be satisfied by an ordinary judicial review standard.

85. The Government relies upon the Court of Appeal's decision in *T-Mobile*,[52] that judicial review is capable of accommodating whatever standard Article 4 requires. But *T- Mobile* concerned the jurisdiction of the High Court in judicial review proceedings, which is limited only by the High Court's inherent jurisdiction and the rules of precedent: [18] per Jacob LJ. To define the standard of review which a statutory tribunal should adopt by analogy with the inherent jurisdiction of the High Court to relax the ordinary limits of judicial review is clumsy. It would, moreover, render the proposed words 'judicial review' in the statute devoid of meaningful content: the reference to a judicial review standard would have to mean: "*the CAT must adopt the modified approach that the High Court would be required to adopt in judicial review proceedings in order to 'ensure that the merits of the case are duly taken into account' for the purposes of Article 4*". This is no way to legislate.

86. The above highlights that the adoption of a "*judicial review standard*" would inevitably lead to argument about precisely what is required by Article 4 both generally and on a case by case basis.

87. From a general perspective, there is very little authority on the requirements of Article 4. The Government relies on Jacob LJ in *T-Mobile* where he said, in *obiter*, that what is required is an examination of whether the regulator has 'got something material wrong', suggesting a review of the regulator's decision for error rather than a fresh examination of the right regulatory solution. Yet Toulson LJ in *08- numbers*,[53] in considering the CAT's powers to admit new evidence on appeal, noted that Article 4 requires the merits of the case to be

[52] *T-Mobile* [2008] EWCA Civ 1373.
[53] [2011] EWCA Civ 245.

taken into account, which are not synonymous with the merits of the regulator's decision: see his judgment [60]. Toulson LJ's approach, in contrast to that of Jacob LJ, appears to envisage that Article 4 requires the appeal body to do more than review the regulator's decision, and to engage on the merits with the identification of the "right answer" to a regulatory problem.

88. The Government proposes that applying a consistent standard of review across all sectors will improve certainty. However, they acknowledge that using judicial review in the communications sector and in relation to competition appeals will require the court to determine how the requirements of Article 4 should apply. This will fall to be determined on a case by case basis, adding a preliminary issue to be considered adding significant court time and potential for appeal as compared to the current regime. The current regime, in contrast and after 10 years of case law (including decisions made by the CAT and the Court of Appeal), benefits from a clear meaning of an appeal 'on the merits' under section 192, as currently drafted.

89. In conclusion, adoption of a "*judicial review standard*" would be very likely to lead to extensive litigation, most likely requiring resolution by a reference to the CJEU, as to the requirements of Article 4 in general, and to further disputes as to how Article 4 should be applied in the circumstances of particular cases. Different judges may take different approaches, and a substantial period of time will be necessary to restore the relatively clear understanding of section 192 that has developed over 10 years of jurisprudence. Far from improving regulatory certainty, as the Government suggests, the adoption of a "*judicial review standard*" for section 192 appeals would result in uncertainty and expensive litigation for industry participants and for Ofcom.

(e) Focusssed grounds of appeal

90. The Government, acknowledging the difficulties posed by judicial review in the context of its objectives of certainty and efficiency, has presented a second option, referred to as 'focused specified grounds'. However, similarly to judicial review, we consider this approach to reforming the current standard of appeals under section 192 of the Communications Act 2003 is seriously flawed not least because it would not allow the CAT to examine the merits of the case and to

form its own view of the right regulatory solution – a right that Communications Providers are entitled to pursuant to Article 4 of the Framework Directive[54].

91. It is plain that the proposed statutory grounds of appeal are a retrograde measure borne of the Government's view that the current appeal right "*gold plates*" Article 4 of the Framework Directive. The alleged "*gold plating*" was the subject of the DCMS's 2011 consultation on implementing the revised EU Electronic Communications Framework – Appeals. O2 and a number of other communications providers responded to this consultation firmly rejecting the Government's position[55]. We note that DCMS did not publish a response to its consultation and that the present Consultation makes only passing reference to it and the responses submitted.

92. It is not clear from the Consultation why the proposed statutory grounds have been drafted as they have been[56]. We note that they bear distinct similarities to the grounds of appeal under section 46B of the Telecommunications Act 1984 - which preceded the implementation of an appeal right, which duly takes into account the merits in accordance with Article 4. Indeed, it appears from the terms of section 192 of the Communications Act 2003 that at that time Parliament appreciated that something more than the old section 46B of the 1984 Act was required in order to implement Article 4 (this was not gold-plating, but compliance with EU law). The Government's proposal in effect to undo the implementation of Article 4 is entirely counterintuitive.

93. A review for material error or irrationality is not enough to satisfy the Article 4 requirement to take due account of the merits. This means that the

[54] Of course, any ambiguity about the application of Article 4 could be removed by an express incorporation of that Article's requirements that appeals "duly take into account the merits of the case".

[55] Cited at footnote 26.

[56] However, O2 notes that the Government has also stated, in the DCMS paper it recently published entitled "*Connectivity, Content and Consumers: Britain's digital platform for growth"* (the "**DCMS Paper**") that, with particular regard to the communications sector, "*companies have a strong commercial incentive to appeal if an alternative analysis of facts can result in a more favourable outcome for them*" and that "w*hilst judicial review is sufficiently flexible to accommodate requirements of EU law, the specified grounds approach overtly binds an appeal to the issue of materiality and removes the ability for companies to appeal simply because they disagree with a decision by Ofcom"* where*, "in light of this a specified grounds approach may be more effective in achieving faster, less costly and more focused appeals"*. As O2 has explained in the context of this current consultation, these statements are unfounded and unsupported by evidence and we are concerned at the Government's apparently more entrenched position in circumstances where it has not yet had the opportunity to consider responses to its proposals.

Government's proposed approach is at real risk of appeal on the grounds that it is inconsistent with European legislation and capable of being set aside. A reference (assuming there is just one – there may be several) to the CJEU will take approximately two years on the present timetabling. Any reference will result in the knock on effect of decisions and cases being stayed pending the outcome thereby causing material delays and uncertainty to the regulatory regime, i.e. the opposite of what the Government hopes to achieve.

94. Moreover, we also note that the proposed grounds of appeal do not expressly include reference even to basic administrative law principles of unreasonableness, proportionality or simple illegality.

95. More generally, it is clear, if only on the basis that it has taken 10 years for the s.192 Communications Act test to bed in, that there will be an increase in litigation in the medium term. This poses a significant risk to the Government's stated objectives of regulatory certainty and consistency, yet although acknowledged by the Government in the Consultation, paradoxically, no attempt has been made to quantify it in the impact assessment accompanying the Consultation. This is all the more surprising when considering that the proposed statutory grounds are likely to give rise to more varied and protracted litigation than that which proceeded implementation of s.192 of the Communications Act, given the number of different grounds, the absence of a reference to unreasonableness, proportionality, or simple illegality and the inclusion of the word "*material*" to preface some of the tests (an approach we note that differs from the approach taken by the Government in respect of Civil Aviation Appeals).

96. Finally, the Government has not provided any insight into its proposals for the statutory grounds in relation to remedies for breach. This is clearly important - remedies can have a significant bearing on the length of end-to-end decision-making, for example, in judicial review cases where the decision is remitted back to the regulator to be reconsidered.

Competition Act decisions

97. O2 read with interest the CAT's response to BIS' consultation, and agrees with the comments it makes as regards competition appeals; in particular, the statement that:

"*The Consultation contains little, if any, analysis of the competition system; it appears not to appreciate the significance of current expectations and developments at European level in relation to appeals in competition cases; and it threatens to undermine a key element of the Government's current reform of the competition system*".

98. In the interests of brevity, O2 does not propose to repeat the CAT response in full here but the following is a summary of our key concerns:

- most significantly, BIS has not set out a case for change for the reform to the current appeals standard, which marks a significant and contradictory departure from the position taken by the Government not to move to a prosecutorial model;
- competition law infringement decisions can lead to significant and very serious penalties and consequences for both individuals and the companies concerned. The rights of defence of the parties involved should be preserved through a full merits-based appeal. It is imperative that regulators can be fully accountable for the decisions they make and that such decisions are robust enough to withstand scrutiny upon appeal;
- incorrect competition decisions can have significant unintended consequences for markets, businesses and consumers. An incorrect decision can have the effect of making illegal (and potentially criminalising) conduct that may otherwise be pro-competitive, resulting in consumer hard such as lower prices and improved quality. For example, an incorrect finding of dominance may actually prevent a company from lowering its prices.
- in a world where the sectoral regulators will be required to "use or lose" their competition enforcement powers, and therefore are arguably incentivised to engage in enforcement action, it is unacceptable that the Government would seek to erode the appeal rights of those who would be investigated; and
- any move to a new appeals standard would run counter to the Government's stated objectives, and result in additional delay, increased cost and legal uncertainty, while industry and the judiciary and legal advisors try to understand the parameters of the new standard (most likely, through additional litigation), which will have a negative chilling effect on investment in the UK to the detriment of consumers.

Price control appeals

99. We note the Government's policy intention that the Competition Commission determines price control appeals in line with other communications appeals, if it proceeds with Option 2. For the reasons set out above, we would not support such a change; in our view, the current system (whereby, in effect, the Competition Commission decides the matter "on the merits", subject to a "judicial review" by the CAT if the CC decision is challenged) is working effectively and should not be reformed.

Annex

Responses to specific questions raised in the Consultation[57]

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?

No. For the reasons discussion at pages 7-19 above, in O2's view, the case for reform is very weak indeed. The principal function of an appeals mechanism must be to uphold good decisions (i.e. decisions that are expected to give effect to statutory general duties) and weed out bad ones. In O2's view, the present regime under the Communications Act performs this function well. It provides for adequate scrutiny of Ofcom's decisions, whilst affording Ofcom a reasonable amount of discretion to balance its statutory duties. The appeals bodies do not "*retake a regulator's decision*" as the Consultation suggests.

O2 believes that replacing the current merits-based review with either a judicial review-based system or focused grounds of appeal would undermine the effectiveness of the appeals mechanism and refer to our detailed comments at paragraphs 80-96.

We propose retaining the current "*full merits*" standard of review, which we consider serves businesses, consumers, markets and the industry well.

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?

In O2's view, there are several problems with this approach:

- as the Government recognises[58] any change in the standard of review or grounds of appeal will lead to precedent-setting litigation as the new standards are tested, adding to the burden of appeals;
- the word "*material*" in the context of error of law, error of fact and procedural irregularity is likely to be subject of litigation in individual cases because it will depend on the factual circumstances of each case. This would conflict with the Government's stated objective for reform, to streamline appeals;

[57] O2 has responded to those questions where the scope is relevant to O2. Where applicable, to the extent that certain questions overlap in scope, O2's responses are drafted in broad terms addressing the overlap.

[58] See paragraph 4.45

- the proposed focused grounds as drafted do not refer to basic administrative law principles (which would apply in a judicial review context) of unreasonableness, proportionality or simple illegality
- it is at least conceivable that an appeal might fall outside the scope of this or any other set of principles, but which should, under European law, nevertheless be subject of a merits review. To this extent, a domestic appeals mechanism based on such principles would be inconsistent with European law; and
- there is little evidence to suggest that appeals of hearings would be shorter under this approach.

We refer to our detailed comments on chapter 4 of the Consultation at paragraphs 90-96.

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

There is no persuasive evidence that reforming the Communications Act appeals mechanism to a judicial review standard would materially reduce the cost and length of appeals. Indeed, it can be expected to result in precedent-setting litigation which would increase the cost and length of appeals.

Further, it would most likely damage the effectiveness of the appeals framework because it would increase the possibility that bad decisions (which give rise to very serious negative consequences) would be allowed to stand. This, in turn, would also increase uncertainty and the cost of capital, which would deter investment.

None of these potential downsides have been reflected in the Government's regulatory impact assessment.

Please refer to our detailed comments at paragraphs 80-89

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?

No. For the reasons stated in this response at paragraphs 26-65, the case for reform has not been made at all. We consider the existing "*full merits*" standard of review should be retained as it offers a number of very important benefits for all stakeholders and, ultimately, consumers. See paragraphs 80-96 for our detailed comments on the benefits of the current system and the problems associated with the Government's proposals.

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?

It is not clear that a change in the standard would reduce the length and cost of appeals, for the reasons set out in this response (and, in the medium term, at least, there is likely to be an increase in the number of appeals and, therefore, costs as litigations tests any new regime). As we set out above, however, a narrowing of the standard is likely to have a detrimental impact on the principal role of the appeals mechanism, which is to uphold good decisions and weed out bad ones.

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?

No. Our response to the questions 1 and 3 apply here, too.

Furthermore:

- given the quasi-criminal nature of an infringement finding, a narrowing of the appeals standard envisaged in this Consultation might not be compatible with Article 6 ECHR;
- the current system appears to be working well and there is little demand for reform;
- in O2's view, a judicial review standard is inappropriate where findings of quasi-criminal conduct are being made; and
- a finding of unlawful anti-competitive conduct should be capable of challenge "*on the merits*" because it is not capable of challenge in follow-on damages claims.

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?

Our responses to the above questions apply here, also.

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?

No. See our response to question 4. Furthermore, price control decisions are typically the most intrusive a regulator has to make (establishing *ex ante* charge controls on the provision of important wholesale and retail services). O2 would be strongly opposed to narrowing the scope in the standard of appeals in respect of these decisions in the way the Government suggests. See paragraph 99 for additional comments.

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?

See our response to question 5.

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]?

The CAT has wide case management powers afforded to it in its rules (the "**CAT Rules**") and, we believe, exercises its discretion sensibly and proportionately. There may, however, be benefit from the stricter approach to statements of case, lists of issues and timetabling taken in the Commercial Court (and, where relevant, the Court of Appeal). Were such an approach adopted in appeals heard in the CAT, it may improve the efficiency of regulatory and competition appeals.

Statements of case

The CAT Rules state that the grounds of appeal should include a "*concise statements of facts*" and a "*summary of the grounds for contesting the decision*".

The Commercial Court Guide[59] goes further: statements of case must be as "*brief and concise as possible*"[60] and, unless the court orders otherwise, "*limited to 25 pages in length*"[61]. Similarly, the Court of Appeal rules[62] state that the skeleton argument which

[59] Admiralty and Commercial Courts guide, 2011, http://www.justice.gov.uk/downloads/courts/admiralitycomm/admiralty-commercial-courts-guide.pdf
[60] *Ibid*, C1.1.(a).
[61] *Ibid*, C1.1.(b).

accompanies the grounds of appeal must be "*concise*" and must both "*define and confine the areas of controversy*"[63].

We consider that the Commercial Court and Court of Appeal approaches instil a discipline in the parties' approach to their statements of case which could be replicated, to beneficial effect, in the CAT by amending the CAT Rules to reflect the relevant provisions in the Commercial Court Guide.

List of Issues

The CAT Rules do not provide for a list of issues to be agreed between the parties whereas the Commercial Court requires the parties to agree such a list. The list of issues should set out succinctly and, in a structured form, the main issues of fact and law in the case. It should also list what is common ground between the parties[64]. This is intended to be a neutral document,[65] which acts a tool for case management purposes and is not intended to supersede the pleadings which remain the primary source for each party's case[66].

We consider that a list of issues could be a valuable resource for the CAT, for example at the case management conference, and that the CAT Rules might usefully be amended to reflect similar provisions as those found in the Commercial Court Guide.

Pre-trial Timetabling

The CAT Rules do not set out detailed guidance on the approach to the management of the pre-trial timetable.

In contrast, the Commercial Court Guide provides detailed guidance on the management of the pre-trial timetable[67]. So for example, only minor variations to the timetable can be agreed between the parties[68] and, if material variations are required, the parties have to get the court involved by reconvening the case management conference[69].

We consider that the CAT Rules could be amended to reflect similar provisions.

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[62] Civil Procedure Rules – Part 52 – Appeals: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52
[63] *Ibid*, Practice Direction 52, Part V, 5.1.(2).
[64] Admiralty and Commercial Courts guide, 2011, D6.1.
[65] *Ibid*, D6.2(a).
[66] *Ibid*, D6.4.
[67] *Ibid*, D8.10.
[68] *Ibid,* D8.11.
[69] *Ibid,* D8.12.

Alternative Dispute Resolution

Following the 4G liberalisation decision key stakeholders agreed a standstill period to enter discussions to see if threatened litigation could be avoided. In that instance, litigation was avoided as clearance of spectrum following the proposed auction was brought forward by several months. Whilst these discussions did not take the form of a formal mediation, we consider that the context of these discussions (i.e. an agreed standstill) provided the parties with an impetus to work together to reach some form of solution which was agreeable to all parties and that ultimately benefitted consumers.

It is with this in mind that we consider that thought should be given to parties to appeals being encouraged to consider mediating their disputes. One way of doing so would be by providing in the CAT Rules that the parties be required to consider mediation either prior to the commencement of proceedings and/or again at the first case management conference, at which point the CAT can order a standstill of proceedings to allow for mediation to take place.

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?

Yes.

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.

We agree on the basis that this approach reflects the current position in the High Court. For the avoidance of doubt we agree with CAT's response to this question[70].

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

We note that the Chairman of the CAT has the power to sit alone already – see rule 62 of the CAT Rules. We do not object to the proposal to extend this power to all CAT members subject to the power being exercisable on a case by case basis at the CAT's discretion and provided that the parties' have the right to make representations to the CAT as regards its

[70] CAT Response dated 23 August to Government's consultation on "Streamlining Regulatory and Competition Appeals", Part 2, Para 63 and 64.

exercise of discretion. For the avoidance of doubt we agree with the CAT's response to this question[71].

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

Yes. The Competition Commission is, we believe, best placed to consider these matters.

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?

We don't see the current arrangements in the communications sector as a particular problem. If price control issues were referred directly to the Competition Commission, there would still be a need to manage cases (for example, since non-price control issues would presumably continue to be dealt with by the CAT).

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

Yes. The CAT has built up considerable expertise and is best placed to consider such 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?

We think that the CAT should continue to hear these appeals in the communications sector.

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?

[71] *Ibid*, Para 65.

The CAT should continue to hear such appeals in the communications sector. Under European law, communications disputes must be resolved in a manner best designed to further Ofcom's regulatory objectives. The CAT, which has built up considerable expertise in the sector and its regulatory regime, is best placed to hear appeals against Ofcom's decisions.

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

We see merit in permitting the CAT to hear both judicial review applications and "full merits" appeals.

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?

O2 would be supportive of measures that would improve Ofcom's decision-making process. However, we are not convinced that the lack of confidentiality rings has hampered decision-making and, accordingly, it is not clear to us that introducing them would improve matters. We believe that a concerted effort to explain to interested parties how Ofcom's consideration of the issues it deals with develops over time would be beneficial. A more open approach to decision-making is likely to flush out problems at an earlier stage.

If confidentiality rings were introduced at an early stage, considerable attention would need to be given to protecting parties' commercially sensitive information.

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?

No. We believe that the current arrangement, whereby the CAT exercises its discretion in the interests of justice, works well.

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?

We think the current arrangement, which permits the CAT a broad discretion, works well.

If there is to be a change, any presumption about awarding costs should be symmetrical – i.e. apply equally to both regulators and appellants. If not, the incentives to appeal and defend would be unjustifiably skewed in (in the case of communications appeals) Ofcom's favour. For example, Ofcom would no longer have the same incentive to actual judiciously during any appeal – it could adopt a 'kitchen sink' approach and may be less likely to give ground on unsustainable aspects of its original decision. This could also affect the length of appeal proceedings. Lastly, we note that such a presumption would make it even less likely that SMEs would appeal (i.e. the risk of being subject to a costs award could have much more serious repercussions for them). This would seem to conflict with one of the stated objectives of the Government.[72]

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

At present, in the Communications sector, Ofcom tends to seek only external (Counsel's) costs. We don't think this is problematic, particularly since the communications providers fund Ofcom's electronic communications regulatory functions.

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?

This is for the administrative bodies to consider on a case by case basis. For the avoidance of doubt we agree with the CAT's response to this question.[73]

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.

[72] See page 5 of the Consultation.
[73] *Ibid*, Part 2, Para 93 and 94.

This question presupposes that there are a number of unmeritorious appeals brought in the CAT which are allowed to progress to trial. As noted in the main body of our response, we disagree with this supposition and note that there is little evidence in the Consultation to support it. Moreover, the CAT Rules provide that the CAT has the discretion to reject an appeal of its own initiative[74]. Accordingly, there is no need to amend the CAT's Rules in this respect.

Furthermore, we do not consider that any amendment to require the CAT to review appeals at the outset in the form proposed would promote efficiency in the appeals regime. Instead, there is a real risk that it would result in further hearings and may give rise to more appeals.

For the avoidance of doubt we agree with the CAT's response to this question.[75]

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

O2 understands this question is asking whether we agree that the current case management and decision-making processes as applied by the OFT in competition cases should also be applied by Ofcom in a similar manner. Although new and untested, we consider that, in principle, reforms that might lead to more effective and robust decision-making on the part of the regulator from the outset would be a positive development as regards efficient case management. In addition, we consider that any reforms that require regulators and competition authorities to engage in more meaningful and transparent dialogue with parties, whether through state of play-type meetings or greater opportunity to comment on draft decisions, are positive. In addition, the measures take to minimise the risk of confirmation bias are important in ensuring that natural justice prevails.

O2 considers that procedural reforms of this type are more proportionate and more likely to achieve the Government's stated objectives than the unsubstantiated proposal to change the standard of review (which, for the reaons disccused above, is likely result in delay, legal uncertainty, and less effective decision-making contrary to the Government's objectives.

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?

[74] CAT Rules, rule 10.
[75] CAT Response, cited at Footnote 21, Part 2, Para 93 and 94.

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

It is not clear that there is problem about being "ambushed" by new evidence (see our comments about new evidence[76]). Regulators already have significant powers to obtain information and expansion of these powers needs to be considered carefully.

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

O2 considers that such decisions should be capable of appeal, in the interests of a symmetrical access to justice; in particular, since as the Government points out, non-infringement decisions can guide stakeholders as to how they to behave appropriately in similar factual circumstances. Further non-infringements can significantly affect third parties, for example victims of potential cartels or victims of conduct arguably in contravention of licence conditions.

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?

[76] See paragraph 52

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?

We do not see any need for reform here, and agree with the comments made by the CAT. The key aim of an appeals mechanism should be to ensure good decisions stand and bad ones are weeded out, where speed and efficiency should be secondary to substance.

The Number UK Ltd (TNUK)

Response to ‘Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform’

on behalf of The Number UK Ltd (118 118)

11 September 2013

Introduction and Background

kgb ('knowledge generation bureau') is a privately held, New York-based company and the world's largest independent provider of directory assistance and enhanced information services. kgb has built some of the most successful brands in the telecommunications, customer care and enhanced information services sectors.

In 2002, kgb (then known as InfoNXX) established 118 118 (The Number UK "TNUK") which soon became the largest and most well-known provider of directory services in the UK. It currently handles about 30 million calls a year, providing both core directory services and a range of enhanced offer, advertising and other information services. kgb has also pioneered the provision of a broad range of wholesale and retail information services beyond traditional directory assistance services.

We set out below our responses to the consultation questions from our perspective as a fairly small service provider, dependent on much larger network operators in order to deliver our services to consumers. In that context, our overriding concern about the operation of the current appeals process relates to whether it provides access (or obstacles) to justice and effective regulation.

In our view, the current appeals process is extremely resource intensive and therefore dominated by larger and better resourced providers, understandably using it to advance their own commercial interests. Smaller providers are largely excluded from that process because they do not have the resources to participate.

Although the costs of litigation may be a concern generally, they have a particular resonance in this context because of the great importance of the appeals process to telecoms regulation. The outcome of appeals often has a very significant impact on Ofcom policy and on specific regulations. Therefore, an inability to engage in the appeals process, effectively equates directly to an inability to engage in Ofcom's policy making process and an inability to influence specific regulation.

A situation in which those able to engage tend to be larger, established incumbents and those less able to engage tend to be smaller and more innovative competitors creates real problems for competition and the effective functioning of the market. The efficiency of the appeals process thereby takes on a greater importance than it might first appear and can have greater long-term consequences for consumers if it acts as a barrier to effective competition.

Overview

In principle, TNUK favours reform of the appeals process. From our perspective, it is not fit for purpose because we feel that we are largely excluded from undertaking appeals due to restrictions which do not effectively apply to large better resourced operators. We therefore approach this consultation positively and with an open-mind towards the Government's proposals.

However, it does appear that some of those proposals are intended simply to limit the right of appeal, rather than to improve the process, which we do not believe is (or should be) the objective of the reforms. Certainly, in its earlier consultations, DCMS stated that its intention was not to limit the right of appeal, which was the reason why we supported it at the time.

We are concerned therefore that some of the current proposals might actually make it more difficult and more expensive for providers such as us to initiate appeals and certainly would do nothing to improve the process. Where those proposals increase the costs of appealing they will further widen the gap between lesser and better resourced providers, which we believe is already a very significant problem.

The Government should be wary not to use the reform of the appeals process to provide cover for changes which will in reality undermine it to the detriment of appellants and therefore ultimately consumers. Aside from proposed changes to the standard of review, we consider that several of the proposals under the heading *'Getting decisions and incentives right'* may have that effect.

We would ask the Government to determine whether limiting the right of appeal is genuinely is the best interests of justice or whether it is simply a reaction to lobbying by some regulators for whom appeals are an administrative inconvenience. In the communications sector in particular, the Government should consider not merely the volume of appeals, but also the percentage of those appeals that are successful (including those which Ofcom concedes even in advance of a hearing).

Successful appeals lead to better policy making, not merely on the issue in question, but also more broadly. The Government must surely concede that the limiting the right of appeal such that appeals which have been successful in the past, could not be successful in the future, is a bad long-term outcome for all concerned.

We have therefore carefully considered each issue on its merits and whilst we strongly support some of the proposals we have expressed concerns about others. We hope that the Government will consider this response in the positive light in which it is intended.

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?

As outlined above, TNUK is fundamentally in favour of reform of the appeals process both in order to make the process itself more inclusive and efficient and also as a means of improving and speeding up Ofcom's policy processes.

However, TNUK does not believe that appeals should based on (or limited to) a judicial review standard. To put it another way, we believe that policy reasons will always a justify a wider standard of review and therefore there is no reason why there should be a presumption in favour of the judicial review standard.

For the avoidance of doubt, TNUK strongly supports the continued availability of judicial review as a means of appealing Ofcom decisions. In some ways, judicial review may be more appropriate than a merits based appeal for challenging certain decisions, which for example the appellant believes are manifestly unreasonable or did not follow due process. However, TNUK believes strongly that judicial review should exist as a complement, rather than an alternative to a merits-based appeals process.

The Government will recognise that our interest in the issue is limited to the process by which Ofcom's decisions may be appealed and therefore we outline our position in greater detail primarily in response to Q4 and Q5.

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?

TNUK believes that the first three principles for non-judicial review appeals are sensible and uncontroversial:-

- Material error of law
- Material error of fact
- Material procedural irregularity

These situations should unquestionably provide grounds for appeal, although it is not clear that they add in any material way to the grounds which already exist with regards to judicial review proceedings. It is therefore perhaps somewhat disingenuous to suggest that these are additional grounds which would only apply if a wider standard of review was introduced.

TNUK believes that the remaining two principles are at the heart of the Government's proposals for reform and therefore require a greater level of analysis and comment:-

- Unreasonable exercise of discretion
- Unreasonable judgements or predictions

Firstly, it seems to us that there is no meaningful difference in practical policy terms between exercising discretion and making a judgement (albeit making a prediction differs slightly) and therefore we will comment on these principles together. In both cases, the principles concern to what extent an appellant is able to challenge the 'merits' of a decision taken by a regulator (beyond any legal, factual or procedural errors). Therefore, we do not agree that in reality they provide distinct/additional grounds of appeal to each other, as the Government may be suggesting by listing them separately.

Whether taken together or separately, overall TNUK believes that these principles provide necessary, but insufficient grounds of appeal. We would firstly note that (as with the first three principles) they are obviously based very largely on the existing well-established grounds of judicial review. Whilst they may appear to be slightly broader in some respects, it is not clear to us that they provide significantly greater grounds than would be available for judicial review.

For both principles, the fundamental requirement for a successful appeal is that the regulator acted in a manner in which "*no reasonable regulator*" would act. This would naturally appear to be based on the 'Wednesbury unreasonableness' test which is the core test for a successful judicial review. However, it is not entirely clear from the wording in Box 4.1 whether the Government intends the test to be precisely the same as 'Wedenesbury unreasonableness'.

On the one hand, the phrase 'no reasonable regulator' is taken from the Wednesbury judgement which suggests that a similar standard is intended. But on the other hand, the 'Wednesbury unreasonableness' test has been interpreted as being different from (and stricter than) merely showing that the decision was unreasonable. However, the third bullet in this section says simply that the test "*should focus on whether the judgement or prediction was reasonable*", which might suggest that a lesser degree of unreasonableness than 'Wednesbury unreasonableness' is still sufficient for a successful appeal.

TNUK would welcome more precise clarification on the degree of unreasonableness which the Government envisages as being required for a successful appeal. However, even if it does envisage less than

'Wednesbury unreasonableness' TNUK believes that the grounds may still be unjustifiably narrow for a merits-based appeals system.

As a matter of principle, TNUK believes that a genuine merits-based appeals process must allow for an appeal on wider grounds than simple unreasonableness. Important though it is, reasonableness does not necessarily go the heart of the merits of a regulator's decision, but rather it simply considers one aspect of it. A decision may be ostensibly reasonable but still objectively be viewed as mistaken in view of all of the facts of the case. The appeal body must therefore consider whether the decision is correct, not merely whether it is reasonable.

As an alternative to a limited consideration of reasonableness, TNUK proposes that the appropriateness of a decision within a merits-based appeal process, would more properly be based on the standard civil grounds of appeal, namely "*the balance of probabilities*". In these circumstances, an appeal will be successful only if the tribunal determines that the regulator's exercise of discretion, judgment or prediction was incorrect or inappropriate on the balance of probabilities. In this way, reasonableness of the action would still be an important factor to consider (as it is in civil cases), but it would not be the only factor to consider (as it is not in civil cases).

TNUK believes that this change would very largely preserve the essence of the Government's proposed reforms, with only fairly limited (but important) changes. It would still retain a set of principles for non-judicial review appeals. Furtheremore, the most important of those principles (exercise of discretion, judgments or predictions) would still require the appeal body to consider the regulator's reasonableness in its actions. The only potential change would be to allow the appeal body to consider other factors in addition to reasonableness, when determining whether the decision was correct or appropriate on the balance of probabilities.

Critically, TNUK does not believe that if the Government was to accept this proposal, it would give appeal bodies the power to conduct a complete re-run of the regulator's decision, nor would they have the obligation to act as a second regulator. We understand that this is a situation which the Government is anxious to avoid. The judgement as to whether the decision was correct or appropriate on the balance of probabilities would not require such a fundamental re-examination of every element of the decision, but it would allow the appeal body to go further than simply determining whether or not it was reasonable.

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

Although TNUK has never participated in judicial review proceedings, we recognise that the far more limited nature of the grounds of judicial review inevitably reduces the length and therefore the cost of the process when compared to a full scale merits-based review, in which many more issues are considered.

However, as the ability to bring a judicial review already exists in relation to any appeal which might currently also be subject to a merits-based review, there would be no additional benefit in replacing the current standard with a judicial review standard. Any potential benefits of judicial review (in terms of length or cost of the proceedings) are already available to any appellants who wish to pursue that option and so there is nothing to be gained by re-introducing that standard. Therefore removing the current merits-based standard would simply remove that element of choice and the potential benefits which derive from it.

However, abolishing a merits-based review (and thereby leaving judicial review as the only available option) would significantly adversely impact the effectiveness of the overall appeals framework as it would remove an important option for potential appellants. We outline elsewhere in this response why we believe

that it is important that a genuine merits-based appeals process remains and those benefits would be lost entirely.

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?

TNUK believes that there are other changes which can be made that would improve the effectiveness of the appeals process for the communications sector, as discussed elsewhere in this response. However, we do accept that a change in the standard of review may be a useful element of those changes.

We do not believe that the new standard should be judicial review which (as we outline above) would not provide any additional benefits beyond those which already exist. We therefore agree that a more focused 'specified grounds' approach may be the best available option. However, for reasons outlined in response to Q2, we do not agree entirely with the principles for non-judicial review appeals which the Government has proposed and we have made suggestions as to how they may be improved, with some relatively minor changes.

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?

We outlined in response to Q3 our view of the impact of moving to a judicial review standard in the communications sector (as we have no experience of any other sector).

The impact of changing to focused specified grounds is far more difficult to predict and we would be sceptical of anyone who thought they could do so with any degree of accuracy, before such changes were implemented. However, as we outlined in response to Q2, TNUK believes that if more focused specified grounds were adopted (even in the amended form which we have proposed), it would not allow (and certainly not encourage) appellants to try to persuade the CAT to undertake a full re-run of an Ofcom decision. This would be the single biggest benefit in reducing the length and therefore the cost of the appeals process in general and the hearings in particular.

The impact on the effectiveness of the appeals framework is almost impossible to predict or even to judge. This is because the effectiveness of the framework is itself very subjective matter, which is likely to be judged by many participants in terms of whether they achieved their objective, be it their own appeal being succeeding or someone else's appeal failing.

That aside, the effectiveness will largely depend on how the CAT chooses to handle the appeals and in particular how widely or narrowly in interprets the principles which the Government imposes. However, it seems reasonable to believe that the overall impact will be positive.

Inevitably, there will be individual cases in which appellants will feel aggrieved at not being able fully to re-argue the decision and they will therefore feel that the changes will have made the appeals framework less effective. Nevertheless, on balance TNUK believes that for the sector as a whole, the positives will outweigh the negatives because as a result of the reduction in time and cost (from which everyone will benefit), the appeals process should become more accessible and open to a larger number of providers who have previously been deterred from entering into it.

As an aside, we believe that it would also have a positive effect on speeding up the Ofcom policy making process, as Ofcom would no longer be quite so concerned that the minutiae of every element of their decision would be open to rigorous scrutiny by the CAT.

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?

Although Ofcom has concurrent Competition Act powers, in reality it exercises those powers very rarely and therefore accepts very few cases. As a result, the number of appeals against those decisions is extremely small and TNUK has never been involved in any such matter.

TNUK therefore has no substantive comments to make on the standard of review for Competition Act appeals beyond those which we have already outlined in response to earlier questions.

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?

Similarly, TNUK has no substantive comments to make beyond those which we have already made in response to earlier questions.

However, we would observe that as Competition Act appeals in the communications sector are so rare, the impact of any changes will obviously be far less significant. On a simple level, there are inevitably far fewer appeals to be affected, but that also means that will be a much more limited wider impact because there are so few appeals occurring in this area. Any Competition Act appeals will be decided on their merits and therefore changes to the appeals framework are unlikely materially either to encourage or discourage additional appeals from being brought. The overall impact of change will therefore be fairly limited.

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?

For reasons outlined in response to Q2 and Q4, TNUK accepts that there may be benefits to changing the standard of review for decisions in the communications sector. We believe that the same considerations apply to price control decisions and we do not therefore agree with the Government's view in para 4.73 that "*there may be a stronger argument for a merits-based appeal for price control decisions*".

We agree that price control decisions are undoubtedly central to the way regulated businesses are operated as they will affect the rate of return on a firm's assets, which in turn affect investors' decisions. However, in TNUK's experience, non-price control decisions can have just as big (or in some cases an even bigger) impact as price control decisions.

For example, in Ofcom's recent review of non-geographic call services, it made two proposals which would have had a very significant impact on directory enquiries call services.

Firstly, it considered imposing a 'safeguard cap' on the level of the directory enquiries service charge. Under the terms of the Communications Act 2003, this was technically a consumer protection measure, rather than a price control measure, and therefore it would not have been referred to the Competition Commission and does not fit within the scope of what is being considered in this section. However, the

adverse commercial impact on TNUK would have been exactly the same as if it had been a price control decision.

Furthermore, owing to the nature of directory enquiries services, this cap would have impacted TNUK's total revenue because effectively we only have a single service. By contrast, most price control decisions in the communications sector only apply to one individual (usually wholesale, rather than retail) charge. Therefore, although they obviously have a significant impact, it is not quite as all-encompassing as a cap on the directories enquiries service charge.

Secondly, Ofcom considered imposing a requirement for an automated pre-call price announcement to be played at the start of every directories enquiries call. TNUK provided empirical evidence to Ofcom which demonstrated that such a requirement would significantly impact the number of calls made to directory enquiries. This was not because people would be deterred by knowing the price of the call, but rather because an automated announcement at the start of every call would fundamentally undermine the core purpose of the service and the reason for calling directory enquiries at all. That is the need to obtain very quick and accurate information.

Once again, although this would not have been a price control decision, the adverse impact would be as great (if not greater) than if it had been, because it would have led to a very significant reduction in the use of the service and therefore the revenues of the business.

After due consideration, Ofcom decided not to proceed with either of these two proposals, but if it had done so, it is very likely that TNUK would have wanted to appeal the decisions because of their potentially devastating impact. Indeed, it is difficult to imagine any measures which would have had a greater impact on our businesses, than one which capped our prices and one which reduced usage. Yet, the Government's view seems to be that these measures would be less likely to justify a merits-based appeal than price control decisions.

We strongly disagree with that view. Whilst we have highlighted two particular recent examples from the directory enquiries sector, it seems likely that there will be many other similar examples which could be highlighted.

For the sake of clarity, we believe that both price control decisions and non-price control decisions in the communications sector justify a merits-based appeals process and we outlined in response to Q2 the slightly amended model which we have proposed. But we would be most concerned if the Government chose to impose a stricter and narrower standard of appeal for non-price control decisions, which we do not believe can be justified.

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?

TNUK has no substantive comments to make beyond those which we have already made in response to earlier questions.

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?

It is not entirely clear why the Government believes that these other types of regulatory decisions are less likely to justify a merits-based appeals process than all of the others which have been considered.

To the extent to which these decisions are made in the communications sector, TNUK believes that a consistent approach should be adopted and therefore would support the slightly amended merits-based appeals process which we outlined in response to Q2.

In particular, we believe that decisions taken by Ofcom in relation to its dispute resolution role are of very great importance and should not be restricted to a lesser form of appeal. The Government will be aware that there are a large number of disputes in the communications sector and they are sometimes used by Ofcom as a means of developing and determining new points of policy, which have not previously been considered in wider policy reviews.

To that extent, the outcome of such appeals is significant not just to the parties directly involved, but to a much broader audience of stakeholders. This can be seen from the fact that third parties often provide evidence and input into Ofcom's consideration of appeals, to which they are not actually a party. This tends particularly to be the case with disputes involving BT, which invariably have a much broader application to a wider range of operators and service providers. A particular very recent example, is a dispute concerning the terms of BT's Standard Interconnect Agreement, which has potential relevance to every other provider in the telecoms sector.

TNUK was one of many parties who provided evidence to that dispute. Whilst that, of itself would not have been sufficient to allow us to appeal its outcome, it is nevertheless indicative of the policy importance which disputes can have and why they should be subject to a merits-based appeals process.

Furthermore, the Government should also recognise that disputes are sometimes in relation to commercial matters which have a major financial impact on the parties concerned and the arguments can be very finely balanced. Again this would seem clearly to justify a merits-based appeals process, rather than a limited judicial review process. Indeed, these disputes are in some respects somewhat akin to normal commercial litigation which is obviously subject to a wider standard of appeal than judicial review. Once again, for reasons of consistency TNUK believes that the same standard of review should therefore be adopted as the Government has proposed elsewhere.

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?

TNUK has no substantive comments to make beyond those which we have already made in response to earlier questions.

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?

TNUK has no objection to this proposed change, although it will obviously not have any impact on the appeals process itself in terms of the available grounds of appeal or how the appeals are conducted.

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.

TNUK has no objection to this proposed change, although it will obviously not have any impact on the appeals process itself in terms of the available grounds of appeal or how the appeals are conducted.

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

Whilst TNUK has no fundamental objection in principle to single judges hearing cases which are limited to points of law, we believe that it is a potentially significant move for which the Government has provided very limited explanation and justification.

In particular, there is very limited detail given about what type of other cases may be appropriate to be heard by a single judge and on what basis and according to what criteria the decision would be made. TNUK would have some reservations about the practice being extended beyond cases which are limited to points of law.

The CAT is specifically intended to be different from the High Court and one of the important differences is that cases are heard by a panel, including two lay members. Those lay members are appointed in order to provide an additional economic or commercial perspective into the decision, which may be very important to the appellants in each case.

If for reasons of cost savings, single judges began to become the norm (and panels the exception), the CAT would very quickly begin to replicate the High Court. If that were to occur, it would represent a very significant loss of expertise and specialism which is the CAT's hallmark. TNUK would be concerned by such a move and we would expect that the Government should be very careful to guard against it.

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

TNUK agrees that the Competition Commission should continue to hear appeals against price control and licence modification decisions.

It obviously has well established expertise and experience in these matters which could not easily be replicated elsewhere and so there does not appear to be any reason or justification for change.

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?

TNUK has no experience of the Civil Aviation Act 2012, but recognises that the current process in the communications sector for referring appeals to the Competition Commission via the CAT may appear to be something of an anomaly.

Whilst we acknowledge the apparent simplicity of introducing direct appeals to the Competition Commission we believe the change will be purely procedural and is unlikely materially to improve the overall efficiency of the process.

In particular, the Government will recognise that some appeals in the communications sector have both policy and price control aspects to them. Currently, the CAT considers the policy matters and remits the price control matters to the Competition Commission.

It appears that the Government envisages that in these situations two separate appeals would have to be brought to the CAT and the Competition Commission in order for them to consider different aspects of the same matter. It is not clear to TNUK that such a change would increase efficiency in all cases and so we

would request that the Government provides further explanation and clarification as to how these cases would be handled.

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

TNUK agrees that the CAT should continue to hear appeals against ex-ante regulatory decisions.

It obviously has well established expertise and experience in these matters which could not easily be replicated elsewhere and so there does not appear to be any reason or justification for change.

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

TNUK has no strong views on this matter, but accepts the logic of a single appeal body hearing enforcement appeals and sees no compelling reason why this should not be the case.

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?

From TNUK's experience in the communications sector, we believe that the CAT would be the most appropriate appeal body to hear enforcement appeals.

The CAT has broad expertise and experience of communications matters generally from all of the other appeals which it hears. Whilst the High Court would no doubt be capable of familiarising itself with the issues in any individual case, it would seem to be unnecessarily inefficient to require it to do so. TNUK does not believe that the High Court would have any particular advantage over the CAT in hearing these appeals and therefore we would propose that the CAT adopts this role.

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

TNUK has no strong views on this matter, but accepts the logic of a single appeal body hearing dispute resolution appeals and sees no compelling reason why this should not be the case.

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?

For reasons similar to those outlined in response to Q23, TNUK believes that the CAT is the most appropriate appeal body to hear dispute resolution appeals because of its broad expertise and experience of communications matters generally.

Indeed, TNUK believes that these arguments are in fact stronger for dispute resolution appeals than for enforcement appeals because the former are likely to require more finely balanced judgements between competing positions (rather than a fairly black and white decision about whether a regulation has been breached).

As we outlined in response to Q12, disputes in the communications sector are sometimes used by Ofcom as a means of developing and determining new points of policy, which have not previously been considered in wider policy reviews. In other cases, they relate to commercial matters which have a major financial impact on the parties concerned and the arguments can be very finely balanced.

The issues in dispute invariably relate to telecoms products and services (rather than to more general commercial matters). They can sometimes be extremely complex and require a detailed understanding of telecoms network interconnection and the types of wholesale products which operators purchase from each other. Experience and understanding of this kind takes time to acquire, which is why it would seem far preferable for the CAT to continue to hear these cases, rather than to expect the High Court to familiarise itself with the issues on the odd occasions when it has to.

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

TNUK does not object in principle to the possibility of the increased use of confidentiality rings at the administrative stage of decision-making. We recognise that they may assist the parties, but we also think that there are limits to the extent to which they are likely to improve the process and in practice the benefits may be fairly small.

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?

TNUK's principal concern relates to the inclusion of in-house lawyers in confidentiality rings which (through no fault of anyone) create a major potential flaw in the process.

In-house regulatory lawyers in the communications sector tend to have a somewhat blurred and indistinct role. Whilst some of their work is undoubtedly 'legal' in the strict sense, some of it is clearly not as it relates to regulatory policy activity. For example, they will be involved in drafting responses to consultation papers and meeting with Ofcom policy teams.

Whilst one operator may employ in-house regulatory lawyers to undertake this activity, another may quite properly employ regulatory professionals without any legal qualification, who are equally able to do the work. However, the critical difference is that the in-house lawyer would be entitled to participate in the confidentiality ring, but the regulatory professional would not, despite the roles which they are performing in this case being identical.

This creates two problems. Firstly, where the operators are competitors and perhaps on opposing sides in the particular matter, it is obviously unfair that one should have access to confidential information whilst the other does not, purely as a consequence of the type of person who they have employed to perform this role. Secondly, where an in-house lawyer has access to confidential information in respect of their legal role, they will unavoidably also have access to confidential information in respect of their policy role, although it is clearly not the intention of confidentiality rings that regulatory policy employees have that access.

TNUK recognises that simply excluding in-house lawyers from confidentiality rings is also not a perfect solution, as those who legitimately employ them in preference to external lawyers would argue that they are being disadvantaged.

TNUK therefore believes that decisions to extend confidentiality rings should be made with caution and only with due consideration as to what benefits are genuinely likely to be derived. Whilst strict lawyer-only confidentiality rings have a benefit during the conduct of legal proceedings, it is less clear that providing confidential information only to lawyers (which cannot be shared more generally) will have any significant benefits at the administrative stage of decision-making.

That said, TNUK agrees that if confidentiality rings are to be extended, it may well be helpful for the CAT to have a role in supervising them.

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?

TNUK agrees that it may be helpful for the factors the CAT should take into account in exercising its discretion to admit new evidence to be set out in statue along the lines proposed.

Whilst we acknowledge that may create the possibility for appealing the CAT's decisions on whether new evidence should be allowed, the wider benefits of certainty and clarity brought about by legislation should outweigh the disadvantages of some additional appeals being brought.

In terms of the factors themselves, TNUK believes that the critical point is that the CAT does retain discretion rather than that the legislation contains an exhaustive list which prescribes exactly the only instances in which new evidence can be adduced. We are satisfied with the factors which the Government has outlined, provided that the CAT has some flexibility in terms of how it applies them.

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?

It is unclear why the Government considers that it needs to take a different approach for antitrust and Communications Act cases compared with price control appeals. Although similar, the criteria are not identical which seems to be creating an unnecessary recipe for confusion. Whilst TNUK has no absolute objection to adopting the approach contained within Schedule 2 to the Civil Aviation Act for price control appeals, we would prefer the consistency of adopting the same statutory criteria as the Government has outlined for applying in antitrust and Communications Act cases.

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?

TNUK believes that the general principles of litigation should apply and that therefore means that costs should follow the event.

We therefore agree that when successful the regulator should be awarded its costs unless its conduct can be characterised as being unreasonable or there are exceptional circumstances.

We further agree that "*costs should create a real disincentive on parties to appeal where there is no merit in the arguments being brought*", but we strongly disagree that costs should create a real disincentive on parties to appeal where there is merit. That is already a significant problem with appeals in the communications sector where we believe that many smaller operators and service providers are deterred from submitting appeals because of the costs involved, regardless of the merits of their case. It is no coincidence that most of the appeals to the CAT in the communications sector are brought by the large fixed and mobile operators despite the factor that Ofcom's decisions have a much wider application to a much broader range of providers. The effect is that smaller providers are excluded from obtaining justice through the appeals process because they simply cannot afford the cost of initiating proceedings.

TNUK had understood that this was one of the problems which the Government was seeking to address, but regrettably it appears that its proposals may in fact make matters worse and will directly contradict its stated aims of not deterring legitimate appeals. The Government is considering "*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*".

To be clear, the Government is proposing that even where an appeal succeeds, the successful appellant should not recover its costs unless particular circumstances dictate. Self-evidently, if an appeal is successful, it has considerable merit and yet costs may not be recoverable. (Indeed, it may still be possible for an appeal to have merit even if it is unsuccessful, because it may have failed on some fairly technical ground).

There can be no greater disincentive on parties to submit legitimate and meritorious appeals than the knowledge that even if they are successful, they may still have to pay their own costs. Not only does that contradict the Government's view about not deterring legitimate appeals, it also inconsistent with the proposal for costs where the regulator is unsuccessful, runs contrary to the general principles of litigation and is grossly unfair.

Finally, we would note the obvious difficulty in saying that costs might only be recoverable by appellants "*who do not have many resources*" or who are "*small businesses*". Bearing in mind the range of potential appellants, it is hard to see how such criteria could possibly be defined and applied in any logical or fair manner. Therefore, whilst TNUK welcomes the intention, we do not believe that it will provide any real benefit.

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

TNUK disagrees that regulators should be encouraged to claim their internal legal costs. As we have outlined above, the issue of costs is a major disincentive to smaller providers participating in the appeals process, even where there is obvious merit to their claim. It is a problem which the Government should be seeking to resolve, rather than aggravate.

However, if appellants now had to consider the risk of having to pay a regulator's internal legal costs it would create an even greater disincentive to appeal than already exists, thereby further excluding them from the process. Once again, it would appear to be fundamentally inequitable and discriminatory.

Furthermore, it's unclear how such a proposal would align with the Government's objectives. It would not in any way improve the appeals process itself and would also not contribute towards "Getting decisions and incentives right", assuming that the Government's intention is not to incentivise larger and more well-resourced providers to appeal, in preference to smaller providers.

Ofcom is a public body which exists to further the interests of citizens and consumers and therefore it seems reasonable to expect it to make a funding contribution towards its internal costs of performing that function. It is quite different to a commercial organisation which has to account to its shareholders for all of its expenditure and therefore should not be under the same pressure to recover its internal 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?

TNUK agrees in principle that this may be a useful proposal which could work in the best interests of all parties, but we are somewhat sceptical about how it would work in practice.

TNUK agrees that there is a problem with some appeals specifying multiple grounds of appeal in the hope that one will succeed, which makes them less focused, longer and more expensive than they would otherwise be. We strongly agree that "*appeals should be focused on those aspects of a decision which are material and where the appeal stands an arguable chance of success*".

Therefore, whilst the Government's intention is commendable, it is not clear what is meant in practice by administrative bodies being "*more active in scrutinising appeal grounds*" which they will obviously do at the moment as soon as they receive them.

More particularly, what does the Government intend by "*challenge them at the CAT at an early stage*"? Does it mean that they should apply more often to have appeals struck out or some other unspecified action?

The Government should be conscious that whilst such applications might terminate unmeritorious appeals (and the threat of such action might disincentivise them), they will in themselves lead to further appeal hearings and costs etc. Therefore, where any application to strike out is unsuccessful and the appeal continues regardless, costs and inefficiency will actually have increased. As an aside, an appellant in such a case would quite legitimately expect to have its costs paid by the unsuccessful regulator in these circumstances.

As a result, we would expect regulators to be very cautious about making applications to strike out and therefore this proposal may have somewhat limited benefits in practice, even aside from its practical obstacles.

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.

TNUK agrees that the CAT should review appeals to identify those that stand little chance of success which should provide a benefit to all parties. However, we disagree that it should be able to reject those appeals without the appellant having the opportunity to make oral representations (if that is the Government's proposal).

Even appellants who choose to submit appeals on multiple grounds should welcome any review which would allow them to know sooner, rather than later whether all (or parts) of their appeal are likely to succeed or fail. This should provide them with greater commercial certainty, as well as saving them both time and costs in pursuing a pointless appeal.

However, we are concerned about the process by which the CAT would reject appeals that it believes stand little chance of success. If the CAT makes these decisions without any hearing or arguments being presented by the parties we would be concerned about a lack of due process where the appellant had no further opportunity to progress its appeal . That might particularly be the case if the appeal concerns a dispute in which one party would win and another would lose as a result of the CAT's decision.

TNUK therefore believes that the outcome of any case review process in which appellants do not have the opportunity to make representations must be advisory, rather than binding. That is, the CAT can advise that the appeal is very unlikely to succeed and the appellant would be expected to take very careful note of that advice and in all likelihood withdraw its appeal.

However, the appellant must still have the opportunity to progress the appeal, if it chooses to do so (although there may perhaps be cost consequences if the appeal is ultimately unsuccessful, which might be the vast majority of cases). Bearing in mind the fundamental commercial importance of some appeals, it would be most unjust if this option were to be unavailable, although TNUK envisages that it would only be exercised very rarely. The general expectation would be that the CAT's advice would be followed and appellants would be taking a significant costs risk if they chose to ignore it.

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

TNUK believes that it is somewhat naïve to believe that appeals can be reduced by providing appellants with "*confidence in the decisions made by regulators and competition authorities*". Any decision to appeal will fundamentally be based on two questions. Firstly, whether the potential appellant agrees with the decision or whether it disagrees with it sufficiently to warrant the time and cost of an appeal. Secondly, whether it believes that it has a realistic prospect of being successful on appeal. Realistically, the openness or transparency of the process undertaken by the regulator in reaching its decision is only likely to be relevant in answering that second question.

Notwithstanding, TNUK would be in favour of any proposal which improved Ofcom's regulatory decision policy making processes. Ofcom's internal processes are somewhat opaque and so TNUK could not comment on the degree to which they might be improved by measures such as collective decision-making or a change in decision-makers, but we would certainly support any such changes.

However, the objective of any appellant at the administrative stage will only ever be to persuade the regulator to adopt its way of thinking and improvements to processes must be seen in that light. Furthermore, if the Government is not envisaging obliging regulators to adopt certain procedures, but rather it is merely allowing them to consider whether to do so, TNUK is extremely sceptical whether Ofcom would choose to change its very entrenched processes.

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?

Ofcom can certainly not be criticised for not consulting, which it does regularly and extensively, issuing extremely lengthy consultation papers which can run up to 1,000 pages. However, TNUK can see no evidence that additional or early consultation has any effect in reducing the number of appeals. The experience of the communications sector would suggest directly the opposite.

Indeed, it is precisely because of the fear of appeal that the Ofcom policy making processes are quite so extensive, which is one of the principle reasons why TNUK (and Ofcom itself) support reform of the appeals process. Ofcom's objective in conducting such lengthy consultations is not necessarily disincentivising appeals by reassuring stakeholders that their views have been taken into account, but rather it is to prepare themselves to be able to defend or deter any appeal which may occur. Ofcom also generally shows a willingness to meet with any interested parties to allow them to make further representations, although there is always a question as to whether Ofcom is genuinely open to hearing views contrary to its own.

As a result, nothing in an Ofcom consultation process will reduce the chances of an appeal occuring, except Ofcom changing its position to that which has been advocated by a potential appellant. Clearly that is not a strategy that Ofcom can employ very often. Therefore, although there may undoubtedly be ways that Ofcom's consultation processes might be improved, regrettably there is no reason to expect that it might reduce the number of appeals.

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

Although Ofcom cannot require individuals to answer questions per se, it does have the power under the Communications Act 2003 to issue statutory information requests which require providers to supply the information stated, often in very short timescales. Ofcom's use of information requests has developed to such an extent that they can be extremely lengthy and require vast quantities of information.

Furthermore, Ofcom stretches the limits of what can viewed as "information" to the extent that its requests can sometimes become in effect 'compulsory consultations', in which stakeholders are obliged to provide their response to certain regulatory proposals. Responding to these information requests can often be a much more onerous task that responding to a consultation, both in terms of the quantity and detail of information required, as well as the short time which is allowed.

We note that the Government does not believe that individuals should be required to answer questions as part of the regulatory framework, which is why we are highlighting that this already effectively occurs in the communications sector.

TNUK certainly does not feel that Ofcom needs any additional investigatory powers and indeed, there is much more likely to be a question as to whether it is exceeding its authority in exercising the powers which it already has.

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?

As a potential appellant, TNUK has an obvious interest in minimising the time taken by the CAT for conducing appeals in order to increase regulatory and commercial certainty and reduce costs. Therefore we would support any potential reduction in the target time limit for hearing cases assuming that it did not have any adverse impact on the thoroughness with which the CAT considered all of the relevant issues.

Certainly as a party to a dispute, we do not feel that our position would be compromised by having the case heard in 6 months, rather than 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?

For the same reasons as outlined above, TNUK would support a target time limit for the CAT to hear all other regulatory appeals within 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?

TNUK has already outlined its views on the Government's proposals for potential limits which may be placed on the ability of parties to introduce new evidence at appeal, to which we gave broad support.

We would be more cautious about limits being placed on the use of 'existing' evidence, although we do agree that some restrictions are likely to be beneficial. In particular, we agree that it may be sensible to give the CAT the power to limit the number of expert witnesses that can be used, as long as it retains some discretion in the use of that power to take account of individual circumstances. The use of expert witnesses is one of the principal factors which drives the length and cost of CAT hearings and so it is certainly something which should be examined.

However, it is much harder to see how the CAT could place a limit on the volume of evidence which any party may adduce, even though that is also a key driver of increased cost. Naturally, the evidence must be relevant to the grounds of appeal, but it is difficult to imagine any practical means by which it may be limited in terms of the number of pages.

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?

TNUK would strongly support the introduction of a voluntary fast-track procedure such as this, which would have the clear potential benefit of reducing the costs of conducting an appeal, as well as the likely timescales. This could go some way towards making the appeals process more inclusive of those smaller providers who have previously been deterred from entering into it. However, there are two potential obstacles to achieving this objective.

Firstly, it's not clear that Ofcom itself would have an incentive to agree to a fast-track procedure. Although Ofcom may incur costs in conducting an appeal, those costs are not 'real' in the sense that even if they are not recovered from the other party to the appeal, they are paid out of the administrative charge which is levied on all providers. Therefore, TNUK does not believe that costs are a major consideration for Ofcom in conducting an appeal.

By contrast, Ofcom will be much more concerned about winning the appeal and preserving its policy position which it has no doubt spent many months developing. It may therefore have much greater reason to want to adduce all of the evidence which it feels it requires, rather than artificially trying to reduce costs.

Secondly, TNUK assumes that a voluntary fast-track procedure currently envisaged by the Government could only be agreed between the parties once the appeal has already been submitted, proceedings are underway and all of the evidence and witnesses have already been identified and included . Therefore, at the point at which the appeal is being submitted (or the decision to appeal is being made) significant work will have been done and commitments made, before the appellant will not know whether they will be able to pursue a voluntary fast-track procedure however much they may wish to. That lack of advanced knowledge may significantly reduce the benefits of this proposal.

TNUK therefore proposes that the fast-track procedure must be designed in such a way that it can be agreed between the parties prior to any substantive work being undertaken by the appellant in terms of initiating an appeal. We appreciate that this is something of a 'chicken and egg' situation, but it should be possible to design a process by which a potential appellant is able to discuss with a regulator whether they would agree to entering into a fast-track procedure before drafting the full notice of appeal and witness statements etc.

This might perhaps be by initiating an appeal via the submission of outline grounds of appeal sufficient to allow the regulator to make a judgment on the likely level of evidence and resources required. If that was not possible, a significant benefit of the fast-track procedure would be lost because the appellant would already have been required to commit to all of its arguments and in particular all of the evidence on which it

intends to rely. From that point on, it would not be possible to limit the amount of evidence and witnesses and the related time and costs which inevitably follow, which a fast-track procedure would be intended to do.

Nevertheless, notwithstanding those concerns, TNUK would certainly be interested in pursuing if it were to be available and so we support its introduction.

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?

As a potential appellant, TNUK has an obvious interest in minimising the time taken by the Competition Commission for conducing price control appeals in order to increase regulatory and commercial certainty and reduce costs. Therefore we would support any potential reduction in the target time limit for hearing cases assuming that it did not have any adverse impact on the thoroughness with which the Competition Commission considered all of the relevant issues.

However, it is not clear why if the current 4 month time limit is seldom met, the Competition Commission will be any more successful in meeting a 6 month time limit, if its cases are usually longer than that, even now

Certainly as a party to a dispute, we do not feel that our position would be compromised by having the case heard in 6 months.

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?

TNUK has no experience of the Civil Aviation Act 2012, but we have no reason to believe that it would not provide a suitable model.

All queries in relation to this response should be to Simon Grossman, Director of Government, Regulatory & Business Affairs, The Number, Whitfield Court, 30-32 Whitfield Street, London W1T 2RG – simon.grossman@118118.com – 07971 050 001

Hutchison 3G UK Limited (Three)

Three's Response to BIS' Consultation on: Streamlining Regulatory and Competition Appeals

Non-confidential

Date 11th September 2013

Three.co.uk

Introduction.

1. **This is Hutchison 3G UK Limited (Three's) response to the Department for Business, Innovation & Skills' ("BIS") Consultation on Streamlining Regulatory and Competition Appeals published 19 June 2013 (the "Consultation")**

2. Three welcomes the opportunity to respond to the specific questions raised in the Consultation, and to comment more generally on the Government's proposed approach to the reform of the standard of appeal. As a mobile communications provider and the UK's leading mobile broadband provider, Three has a clear interest in the future health and viability of the UK's communications market. Therefore, the most part of Three's response is given over to discussion of proposals in relation to changes in the standard of appeal in relation to decisions made by the communications regulator, Ofcom.

3. Three supports BIS's proposals for streamlining appeal processes across economic regulators, underpinned by a single, clearly understood standard of appeal. This can only be good for business, the wider economy and future economic certainty. We have commented in this response on the substance of the BIS proposals in relation to appeals of decisions made by Ofcom to the Competition Appeal Tribunal ("CAT"). We have included a detailed and compelling body of evidence in support of what Three believes is much needed and long overdue reform. We have then set out our responses to BIS's specific questions in Annex 1 to this response.

4. In summary, Three believes that the current framework for appeals brought under the Communications Act 2003 has the following failings:

    - It creates perverse incentives in the regulatory process in that it encourages operators to hold back evidence and arguments for the appeal rather than provide them to the regulator for consideration in taking the initial decision.
    - It is slow. Protracted appeal litigation creates regulatory uncertainty and gridlock, and inhibits the market's ability to move forward to meet the pace of innovation and demand.
    - It is resource intensive and costly, preventing industry players and Ofcom from using their resources for other projects.
    - It is anti-competitive because it favours incumbents with deep pockets at the expense of smaller players and new entrants.
    - It is out of step with the process applied to other Ofcom decisions. For example, most Ofcom spectrum decisions are subject to judicial review only. This is considered to be the appropriate standard for those Ofcom decisions which arguably have the most profound impact on industry stakeholders and the wider economy.
    - It is out of step with other regulated sectors, where the vast majority of decisions of regulators are subject to judicial review or "enhanced

judicial review" only (whether enforcement decisions, decisions under licences or industry codes, or otherwise).

- It is out of step with other EU jurisdictions, because Ofcom's decisions are subjected to a higher level of scrutiny that those of its European NRA counterparts. This may place UK operators at a competitive disadvantage.

5. It is Three's view that the Government's long overdue proposals to introduce a judicial review standard to communications appeals would remedy many of these failings. Judicial review would be proportionate, remove gaming opportunities, and offer a faster and more efficient process, targeted at material flaws in Ofcom's decision making process and delivering greater benefits to the communications sector than is currently the case.

Contents.

1. Executive Summary

1. BIS has asked for the views of business on its proposals to streamline regulatory and competition appeals. It is Three's view that a robust and open system of appeal is necessary to underpin effective and proportionate regulation and ensure competitive and fair markets.

2. Three believes that it is vital for the health and the future prosperity of the UK economy for both businesses and consumers to have confidence that economic regulators and competition authorities are not only independent but are well placed to make timely decisions in the interests of the relevant sector and also the wider economy. The enforcement of fair and open competition through appropriate regulatory intervention remains one of the most important mechanisms for ensuring that markets operate effectively and for the benefit of consumers.

3. Three also recognises that effective systems of appeal provide an important mechanism for holding regulators to account as well as enabling companies to challenge decisions, particularly where these rest on errors of law, errors of fact or cause material detriment to the business concerned.

4. Underpinning the Government's proposals in relation to the streamlining of regulatory and competition appeals is the assertion that the UK's appeal regime is broadly performing well. Whilst this may be true of many sectors, it is manifestly not true of certain sectors and of communications in particular, where the standard of review is not only much lower than in other sectors but the number of appeals of regulatory decisions is much higher.

5. Three believes that there is evidence that this has enabled some companies to see appeals as a largely risk free one-way bet, as well as an opportunity to re-open regulatory decisions to pursue a commercial advantage. The current standard of review has also enabled some appellants before both the CAT and the Competition Commission to consistently argue that each and every element of Ofcom's decisions, including (in particular) where Ofcom is exercising its regulatory judgment, should be subject to a detailed review on the merits and the appeal bodies should overturn Ofcom's decisions where they prefer an alternative solution to that decided upon by Ofcom. Three welcomes the Government's recognition of this concern.

6. Disproportionate regulatory resource is now tied up in either defending decisions or seeking to forestall legal challenge through ever more time consuming and granular consultation and decision making processes. Since the Communications Act 2003 came into force, Ofcom has been appealed 46 times, leading to 32 Tribunal proceedings (some of the appeals were heard together as they covered similar issues).

7. Although the Government recorded that the level of staff time required to defend an appeal varies considerably, but in one year, on one appeal, over 7,000 staff hours (almost four staff years) were recorded. More recent evidence from Ofcom indicates that more than 11,500 hours (about six staff years) were allocated to addressing appeals litigation in the financial year 2009-10, whilst the figure for the period April 2010, January 2011 was almost 9,000.[1]

8. It is the view of Three that the frequency and length of appeals under the Communications Act 2003 has risen. Ofcom has recorded an associated cost to Ofcom of over £1 million per year since 2007/08. This figure increased to more than £2 million in 2010/11, against a total cost, if all appeals against Ofcom's decisions are included, of £4.7 million during that financial year.[2]

9. Three does not believe nor has seen compelling evidence to demonstrate that these increases in any way reflect an increase in the quality of decisions made by Ofcom; the current system leads to inefficiencies.

10. Appeals inevitably create costs for operators as well as the regulator. Three conservatively suggests that operators incur costs at least as much as those incurred by the regulator. [redacted] However, Three also recognises that while there is limited evidence that this upward trend may have been arrested, this should not detract from the fact that the cost of appeals in telecoms is too high.

11. Whilst the appellant may willingly bear these costs, appeals typically generate a plethora of consequent interventions from third parties who are required to expend further resource under an extended regulatory decision making process. Under this system, the aggregate cost of appeals can become enormous.

12. Although in the broader context of revenues across the communication sector the amounts of money spent by the industry in bringing appeals may not appear unduly significant, the cost of contesting decisions should not be assessed in monetary terms alone. Appealing regulatory decisions or, indeed the contest of counter appeals in support of a given regulatory intervention, makes significant demands of limited expert legal and regulatory resource that might otherwise be deployed to support the rollout of new and innovative products and services to the benefit of the individual business, consumers and the wider sector. Similarly, the uncertainty caused by protracted appeal processes has real impacts on the ability of businesses to make timely investment decisions and pursue innovative products and services.

13. It is increasingly clear that the balance between appropriate review and the ability of the regulator to take decisions in the interest of the

[1] DCMS, *Impact Assessment: Reforming the Appeals Regime for the Electronic Communications Sector*, (2011), p. 4
[2] DCMS, *Impact Assessment,* p. 5

market is under severe strain. It is telling that although Ofcom's decisions are rarely overturned, they nevertheless account for significant resource. There should be little doubt that this has stifled Ofcom's ability effectively to carry out its statutory duties either in the public interest or to the benefit of the sector. A change in the standard of review should enable Ofcom better to fulfil the role that Parliament has set for it.

14. Three believes this situation is unsustainable and will lead to regulatory logjam and inertia. The communications sector is becoming increasingly complex and, in the growing absence of brave, market shaping decisions intended to improve competition and open up the sector to new and innovative products (such as ensuring the timely release of new spectrum and the efficient and fair use of new spectrum, bringing down the price of termination rates and taking action to reduce Donor Conveyance Charges), Ofcom has been compelled to make seemingly less contentious decisions intended to secure consumer facing outcomes on mid-contract price changes, bill shock, additional charges, and mobile "quality of experience". However, these too have been subject to appeal from operators keen to protect inherent and systemic advantages.

15. Regulatory decisions and particularly those relating to competition, necessary for the future health of the communications sector have been postponed, sometimes indefinitely. For example, the failure to resolve the appropriate level of the Donor Conveyance Charge in respect of disputes brought in 2007 to a level that is cost orientated is emblematic of the logjam and delay that characterises the communications sector.[3]

16. Three believes that the upward and unsustainable drift in both the cost and length of the appeal process, as well as the consequent impact on the regulator's ambition, is the consequence of the incorrect implementation in 2003 of Article 4(1) of the Framework Directive[4] by the UK Government. The UK Government recognised this in terms in the 2011 DCMS consultation on reform of the telecoms appeals framework.[5]

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[3] Ofcom first sought to reduce the cost of Donor Conveyance Charges as a consequence of a dispute brought by Three in August 2007. That decision was appealed in October 2007. At the time of writing, despite the withdrawal of the appeal in May 2010 and a series of complicated interactions between Ofcom, CAT and operators during which time Ofcom twice sought to adjourn proceedings because of resource constraints, and the CAT considered itself compelled to write the regulator to express concern at the actions of the regulator, Donor Conveyance Charges are still not cost orientated and are remain an obstacle to fair competition. This and other examples of delayed decision making to the detriment of the sector and also to consumers are explored in the section on case studies from p. 38.

[4] (2002/21/EC)

[5] DCMS, *Consultation: Implementing the revised EU Electronic Communications Framework - Appeals Consultation*, p 8.

17. Three recognises that the CAT holds much expertise in telecoms issues and is rightly recognised for both that knowledge as well as its experience of reviewing economic regulation and competition decisions. Three also recognises that the CAT has almost unique experience of bringing to bear judicial scrutiny with knowledge of competition policy and economics.

18. However, we question, whether the current regime (with its consequent impact on regulatory decision making and legal certainty) is appropriate given the dynamic and fast-moving nature of the telecommunications industry and whether such decisions might be better and more expeditiously reached through a different standard of review; namely through a modern standard of judicial review rather than on the merits as is currently the case.

19. The Government has published data that shows that appeals before the CAT on a judicial review basis take an average of four months, against an average of over nine months for all CAT cases between 2008 and 2012. These figures chime with Three's own experiences of appeal before the CAT. However, Three notes that the CAT has published figures that purport to show that stripped of outliers, appeals on the merits heard before the CAT involve almost as little court time as appeals on a judicial review standard. Three strongly suggests that this claim is disingenuous, as it reduces the appeal solely to the time spent at the tribunal and excludes time intensive elements of case management and practice associated with the current process. Moreover, it is precisely the current standard of review that enables these outliers to occur. It is therefore entirely wrong to consider the current system without including all cases of appeal heard on the merits before the CAT.

20. It therefore follows that Three is supportive of the Government's proposals to further streamline the process of appeal in addition, to the more important change to the standard of review.

21. Three believes that to address issues around process without changing the standard of review of telecoms appeals, will not help meet the stated objective of a faster and more efficient appeals process that provides certainty to business whilst maintaining access to justice. Three also agrees with the assessment of the Government that, in the context of a revised standard of review, there is tangible benefit in continuing to hear telecoms appeals before a specialist body.

22. However, we agree with the Government that there are process changes to CAT procedure that could be usefully made to further manage both the cost and length of proceedings. Three believes that:

    I. 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 will help to ensure that unmerititous appeals are not brought before the CAT;

II. Encouraging regulators to claim their full costs and consulting on whether courts will only award costs against a regulator where they have acted unreasonably may also help to disincentivise operators from bringing unmeritious appeals. However, Three strongly cautions against the routine award of costs against operators for all unsuccessful appeals as this will act as a unnecessary deterrent to businesses seeking justice. Three suggests that any move to award costs to the regulator should be underpinned by clear guidance.

23. Three is also supportive of other proposals set out in the consultation document to ensure the efficient hearing of telecoms appeals. These include 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; as well as encouraging cases to be resolved on the papers wherever possible, for example for cost awards and straightforward matters. Three believes these proposals will help to strengthen processes and the quality of hearings both in the CAT and the Competition Commission. Both these sets of proposals are relatively straightforward and common-sensical, with clear precedent in other legal settings. Therefore, Three does not propose to comment on either proposal further.

24. However, Three is unconvinced that the increased use of confidentiality rings by the regulator suggested by the Government is practical in relation to the communications sector. Whilst external expert Counsel are routinely used before the CAT, this is not usually the case when companies refer disputes to Ofcom for determination. The dispute process itself is routinely managed by internal legal and economic teams. It is far from clear to us how confidentiality rings would work in this context, given the need to establish effective paper walls within operators. We have also not seen any evidence to suggest that lack of access to confidential documents is a motivating factor for appeals to the CAT.

25. Therefore, Three believes that the promotion of confidentiality rings in the Ofcom decision-making process will prove costly, difficult and cumbersome and is unlikely to help reduce either the cost or length of subsequent telecoms appeals. This view was shared by the Government in the 2011 DCMS consultation on the reform of the telecoms appeals framework. Three also notes that no compelling evidence was presented in response to that consultation on the efficacious use of confidentiality rings in similar regulatory forums.

26. The Government has made clear in its proposals the importance of maintaining and reinforcing regulatory certainty. Three is clear that this can only be good for the communications sector. However, like the Government, Three believes that market and regulatory certainty, both of which are vital if businesses are to plan effectively and make optimal investment decisions, are best served through good, timely and expeditious regulatory decisions.

27. This does not stop with the regulator and it is the view of Three that the Government's proposals to streamline regulatory and competition

appeals, and in particular to change the standard of appeal, will help deliver this certainty without undermining the best features of the current appeal regimes.

28. Three is clear that there are real substantive economic benefits to be had from the proposed reforms. In the 2011 DCMS consultation on the reform of the appeals framework, the Government estimated that the reform of the telecoms appeals framework would deliver benefits to society estimated to between £12m and £24m p/a.[6] The BIS consultation places the value of reform in the context of the overall reform packages and values the change at £65m. Three believes that both these estimates are unrealistic and are unduly and unnecessary conservative. Research commissioned by Three has estimated that given a reasonable interpretation of the data and evidence on which it is based, a net benefit of £238m in NPV terms could represent a reasonable interpretation of the 'most likely' outcome of the proposed reforms.[7] Three believes that this estimate is much closer to a true reflection of the value of the proposed reform.

29. Three believes that moving to a recognised and established standard of review, namely judicial review, for which there is both significant legal precedent and case law, is central to securing the Government's objectives for the appeals regime. It will provide for independent, robust, predictable decision-making, as well as ensuring appropriate and proportionate regulatory accountability where decision making has erred. More significantly, a move to judicial review as the standard of review, should ensure that appeals are focused on identifying cases where regulators have made material mistakes which have a material detriment on outcomes or, indeed, where a decision is unreasonable rather than allowing indefinite delay to regulatory decisions through the detailed re-examination of all aspects of the regulators decision making.

30. Three is convinced that the proposed change to the standard of review will ensure that the appeals framework remains capable of correcting mistakes made by a regulator where these occur, providing sufficient access to justice to operators and other parties and not only the largest and most established operators. Three notes that in other sectors, where appeal of regulatory decisions is by judicial review, no evidence exists of either worse decision making or the complaint at the inability on the part of business to access justice.

31. More broadly, Three supports the Government's objective of seeking to simplify and harmonise regulatory and competition appeal across all sectors. Currently, there is a significant degree of diversity in approach and standards across sectors. This is an unnecessary and, Three contends, anachronistic complication for business. Harmonising standards of review and other processes and, in particular, bringing clarity and greater coherence to which appeal bodies should hear

[6] DCMS, *Impact Assessment,* p. 2.
[7] Economic Impact , *Economic Evidence Relating to the Streamlining of Regulatory and Competition Appeals*, (2103), p. 14.

different types appeal will bring much needed simplicity for business, particularly those that operate across sectors.

32. However, Three unambiguously does not support proposals set out by Government to make a similar changes to the standard of review for appeals under the Competition Act 1998. Three believes that not enough evidence has been heard or tested to assess the relative merits of the proposal. Three strongly suggests that it is in the interest of the wider objectives of the proposals for reform for competition and regulatory appeals processes, that changes to the standard of review under the competition Act 1998 should be halted, pending more detailed information around those proposals, and a fuller and more focused consultation. Further, Three believes that implementing changes to the standard of review for appeals under the Competition Act 1998, risks introducing unnecessary uncertainty into the market and running counter to the Government's stated aim of improving market certainty.

2. Streamlining Competition and Regulatory Appeals

The current standard of review

Three's experience of the current appeals process

1. Three has been involved either as a party or as an intervener in many appeals of Ofcom decisions to the CAT, and then on to the Court of Appeal. We therefore have considerable experience of the efficacy of the appeal framework in relation to telecoms and have been witness to the development of the scope and nature of appeals of Ofcom decisions. Three is therefore well placed to comment on the failings of the current system.

The current system of appeal on the merits is uncertain

2. As we noted in the executive summary, telecoms appeals are characterised by the length and costs associated with the process. In Three's view, these significant areas of uncertainty are, at least in part, caused by the UK's 2003 implementation of Article 4(1) of the Framework Directive, and in particular, the uncertainty as to the exact scope and meaning of an "appeal on the merits" under the Communications Act 2003 regime. For instance, there is uncertainty as to:

   - the circumstances in which a litigant should be permitted to introduce evidence in proceedings which it has not provided to Ofcom during the administrative process.

   - the level of scrutiny which the CAT should apply to Ofcom decisions. The CAT's current case law variously states that:

     - The CAT, as a specialist court, should "*scrutinise the detail of regulatory decisions in a profound and rigorous manner*"[8];

     - The question for the Tribunal is "*not whether the decision …was within the range of reasonable responses but whether the decision was the right one*"[9].

     - *"there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single*

[8] *H3G v Ofcom* [2008] CAT 11, at [46].
[9] *Ibid* at [47].

"right answer" to the dispute.."[10]

- *"… the way in which the Tribunal exercises its jurisdiction is likely to be affected by the particular circumstances under consideration... the Tribunal may, depending on particular circumstances, be slower to overturn certain decisions where, as here, there may be a number of different approaches which OFCOM could reasonably adopt… However it is still incumbent on OFCOM, in light of their obligations under section 3 of the CA 2003, to conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny that the Tribunal will apply on an appeal on the merits under section 192 of the CA 2003... The essential question for the Tribunal is whether OFCOM equipped itself with a sufficiently cogent and accurate set of inputs to enable it to perform a reliable and soundly based CBA [cost-benefit analysis] ... It is the duty of a responsible regulator to ensure that the important decisions it takes, with potentially wide ranging impact on industry, should be sufficiently convincing to withstand industry, public and judicial scrutiny"."*[11]

3. Each of these tests represents current law and their competing imperatives have to be addressed and accommodated in each new case before the CAT. Each also has the ability to cause delay and uncertainty. It is the view of Three that the standard of review for modern judicial review, as applied by the High Court, is by contrast very well established and unlikely to cause such uncertainty.

The current system of appeal is inefficient

4. It has been recognised that the current Communications Act appeals process is slow and resource heavy. Three notes that respondents to the DCMS 2011 consultation on reform to the telecoms appeals framework recognised that efficiencies could be brought to the system even if they were ill-disposed to proposals to change the standard of review.[12]

5. It is the view of Three that "appeal on the merits" has led to unnecessarily lengthy hearings at the CAT. In the 2011 DCMS consultation, the Government noted that:

"*appeals before the CAT are considered by many to have become a full rehearing, with full consideration and interrogation of Ofcom's evidence, analysis and decision. This results in a lengthy appeals process, in which decisions lag behind the pace of technological change and market development.*"[13]

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[10] *T-Mobile (UK) Ltd and others v Ofcom [2008] CAT 12 at [82]*
[11] *Vodafone and others v Ofcom [2008] CAT 22 at [46]-[47]*.
[12] DCMS Consultation, paras 102-107
[13] DCMS Consultation, paras 29.

and

> *"Under the current appeals system, Ofcom's findings of fact and analysis are routinely interrogated in significant detail. Hearings are lengthy, and considerably lengthier than is typically the case for judicial reviews. This is in our view primarily due to the treatment of alleged errors of fact and/or analysis of those facts, and the regular extensive examination and cross examination of factual and expert witnesses in relation to these matters on each and every part of Ofcom's decision."*[14]

6. Three firmly agrees with this assessment of the current process. By way of example, the 2010 non-geographic numbers appeal entailed an 11 day main hearing at the CAT (with satellite litigation before both the Tribunal and the Court of Appeal).[15] The proceedings involved two appellants (BT plc and Everything Everywhere Limited), Ofcom as defendant and five interveners. A very large volume of evidence was adduced[16]:

   - In total, 49 witness statements and expert reports were adduced in evidence[17].
   - 13 witnesses of fact provided evidence, with four being called to give oral evidence to the Tribunal.
   - By far the most time consuming element of the hearing was the cross-examination of seven economic experts who, between them, had prepared 24 reports analysing the impact of BT's proposed price changes.

7. The CAT's judgment in this appeals case was subsequently overturned by the Court of Appeal in 2012. BT has since been granted permission to appeal to the Supreme Court, and this hearing is listed for February 2014 (almost 5 years after the charges were purported to have been introduced).

8. Moreover, the broad scope of appeal under the Communications Act 2003 has led the CAT to allow fresh evidence to be introduced at appeal, notably in *Vodafone and others v Ofcom [2008] CAT 22*. The admission of further new and untested evidence can act as a cause of delay. It can also have significant impacts on the likely outcome of a hearing.

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[14] DCMS Consultation, para 34.

[15] Case 1151/3/3/10: *British Telecommunications plc v Office of Communications* (Termination charges for 080 calls); Case 1168/3/3/10: *Everything Everywhere Limited v Office of Communications* (Termination charges for 0845/0870 calls); and Case 1169/3/3/10: *British Telecommunications plc v Office of Communications* (Termination charges for 0845/0870 calls) (the "non-geographic number disputes appeals")

[16] Tribunal's judgment in the non-geographic number appeals dated 1 August 2011, paras 20 – 33.

[17] *Ibid*, para 32.

9. On the basis of this evidence the CAT decided that Ofcom's decision to the mandate direct routing of calls to ported numbers was not robust and should be overturned. However, had the appeals regime included stronger incentives on parties to put forward all available evidence supportive of their case at the consultation stage, it is not incorrect to assume that Ofcom would have likely taken a different, more robust decision. It is Three's view that in this case and others, expensive litigation and delay in the development of regulatory policy could therefore have been avoided.

10. Taken together, the breadth and depth of review available at the CAT, together with the potential for new evidence to be introduced at the appeal stage means that in certain sectors at least dispute decisions and market reviews are almost inevitably appealed, regardless of the overall merits of Ofcom's decision. The non-geographic number appeals are a case in point and well illustrate the matter (see case study below (see p. 38)**.**

11. Three further notes that by their very nature, Ofcom's decisions often, at least to some degree, create winners and losers. However, this does not mean that it is necessary or indeed in the interest of the public, for such decisions to be subjected to profound and rigorous scrutiny on appeal.

12. By contrast, modern judicial review incorporates incentives which work to ensure that all stakeholders "put their best foot forward" from the outset. This facilitates informed debate and scrutiny of relevant evidence by industry as a whole before decisions are made, rather than in court after the event.

The current system is out of step with other regulated sectors

13. The standard of review for appeals in relation to telecoms is an outlier, and very different from standards of review across other regulated sectors. In all other sectors, the decisions of regulators are subject to judicial review or "enhanced judicial review" only, irrespective of whether they are enforcement decisions, decisions under licences or industry codes, or otherwise.

14. The licence modification process has been cited by some and in previous responses to Government consultations on the telecoms appeals framework as an exception and an equivalent to a Communications Act "appeal on the merits". This is not the case. Firstly, the process is very different. A licence modification can only be initiated by the regulator. It is more appropriately described as a second stage administrative review than an appeal. If the licensee is dissatisfied with the outcome of the Competition Commission process, the only remedy available there is judicial review. Licensees and third parties cannot make a reference themselves to the Competition Commission for "failure to make a modification" or appeal the terms of an agreed licence modification. The remedy available in these circumstances is also judicial review.

15. Three also notes that the energy regulator, Ofgem, has issued many thousands of licence modifications since it was established in law in 2000. However, only a very small number of Ofgem's decisions in this regard have been challenged. This is in comparison to the much larger number of appeals in relation to telecoms brought to the CAT, 32.

16. Three questions why regulatory decisions in the communications sector require greater scrutiny than those in other sectors and welcomes the Government's stated intention of correcting this anomalous situation. Whilst it is true that there are many competing interests in the communications sector, and these underpinned by significant investment, similar claims can be made in relation to other sectors. Three notes, for example, that there is significant wholesale and retail competition as well as major investment in the energy sector, particularly now that the industry is diversifying and exploring new potential energy sources.

17. It therefore follows that if a decision which could have a profound impact in the energy sector, for instance, on investment in LNG terminals or a nuclear power station, should be subject to judicial review, the same standard of review could also apply to a decision on whether to allocate a number range to an adult service provider or to a finding of significant market power. In our view, such decisions do not warrant or need to be subject to profound and more rigorous scrutiny before the CAT.

The cost to Three of appeals under the current system

18. As the MNO with the smallest market share, Three is acutely aware of the current financial burden imposed by appeals, especially as our interests are often not aligned with those of the incumbent MNOs.

19. We have found that very significant resources are required to protect our interests in a regime where every regulatory decision is potentially subject to profound and rigorous scrutiny at the appeal stage. The costs are the same whether you are a large, established player or a new entrant. The burden of operating under such a regime, therefore, is arguably in inverse proportion to the size and financial muscle of the stakeholder.

20. The cost of preparing the evidence necessary to present a compelling case at the CAT, both financially and in terms of diverted resource (particularly senior lawyers and economists), is difficult to quantify, albeit that it is fair to say that it will be significant for each of the parties. For example, the breadth and depth of review available at the CAT in the non-geographic numbers appeals meant that they became, in effect, a full rehearing of all issues that were before Ofcom as well as a first hearing of various issues that were not previously before Ofcom.

21. In this case, the CAT's judgment did not turn on the economic evidence that was before it, but rather on a contractual interpretation point that could have been addressed in a much shorter hearing, if the CAT had been required to consider the dispute on the narrower

grounds of judicial review. A narrower appeals standard based on judicial review principles would likely have resulted in a far more efficient use of resources by all parties and a swifter resolution.

22. Three notes that some parties have suggested that the cost of appeal before the CAT is reasonable or affordable. This is not the case in Three's experience. Since 2010, Three has been involved in three key pieces of litigation involving appeal before the CAT and on to the Court of Appeal and the Supreme Court. [redacted]

23. In summary, the appeals system under the Communications Act has the following failings that need to be remedied urgently:
    - It creates perverse incentives in the regulatory process in that it encourages operators to hold back evidence and arguments for the appeal rather than provide them to the regulator for consideration in taking the initial decision.
    - It is slow. Protracted appeal litigation creates regulatory uncertainty and gridlock, and inhibits the market's ability to move forward to meet the pace of innovation and demand.
    - It is resource intensive and costly, preventing industry players and Ofcom from using their resources for other projects.
    - It is anti-competitive because it favours incumbents with deep pockets at the expense of smaller players and new entrants.
    - It is out of step with the process applied to other Ofcom decisions. For example, most Ofcom spectrum decisions are subject to judicial review only. This is considered to be the appropriate standard for those Ofcom decisions which arguably have the most profound impact on industry stakeholders and the wider economy.
    - It is out of step with other regulated sectors, where the vast majority of decisions of regulators are subject to judicial review or "enhanced judicial review" only (whether enforcement decisions, decisions under licences or industry codes, or otherwise).
    - It is out of step with other EU jurisdictions, because Ofcom's decisions are subjected to a higher level of scrutiny than those of its European NRA counterparts. This may place UK operators at a competitive disadvantage.
    - It has been made increasingly unworkable given the changes made to the revised Framework (e.g. extension of appeal rights to new classes of litigant, the requirement for a 3-year market review cycle, and other mandatory reforms).

24. It is our view that the Government's proposal to introduce judicial review would remedy these failings. Judicial review would be proportionate, remove gaming opportunities, and offer a faster and more efficient process, targeted at material flaws in Ofcom's decision making process.

The call to maintain the status quo

25. Three is aware that that proposals for the reform of the communications appeals framework have not found favour with some parts of the industry. Many of the arguments in favour of the current appeals regime were marshalled on behalf of those parts of the industry by Towerhouse consulting in their 2010 report, *Appeals from Ofcom decisions: Time for Reform*. Three believes that there is value in revisiting that report and critically re-appraising some of the points it made.

26. The Towerhouse Consulting report recommended that the existing 'on the merits' approach to appeals worked well and should be retained. Specific findings put forward in the report included:

    - That a robust appeals mechanism raises the standard of regulatory decision making and is essential to the proper functioning of any regulatory structure.
    - That a proper, full consideration on the merits on appeal is important – the authors specifically stated that: *"we do not consider any watering down of the right to merits-based appeal is attractive."*[18]
    - The existing regime has been established for almost 7 years, and is therefore well understood.
    - Any substantial revision of the appeals process would create confusion, which would invariably result in protracted legal battles regarding the meaning of the new standard.
    - The authors do not consider that the current regime results in any material regulatory uncertainty – but rather, guards against it.
    - There is a case for seeking to 'fine tune' and make more efficient existing processes.

27. Three believes that there are a number of issues with the conclusions reached in the Towerhouse Consulting report that deserve further consideration. These are:

    I. First, the report contains largely qualitative evidence, such as (a) structured interviews with industry stakeholders; (b) a qualitative review of relevant appeals; and (c) a 'game theoretic framework' for considering the merits of the existing appeals process. Whilst qualitative evidence is both an important and valuable source of information, it also has a number of limitations and – in particular – tends to mean that any inferences drawn are more subjective.

    II. Second (and related to the above) the authors assert that under the current approach appeals are *"not generally excessively lengthy".*[19] We note that this is an entirely subjective statement; one could equally review the same data on appeals timings and form the counter view.

[18] Towerhouse Consulting, *Appeals from Ofcom decisions: Time for Reform,* p. 4.
[19] Towerhouse Consulting, *Appeals from Ofcom decisions,* p. 19.

III. Thirdly, the report's suggestion that the existing approach creates regulatory certainty (relative to the counterfactual of a 'watered down' approach to appeals) does not appear to be based on any clear framework for considering risk and uncertainty. In particular, based in part on the views of stakeholders, the report states that: (i) appeals make the regulatory regime more certain by increasing the chance of the correct outcome being arrived at; and (ii) the current regime is well understood – the implication being that stakeholders' experience of it makes it relatively certain compared to any new appeals framework.

28. These themes are elaborated in more detail in *Economic evidence relating to the streamlining of regulatory and competition appeals*, a report commissioned by Three from Economic Insight. Taken together, they serve only to highlight the evidential weakness of the Towerhouse Consulting report. It is our view that the Towerhouse Consulting report does not provide compelling evidence of an appeals regime that works well, rather it sets out the subjective view of a number of established communications providers. As such it is an unreliable guide to the efficacy of the communications appeals framework.

The Government's proposed approach

29. The Government has set out proposals to streamline competition and regulatory appeals proposals. At the heart of this ambition, and of most interest to Three, is the intention to move the standard of appeal in relation to telecom appeals before the CAT from appeal on the merits to judicial review.

30. It has been suggested that the pace of change in the communications sector is a reason for this greater scrutiny. Yet surely the opposite is required. A fast moving sector requires swift and responsive regulation, not protracted litigation. The uncertainty created by lengthy appeals inhibits the market's ability to move forward to meet the pace of innovation and demand.

31. Three believes that this reform is not only necessary, correcting the acknowledged and inappropriate gold plating of the appropriate provisions of Article 4(1) in the Framework Directive implementation of the first European Electronic Communications Framework in 2003, but also believes that this change will be to the benefit of the sector as whole, as well as consumers.

32. In the 2011 DCMS consultation, the Government estimated that the potential benefits to t of a change to the standard of review at £173m in NPV terms.[20] Three agrees that the net impacts of the change are likely to be positive. However, we also believe that the economic benefits are likely to be far greater than those suggested by the Government (see paras 53-56).

[20] DCMS Impact Assessment, p. 2.

33. The Government has set out a presumption that the standard of review should be judicial review, which is now understood to be flexible enough to enable the merits of the matter to be taken into account where appropriate. Three agrees with this assessment. The Government has also consulted on whether "specified grounds" might form a more appropriate standard of appeal than judicial review. Three is clear for reasons set out below that a move to appeal on the basis of judicial review, for which there is well understood precedent and case law, is the correct approach.

34. By contrast, appeal on specified or "more focused" grounds would be a step into the unknown. Such a change would provide for the unfettered examination and testing of those grounds as well as the lengthy and protracted discussion of what evidence in each dispute is material. Similar discussions currently take place in the context of "on the merits" appeals, and these are elements of the current appeals regime that the reform proposed by government seeks rightly to curb. Three's position is explained in more detail below.

35. As noted above, Three does not support proposals set out by Government to make a similar changes to the standard of review for appeals under the Competition Act 1998. Three believes that not enough evidence has been heard or tested to assess the relative merits of the proposal. Our analysis at the proposal is set out at paras 73-83**.**

36. Lastly, Three is aware that in previous responses to the Government's 2011 and 2010 consultations on changes to the appeals framework for telecoms, some respondents argued that changing the standard of review from "on the merits" to judicial review would prove ineffective as the CAT would remain able to apply a judicial review standard in a manner akin to the current merits review standard. The Government has also noted this as a potential risk in the current consultation. However, Three believes that this risk is unfounded and notes, as set out above, that previous attempts by the CAT's to extend the scope of judicial review were halted by the Court of Appeal in *IBA Health.*[21]

Advantages of adopting an ordinary judicial review standard for regulatory appeals

37. It is Three's view that the judicial review standard proposed for telecoms appeals is the correct standard. There are a number of real advantages to the adoption of judicial review.

Judicial review satisfies the requirements of Art. 4(1) of the Framework Directive

38. The Court of Appeal held in *T-Mobile UK Limited and Telefonica O2 UK Limited v Ofcom,*[22] that judicial review was sufficiently flexible to take into

[21] *IBA Health v OFT* [2003] 27 at §220
[22] [2009] 1 WLR 1565

account the requirement of Article 4(1) of the EU Electronic Communications Framework Directive that "*the merits of the case be duly taken into account*".

39. The Government has further twice now made plain its view that modern judicial review, as has been recognised by the Court of Appeal, meets the requirements of Article 4(1) of the Framework Directive. Three agrees with the Government's assessment; appeal on the merits gold-plates the provisions of the Framework Directive and over implements the requirements of the originating Directive. To the best of our knowledge, the UK is alone in Europe in this over-implementation.

Judicial Review is well understood and certain

40. While the scope of appeal on the merits remains uncertain, judicial review is well established and well understood. It is underpinned by an extensive body of case law. Consequently, there is little scope for litigation to explore and push at its parameters. This provides for both clarity and certainty of process.

41. In *IBA Health,*[23] the Court of Appeal restated the principles of judicial review through reference to the leading cases of *Padfield, Tameside* and *Edwards v Bairstow.*[24] The Court of Appeal made it clear that where the CAT was required by Parliament to apply the "judicial review" standard[25], it was the ordinary and well-established judicial review standard that was to be applied.[26]

42. Since the Court of Appeal finding, this judgment has been applied consistently by the CAT where it is required to apply the judicial review standard since 2004. Three notes that during this time, there has been little dispute as to the meaning of "*the principles applicable on an application for judicial review"* under s. 120 of the 2002 Act and s. 193(6) and s.193 (7) of the Communications Act 2003.[27]

43. Given the arguments likely to be put forward in defence of the current appeals framework for telecoms, it is important that this key point is not lost. Although the case in question was worth very significant sums of money to the litigants, and although the appellants made some attempt to argue that the boundaries of the judicial review standard should be stretched to permit a more intrusive review, closer to on the merits, these arguments failed after relatively cursory treatment by the CAT.

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[23] *IBA Health v OFT* [2003] 27 at §220

[24] *Education Secretary v Tameside BC* [1977] AC 1014, 1047, *Padfield v Minister of Agriculture* [1968] AC 997 and *Edwards v Bairstow* [1956] AC 14, 36.

[25] That is, under s. 120 of the Enterprise Act 2002 ("the 2002 Act") and s. 193(6) and (7) of the 2003 Act.

[26] *IBA Health v OFT* [2004] EWCA Civ 142, §§88-101

[27] *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, §56; *Barclays Bank plc v Competition Commission* [2009] CAT 27, §27; *BAA Limited v Competition Commission* [2012] CAT 3, §20(6). *Stagecoach Group plc v Competition Commission* [2010] CAT 14, *BT plc v Ofcom (Mobile Call Termination)* [2012] CAT 11

44. It is also of note that subsequent attempts to push at the inquisitorial boundaries of judicial review in cases of putatively high value have failed. Arguments made in favour of such attempts to introduce a more detailed review, closer to on the merits have failed to slow the process of review because, since *IBA Health,* it has been clear that ordinary judicial review principles apply and these are well-understood.

45. Three notes that this is in marked contrast to the debates which have surrounded the meaning of merits review by the CAT in appeals "on the merits" under the Communications Act 2003. As the Government rightly argues in the Consultation Document, this issue has led to extensive litigation since 2003 including in the non-geographic number appeals.

46. There are many reasons for this, most significantly because the concept of an appeal of a regulatory decision "on the merits" was new when it was first introduced into UK law under the Competition Act 1998 and the Communications Act 2003. Previously, such decisions (which are public law decisions taken by statutory industry regulators) could be challenged on judicial review grounds only.

Better decision making

47. Three notes that there is no compelling or indeed anecdotal evidence to suggest that judicial review as a standard of review for regulatory appeals leads to worse or lesser regulatory decision making. Rather the counterpoint is often true.

48. Economic analysis commissioned by Three suggests that where the standard of review of regulatory decisions is lower, and the resource costs associated with the process of appeal are lower, then the regulator is incentivised to make better decisions in the first instance, that deliver optimal benefits benefit to society and are less likely to be aligned with the narrower interests of some established businesses. Similarly, the adoption of a judicial review standard as proposed by the Government will limit the scope for the introduction of new/additional evidence at the appeals stage and is likely to mitigate incentives to withhold evidence – and in so doing improve the ability of the regulator to make a good decision in the first instance.

49. Furthermore, there is compelling evidence from other regulatory systems to suggest that under appeal systems, where the standard of review of regulatory decisions is particularly high, and akin to review on the merits, then the regulator may become disinclined to make decisions that it considers likely to lead to an appeal, or may pay disproportionate attention to the submissions and interests of a party it understands to be more likely to bring an appeal against its decision. As a consequence, the pursuit of regulatory policy and more robust decision making becomes moribund

50. In essence, this is a form of regulatory capture, which is much less likely if the standard of review for the appeal of regulatory decisions is judicial

review.[28] Three notes that elements of the regulatory malfunction described by Levine and Florence and cited in the economic analysis undertaken by Economic Insight are increasingly apparent in the current communications appeals framework.[29]

51. In Three's experience, fear of appeal has made Ofcom increasingly unwilling to make important regulatory interventions necessary to improve competition and ensure the smooth function of the market. Three notes that promised regulatory action on mobile number portability (the ability of consumers to take their number when they switch providers) has been promised in each of the Ofcom Annual Plans for the last six years. However, that action has failed to materialise in any meaningful form; the promise of regulatory action has nullified by the consistent opposition as well as the threat of legal action from some UK operators.

52. Three notes that it is not only in relation to switching where Ofcom has failed to make important regulatory interventions, necessary both for the future health of the communications market, as well as to remedy existing consumer harm. Despite the repeated promise of intervention by the regulator, Ofcom, has yet to take determined action in relation to: mobile number portability, spectrum licence fees or the donor conveyance charge.

The costs of change

53. Three is clear that not only is a move to judicial review likely to result in faster and less costly disputes, but there are economic benefits to be had from such a change that have not been factored into the Government's impact assessment. The proposed benefits of the change likely to be accrued by industry seem to be unduly conservative (this has in part been acknowledged by the Government both in the current and the previous DCMS consultation published in 2011). They do not seem to convincingly tally with the very high costs of appeal before the CAT experienced by Three under the current regime [x-ref to Three's costs of appeals].

54. Similarly, the benefits to consumers suggested by Government in the consultation seem unrealistically low and do not take into account the real benefits to be delivered to consumers from faster and more active regulatory decision making. On the basis of economic analysis undertaken by Economic Insight for Three, we believe that the proposed reforms are likely to have a net benefit of £238m in NPV terms, substantively more than the range of benefits suggested by the Government. This is derived from a higher likely benefit of a speedier appeal process to consumers (equivalent to a £0.92m cost of delay per month by comparison to a figure of £0.1m suggested by the Government) and a far greater benefit in NPV terms as a consequence of changed behaviours, caused particularly by greater regulatory certainty. It is to note that the Government did not factor such behavioural change into its calculation.

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[28] Economic Insight, *Economic Evidence Relating to the Streamlining of Regulatory and Competition appeals*, (2013), pp. 22-26.

[29] Economic Insight, *Economic Evidence*, p. 22.

55. Three considers it is vitally important to the accurate assessment of the quantitative benefits of the proposed changes, that the likely behavioural responses of stakeholders to the proposed changes are captured, given the importance of incentives and behaviours to the costs and benefits of reforms. Three believes that these can be summarised as:

    - better decisions as to whether appeals are brought in the first place;
    - changes to both the nature and extent of evidence provided at both the initial and appeals stage;
    - changes to the motivations of regulatory and appeals bodies – and therefore the likely welfare consequences of the decisions they take;
    - greater certainty to the overall predictability of the regulatory framework; and
    - more generally, reduced opportunities for regulatory gaming by stakeholders.

56. Three considers that this assessment of the likely benefits is justified by three key branches of economic theory relevant to the issues considered in this submission:

    - **Regulatory capture:** whereby regulatory processes and decisions are influenced by the goals of special interest parties, rather than being exercised to optimise the welfare benefits to society as a whole.
    - **Game Theory:** the modelling of economic situations in which individuals maximise their payoffs with respect to the 'rules of the game'.
    - **Investment incentives*:*** in particular, a consideration of how regulatory frameworks can themselves impact the drivers of firms' investment decisions.

"Focused specific grounds" for regulatory appeals

57. The Government has suggested that there may be advantages to adopting "focused" specified grounds for regulatory appeals rather than judicial review and it has invited the views of respondents on this proposal. Three does not believe that a move to "focused specified grounds" will affect the paradigm shift in terms of speed of due process and cost to regulatory appeals that the Government has stated as its objective. Three believes that there are real risks around the adoption of "focused specified grounds". These are:

In substance they replicate the ordinary judicial review standard and are, to that extent, unnecessary

58. Three is concerned that while the intention behind the suggested adoption of "focused specified grounds" is to limit the scope of review to: errors of law; errors of fact, other material error and bad faith on the part of the regulator, in practice the proposed "focused specified grounds" will

prove much less limited than the existing grounds of judicial review and could lead to expansive and lengthy hearings in order to debate and establish the scope of the "focused specific grounds".

59. On the basis of existing judicial review principles, the scope of a judicial review of Ofcom's regulatory decisions would be:

    i. to vitiate a public law decision, an error of fact[30] or law[31] or procedural unfairness[32] must be material; and

    ii. before the Court sets aside Ofcom's exercise of discretion or prediction, it must be satisfied that the exercise of discretion or prediction was unreasonable (i.e. it is not sufficient to show that it was merely wrong or incorrect).[33]

60. It is unclear what the focused specified grounds are intended to add to this formulation.

61. It is also of note that the ground of review that has created the greatest scope for uncertainty and merits-based challenges is proportionality. It is well established that proportionality is a question of law.[34] Therefore, even under the proposed "focused specified grounds" it will be open to a litigant to allege that Ofcom's decision is disproportionate and that such disproportionality is a material error of law on its part.

62. Therefore, it is unclear how the proposed "focused specified grounds" would reduce the intensity of review which would apply under the ordinary judicial review standard, if this is their object. In summary, Three is concerned that in seeking to achieve "focused" grounds for appeal, akin to those which would apply under existing judicial review principles, the Government will only open an already uncertain and lengthy appeals process to further uncertainty.

The introduction of a new standard of appeal in these terms would inevitably generate uncertainty and extensive litigation

63. Three is also concerned that the introduction of a new standard of appeal in these terms, namely on "focused specified grounds", would inevitably generate uncertainty as well as extensive litigation in precisely the same manner as the scope of the CAT's "merits review" power has done since the enactment of the relevant provisions in the Communications Act in 2003.

64. In particular, Three is concerned that, if the Government suggests that these new grounds of review are more limited or less flexible than ordinary judicial review and, as a consequence, the understanding of the standard of review is moved further from established jurisprudence, there

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[30] *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, §66
[31] *R v Hull University ex p. Page* [1993] AC 682, 702C-D
[32] *R(B) v Carlisle Crown Court* [2009] EWHC 3540 (Admin) at §18
[33] *BAA Limited v Competition Commission* [2012] CAT 3 at §20(5)
[34] *B v Secretary of State for the Home Department* [2000] Imm AR 478 (Court of Appeal)

will be dispute as to whether "focused specified grounds" for appeal comply with the requirements of Art. 4(1) of the Framework Directive. Three is of the view that the likelihood of dispute is because a right of appeal on "focused specified grounds" will be sufficiently different from judicial review so as not necessarily to benefit from the dicta of the Court of Appeal finding in the *T-Mobile* case referred to above (see para 38).

65. Further it should not be forgotten that a new standard of appeal, untested in UK law will almost inevitably be tested both in the Court of Appeal, and ultimately the Supreme Court. This will cause both delay and confusion and will not provide remedy to the issues around cost, and length of appeal process that the Government is seeking to address. In this context, Three notes that the existing judicial review standard, well understood as it is by appellants, is more like to withstand challenge by other operators than the proposed new standard of appeal.

66. Three also notes that the likely benefits of a move to appeal on "focused specific grounds" are unlikely to be as great as those won through a move to a judicial review standard. Economic Insight have suggested that the benefits of such a move in NPV terms are likely to be £43m less than those caused through the adoption of a judicial review standard for appeals brought under the Communications Act 2003.[35]

Current standard of appeal gold-plates the EU requirements

67. At the heart of this discussion around the Government's proposals in relation to the standard of review for appeals of Ofcom's decisions before the CAT is a real and tangible test of law, namely whether the current formulation of appeal on the merits, meets or indeed goes unnecessarily beyond the requirements of Article 4(1) of the European Framework Directive.[36]

68. Article 4 of the Framework Directive sets out the rights of appeal against the decisions of national regulatory authorities and is implemented in UK law through sections 192 to 196 of the Communications Act 2003, which provides for an appeal on the merits.

69. In the DCMS consultation of 2011, and reiterated in the current BIS consultation, the Government has set out its view that this aspect of the current transposition goes further than what is required by the Directive. Three fully agrees with this view.

70. The Government also set out those elements that it understood an effective appeal should, as a minimum, consider, including whether the regulator acted lawfully, followed the correct procedures, took relevant issues and evidence duly into account and generally acted in accordance with their statutory duties. It also noted that an effective appeal should allow, where appropriate, the interrogation and cross examination of evidence and in considering these issues, it should duly take account of

[35] Economic Insight, *Economic Evidence*), p. 15.
[36] DCMS Consultation, para 30.

the merits of the case. Three notes that modern judicial review as it is widely understood meets such a standard of appeal.

71. Three is also concerned that Ofcom's ability to act has been similarly restricted through significant changes to the overall Electronic Communications Framework. These include: the extension of appeal rights to new classes of litigant, the requirement for a 3-year market review cycle. Unless issues around the standard of appeal are finally and comprehensively addressed as per the Government's proposals, the current regulatory decision making and appeal process will be stretched to breaking point.

72. Lastly, it is also to note that a multi-jurisdictional survey commissioned by Three in 2011 (and previously shared with BIS and DCMS) on the implementation of Article 4 of the Directive across other EU Member States, clearly demonstrated that the UK is not only an outlier but that the UK's current over implementation acts as a high water mark amongst Member States. The Government's latest proposals will both correct longstanding over implementation and ensure that the requirements of the Framework Directive are fully implemented. The relevant provisions of Article 4 are as follows;

Article 4 - Right of appeal

I. 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 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. Pending the outcome of any such *the* appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise *interim measures are granted in accordance with national law.*

II. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.

III. *Member States shall collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures. Member States shall provide such information to the Commission and BEREC after a reasoned request from either.*

Standard of appeal in challenges to infringement decisions under the Competition Act 1998

73. Whilst Three is fully supportive of the Government's intention of changing the standard of review in the appeal of regulatory decisions in relation to telecoms, this support does not extend to proposals to change the appeal of infringement decisions brought under the Competition Act 1998.

74. Three cautions against any such change, in contrast to the proposed change to the appeal framework for regulatory decisions made by Ofcom, this would be a step into the unknown and would bring real instability to a system that has hitherto worked well. Moreover, introducing such a change concurrently to the changes discussed above, may lead to a period of prolonged regulatory and market uncertainty, detrimental to investment decisions and the wider economic health of the UK communications sector.

75. Moreover, Three believes that while for the case for change in relation to the appeal of telecoms regulatory decisions is well made and properly evidenced, this is not the case for appeals brought under the Competition Act 1998. Three respectfully suggests that the Government delay any decision in relation to appeals brought under the Competition Act 1998 until a full body of evidence has been collated and presented and a full and informed discussion can be had on the proposals.

76. It is the firm view of Three that decisions made under the Competition Act 1998 are not comparable with Ofcom's decisions under the Communications Act 2003. Three believes that the complicated nature of Competition Act decisions require a more intrusive level of appellate scrutiny than would be permitted by way of judicial review or is necessary for decisions made under the Communications Act 2003.

77. Three notes that unlike decisions made by Ofcom under the Communication Act 2003, infringement decisions under the Competition Act 1998 involve complex *ex post* investigations (using extensive inspection and investigation powers) and may lead to quasi-penal sanctions. Three notes the Government's suggestion that there is a difference between those decisions involving penalties and those decisions. However, Three does not believe those differences are as significant as the Government has suggested in the Consultation document at §§4.46-4.66 (by reference to cases C-272/09 *KME and Others v Commission* and C-389/10 *KME and Others v Commission*).

78. Furthermore, it is the view of Three that even in an infringement decision which does not involve penalties, there are prejudicial consequences for addressees. For example, even if (by reason e.g. of leniency) a cartelist is not fined, it remains vulnerable to damages actions by direct and indirect purchasers of the cartelised goods.

79. Three notes that complex economic evidence is often of central importance in infringement cases (e.g. in relation to market definition). This must be subject to appropriate scrutiny and tested by experts. Therefore, Three believes that judicial review is not the optimal process

for the testing of such evidence where it has been relied on by the regulator.

80. In this respect, Three notes that in the General Court of the European Union where the Commission's infringement decisions under Arts 101 and 102 TFEU are tested, there is only very rarely examination of witnesses. Instead, there is a much more extensive written procedure.

81. It is to noteworthy that this process, so very different from the merit appeals under s195 of the Communications Act 2003 heard before the CAT, provides the model for the appeals on the merits brought under the Competition Act 1998. It provides an appropriate level of scrutiny to the decision.

82. The value of the merits appeal in the context of infringement cases has been made clear in the collapse of a number of cases presented by the Office of Fair Trading high-profile appeals heard before the CAT since 2010, e.g. the *Tobacco* appeals in 2012. The intrusive merits review revealed serious errors of process, a fact that might not have been identified in a judicial review.

83. Lastly, but importantly, in stark contrast to appeals brought under the Communications Act 2003, it is not the experience of Three that the merits appeal process for infringement cases under the Competition Act 1998 has been used to delay much needed liberalisation and reform.

Appeal bodies and routes of appeal

The CAA regime

84. The Government has also set out proposals to make substantive changes to the route of appeal for price control decisions made by Ofcom under the Communications Act 2003. The Government has proposed for price control appeals brought under the Communication Act 2003, an appeal routeway similar to that used to appeal price control decisions made by the Civil Aviation Authority. Three has only limited understanding of that regime but considers there could be real advantages to its adoption in relation to telecoms price control appeals. Three's understanding of the CAA regime is thus:

    I. Under the Civil Aviation Act 2012, price controls may be imposed by the CAA on dominant airports (s. 19). Such price controls may be appealed directly to the Competition Commission under ss 24 and 25 of the 2012 Act. Significantly, as is the case in relation to judicial review in the High Court (but not in the CAT under s. 120 of the 2002 Act or s. 193 of the 2003 Act), permission is required before a challenge may be brought under ss. 24 or 25 of the 2012 Act: s. 24(3) and s. 25(3). The test for the grant of permission is the same as in judicial review: s. 24(4) and (5), and s. 25(4) and (5).

    II. If permission is granted, the grounds for review under the 2012 Act are the same as apply in judicial review: s. 26. These

are error of fact, law or discretion. Although the word "material" is not used, it will be inferred since the intention was plainly to adopt a judicial review standard.

III. Unlike judicial review, however, s. 27(2)(c) of the 2012 Act permits the CC to substitute its own decision for that of the CAA (as an alternative to quashing or remitting the decision on a successful appeal).

85. Three notes that the appeal process for a CAA price control decision is in certain respects similar to the powers available to the Competition Commission on a merits appeal under the Communications Act 2003. However, there are important differences between the two regimes. Under the CAA regime, the Competition Commission does not provide for a full re-hearing of the regulator's decision. As such, the CAA regime seems to Three to be a useful and proportionate remedy as the Competition Commission is well placed (unlike the High Court) to determine the substance of a price control itself and to undo the effect of any identified error. This saves the time and resources that might otherwise be wasted if the matter were remitted to the CAA with directions.

CAA process holds significant advantages over the 2003 Act process

86. Three can see considerable merit in the changes proposed by Government. Currently, the appeal process of price control decisions brought under the Communications Act 2003 is anomalous and an outlier. Not only is the standard of review "on the merits' higher than the standard appeal of appeal for similar decisions by the relevant regulators in other sectors, allowing for the rehearing of Ofcom's decisions, but the process has two possible stages; a first referral to the CAT, and a second expert review at the Competition Commission. The view of Three is that this two stage process is not only time consuming but does little to enhance either the quality of the regulator's decisions or the quality of the review.

87. Three notes that the reality of price control appeals brought under the Communications 2003 Act to the Competition Commission is that the prior stage of an appeal to the CAT and a hearing before that to determine "reference questions" is unnecessary. Adoption of the CAA price control appeal procedure over that followed under the Communications Act 2003 would remove the fiction of the first stage of appeal to the CAT, as price control decisions would instead go directly to the Competition Commission, where the relevant expertise necessary to hear such an appeal resides.

88. Further, adoption of a judicial review standard would prevent the Competition Commission from functioning as a de facto duplicate regulator, as the Competition Commission would no longer be able to rerun Ofcom's decision. Three notes that this practice is contrary to the finding of the Court of Appeal in the *T-Mobile* case. Three is also clear that this would cease if the Competition Commission were to apply the judicial review standard to appeals brought under the Communications Act 2003.

89. For these reasons, Three is in favour of the adoption of both a judicial review standard in relation to the appeal of price control decisions brought under the Communications Act 2003, as well the appeal routeway for price control decisions made by the Civil Aviation Authority under the 2012 Act whereby challenges are brought directly before the Competition Commission.

90. However, Three believes there should be one exception to this process. Where a price control decision includes a finding on Significant Market Power and this is the subject of the appeal to be brought, it is proper that these appeals should continue to be heard before the CAT, which has the necessary legal expertise to consider such matters fully.

Getting decisions and incentives right

91. The Government has also consulted on a number of ancillary measures intended to ensure the timely and expeditious hearing of appeals brought under the Communication Act 2003. These include new rules on the admissibility of evidence, as well as proposals to encourage regulators to claim their costs when successful at appeal and other procedural measures intended to streamline the appeals such as target time limits. Three notes that that many of these measures were considered in the DCMS consultation on reform of the telecoms appeal framework in 2011. Respondents to that consultation suggested that some of these measures might serve to achieve fully the Government's stated objectives in the reforms.

92. In this regard, Three notes, as it did in response to that DCMS consultation, that it considers that the proposed process changes to CAT procedure have merit as a complement to the proposed change to the standard of review. However, they are not valid alternatives to reform. In our view, none of these measures, whether individually or in combination, would be sufficient to address fully the underlying problems with the current appeals process detailed below. Indeed, in many cases it is wholly unclear in what way the proposals are in fact relevant to the standard of appeal in question or otherwise capable of remedying the gold-plating that has been enshrined in the current legislation.

93. None of these specific ideas provide a valid alternative to legislative reform, and should not be considered as such. They do not address the fundamental problems with the current process, outlined in this response. Only an amendment to the Communications Act 2003 Act, along the lines of that proposed by the Government in the Consultation, will address concerns around the cost and length of appeal processes as well as their impact on regulatory decision making and the health and viability of the communications market. Therefore, we firmly agree with the Government that, at most, these measures are "*potential additional tools*", rather than in any form alternatives to the Government's proposed legislative reform.

94. Clearly, there are process changes to CAT procedure that could be usefully made to further manage both the cost and length of proceedings. Three is supportive of these. For instance, as we noted above (see p. 8)

making clearer the 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 will help to ensure that unmerititous appeals are not brought before the CAT.

95. Three is also supportive of proposals set out in the consultation document to ensure the efficient hearing of telecoms appeals. These include target case time limits of 6 and 9 months and/ or fast track processes similar to those proposed for private actions in competition law; as well as encouraging cases to be resolved on the papers wherever possible, for example for cost awards and straightforward matters.

96. Three believes these proposals will help to strengthen processes and the quality of hearings both in the CAT and the Competition Commission. Both these sets of proposals are relatively straightforward and common-sensical, with clear precedent in other legal settings. However, Three cautions that collective impact of these proposed changes may be small and only of value if underpinned by real legislative change to the standard of review,

Evidential rules

97. Three supports the Government's proposals to limit the admissibility of new evidence, particularly where it was previously available to the appellant and might have been admitted ahead of a decision made by the regulator. However, Three is concerned that the Government's ability to tighten the current evidential rules for appeal the CAT under the Communications Act 2003 may have been circumscribed by recent case law. The Court of Appeal has clarified that the CAT has discretion when considering the admission before it of additional evidence that had not previously been made available to Ofcom. In the *BT v Ofcom* judgment, Toulson LJ states that:

> *"Since the introduction of fresh evidence is not a matter of right, in the event of a dispute about its admission I would regard it as the responsibility of the party who wants to introduce it to show a good reason why the CAT should admit it. The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted. I would not attempt to lay down any more precise test, nor would I attempt to lay down a comprehensive list of relevant factors or suggest how they should be balanced in a particular case..."*[37]

98. In light of this case law, it may prove more complicated for the Government to set a different rule, and in so doing fetter the CAT's discretion to allow new evidence to be adduced. However, in setting a revised standard of appeal, the expectation should be that the scope for new evidence to be adduced will be narrowed, and we urge the Government to make this clear.

[37] *British Telecommunications plc v Ofcom* [2011] EWCA Civ 245, paragraph 72

Award of costs

99. Three also welcomes the Government's proposals to discourage the launch of unmeritious appeals through changes to the award of costs. The Government intends to encourage regulators to claim their full costs and has asked questions as to whether courts should only award costs against a regulator where the regulator may have acted unreasonably.

100. Under the Competition Appeal Tribunal Rules 2003 (SI 2003 No.1372) (the "CAT Rules"), the Tribunal already has extensive discretionary powers to make *"any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings*", and when determining any such costs, *"the Tribunal may take account of the conduct of all parties in relation to the proceedings."*[38]

101. Notwithstanding these powers, as a matter of course, the CATdoes not award costs against the losing party in appeals of Ofcom's decisions.

102. Three agrees that whilst there may be merit in the award of costs against operators in some circumstances, the routine award of costs against operators for all unsuccessful appeals should also be avoided, as it will act as an unnecessary deterrent to businesses seeking justice.

103. It is the view of Three that it would be wrong for the Government or the CAT to use the threat of costs as a means of discouraging parties from bringing genuine appeals against Ofcom's decisions. The desire to discourage vexatious litigation must be balanced against the right of access to justice. To address this, Three strongly suggests that any move to award costs to the regulator should be underpinned by clear guidance.

Confidentiality rings

104. The Government has also consulted on the merit of introducing confidentiality rings to the pre-administrative stages of Ofcom disputes. This idea is not new. It was considered by the Government in the DCMS consultation in 2011. It was also discussed in the detailed proposals for alternative means of achieving change to the telecoms appeal framework put forward by Towerhouse Consulting on behalf of some parts of the telecommunications industry in 2011.

105. In response to that 2011 consultation document, Three recorded that it saw no merit in the proposals. Confidentiality rings would be extremely difficult for Ofcom to establish at the pre-administrative stage of telecommunications disputes, where, there is a need to consult frequently with technical teams within a given business making it very difficult to establish effective paper walls.

106. It is to note that at the administrative stage of an appeal, particularly in ex ante regulatory processes, appellants will conduct engagement with Ofcom directly through their internal regulatory, legal, commercial and

[38] CAT Rules, Rule 55(2).

economic functions. It is relatively rare for parties openly to instruct external legal advisors or to conduct correspondence through them.

107. This is important as it has bearing on: (1) who may be able to become a party to such a ring: and (2) what the purpose of such a ring should be. Clearly, the purpose of a confidentiality ring is to enable a party to see some of their competitors', suppliers' or customers' confidential information which would otherwise be withheld by the regulator because of its confidential nature. In such a circumstance, the question of who can be a member of a confidentiality ring becomes both key and contentious.

108. Parties will usually need technical experts within their business to see that information, yet these are precisely the individuals from whom the information is likely to be most confidential and with whom the sharing of such information may well be prohibited by *ex post* competition law. If confidentiality rings are therefore limited to internal legal advisors and possibly external consultants (as we consider they should be), they may not achieve the Government's policy intention.

109. Neither the DCMS consultation nor the Towerhouse Consulting paper set out how such obstacles might best be overcome. Three also notes that no compelling evidence was provided, either in the Towerhouse Consulting paper or in response to the DCMS consultation of the effective use of confidentiality rings in processes similar to and as complex as decisions made by Ofcom under the Communications Act 2003.

110. While there may be in principle some potential attraction to using confidentiality rings in administrative, pre-judicial processes, there remain real issues with the likely application. In 2011 Ofcom consulted on new Dispute Resolution Guidelines. As part of that consultation Ofcom asked questions on two potential models of confidentiality ring that had been put forward by stakeholders that might be employed during the initial Ofcom dispute process. These were:
    - Ofcom ought to make non-confidential versions of each parties' submissions available to the other parties during the course of the initial dispute proceedings at Ofcom (the "Transparency Measure"); and
    - Ofcom ought to establish confidentiality rings in the initial proceedings, in much the same way as those established by the Tribunal (the "Confidentiality Ring Measure").

111. In its subsequent statement Ofcom found that:

> *"As regards confidentiality rings, we do not consider that Ofcom has the legal powers to set up and more importantly enforce such rings. Ofcom does not have the same sanctions available to it that a court does. A confidentiality ring is only likely to serve any useful purpose if supported by an appropriate and effective enforcement mechanism.*
>
> *"In any event however, we do not think that confidentiality rings should be necessary: the purpose of an Enquiry Phase is to establish (a) whether the Parties are in dispute and whether the*

> *submitted dispute satisfies any of the statutory grounds for referral; (b) whether it is appropriate for Ofcom to handle the dispute; and (c) the scope of the dispute to be determined. As set out in our December consultation and this statement, we aim to do this within 15 working days. It is not clear how confidentiality rings would significantly assist substantively, and their establishment would be likely to have an impact on timescales and the resources of Parties involved. We believe that this would create a disproportionate delay and addition burden on the Parties."*[39]

112. Three agrees with the concerns set out by Ofcom in that statement and does not believe that matters have changed sufficiently to alter that view. Three is also concerned that were they introduced, confidentiality rings would bring a further element of delay into the dispute process. In our view, the introduction of confidentiality rings would be a retrograde step that in no way goes towards resolving the fundamental problems with the current appeals process. Decisions to appeal are not made on the basis of whether or not confidential information has been shared at a pre-administrative stage of dispute

113. Whilst there may be scope for exploring further the Confidentiality Ring Measure in the future, we do not think that this poses either a valid alternative to the Government's proposal, or is a useful complement to the amendment of the standard of review for appeals brought under the Communications Act 2003.

Transparency and the need for joined up learning

114. Three recognises that a change to the standard of review for appeals brought under the Communications Act 2003 may take some time to bed in, although Three believes that any uncertainty caused will be limited as judicial review is well understood and established in law. Three is also aware that any period of regulatory uncertainty caused by a change in the standard of review is likely to be coterminous with the establishment of the Competition and Markets Authority ("CMA") and the development of process before that body. Therefore, Three suggests that a best practice approached is adopted to this transition and that steps should be taken to minimise any such disruption.

115. Three believes that these changes will present opportunities as well as challenges and urges that any cross over with the new CMA decision making process should be used to strengthen regulatory certainty through the harmonisation of practice and procedure, where appropriate, to minimise disruption to business and minimise any market uncertainty. Steps that might usefully be taken include sharing learning and good practice, collective decision making; separating investigation and decision-making teams. These measures may also help to avoid confirmation bias in regulator decision-making. This does, of course, need to be balanced against resource and timing considerations,

[39] DR Statement, paragraph 2.7 and 2.8

especially in the context of dispute resolution by Ofcom where a 4-month statutory timeframe must be met.

116. Three also believes that measures to increase transparency both in regulatory decision making and the appeals process are to be welcomed and steps to improve transparency are to be welcomed.

How will the Government's proposal work in practice?

117. Three believes that the proposed move to change the standard of judicial review will lead to faster and efficient hearing of appeals, targeted at material flaws in the decision making process. Three believes that the standard of judicial review, as applied by the High Court, is very well established, and as the Government has noted, is applied without issue to the decisions of most sectoral regulators. It is a coherent framework which is the subject of numerous practitioner guides.

118. Three accepts the Government's view both: a) that there is no intention of reducing the number of appeals brought under the Communications Act 2003; and, b) that under the proposed regime, it would be possible to bring all of the appeals that have been brought under the current telecoms appeals framework. However, post-implementation of the judicial review standard we would expect that:
    - the grounds of such appeals would be narrower;
    - the length of hearings at the CAT would shorten significantly; and
    - the resource burden on industry and Ofcom would be lightened.

119. Three expects that it will be possible to deliver greater benefits if the change to the standard of review is supported through the process changes to CAT procedure discussed in this submission. Three does not believe that these benefits will be accrued in similar measure through a move to "specified focused grounds" of appeal.

120. Three is aware that some opponents to the Government's proposed legislative change have argued that a move from an "appeal on the merits" standard to a judicial review standard would cause significant uncertainty, unnecessary complexity and confusion. Three does not believe that there is merit in this claim. This argument simply does not bear close scrutiny of recent cases before the CAT.

121. As Three has noted at para 2, the exact scope of an "appeal on the merits" under the Communications Act 2003 is far from being settled and well understood. Rather, in every new appeal before the CAT, the parties debate at length the scope of the CAT's powers.

122. Each test represents current law and their competing imperatives have to be addressed and accommodated in each new case before the CAT. Examples of the CAT's attempt to reconcile these apparent inconsistencies in the case law can be found in the case studies included in this document (from p. 38)

123. In both the current Consultation on streamlining regulatory and competition appeals and the earlier DCMS consultation on reform of the

telecoms appeals framework, the Government has clearly articulated how it expects the new appeal standard to be implemented. It is telling that this also serves as a useful summary of the main principles of judicial review and as such is worth repeating:

- The Tribunal, as a specialist court, should *"scrutinise the detail of regulatory decisions in a profound and rigorous manner"*;[40]
- The question for the Tribunal is *"not whether the decision …was within the range of reasonable responses but whether the decision was the right one"*.[41]
- *"there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute."*[42]
- *"… the way in which the Tribunal exercises its jurisdiction is likely to be affected by the particular circumstances under consideration... the Tribunal may, depending on particular circumstances, be slower to overturn certain decisions where, as here, there may be a number of different approaches which OFCOM could reasonably adopt... However it is still incumbent on OFCOM, in light of their obligations under section 3 of the CA 2003, to conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny that the Tribunal will apply on an appeal on the merits under section 192 of the CA 2003.... The essential question for the Tribunal is whether OFCOM equipped itself with a sufficiently cogent and accurate set of inputs to enable it to perform a reliable and soundly based CBA [cost-benefit analysis] ... It is the duty of a responsible regulator to ensure that the important decisions it takes, with potentially wide ranging impact on industry, should be sufficiently convincing to withstand industry, public and judicial scrutiny")."*[43]
- *"We believe an effective appeal should, as a minimum, consider whether the regulator acted lawfully, and followed the correct procedures, took relevant issues and evidence duly into account and generally acted in accordance with their statutory duties. It should allow, where appropriate, the interrogation and cross examination of evidence. In considering these issues, it should duly take account of the merits of the case."*[44]

[40] *H3G v Ofcom* [2008] CAT 11, at [46]
[41] Ibid at [47]
[42] *T-Mobile (UK) Ltd and others v Ofcom* [2008] CAT 12 at [82]
[43] *Vodafone and others v Ofcom* [2008] CAT 22 at [46]-[47]
[44] Consultation, paragraph 31

Clear policy statement of intentions and Guidance

124. As the Government has identified in the Consultation, it is likely that there will be a transitional period, during which parties to appeals referred to the Tribunal will work to interpret the precise meaning and effect of the new legislative provisions. In Three's view, once this initial transitional period has passed, the Government's proposal will bring much needed clarity and certainty to the communications appeals process.

125. However, Three would suggest that parties will be assisted if the Government takes the opportunity, when publishing its response to the Consultation and statement regarding next steps, to make a clear policy statement as to the rationale behind its decision to change the standard of review in relation to appeals brought under the Communications Act 2003 and the results it hopes to achieve.

126. Further, Three asks that when the proposed changes are enacted, the Government should provide clear guidance that these do materially change the approach in appeals, particularly in relation to telecoms. This will help assist the CAT in the application of a judicial review standard to to relevant appeals under section 192 of the Communications 2003 Act, and provide confidence to business.

3. Case Studies

Three has set out Three case studies of appeals before the CAT that it believes well illustrate both the issues and impacts of the current standard on process and the sector.

Non-geographic Number Range Appeals

1. Ofcom is currently undertaking an industry wide review of pricing in the sector to address concerns raised by BT, amongst others, as to the structure of pricing in relation to these numbers. Ofcom's statement is due in November this year with implementation of reform scheduled for spring 2015.

2. In 2009 BT introduced schemes of wholesale pricing on its non-geographic number ranges. This pricing linked the wholesale and retail charges and has become known as "ladder pricing". Operators appealed these charges to Ofcom on the basis that they were not fair and reasonable. In 2010 Ofcom found in the operators favour. BT subsequently appealed this decision to the CAT.

3. The appeal of Ofcom's decision in relation to non-geographic numbers entailed an 11 day main hearing at the CAT (with satellite litigation before both the Tribunal and the Court of Appeal).[45] The proceedings involved two appellants (BT plc and Everything Everywhere Limited), Ofcom as defendant and five interveners. A very large volume of evidence was adduced:[46]

    a. In total, 49 witness statements and expert reports were adduced in evidence.[47]
    b. 13 witnesses of fact provided evidence, with four being called to give oral evidence to the Tribunal.
    c. By far the most time consuming element of the hearing was the cross-examination of seven economic experts who, between them, had prepared 24 reports analysing the impact of BT's proposed price changes.

4. The CAT's judgment in this appeals case was subsequently overturned by the Court of Appeal in 2012. BT has since been granted permission to appeal to the Supreme Court, and this hearing is listed for February 2014 (almost 5 years after the first BT wholesale charges were purported to be introduced).

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[45] Case 1151/3/3/10: *British Telecommunications plc v Office of Communications* (Termination charges for 080 calls); Case 1168/3/3/10: *Everything Everywhere Limited v Office of Communications* (Termination charges for 0845/0870 calls); and Case 1169/3/3/10: *British Telecommunications plc v Office of Communications* (Termination charges for 0845/0870 calls) (the "08 Appeals")

[46] Tribunal's judgment in the 08 Appeals dated 1 August 2011, paragraphs 20 – 33.

[47] *Ibid*, paragraph 32.

5. Three notes that BT, was able to appeal Ofcom's various disputes decisions because the scope of the current appeals system allows it a "second bite at the cherry" before the CAT, including the ability to put forward evidence not provided to Ofcom.

6. Whilst Three recognises that the issues involved are inherently complex and required in-depth analysis, Ofcom's decision to address the non-geographic numbering issue through an industry review, rather than ratify controversial proposals put forward by BT through the disputes process, was sound and fair. Indeed, the considerable resources already engaged in this litigation would arguably have been much better directed at Ofcom's forward looking policy review.

Donor Conveyance Charge Appeals

1. Ofcom first sought to reduce the cost of Donor Conveyance Charges (DCC) as a consequence of a dispute brought by Three in August 2007 that the level of DCC was not cost-oriented and therefore did not comply with General Condition 18. Ofcom determined the dispute in Three's favour on 17 August 2007.

2. T-Mobile subsequently appealed the determination to the CAT on 17 October 2007. Both Three and O2 were given permission to intervene. On 17 January 2008, Ofcom wrote to the CAT and effectively conceded that it had erred in: (i) finding that GC18 permitted parties to agree charges that were not cost-oriented; and (ii) failing to have regard to its enforcement powers under the Communications Act 2003 as a means of resolving the disputes. Ofcom further stated that it would not contest these points on appeal and that it was considering whether industry wide compliance was appropriate.

3. Ofcom then decided that industry wide compliance was appropriate and wrote to the Mobile Network Operators on 8 February 2008 informing them that they must ensure, with immediate effect that the DCC be set at 0.2ppm split equally between the donor and recipient networks. Three also understand that that Ofcom wrote again to the MNOs in November 2008 setting out its provisional indication that it did intend to take industry wide enforcement action.

4. In December 2008 Ofcom successfully argued for the CAT to adjourn the appeal. Ofcom subsequently wrote to the parties on 12 January 2009 in which it set out its conclusion that GC18 be cost-oriented. Ofcom also noted that it expected to provide provisional conclusions on this and the appropriateness of taking enforcement action by the end of January 2009.

5. It was then only on 20 January 2010, when the CAT wrote to the parties requesting an update on progress, that this matter came back to life. Ofcom quickly responded that its inaction was due to resource constraints but that it now had a full team considering whether it would be appropriate and proportionate to take enforcement action for non-compliance with GC18. Following more correspondence between the parties the CAT set a hearing date for 12 May 2010.

6. On 5 March 2010 Ofcom again wrote to the CAT requesting a stay of the proceedings pending the outcome of Ofcom's on-going compliance investigation. The CAT responded in strong terms expressing its concerns about the conduct of this matter but agreed to postpone the hearing one final time until 16 June 2010. Ofcom subsequently wrote to the MNOs on 12 April 2010 setting out its provisional views on the maximum level of DCC.In late May 2010, T-mobile withdrew its appeal for reasons that are unclear.

7. Although Ofcom has recently re-commenced work in relation to the DCC , the progress on this vital work has been at best chequered, a situation exacerbated by length and complexity of the appeal process before the CAT. This has not been good for either operators or consumers. DCCs are still not cost orientated and remain an obstacle to fair competition.

Mobile Number Portability

1. Number portability is a facility that enables subscribers to keep their telephone numbers when they switch communications providers. By saving subscribers the cost and inconvenience of changing numbers, number portability is considered to be a key facilitator of competition and consumer choice. The effectiveness of a number portability depends on how the system is designed – and depends on factors such as the speed and cost of the process.

2. The UK was one of the first countries to introduce number portability. Despite being a world leader in its introduction, the UK currently lags behind most other jurisdictions in its implementation of number portability. Somewhat anomalously, the UK currently deploys a donor-led, onward routing system for mobile number portability ("MNP"). This is in contrast to almost every other jurisdiction in Europe and North America where recipient-led systems are used. The difference between these concepts is as follows:

    - **Onward vs direct routing**: with onward routing, calls are first sent to the network to which the consumer originally subscribed (the donor). The donor then forwards the call to the consumer's current network (the recipient). The recipient pays the donor a fee (the donor conveyance charge) for onward routing the call. In the UK, the DCC is currently set at 0.1 pence per minute. With a direct routing system, a central database ("CDB") lists each operator serving a ported number. This enables the originating operator to forward calls directly to the recipient and to avoid incurring unnecessary call routing (with the inherent quality and resilience issues) and the donor conveyance charges.

    - **Donor vs recipient-led porting**: with donor-led porting, subscribers must first request a port authorisation code ("PAC") from the donor. With a recipient-led process, consumers may request porting directly from the recipient. This is not only more convenient and cost-effective for consumers. It also promotes competition by facilitating the entry of smaller operators into the market, whose customer base tends to draw from that of the larger operators. For this reason, larger operators lack the incentive to facilitate port requests from their existing customers. This is borne out by the fact that consumers have complained to Ofcom in the past that the porting processes of their current providers were not readily available or transparent.[48]

    - More generally the donor-led system inherently creates the opportunity and incentives for all donor operators to refuse or delay the provision of the PAC, which has required Ofcom to impose various conditions to limit such behaviour under General Condition 18. However, this means that albeit consumer

[48] Ofcom, *Letter of clarification regarding the transparency of porting arrangements*, 28 October 2009, available at: http://stakeholders.ofcom.org.uk/binaries/telecoms/numbering/Porting_Letter.pdf

protection is therefore inherently contingent on enforcement by Ofcom rather than, in effect, "built in".

3. In light of the deficiencies inherent in a donor-led onward routing system, Ofcom previously took a number of steps to introduce a recipient-led direct routing system. Ofcom started consultations in November 2006[49] which culminated in the publication of a statement on 29 November 2007 entitled *Telephone number portability for consumers switching* suppliers.[50]

4. In February 2008, Vodafone launched a full appeal on the merits against Ofcom's 2007 statement. On 18 September 2008, the CAT set aside the 2007 statement in its entirety and remitted the matter back to Ofcom for reconsideration. This decision was in large part based on a full rehearing of the costs and benefits of Ofcom's policy decision, and the introduction of evidence that had not been put before Ofcom during the consultation process. As this example demonstrates, the current standard of appeal inevitably creates an opportunity for regulated companies to "ambush" the regulator via the appeals process since, as in this case, the full reconsideration of a policy decision and the admission of evidence not available at the time of decision making inherently weakens not only Ofcom's ability to reach an optimal and accurate original policy decision, but to defend it also.

5. Following the CAT's judgment, Ofcom initiated another review of MNP in August 2009, which culminated in the publication of a statement on 1 April 2010[51] in which Ofcom decided against implementing a direct routing system, and a final statement on 8 July 2010[52] in which Ofcom declined to impose a recipient-led system. In Three's opinion, the 2008 decision served to significantly weaken Ofcom's resolve, ambition and ability to pursue regulatory reform by marking a significant defeat of a challenge to the status quo. The persistent subsequent threat of legal action and detailed economic review of Ofcom's decision has inevitably had a chilling effect on regulatory policy making and led to increasing resource being spent on both protracted consultation and subsequent litigation. In the interim, UK consumers remains subject to an MNP process other countries have almost universally rejected, and the ambition to review it has languished for six years, persistently unheeded in Ofcom's annual plan.

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[49] Ofcom, *Review of general condition 18 – number portability*, 16 November 2006, available at: http://stakeholders.ofcom.org.uk/binaries/consultations/gc18/summary/gc18r.pdf

[50] http://www.ofcom.org.uk/consult/condocs/gc18review/statement/statement.pdf

[51] Ofcom, *Routing calls to ported numbers*, 1 April 2010 (statement)

[52] Ofcom, *Changes to the mobile number porting process*, 10 July 2010 (final statement), available at: http://stakeholders.ofcom.org.uk/binaries/consultations/mnp/statement/mnp.pdf

4. Answers to Specific 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?

Yes. Three is fully supportive of the Government's proposal that appeals should be heard on a judicial review standard. The Government consultation makes plain a general presumption in favour of judicial review. Three believes that this is the right approach. Such harmonisation will be good for business and will lead to real benefits across all regulated sectors.

Three recognises that there are circumstances where an appeal may need to be heard on a basis that is not judicial review, such as in relation to appeals brought under the Competition Act 1998. However, Three is clear that a higher standard of appeal should not apply to appeals brought under the Communications Act 2003. Three believes that it has been established beyond doubt that the current standard of review over implements the requirements of the originating European Directive and has led to increasingly lengthy and costly appeals.

Lasty, Three notes that it had been established in law that modern judicial review is fully capable of meeting the requirements of merits review. Three does not believe there are any circumstances peculiar to the telecoms sector that might necessitate the current standard of review. If the Government is to correct the serious deficiencies in the current system, as well as to achieve objectives in relation to the cost and efficiency of the appeal process, then a change to the standard of review for appeals brought under the Communications Act 2003 is not only imperative but unavoidable.

These issues are dealt with in the main part of the Three response. Please see pp. 18-23.

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?

Although Three recognises some merit in the principles of appeal set out by the Government. We do not believe that in practice the introduction of "specified focused grounds" for appeal, will help the Government to achieve its objectives. Three believes that the grounds will be subject to dispute and will cause uncertainty. This will lead to unnecessarily long appeal hearings. Three believes this will have real cost implications for business and consumers (see p. 25).

Three is clear that modern judicial review can be applied to the appeals set out in Box 4.1 of the consultation and particularly in relation to the appeal of price control decisions made by Ofcom. As Three has made clear in the main part of its response (please see pp. 28-30), there is scope for further reform in relation to Ofcom price control appeals through the adoption of the appeal routeway provided for in the Civil Aviation Act 2012. Such a change would expedite the appeal process through the removal of the first stage of the appeal. Three believes it is right that these decisions should be heard at the Competition Commission where the appropriate expertise in this area resides.

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

Three is clear that a move to a judicial review standard for appeals brought under the Communications Act 2003 will significantly reduce the length and cost of appeals hearings. Three understands that such a change may result of benefits in terms of NPV of £238m. Three believes that such a move will have no detrimental impact on the standard of appeal, and has seen no evidence from other sectors to suggest that this may otherwise be the case. Indeed, Three notes that there is evidence supplied by Economic Insight (see pp. 21-23) that a lower standard of review may lead to better overall decision making by regulators, as they are less likely to become susceptible to regulatory bias or capture.

Three has some concern that the CAT may seek to extend the scope of review post implementation but believes this can be mitigated through clear guidance and a firm statement of policy intent from Government. Three notes that the adherence of the CAT to the new standard could be ensured through the periodic review by Government of the CAT's function as well as its adherence to the new standard.

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?

Yes. Three believes that a change in the standard of review for appeals brought under the Communication Act 2003 is long overdue. Three believes it is only through a move to a judicial review standard that longstanding issues around legal uncertainty, regulatory log jam and necessary market reform will be addressed. These points are addressed in detail at pp. 11-18. Three is clear that the Government will not meet its stated objectives around cost, length and efficiency of review unless it adopts a judicial review standard for appeals brought under the Communication Act 2003.

Whilst there may be some superficial attraction in the Government's consideration of "focused specified grounds" for appeal, Three does not favour such a move. We are unconvinced that the change would tackle issues around legal uncertainty and opportunity for dispute that the

reform seeks to address. Moreover, the putative benefit of the proposed change, namely a narrower ground for appeal than is currently the case, is more likely to be achieved through a move to a judicial review standard, which is governed by established and well understood case law.

Three also notes that the benefits of harmonisation and simplification of appeals standards across business sectors to industry will not be realised if a "focused specified grounds" for appeal is adopted. Three is also clear that the same standard of judicial review should also apply to price control decisions in communications sector.

These issues are dealt with in the main part of the Three response. Please see pp. 18-23.

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?

Three is clear that there are significant benefits to be won for the regulator, industry and consumers through a move to a judicial review standard for appeals brought under the Communications Act 2003. Three has set outs its position in the main part of our response at pp. 21-23. Three notes that the average length of a hearing before the CAT is lengthy by comparison to much shorter processes common in judicial review. Three also notes the likely economic benefits of such a change which the Government has conservatively estimated at £65m but which will more likely be £238m in NPV terms. Three believes that the economic evidence alone makes a compelling case for change.

Three does not favour a move to a "focused specific grounds" for review above judicial review. However, Three is clear that options will provide for a better appeal process for appeals brought under the Communications Act 2003, than the current formulation on the merits.

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?

Three does not believe the Government has set out a convincing or compelling case for a change in the standard of review for appeals brought under the Competition Act. It is Three's view that the current system of appeal works well in this respect. Three respectfully suggests that to pursue reform of appeals brought under the Competition Act 1998 is a step too far and is unsupported by the evidence or argument. Rather than pursue change to Competition Act appeals, the Government should focus on addressing the harm caused by merits based appeals brought under the Communications Act 2003.

The substance of Three's argument in relation to decisions under the Competition Act 1998 is set out in the main part of our response at pp. 26-28.

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?

Three believes that to change the standard of appeal would be to provide for an inappropriate standard of review in relation to appeals brought under the Competition Act 1998. This would be detrimental to a system that works well and for which the level of review is well understood by parties. Three's position is explained further at pp. 26-28.

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?

Three believes that harmonisation of appeals standards across sectors will be advantageous to business, this includes in relation to price controls decisions, where the process appeal under the Communications Act 2003 is anomalous. Three believes that such appeals should be to a judicial review standard. Our arguments in favour of such a standard are set out at pp. 29-30.

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?

As Three noted in response to Q5, Three is clear that there are significant benefits to be won for the regulator, the industry and consumers through a move to a Judicial Review standard for appeals brought under the Communications Act 2003. Three has set out its position in the main part of our response at pp. 21-23. Three notes that the average length of a hearing before the CAT is 9.07 months by comparison to much shorter processes common in judicial review. Three believes that the scale of efficiencies to be won through a change to the standard of review for price control hearings is broadly similar to those set out for the appeal framework more generally.

Three does not favour a moved to a "focused specific grounds" for review above judicial review. However, Three is clear that both options will provide for a better appeal process for appeals brought under the Communications Act 2003, than the current implementation on the merits.

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?

Three has no comments to make in response to this question.

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?

Three has no comments to make in response to this question.

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?

Three is clear that with the exception of appeals brought under the Competition Act 1998, for which merits reviews are not only appropriate but the current practice, and jurisprudence, is well established, the standard of review for other regulatory decisions should be a judicial review standard. This includes for *ex ante* regulatory decisions (i.e. SMP decisions) and enforcement decisions (e.g. in relation to the breach of the General Conditions of Entitlement). Three supports a consistency of appeal across regulatory decision making and believes that harmonisations of review standards for such regulatory decisions will be good for business.

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?

As Three noted in response to Q5 and Q9, Three is clear that there are significant benefits to be won for the regulator, the industry and consumers through a move to a judicial review standard for appeals brought under the Communications Act 2003. Three has set outs its position in the main part of our response at pp. 29-30. Three believes that the scale of efficiencies to be won through a change to the standard of review for other regulatory decisions is broadly similar to that outlined elsewhere in this response for regulatory decisions made under the Communications Act 2003.

Three does not favour a moved to a “focused specific grounds” for review above judicial review. However, Three is clear that options will provide for a better appeal process for appeals brought under the Communications Act 2003, than the current implementation of the on the merits standards.

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]?

Three welcomes the Government's proposals to undertake a full review of CAT's governance arrangements and reform CAT processes to make appeal before the CAT more efficient. These issues are covered in the main part of our response at pp. 30-34. Three believes that such a review is overdue. In this regard, Three notes that any processes changes while helpful are unlikely to achieve the Government's objectives in relation to the cost and length of appeals unless they are underpinned by a change to the standard of appeal. Anything less will be no more than tinkering with the current defective and inefficient system of appeal.

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?

Three supports the Government's proposal 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.

Three supports the Government's proposal that these judicial office holders should not be limited to a term of 8 years. However, any change to the length of term should not enable the holding of such office indefinitely.

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

Three is clear that the presence of lay members, and, in particular, economic experts, brings additional value to the quality of decision making in relation to appeals heard at the CAT. Three believes that the advantages of such expert lay representation on the panel of the Tribunal outweigh the cost savings that might be achieved if appeals were heard before a single judge without lay panel members.

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

Three agrees with the Government proposal that the Competition Commission should continue to hear appeals against price control and licence modification decisions. This is explored further at p. 30 in the main part of our response.

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?

Three agrees with the Government's proposal 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, except where that price control decision involves a finding on Significant Market Power, in which case Three believes that such appeals should continue to be heard by the CAT where the relevant expertise and experience resides. Although Three's understanding of the Civil Aviation Act 2012 is limited, Three considers that this would provide an appropriate model. The detail of Three's response in relation to these issues is set out at pp. 28-30.

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

Three's view is that in most instances the CAT is the appropriate body to hear ex-ante appeals. However, Three is clear that this is not the case in relation to price control element of price control decisions made by Ofcom. Three believes that such decisions should be heard by the CAT. Please see Three's answer to Q20 and also p. 30 in the main part of Threes' response.

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

Three has no comments to make in response to this question.

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

Three agrees with the Government's proposal 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?

Three considers the CAT is the most appropriate body to hear enforcement appeals and that this is appropriate if consistency of process across regulatory decision making is to be achieved.

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?

Three has no comments to make in response to this question.

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

Three agrees with the Government's proposal 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?

Three believes that for reasons of consistency dispute resolution appeals brought under the Communications Act 2003 should be heard before the CAT, assuming that the standard of review for such appeals is changed to a judicial review standard. Otherwise such decisions should be heard before the High Court.

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

Three agrees with the Government's proposal that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998. This is explored further in the main body of Three's response at pp. 26-28**.**

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?

Three agrees in principle with proposals to increase the use of confidentiality rings at the administrative stage of decision making, but is concerned at how these might function in practice, in particular, the lack of enforcement powers available to Ofcom in relation to confidentiality rings as well as the innate complexity of telecoms appeals, make the use of confidentiality rings in the pre-administrative stage of Ofcom disputes difficult. Three is clear that confidentiality rings are ancillary measures and will not in themselves deliver the Government's objectives in relation to the reform of regulatory and competition appeals.

Three's views on confidentiality rings are set out in more detail at pp. 32-34**.**

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?

The views of Three as to what it considers the salient issues and real complexities in relation to the use of confidentiality rings in the pre-administrative stages of Ofcom disputes at pp. 32-34 of its main response.

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?

Yes. This needs to be in legislation given previous Court of Appeal judgments in relation to non-geographic number litigation on the admission of evidence.

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?

Three agrees with the Government's proposal 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, except where that price control decision involves a finding on Significant Market Power, in which case Three believes that such appeals should continue to be heard by the CAT where the relevant expertise and experience resides. Although Three's understanding of the Civil Aviation Act 2012 is limited, Three considers that this would provide an appropriate model.

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?

Three sees some merit in changes to the cost regime to disincentivise umeritious appeals. Typically, under existing processes, the regulator is awarded its costs when successful at appeal and has costs awarded against it when not. The Government has proposed that when the regulator is unsuccessful at appeal, costs should only be awarded against it if the regulator has behaved unreasonably; this seems a proportionate and reasonable step.

However, Three is concerned at proposals that might see the routine award of costs against unsuccessful parties to counteract the supposed bias towards appellants; "the one way bet". Three cautions against this and suggests that clear guidance is needed on this issue, particularly where costs may not have been incurred on a reasonable basis.

Three's position is elaborated with regard to costs is set out at p. 32 in the main part of our response.

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

As noted in our response to Q32, Three is concerned at proposals that might see the routine award of full costs against unsuccessful parties – to counteract the supposed bias towards appellants or "the one way bet". Three cautions against this and suggests that clear guidance is needed on this issue, particularly where costs may not have been incurred on a reasonable basis. This should not extend to 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?

Three understands that at the heart of this proposal is a measure to allow the regulator, Ofcom, to police appeals before the CAT through the more active scrutiny of appeal grounds. Three suggests that there not only is there an absence of detail underpinning this proposal, but it touches on real and fundamental issues around access to justice, as Ofcom will be the respondent. There is clearly a misalignment of interest at play that would be damaging to the ability of parties to seek justice if it should go ahead.

Q35 Do you agree that 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.

Three does not believe there is merit in empowering the CAT to review appeals and identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success. Three notes that while this proposal might be consistent with idea the of the CAT is an appeal body rather than secondary regulator, and closer than existing practice to the current process in the courts system, whereby the High Court is the principle decision maker and then the unsuccessful party must seek permission to appeal that decision to Court of Appeal. Three believes that the objective of such change, to discourage unmerititious review and presumably also to reduce the cost and length of appeal is better served through a change to the standard of review.

Three believes that this proposal would essentially introduce a new phase to the CAT process whereby parties would request permission from the CAT to appeal Ofcom's decision, rather than the appeal being automatically accepted. Whilst there may be some value to this as, as a measure, as it might introduce greater rigour and scrutiny, it would introduce the potential for further cost and delay, particularly if an avenue for the appeal the CAT's decision to the Court of Appeal were provided.

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

Three is aware that the Government has put forward a number of proposals for the investigative and decision making procedures in relation to decision making in anti-trust cases for the new Competition and Markets Authority. These will mark a modal shift from the procedures employed hitherto by the Office of Fair Trading in the investigation of such cases. The Government has proposed that a collective decision making process is adopted which would see the investigation and decision making elements of an antitrust case undertaken by separate teams. There are clear advantages to such an approach, particularly around fairness for the party under investigation, given that such cases deal with breaches in criminal law. They may also lead to procedurally more robust decision making and help guard against any tendency to confirmation bias.

However, Three is of the view that there are clear differences between potential breaches of regulation and breaches of the criminal law, that might warrant a difference in approach. Three is also unclear as to how such a process would work in practice at Ofcom, and whether it may even be possible to establish effective paper walls between investigatory and decision making teams. Three is also opposed to any approach that would extend the four month statutory timeframe for dispute resolution decisions. This would be unacceptable and would cause harm in a dynamic and fast moving environment.

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?

Three is concerned at the lack of transparency around Ofcom processes and decision making and understands that this concern is widely shared by the industry. Our concerns are grounded in the experience of 10 years of regulation by Ofcom and the relative lack of scrutiny of both the organization and its decisions.

Currently, Ofcom is accountable to Parliament only through a requirement to place its annual report before Parliament as well as to report to Parliament. It has been custom and practice that the Ofcom Chief Executive and Chair appear before the relevant Select Committee, however there was no appearance in 2012. This does not provide adequate opportunity for scrutiny of Ofcom's decision making, progress against its annual plans and other workstreams, or questioning of the regulator's business priorities and chosen method of intervention.

Just as Ofcom is insulated from Parliament, so too does it seek to distance itself from the industry it regulates. Outside of the formal consultation process Ofcom, is not subject to any mechanism to gauge current industry trends and views, in contrast to the processes and structures that enable it to draw on consumer views. This lessens

industry's ability to inform strategic decision making and influence its learning. Arguably, it has resulted in regulation that focuses on consumer outcomes rather than the stimulation of competition and the effective functioning of those regulated markets.

Ofcom must, of course, remain independent, but outside of the formal process of consultation it all too often engages only through the increasingly numerous, seemingly speculative and often burdensome use of information requests (often under formal powers whereby it attaches a threat of a £2,000,000 fine). Although specific decisions may be appealed through the courts (and all too often are), this could be avoided if Ofcom were to engage more openly and broadly. Engaging positively and constructively with industry could be done professionally without creating bias or a lack of independence. Ofcom's decisions have not only significant costs for individual business but shape the entire sector: reaching decisions from a buttressed and isolated position only increases the likelihood of bad regulation and legalistic court challenges.

With regard to the specific measure, whilst Three is in favour of greater transparency, we believe that this must apply to the totality of the regulatory process and will not deliver if only targeted at a small part of the appeals process. Three notes that it is unclear how such a measure might reduce either the numbers of appeals or the cost and length of appeals, particularly given the amounts of money often at stake. Three also notes that while Ofcom practice is far from ideal, it has made limited steps to improve the transparency of its process (a very welcome step). However, this has not led to a reduction in the number of appeals of Ofcom decisions.

Indeed, it is arguably (as well as likely) that without a change to the standard of review for appeals brought under the Communication Act 2003, requiring greater transparency at an earlier stage of the regulator will have the opposite effect: namely it will create deadlock and provide for more potential grounds for appeal.

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

No. Ofcom has wide ranging information gathering powers under s.135 and s. 136 of the Communications Act 2003. These were recently reviewed and strengthened in 2011 and have been backed by substantive sanctions for parties who do not comply with such requests. Three would argue strongly that any perceived lack in such powers is more widely demonstrative of problems in the appeals process.

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

Three is absolutely clear that non-infringement decisions should continue to be appealable. It is right that businesses should have the

right to appeal decisions taken by the regulator. This is about a fundamental right to justice and good decision making.

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?

Three favours the Government's proposal that straightforward cases heard by the CAT should have a target time limit of six months rather than nine months as is currently the case. Three believes that the six month time limit should be mandatory for straightforward cases. However, Three is not certain what should be considered a straightforward case given the typical complexity of appeals brought under the Communications Act 2003 and would welcome further guidance from Government on this.

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

Three supportive of proposals to introduce target times for regulatory appeals but believes these should be aspirational rather than mandatory and that the benefits of any such move to a mandatory target are unclear. Three notes that twelve months is by no means a short time frame, particularly where dispute resolution matters may be under consideration. Further, it should be noted that Ofcom is already bound by a four month statutory time limit to resolve such matters.

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?

Three is supportive of the proposal to provide the CAT with the power to limit the amount of evidence heard during appeal processes. Although Three recognises that appeals brought under the Communications Act 2003 are complex, Three is also clear that some appeal hearings before the CAT have been characterised by immaterial evidence and unnecessary testimony from witnesses. This has served only to draw out the length of an appeal and has had little to do with the review of the Ofcom decision in question.

Given existing case law on the admissibility of evidence (see pp. 31-32), Three questions whether the Government's proposal will have a material impact on the amount of evidence heard during an appeal, particularly if any decision on the inadmissibility of evidence will be appealable to the Court of Appeal. Three asks that the Government considers this proposal further and elaborate further on how it might be effectively implemented.

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?

In principle, Three is supportive of Government proposals around a voluntary fast track procedure which might include parties agreeing to limiting evidence from witnesses and capping costs. However, Three is unclear how this might function in public and has serious reservations given the history of appeals litigation brought under the Communications Act 2003 that a voluntary fast track procedure might ever be effectively implemented.

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?

Three agrees with the Government's 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?

In principle, Three agrees with the proposal to use the Civil Aviation Act 2012 as a model to ensure that the Competition Commission has the relevant case management powers. Three recognises that it has only limited understanding of the Civil Aviation Act 2012 but from the evidence presented, this appears a sensible and proportionate approach to case management that might usefully be adopted for other cases heard before the Competition Commission.

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?

Three has no comments to make in response to this question.

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

Three is clear that there are a number of process changes that could be made to CAT procedure to help drive efficiency in the system and help reduce the cost and length of appeals brought under the Communication Act 2003. Three has explored these in detail in the main part of its response, please see pp. 30-34. However, Three is clear that taken singular or jointly these measures will not enable the Government to deliver on its objectives. They are and should only be considered as a useful complement to a change in the standard of review to Judicial Review standard.

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

As we noted in response to Q37, Three is concerned at the lack of transparency around Ofcom processes and decision making and a lack of accountability and scrutiny about the work undertaken by the regulator. These concerns are widely shared by the industry.

Although Three has no doubt that the current appeal framework for the appeal of Ofcom decision making under the Communications 2003 is dysfunctional and has had a detrimental impact on the type and quality of Ofcom decisions, Three is also clear that the situation is made worse by the level of parliamentary and Governmental scrutiny of the decisions made by the regulator. Currently, Ofcom is accountable to Parliament only through a requirement to place its annual report before parliament as well as to report to Parliament. This is inadequate/

Taken together, these conditions have created a framework for regulatory decision making that is ill-suited to the pace of market change in the communications sector. These have left the regulator institutionally disinclined to make much needed structural changes necessary to improve competition and drive investment. Instead, Ofcom has pursued minor changes to influence and determine market outcomes, largely in the consumer protections arena.

The Ofcom Annual plan for 2013/14 plainly illustrates this trend. It set out plans to consider interventions in relation to:

- mid-contract price changes
- bill shock
- additional charges
- services for disabled
- mobile “quality of experience

While Three recognises that it is valid for the regulator to consider the issues above and that in some cases specific regulatory interventions may be necessary to improve the overall consumer experience, these should not come at the expense of decisions necessary to improve competition and ensure the future health of the market. Indeed, there are also real and unanswered questions as to whether regulatory intervention is in each case the best means of achieving those outcomes.

Three also notes that in many cases these interventions are not light touch. They are often heavy handed and disproportionate as well as subject to penalties of up to £2m. Compliance incurs unnecessary costs for providers at a time when operators are investing record amount in infrastructure and services.

Three has long argued that Ofcom should seek to make better decisions through earlier engagement with the industry. When seeking to improve market outcomes for consumers, it should set high level objectives and work together with the industry to deliver on these objectives. Three has

no doubt that the market could deliver solutions such to consumer issues at less cost than what are expensive regulatory interventions, and serve only to distort the wider market.

Three asks the Government to consider the following factors:

1) If the market were more competitive it is unimaginable that many of these outcomes would not be achieved as a consequence of competitive force or consumer demands.

2) Placing additional obligations on mobile and fixed line providers, restricts the ability of providers to plan and invest. More significantly, it impacts the ability of UK based providers to compete effectively with OTT operators based outside of the UK and without those regulatory obligations.

3) Such interventions might achieve desired market outcomes in the short term, however in the long term they will expose consumers to unregulated services and content provided by over the top regulators.

4) Greater scrutiny might improve the speed of regulatory delivery, drive efficiencies in the regulator's decision making and help the regulator focus resource better on strategic priorities.

In the year of its 10th anniversary, Ofcom needs to renew its focus on ensuring a more competitive market, delivering on strategic objectives through the increased strength of competition. This will encourage further forms of competitive differentiation and consumer benefits far greater than those achievable through individual initiatives by the regulator.

Towerhouse Consulting LLP

BIS CONSULTATION: *STREAMLINING REGULATORY AND COMPETITION APPEALS*

A REVIEW OF BIS' IMPACT ASSESSMENT

(19 June 2013)

REPORT BY TOWERHOUSE CONSULTING LLP

11 September 2013

towerhouse | consulting

About Towerhouse

We are a law firm based in London and focused on the regulated sectors of the economy. We are particularly renowned for our expertise in communications. Our clients are generally firms and regulators in regulated sectors, which includes telecommunications and the digital economy, health, utilities, post, civil aviation and financial services.

Clients seek us out to support them on regulatory investigations, proceedings or commercial transactions of strategic significance, where our expertise in regulation, competition policy, economics and commercial law will make a difference. We have a multidisciplinary approach, with leading expertise on law, policy and economics.

We have particular experience in regulatory litigation, representing our clients before the Competition Appeal Tribunal, Competition Commission, Court of Appeal and Supreme Court and in dealings with regulators and competition authorities in major jurisdictions. We often advise clients who are considering appealing decisions of regulators and competition authorities, and we have drawn on this experience in preparing this review.

Where we have represented appellants or interveners in matters that are discussed in this report, or where one of our partners, David Stewart, was (in his former role) the individual exercising delegated authority in relation to decisions that were the subject of appeal, we have disclosed this fact in the text.

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Executive summary

i. We have reviewed the impact assessment ('IA') published on 19 June 2013 by the Department for Business Innovation and Skills ('BIS') to accompany its consultation, *Streamlining Regulatory and Competition Appeals* (the 'BIS consultation'). This review has been commissioned by British Sky Broadcasting Limited, British Telecommunications plc, Telefónica UK Limited and Vodafone Limited. The views expressed are our own and are not necessarily the views of any of our clients.

ii. As part of our review, we document evidence, obtained by reviewing cases already decided by appeal bodies, about how the existing process of review on the merits furthers the interests of consumers. Just as market failure is a constant risk, so is regulatory failure, and **merits review enables appeal bodies to improve outcomes for consumers.** Fixing poor decisions directly, and creating indirect benefits by raising the quality of all regulatory decisions, are the most significant effects of the current appeal system, and the loss of those benefits – that is, the cost of the Government's proposals – is currently not quantified in the IA.

iii. Why is this significant benefit not recognised? The IA (and the BIS consultation) both seem to conflate:

   a. decisions that ought be overturned or modified; with

   b. decisions that are unlawful.

iv. This misunderstanding colours much of the Department's analysis. Sometimes, regulators will make decisions that are lawful in the JR sense (that is, they fall within the reasonable range of possible decisions) but nonetheless are a bad outcome for consumers. BIS's approach in the IA ignores the possibility of a decision which is incorrect but lawful. We document a number of decisions that were modified on appeal during the past few years and explain how and why they fall into this category of 'incorrect but lawful' decisions that are, as the CAT put it, '*robust, but wrong*'.[1] Sometimes, inevitably, a regulator gets a decision that is, at its root, wrong; other times, a regulator will make a decision that is subsequently substantially improved following merits review. Reduced scrutiny also means errors (that might fall within the grounds of JR or 'focused specified grounds') may be more likely to be missed on appeal. Our review explains how this analysis could be used by BIS to improve the IA to produce a truer picture of the impact of the Government's proposals.

v. Because of the size of regulated sectors of the economy, if merits review does help improve outcomes for consumers, even by a little, and even for a small proportion of cases, then the impact on the IA is very significant. For example, this review explains how in just one sector (communications), **the loss of consumer benefits resulting from changing the standard of review may be in a range from £50m to £100m NPV or more** in relation to each individual

[1] CAT submission, paragraph 5.

decision that is modified on appeal.[2] On any reasonable set of assumptions, considering the effects across the range of regulated sectors and the impact on competition law decisions that affect the wider economy, these costs dwarf the relatively modest benefits that the IA purports to identify.

vi. In fact, because the markets involved are so large, and the putative benefits of reducing the degree of scrutiny of appealed decisions are so small, our view is that **the only way that the IA can be made to show a positive result is to assume that there is no improvement in the quality of decision-making as a result of merits review**. This appears to be the basis on which the IA has been constructed. Given its sweeping nature and that it pre-supposes the specific question that the IA is testing, we think that is an assumption no reasonable person, properly advised, would make in assessing the impact of the Government's proposals.

vii. A secondary but also material problem with the IA is that it assesses the 'benefits' of changing the standard of review by assuming that a move away from merits review will imply a shorter hearing, reducing costs. The evidence suggests that this view may simply be wrong: the CAT itself does not believe there are significant differences in the length of hearings in matters reviewed on the merits and under JR. The evidence it provides requires careful attention currently missing from the IA. But even if the CAT's evidence was ignored, the IA currently does not assess an obvious consequential impact of changing the standard of review: **the longer period taken to reconsider decisions that are remitted back on appeal**. In merits review, the appeal might take longer but often reaches a definitive answer; on JR (or focused specified grounds), the appeal *may* be quicker but necessarily, will normally be inconclusive. Therefore, under the Government's proposals, it is more likely that more decisions will, if set aside, be remitted for reconsideration. On a reasonable view of these additional delays, **the effect of a longer 'end-to-end' decision-making process under JR (or focused specified grounds) is likely to offset entirely the impact of shorter appeals (if any), which is only material benefit quantified by the IA**.

viii. Drawing on HMG's guidance for impact assessments, our review also identifies other respects in which the IA would require material improvement, to enable an arms-length assessment of the costs and benefits of the Government's proposals. For example, the IA fails to consider **the likely impact of increased regulatory risk** (if regulators always 'have the last word') on economic growth and investment, or **the impact on access to justice and increased costs for SMEs** and other unsophisticated litigants of navigating a system that is geared more fully to shielding decisions from 'too great' a level of scrutiny rather than protecting consumers from the consequences of poor decisions.

ix. Finally, the report quantifies some of these costs and benefits and, without carrying out an entire shadow impact assessment, explains the basis for our conclusion that, properly

[2] The table on page 90 provides more detail but there are several appeal decisions with an annual estimated impacts of £5m-£15m (yielding roughly £50m as a lower bound when converted into NPV) and a number than have impacts of up to more than £100m.

constructed and drawing on the available evidence, BIS should conclude that **there is a substantial net cost of the Government's proposals**. That cost will include direct effect (higher prices) on consumers, harm to business flowing from increased regulatory burden and the effects of greater uncertainty. More widely, we also anticipate likely effects of harm to investment and economic growth.

Contents

A. Introduction and context

1. This report analyses the impact assessment (the 'IA') published on 19 June 2013 by the Department for Business Innovation and Skills ('BIS') to accompany its consultation, *Streamlining Regulatory and Competition Appeals* (the 'BIS consultation').

2. This section sets out some brief introductory points and the history of these issues, notes the sources we have drawn on during our review and explains the approach we have taken.

History and context to the consultation

3. The UK is an acknowledged world leader in regulating economically significant activity using competition law principles to design rules to make markets work more effectively. Operating concurrently with the UK's widely-admired system of competition (antitrust) law, these sector-specific regimes in electronic communications, energy, civil aviation, rail, water and other 'network industries' set the balance between the interests of those who invest in infrastructure, and those who rely on it in myriad ways to sustain the UK's daily life.[3]

4. Sector-specific regulation and competition law work in tandem to ensure that, across the economy, competitive market structures are preserved in those markets that are already open and that competition is promoted where feasible and economically viable in areas that were once monopolies. Where competition cannot work effectively, competition authorities and regulators intervene to enforce competition law and to impose rules that protect consumers from market abuse.[4]

5. To make that system work, competition authorities and regulators decide which interventions are necessary and proportionate actions in the interests of consumers. By legal necessity and the demands of good governance, those decisions are subject to scrutiny on appeal. The purpose of the appeal regime is to provide an appropriate level of constraint on regulatory decision-making (to ensure that there is, as it were, appropriate 'regulation' of regulators and competition authorities). This reduces the chance that the considerable powers conferred on regulators to shape markets and affect outcomes for consumers and regulated firms, and the powers of competition authorities to sanction anti-competitive conduct, are not over- or mis-used.

Regulatory and competition appeals in the UK

6. Review on the merits is available in relation to competition law enforcement decisions and in relation to specific sector regime for electronic communications, as well as some broadcasting appeals and in relation to certain price controls.

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[3] See, for example, the National Audit Office's report in March 2010, 'Review of the UK's Competition Landscape' at paragraph 1.

[4] Regulation is also used to advance other defined public policy goals (such as universal access or universal service).

7. Although distinct, and with some significant differences in their approach, the competition law and communications regimes are linked by the application of competition law principles, with the regulation of the electronic communications sector enabling *ex ante* rule-setting that is broadly modelled on, and reflects, the approach that would be taken to market analysis applicable in competition law.[5] As a matter of practice, in the UK these two regimes are also often considered in tandem because Ofcom, the national regulatory agency for electronic communications, also exercises concurrent powers to enforce competition law (in common with a number of other sector regulators, as well as the OFT – and in due course, the CMA).[6]

8. The conduct of these appeals on the merits falls within the functions of CAT.[7]

9. Review on the merits in relation to competition law decisions is often described as a consequence of the quasi-criminal nature of the offence (i.e. it is very serious), coupled with the fact that the competition agencies have the power to decide whether an infringement has occurred and to impose the significant consequences that can follow – including fines, reputational harm and remedies.[8] Merits review is necessary, because (as the CAT puts it) '*[b]asic justice requires that, when the finding comes for the first time before an impartial and independent court, a legal challenge based on the merits (including the factual assessment of the decision-maker) should be possible.*'[9] Future action to restrict the rights of appellants affected by competition law decisions brings the risk that competition law enforcement process will not comply with Article 6 of the European Convention on Human Rights.[10]

10. Review on the merits in the electronic communications regime is required by Article 4 of the Framework Directive ('FD'). Art 4 FD requires that:

> *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 the appeal, the decision of the national regulatory authority shall stand, unless interim measures are granted in accordance with national law.*

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[5] See, for example, the approach taken in the electronic communications sector regime e.g. at Recital 27 and Article 14(2) of Directive 2002/21/EC of 7 March 2002 (Framework Directive).
[6] For a discussion about the concurrency regime and its operation, see for example Whish, R and Bailey, D. *Competition Law* (7th edition), Oxford University Press, 2012 ('Whish') at pages 437 - 439.
[7] BIS consultation, Annex B.
[8] Whish, pages 445-6.
[9] CAT submission at paragraph 25.
[10] See, for example, the CAT submission at paragraph 26 to 31.

11. Our understanding (based on research by the Centre for Regulation in Europe) is that the legislative purpose in providing for the merits of the case to be taken into account was to ensure that an appeal could address the substance of a case, and not be limited to procedural aspects – that is, to avoid the risk of delay arising from (in UK parlance) remittal of decisions back to the national regulator.[11] This requirement has been transposed via section 195(2) of the Communications Act 2003 (the 'Communications Act'), which provides for review 'on the merits'.

12. The role played by appeals in general, and merits review in particular, has been debated from a variety of different perspectives in both the competition and communications regimes, with the Government's push to remove merits review a relatively late development.

13. In March 2010, for example, the NAO was concerned not at the fact that there were too many appeals, but that there were too *few*, as a result of regulators and competition authorities failing to create a corpus of decisions that could be the subject of appeals – which it saw as building greater regulatory certainty:

> ***It is vital that there is an effective system for appealing against decisions taken by the competition authorities and Regulators.*** *The decision process itself is often lengthy; and following a decision, most Competition Act investigations are subsequently appealed. There is a risk that the length, and uncertainty of outcome, of the enforcement process in its entirety may reduce the appetite of the authorities for using their competition enforcement powers. These factors may also encourage greater use of either early resolution to expedite cases, or of regulatory rather than competition powers by the Regulators, than is desirable for the development of the application of competition law in the UK.* ***The Government should review whether progress in the development of the body of case law has been adversely impacted by these factors.***[12]

14. Similarly, the Government has recognised the role that appeals play in relation to maintaining the quality and fairness of the system, linking the role played by merits review to the wider reforms it has introduced in the wider competition law environment:

> *The Government sees a need to improve the system's efficiency and fairness. The Government accepts the strong consensus from the consultation that* ***it would be wrong to reduce parties' rights and, therefore, intends that full-merits appeal would be maintained in any strengthened administrative system.*** *Since such a strengthening would involve introducing further checks and balances to buttress the actual and perceived quality and fairness of decision-making, there would need to be a marked decline in the incidence of appeals and of successful appeals if the result were not to be to make the process even more protracted and*

[11] See 'Enforcement and judicial review of decisions of national regulatory authorities', 21 April 2011, at page 125 and also the discussion in the CAT submission at paragraph 15.

[12] NAO Competition Landscape Report, at paragraph 10, under 'Findings'. Emphasis original.

procedurally heavy whilst still being reliant on appeals to correct mistakes made in the administrative process.[13]

The DCMS consultation and the DCMS Impact Assessment

15. The Government first proposed reform of the communications sector appeals regime in September 2010, whilst consulting on proposals to give effect to 2009 reforms of the EU Framework for Electronic Communications.[14] In relation to the sector-specific appeals regime, these proposals were not well-received, as the Government itself described subsequently:

> *after the consultation closed in December 2010, a number of industry stakeholders voiced concerns about the proposed changes to the appeals regime. In order to address these concerns, Government has implemented the mandatory changes to the EU Framework separately, without making the proposed changes to appeals, and decided to launch a second consultation on the issue with more focus and detail.*[15]

16. Despite the greater degree of '*focus and detail*', and an accompanying impact assessment that calculated the benefits of reform at between £117m and £173m, the second consultation (the 'DCMS consultation') was also, broadly, opposed by stakeholders. The CAT response to the DCMS consultation, for example, described the proposals as '*dangerous*' and grouped its input under sub-headings that read:

    - *'The rationale for the proposed change is flawed'*
    - *'The stated purpose of the proposed change is misconceived'*
    - *'The proposed change will not achieve the stated aim'*[16].

17. Similarly, other stakeholders in the communications sector – including both access providers and access seekers, who might perhaps be expected to have opposing views on regulatory matters – were, in the substantial majority, opposed to the Government's proposal:[17]

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[13] BIS, Growth, Competition and the Competition Regime: The Government response to consultation', March 2012. Emphasis added. It is noteworthy that the data cited in the BIS consultation is consistent with there being a gradual reduction in the number of appeals (for example, from the peak in 2008-09), perhaps reflecting a 'bedding in' period for merits review. We discuss the possible impact of a 'reset' of the standard of review, in terms of additional uncertainty that must be resolved in litigation, in sections F and G.

[14] *Implementing the Revised EU Electronics Communication framework – Overall approach and consultation on specific issues*, BIS, September 2010. For a broad overview of the EU Framework and links to the various Directives and other instruments, see http://europa.eu/legislation_summaries/information_society/legislative_framework/l24216a_en.htm

[15] *Implementing the revised EU Electronic Communications Framework – Appeals / HMG proposals on reform of the Telecommunications Appeals Framework,* BIS, August 2011 ('DCMS consultation') and the accompanying impact assessment ('DCMS IA'). The quote comes from the DCMS IA, paragraph 1 on page 5.

[16] CAT response, dated 14 October 2011 ('CAT DCMS submission'). For a full set of the non-confidential submissions received in response to the DCMS consultation, see http://old.culture.gov.uk/consultations/8923.aspx

Supporting reform	Opposing reform
Three The Number	BT Sky Cable & Wireless Everything Everywhere Southern and Scottish Energy TalkTalk Telefónica UKCTA Virgin Media Vodafone

18. The BIS consultation and the IA hardly mentions these earlier consultations or the fact that there was such significant opposition to reform. This is an important omission, since the DCMS consultation represents a close proxy for some of the questions that the IA is seeking to answer (particularly in relation to the communications sector and, potentially, more generally).

19. In other words, the IA appears to fail to take account of the already-gathered evidence from the DCMS consultation. That evidence suggests that, despite DCMS' assessment being that appeals reform in a single, albeit very significant, sector like communications should bring significant benefits, stakeholders clearly had a wide-ranging and deeply-held view that this assessment was wrong. Why was there such a discrepancy? What were the implications for the construction of the (BIS) IA? By not having appropriate or detailed regard to this history, the BIS team risk mis-directing themselves; they have not yet turned their minds to these important questions. It is telling that many of the criticisms that are now being made of the IA were already apparent in the responses to the DCMS consultation.

20. We think that the IA as it is currently constructed is deficient with respect the evidence base, as a result of not having regard to the submissions to the DCMS consultations to give a better sense of the likely impact of the Government's proposals. In our review of the costs and benefits in our review, we have sought to flag where this might be done.

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[17] Because it is not relevant to the point we make about the positions of sector stakeholders, we have omitted from this list the short response from PhoneAbility, a non-profit organization dedicated to promoting accessibility to ICT for older and disabled people. PhoneAbility supporting the Government's proposals on reform, albeit in very brief terms, and opposed other reforms.

The Minister's update on the DCMS consultation responses

21. On 6 March 2012, the Minister for Culture, Communications and Creative Industries, Ed Vaizey MP, wrote to the respondents to the DCMS consultation. In his letter, he explained that:

> *I remain concerned about the number and length of appeals against Ofcom's decisions and the impact this has on Ofcom's ability to regulate effectively in the best interests of consumers. However I am concerned about the potential impact any legislative changes might have on industry so I do not propose to change the legislation at the common commencement date in April this year.*
>
> *There is no doubt that a more streamlined process would benefit everyone but having considered the responses and the issues raised therein I am not yet convinced that changing the standard of appeal (to 'Judicial Review with merits') will, on its own, achieve the desired aims of faster decision-making at Ofcom and a reduction in the time and cost spent on appeals.*
>
> *We are in the process of publishing all non-confidential responses received on our website and I intend to issue a formal government response to the consultation in March.*

22. As far as we are aware, at the time of writing the Government's response is still awaiting publication.

The BIS consultation and the Impact Assessment

23. On 19 June 2013, the BIS consultation and the IA were published.

Source material and evidence

24. This section briefly outlines the source material and evidence we have drawn on in preparing this report, in addition to the various BIS and DCMS consultation documents.

Decisions taken by appeal bodies in the UK

25. We have considered the decisions of various regulators, competition authorities and appeal bodies that are likely to be affected by the changes. These are noted in the text.

Public statements by various stakeholders

26. Where appropriate, we have cited public statements by various stakeholders, including senior officials in public bodies.

27. We have also considered other Government consultations, for example in relation to the reforms of the competition regime and in relation to the Government's better regulation agenda.

Responses to the DCMS consultation

28. At the time of writing, the date for written submissions to the BIS consultation has not yet passed, and so we do not know what stakeholders may say in response. However, the DCMS

consultation covered a subset of the changes proposed in the BIS consultation, and so the responses received by DCMS provide some evidence as to the gist of the responses BIS may receive. In the absence of a more up-to-date view of their position, the responses to the DCMS consultation provide a window into the likely views of stakeholders to the proposals in the BIS consultation.

29. One significant stakeholder has opted to publish their response ahead of the end of the consultation period: on 23 August 2013, the CAT published its response (the 'CAT submission').[18] That substantial response makes it clear that the CAT has invested significant time and effort to understand, and to respond in detail to, the Government's proposals.

The BIS stakeholder sessions

30. In late July and early August, BIS conducted four stakeholder workshops.[19] We attended all four sessions. We are therefore in a position to comment on the nature and balance of the feedback received by BIS in that process.

HMG's IA Toolkit, IA Guidance and the Green Book

31. In July 2013, BIS issued the '*Better Regulation Framework Manual: Practical Guidance for UK Officials*' ('Framework Manual'). This consolidated a number of existing forms of guidance, including the Treasury's *Impact Assessment Toolkit* ('IA Toolkit') and *IA Guidance*. It is part of a system designed to support, and to influence, officials dealing with questions of policy, including those preparing impact assessments. This system includes financial guidance as set out in *The Green Book* and various other resources such template documents and spreadsheets.

32. We have used this material to guide our review, as indicated in the text.

[18] http://www.catribunal.org.uk/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html

[19] The workshops were: session 1 held on 24 July 2013 (10am to 12 noon); session 2 held on 26 July 2013 (1pm to 3pm); session 3 held on 30 July 2013 (10am to 12 noon) and session 4 held on 1 August 2013 (1pm to 3pm). All the workshops were held at the BIS offices at 1 Victoria Street, London, SW1H 0ET.

B. Our approach to reviewing the IA

1. In reviewing the IA, we have considered it in light of the guidance provided by HM Government to Departments that are preparing impact assessments, including the Framework Manual and the IA Toolkit.

The Government's guidance to Departments undertaking IAs

2. The Framework Manual stresses the iterative and functional nature of impact assessments:

> *An impact assessment is both:*
>
> - *A continuous process to help think through the reasons for government intervention, to weigh up various options for achieving an objective and to understand the consequences of a proposed intervention; and*
> - *A tool to be used to help develop policy by assessing and presenting the likely costs and benefits and the associated risks of a proposal that might have an impact on the public, business or civil society organisations, the environment and wider society over the long term.*
>
> *An impact assessment allows Ministers, and (when published) those with an interest in the proposed measure area to understand:*
>
> - *Why the Government is proposing to intervene;*
> - *The main options the Government is considering, and which one is preferred;*
> - *How and to what extent new policies may impact on different stakeholders; and*
> - *The estimated costs and benefits of proposed measure.*[20]

3. Constructing an IA is not a cursory or optional step; the Government has stressed the need for a robust impact assessment before taking action in the strongest terms in its Regulatory Principles:

> *There will be a general presumption that regulation should not impose costs and obligations on business, social enterprises, individuals and community groups unless a robust and compelling case has been made.*[21]

4. We have used the Framework Manual and the IA Toolkit to analyse and assess the IA. We have not reviewed the Government's objectives[22], although we made some observations intended to

[20] Framework Manual, paragraphs 2.1.4 and 2.1.5.
[21] Framework Manual, 'Government's Principles of Regulation', page 4.

assist the Ministers in relation to the relationships between some of their currently-stated objectives.

The steps in preparing an impact assessment

5. The IA Toolkit (which is now Section 2 of the Framework Manual) describes various steps that are to be taken in preparing an impact assessment. They are:

   Step 1: Define the problem

   Step 2: Specify defined objectives

   Step 3: Identify viable options that will achieve the objectives

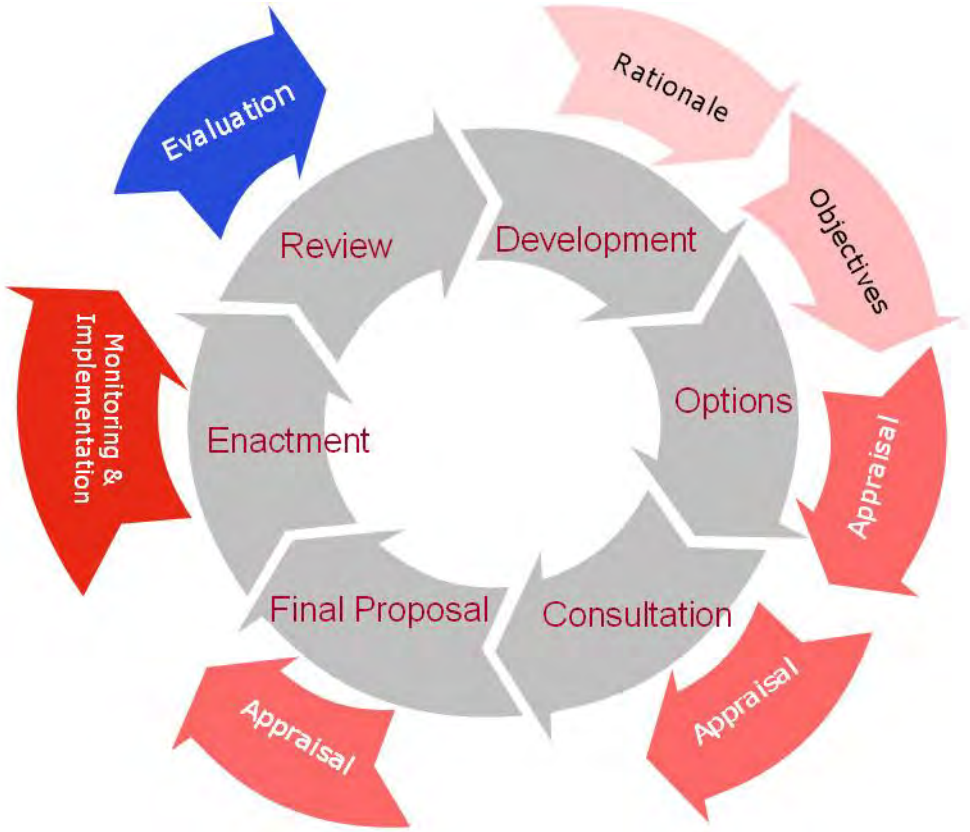
   Step 4: Identify the impacts

   Step 5: Value the costs and benefits and select best option

6. The IA Toolkit also describes how the process of preparing an IA ought to be iterative, with material received in a public consultation forming one of the important inputs to be taken into account when deciding how to improve the IA.

7. The IA Toolkit also illustrates the process of preparing an IA, using the diagram reproduced below.

[22] In this respect, we have taken our lead from the Regulatory Policy Committee which, in its reviews of Government impact assessments, 'does not comment on the Government's policy objectives, which are a matter for ministers, but focuses on the options which have been considered for implementation and the robustness and quality of the analysis and evidence used to inform the policy decisions' (*Reducing Regulation Made Simple: Less regulation, better regulation and regulation as a last resort*, HMG, December 2010, paragraph 38)



Source: Framework Manual, page 58

8. We understand the IA to be in the 'Consultation' stage, with at least one further opportunity to assess the case for the Government's proposals in light of the material received in response to the BIS consultation. The IA itself and the BIS consultation refer in a number of sections to the need to reconsider various issues or to test various assumptions against the evidence received in response to the BIS consultation.

9. We have therefore approached our review on the assumption that the BIS team will be looking to reassess their initial findings and conclusions in the IA and to update and improve the IA in light of the consultation responses they receive (including this review).

C. Step 1: Identify the problem

Introduction

1. Impact assessments should begin by stating clearly the problem the policy-maker is seeking to address. The IA Toolkit, for example, notes that:

> *In line with all Government appraisals, for regulatory measures, the rationale for government intervention needs to be identified early in the policy development process.*[23]

2. Alternatively, we think the challenge set to policy-makers by the Government in a pithier version of the same proposition is also relevant in this context, which is to ask:

> *What exactly is wrong?*[24]

3. We have analysed the IA and supporting documents to see whether it identifies the problem the Government's proposals seek to address. Where it seems to us that parts of BIS' reasoning could usefully be improved, we have made suggestions to that effect.

4. We have then provided some observations on possible implications for BIS' policy reasoning.

The source of 'concerns' (transparency)

5. It is surprisingly difficult to establish what, precisely, is the initiating cause or events behind the proposals, and the decision to devote so much time and effort to supporting them. The IA and the BIS consultation often use the passive voice ('*There are concerns*', '*concerns have been raised*', etc) in a way that does not always leave the reader clear as to which individuals or organisations have raised which concerns, or in what context.

6. The IA refers to '*preliminary evidence we have gathered from regulators and appeals bodies*' that suggests areas where objectives of an effective appeals regime are not being met, and cross-refers to the BIS consultation. The BIS consultation, after stressing the need for an effective and robust appeals mechanism, notes that:

> *… 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;*

[23] IA Toolkit, paragraph 2.3.1 (Framework Manual, page 63)

[24] This is the first 'key underpinning question' in the first principle ('Is it necessary for Government to act?') set out in the table of the Coalition's principles of regulation. *Reducing Regulation Made Simple*, BIS, December 2010 at section 4.

- *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.*

7. The implication is that the '*regulators and appeal bodies*' have expressed these concerns, and that they have provided '*preliminary evidence*', but the IA does not identify any specific regulators or appeal bodies, nor is it explicit as to what that evidence is.

8. The public record supports the sense that the core constituency for these proposals has been the regulators themselves. The appeal bodies (that is, the CAT, the CC and the High Court) and the regulators do not necessarily have a common perspective.

9. Ofcom, for example, has made a number of public statements over a number of years expressing its frustration at the extent to which its decisions are appealed.

10. On 8 June 2010, the Ofcom Board welcomed a visiting team from the National Audit Office ('NAO') to their meeting. The main purpose was to enable the NAO's review of Ofcom's effectiveness, but the published Board minute also records that:

> *National Audit Office Value for Money Study – Board Paper 79(10)3.*
>
> *The Chairman welcomed the National Audit Office (NAO) representatives to the meeting. The NAO gave an oral report on the progress of their work, emerging findings and the process and timetable for finalising the report. During the course of discussion a number of comments were noted. The Board was pleased to note that although the NAO were not yet in a position to share with Ofcom the value for money aspects of their assessment, the emerging findings showed a good picture for Ofcom.* ***The Board asked the NAO to make clear to the Comptroller and Auditor General the strength of feeling amongst the Board that the standard for appeals against Ofcom's decisions and therefore the need to take all appropriate steps to mitigate the risk of litigation was key to the speed of Ofcom's decision making.***[25]

11. Also in 2010, Ofcom's CEO Ed Richards acknowledged the case for greater scrutiny in Competition Act cases, but in the case of sector-specific regulatory regimes, was concerned at the lack of consistency as between different sectors, arguing for convergence around either merits review for all, or JR for all:

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[25] Ofcom Board Minutes, 8 June 2010, available at http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board-2/minutes-and-notes-of-ofcom-board-meetings/board-minutes-8-june-2010/. Emphasis added. The NAO duly obliged, recommending in its report, 'Ofcom: The effectiveness of converged regulation' (published in November 2010) that '*The Communications Act sets a higher 'hurdle' for Ofcom in dealing with appeals against its regulatory decisions than is the case for other economic regulators. The Department for Business, Innovation and Skills, should take into account Ofcom's evidence concerning the impact of the current regime as part of its review of the legislative framework for appeals.*'

While the burden of proof might seem appropriate for quasi criminal Competition Act investigations, it might not represent the right balance for regulatory interventions in areas where regulation needs to be fine-tuned over time; where regulation needs to react rapidly to changing circumstances, and where there is a well-established ex-ante framework which with effective implementation demonstrably delivers benefits to consumers through more effective competition.

Now, I believe very strongly that stakeholders have a right to a meaningful and fair appeal of our decisions, and indeed those of any other regulators. It is entirely correct that regulatory decisions are appropriately scrutinised.

However, it is important also to examine whether the current system is working effectively more generally.

You could reasonably take the view that the appeals model in telecoms is right exactly as it is today. But also note the fact that Ofcom has to deal with significantly more appeals than any other economic regulator carrying out an equivalent function, but who are not subject to the same standard of review. The question is then perhaps better phrased as: If this standard of review is correct in telecoms, then why should all economic regulators not have the same standard of review as Ofcom? It would certainly be a red-letter day for the legal community.[26]

12. In 2011, Mr Richards gave voice to Ofcom's frustration to a different problem:

It has been very disappointing to witness the extent to which the incumbent mobile operators have chosen to entangle this process in litigation or threats of litigation.

We recognise, of course, the need for companies to defend their commercial interests and to have recourse to the law in order to do so.

If a regulator or any other public authority makes a decision that is either procedurally or substantively flawed, the right of appeal is there to ensure good decisions replace bad ones. But when litigation becomes essentially strategic rather than based on objective grounds, and when it has the effect of holding back innovation and hampering growth, it is legitimate to ask whether the overall legislative framework fully supports the public interest in this increasingly vital area.

[26] Competition law and the communications sector, speech to the UCL Jevons Institute for Competition Law and Economics Annual Colloquium, 13 July 2010 (http://media.ofcom.org.uk/2010/07/13/competition-law-and-the-communications-sector/). As noted in Section A, the proximate cause of the different approach in electronic communications is the transposition of Article 4, FD.

> *As the UK parliament's Culture, Media and Sport committee recognised only a few weeks ago, the stance of the operators makes it increasingly hard for important decisions to be made and implemented.*[27]

13. In that case, he was referring to spectrum policy and the '*litigation and threats of litigation*' that were the problem were not threats of merits review, but of JR. These comments are consistent with Mr Richards' reported comments on the launch of Ofcom's 4G spectrum auction:

> *"We are fully prepared for litigation…and we are fully prepared to defend our decision," Mr Richards said.*
>
> *He added that UK regulators needed more "teeth" to push changes through, in the face of politicking from major companies with the resources to embark on huge legal battles.*
>
> *"The UK's system is too legalistic and too open to gaming...the public authorities involved need to have the power and the tools to make timely decisions [but] there is a risk that the country is going in the wrong direction on the issue," he said.*
>
> *"Everything we do now is subject to huge shadow of threat of litigation. [That can mean] multiple courts over multiple years. It's not just a case of one court and you get an answer. It can be appealed and appealed."*[28]

14. As discussed further in this report, the conflating of concerns about litigation in general (specifically, the impact of JR in relation to spectrum policy) being used as to support reform of merits review is something of a theme in the IA (and the BIS and DCMS consultations). As discussed below, the logical link between them is relatively weak.

15. It is perhaps understandable – maybe even inevitable – that regulatory agencies or competition authorities might come to see appeals as a fetter on their freedom to act, or even a nuisance.[29] The salient question for BIS (and that the IA should focus on) is not whether any one institution supports or objects to the reforms but whether the case for reform can be made on the basis of relevant public interests (that is, the interests of consumers and the taxpayer). This means being prepared to look beyond the individual institutional incentives of the different players in the competition law and regulatory landscape.

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[27] Ed Richards, speech on 29 November 2011 to ECTA

[28] Daily Telegraph, 24 July 2012, 'Ofcom unveils rules for 4G spectrum auction'. We note the subsequent statements reported to be made by various mobile operators denying that they had threatened litigation (see, for example, http://www.zdnet.com/operators-deny-4g-litigation-threats-4010024916/)

[29] See, for example, the comments by Peter Freeman, QC, that '*[a]uthorities from time to time complain that full merits appeals are excessive and encourage the kind of mischief described above, with the risk of the courts usurping the authority's role. As I have said, this risk is in my view over-stated, and in any case it misses the point.*' ('Competition decision-making and judicial control – the role of the specialised tribunal', speech given to CCP UEA Annual Conference, June 2013).

16. The value in maintaining a focus on the interests of consumers is also borne out in the international experience – for example in the recent review of the Australian experience with 'limited merits review' in energy markets (designed to move away from merits review to a more targeted exercise). Despite policy-makers having many of the same objectives, and designing reforms evocative of the Government's proposals, the independent panel's review observed concerns in practice that are strikingly similar to warning notes already sounded in in response to the DCMS consultation. The panel found the implementation of these limits on merits review appeared to have had the opposite effect to that which was intended, shifting the focus away from consumer interests:

> *The Panel's high level assessment of the performance of the LMR regime is that, in its implementation, the regime has failed to address the realities of regulatory decisions summarised in this ARC statement. Instead,* ***a narrower, more formalistic and more formulaic approach to review has developed, which has been relatively detached from the promotion of the [policy] objectives set out in the NEL and NGL, and particularly from the requirement that regulatory decisions be directed toward encouraging outcomes that are in the long term interests of consumers.***[30]

17. Ultimately, the source of lobbying in favour of a reduced degree of scrutiny of regulators' decisions is not relevant to the question of whether the concerns expressed are justified. But transparency is an aid to good decision-making, and it does not seem to us helpful (or satisfactory, in terms of transparency) that the reader is left to parse statements in press conferences to understand the views of some of the main stakeholders.

18. Therefore, the IA should be more clearly supported by any submissions or material received (such as the '*preliminary evidence*' that BIS mention they received).

The problem as identified in the IA and BIS consultation

19. Paragraphs 12 to 21 of the IA, under the title 'Problem under Consideration', identify a number of rationales for action. Each is discussed below.

'Wide variation between sectors' in proportion of decisions that are appealed

20. The IA notes that:

> *A high proportion of telecoms decisions are appealed – for example, there have been six telecoms price control appeals in the last five years. In contrast, there have been relatively few recent appeals in the energy and water sectors. In these*

[30] "Review of the Limited Merits Review Regime", Report by Professor George Yarrow, The Hon Michael Egan and Dr John Tamblyn, 29 June 2012, at page 3. The report is available at http://www.rpieurope.org/Publications/2012/Stage_One_Report_to_SCER_29_June.pdf

sectors the lack of appeals makes it difficult to judge whether the system is supporting robust decision-making.

21. This issue was elaborated in the discussion in the BIS consultation, under the heading, 'Variation in number of appeals between sectors' and evidence provided as to the proportion of decisions appealed in different sectors.

22. This posits three problems:

    - There are too many appeals in telecoms;
    - There are too few appeals in energy and water;
    - There is variation between sectors (as a problem in and of itself).

23. This concern is echoed in the BIS consultation.

24. The proposition that there is an optimal level of appeal activity, to any given standard of review, across a variety of sectors and over time, does not seem an intuitively strong starting point for the Department's analysis. The example given of the frequency of telecoms price control appeals, is an outlier, but an important one - in section G below we analyse those cases in more detail to understand how they might have been decided under a different standard of review.

25. So what evidence is there about why firms appeal some decisions and decide that they can live with others?

26. Based on our experience of advising clients facing choices about whether to appeal regulatory decisions, the decision to appeal a decision always involves at least three questions:

    - **Commercial**. What is at stake? Firms generally seek to act rationally. The difference in outcome between an adverse and a favourable finding must be greater than the risk-adjusted costs of an appeal. The 'costs' in this context means both the direct cost of an appeal (including the risk of third-party costs in the event of failure in the appeal) and the indirect costs of, for example:
        - reputational risk, including perceptions by shareholders and/or capital markets, customers or other stakeholders (for example, Governments);
        - risk to the relationship with the regulator (often a significant factor); and
        - opportunity costs of senior management distraction.
    - **Legal**. Is the decision a flawed decision? Firms take into account the likelihood of success.
    - **Strategic**. Is this the right case for us? Firms have their own agenda – and senior management must support the decision to appeal. They do not simply add together the commercial and legal questions, although those are important factors taken into account. Some firms are very reluctant to appeal; others have particular issues that they regard as a 'line in the sand'.

27. If any one of these factors is missing, firms do not appeal. These factors vary between individual companies and between different communities of companies (for example, between different segments of the digital economy or as between retail and wholesale players). Firms often weigh what they perceive to be the approach taken by their competitors and comparators to gauge their own approach. These factors also vary considerably between sectors, which is not surprising since, for example, the perceived risk of damaging the relationship with the regulator will vary between institutions or even individual senior officials. They can also vary over time – for example, appeals may play a different role at different times in an industry's development – and can change quickly depending on external factors such as market perceptions or the behaviour of competitors.

28. And most important of all, each decision whether or not to appeal is specific to an appeal of the *particular* decision, by the *specific* regulator, by *that* appellant, at that point in time.

29. Given all of that uncertainty, we do not see a strong case that variation in the level of appeals, by itself, constitutes a 'problem'.

30. In terms of the number and proportion of appeals in particular sectors, a direct addressing of the BIS analysis is outside the scope of the IA. But we are not aware of any direct evidence as to how one might assess whether there are 'too many appeals' (or 'too few appeals') in a particular sector. And there are a number of reasons why one might observe – or even expect – significant variation between sectors:

    - Different sector regulators have different statutory powers and duties. Ofcom has a statutory duty to resolve regulatory disputes, for example, with such decisions inherently prone to being subject to heightened risk of appeal given that there is generally at least one and sometimes more than one 'losing' party.
    - Different regulators may have different views about their appetite for risk, and their willingness to push through unpopular proposals in the face of entrenched resistance. Some regulators, individually or institutionally, have a strong preference for consensus; others do not.

31. We do not consider that, in its current state, the analysis in the IA is sufficiently clear or robust as to support there being a 'problem'. We think that BIS must either provide a clearer and more robust analysis as to why this variation constitutes a problem (rather than simply documenting it) or drop this material from the IA.

The cost and time taken for appeals

32. The IA notes that:

> *appeals can take a long time and impose significant costs. First stage appeals have taken an average of just over 9 months over the last five years, but with significant variation around this average (some cases have taken as much as 24 months, while other cases have been completed in less than a month). When there are further appeals to the Court of Appeal and/or Supreme Court, this adds*

an average of a year to the time taken. This lengthens the end-to-end decision-making process and imposes significant costs on firms, regulators, appeal bodies and consumer welfare

33. There is no doubt that some appeals can be expensive – that is one reason why companies are so careful not to undertake them without careful consideration of the risks.

34. The reference to '*further appeals to the Court of Appeal and/or Supreme Court*' is something of a non-sequiteur; by definition, these appeals are judicial 'review' (that is, appeals on a point of law) and in both courts there are significant hurdles faced by parties seeking leave to bring their case to a higher court. Nothing in the Government's proposals affects these rights of appeal, and so this '*additional year*' should, we think, be excluded from BIS' assessment of the 'problem' (other than, perhaps, as context).

35. What is left is the fact that appeals take, on average, just over nine months. By what yardstick should we decide whether this is a problem? We have not reviewed the international benchmarking evidence in detail (it is out of scope of this review), but we observe that the BIS consultation does, and concludes that the UK is fairly typical in comparison to its European counterparts.[31] Our direct experience supports the view expressed by the CAT that the existing process is often as swift as it can reasonably be in the circumstances of a particular case.[32]

36. We expect that BIS will want to consider its preliminary views in light of the submissions received about the speed and effectiveness of the UK's appeal bodies, which are generally regarded as ranging from good to truly outstanding.

37. Some available and relevant evidence could usefully be added to the IA, including the assessments in relation to the competition regime. For example, the NAO in March 2010 noted that:

> **…** *The length of the appeal process from the lodging of the appeal with the Competition Appeal Tribunal to the Competition Appeal Tribunal's final judgment (including where it has remitted cases back to the Regulator or competition authority for further work and subsequent hearings by the Competition Appeal Tribunal), varies in length. In the majority of appeals (some 60 per cent) the process has taken a year or less to complete. A further 35 per cent took between one and three years. … The remaining two cases took more than three years to conclude, both were appeals against Regulator decisions. These cases are exceptional because they involved matters being remitted back by the Competition Appeal Tribunal to the Regulator for further work or re-investigation during the lifetime of the appeals proceedings. These cases can perhaps be seen as atypical of the appeals process, and have raised complex matters of*

[31] BIS consultation, Annex F.

[32] We also note the CAT's observation that it frequently receives requests for additional time (i.e. to slow down the appeals process) and that these are often justified on the facts of particular cases: CAT submission, paragraph 47.

importance to the industries concerned which have taken a number of years to determine.

38. A number of points bear emphasis here:

- The NAO saw value in excluding the outlier ('*exceptional*') cases from the main conclusion to be drawn, which was that in '*the majority of appeals … the process has taken a year or less to complete*'. As noted below, we think BIS should take a similar approach in the IA.
- The exceptionally long cases involved '*matters being remitted back … for further work or r-investigation*', instead of the current usual outcome in merits review, which is that the appeals body can cure the problems with the decision. As we discuss further in our review, far from being 'exceptional', under the Government's proposals, this cause of delay is likely to be become the norm, not the exception.
- Contrary to the approach taken in the IA, those exceptionally long cases are not seen as a problem in and of themselves, but a necessary (if '*atypical*') feature to enable the system to deal with '*complex matters of importance to the industries concerned*'.

39. The CAT response is unequivocal that there is insufficient evidence to warrant being a problem:

> *The statistics on length of appeals and hearings at Figures 3.3 and 3.4 provide a rather bald and misleading view of the relative duration of judicial review and merits cases (and hearings). The Consultation does not appear fully to engage with the statistics, or to consider the implications of including or excluding certain cases from the analysis. For example:*
>
> *(i) Included within the statistics in Figure 3.3 are a number of CAT cases, such as Cable & Wireless UK & Ors v OFCOM (Carrier Pre-Selection Charges) and Everything Everywhere Limited v OFCOM (Stour Marine) which were lodged, stayed on the parties' request, but ultimately withdrawn by consent. Including such cases within the statistics will misrepresent the average length of case, because these cases are not actively case-managed by the CAT.*
>
> *(ii) Footnote 7 to the Consultation explains that the statistics "count appeals as they are heard by the CAT – where multiple cases are heard together they are counted as one appeal." Although this may be a viable approach for multi-party appeals which had a single hearing, applying this approach to the 25 separate appeals against the OFT's Construction decision, which were not heard together, distorts the statistics. Each of these merits appeals had a separate hearing, lasting between0.5 days and 5 days. Treating these diverse appeals as a single case gives the impression that the CAT took a substantial period of time to consider a single case, when the CAT in fact decided upon all 25 separate appeals in this period, albeit the CAT delivered fewer than 25 substantive judgments as some of the CAT's rulings were "grouped". It also considerably distorts*

the average length of hearing for the period, as 24 merits appeals with an average hearing length of 0.82 days have been excluded from the statistics.

(iii) The Consultation does not appear to consider the impact of including two very large multi-party appeals – namely the eight separate Pay TV appeals and the six separate Tobacco appeals – within the statistics. These were atypical cases which involved hearings of unprecedented length (37 and 29 days respectively), and which skew the data.

(iv) If the exceptional Pay TV and Tobacco appeals are excluded, and the Construction appeals are properly considered as individual cases (given that they were not heard together), ***the distinction in length of hearing between merits appeals and judicial review applications rapidly (taking the same five year period as that set out in the Consultation) vanishes****, at an average of 2.54 days for merits appeals and 2.38 days for judicial review applications. In the CAT's view, this provides a more accurate reflection of a typical case.*[33]

40. We think that, at a minimum, BIS should undertake a proper analysis as to whether there is any relationship discernible between the standard of review and the complexity of cases before concluding that the cost and time taken for appeals is a product of the standard of review and not other independent features of the relevant appeals process.

41. More broadly, our view is that the existing analysis of the cost and time taken for appeals does not reveal a sufficient or robust basis for concluding that there is a problem.

The *standard* of review is so liberal as to invite appeals

42. The IA notes that:

> *… there is a concern that the standard of review in some sectors (particularly communications) gives parties a wide scope to challenge decisions, and significant discretion for the appeal body to re-examine elements of the regulatory decision. The degree to which decisions can be reopened may affect both companies' propensity to appeal and the length of appeals. The more intense the review and the more widely the appeal body is able to challenge a regulator's decision, the more incentive parties are likely to have to bring an appeal.*

43. Whether or not firms are likely to succeed on appeal is not, by itself, a source of public policy concern (except perhaps to the agencies themselves). What matters is the *quality* of regulatory decision-making – that is, whether decisions reached on appeal lead to good or bad outcomes for consumers. We address this question later in this review.

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[33] CAT submission, paragraph 4(2). Emphasis added.

44. Against the 'problem' of appeals that are brought needs to be considered the point that only decisions that fail to withstand scrutiny are overturned. Despite references to '*re-examination*', it is now settled law that review on the merits can incorporate a significant degree of deference to the judgments reached by regulators. As the CAT itself noted:

> *Concerns that an "on the merits" review might lead to excessive second-guessing of regulators ought, by now, to have been laid to rest. Questions of policy or discretion are typically cases where there are several "right" answers. Where there are a number of competing, legitimate views, the CAT will not interfere in a regulator's decision unless it is clearly wrong.*[34]

45. The 'second regulator waiting in the wings' is a phantom danger, easily dismissed by a close consideration of the day-in, day-out experience of the appeal bodies built up over several years.[35] On this point specifically, in response to the previous DCMS consultation, the CAT expressed its view about this point in frank terms:

> *The premise for this change [replacing merits review with JR] would appear to be that indicated in paragraph 29 of the [DCMS] Consultation Document that there is a prevailing view that the present right to an appeal constitutes a full rehearing of the case. Who holds that view and how many they number is not clearly expressed. Certainly they appeared to be silent in the previous consultation exercise (on revisions to the EU Electronic Communications Framework) since an examination of the published responses to that consultation indicates that the majority of those responding held the opposite view - that the right of appeal does not amount to a re-hearing. That is not surprising given that it is the position in law - as clearly indicated by the Tribunal in the case of British Telecommunications Plc v Office of Communications [2010] CAT 17 to which the Department's attention was drawn by myself and other respondees.*
>
> *As part of the rationale for introducing this change paragraph 34 states:*
>
> > *"Under the current appeals system, Ofcom's findings of fact and analysis are routinely interrogated in significant detail. Hearings are lengthy and considerably lengthier than is typically the case for judicial reviews. This is in our view primarily due to the treatment of alleged errors of fact and/or analysis of those facts, and the regular extensive examination and cross examination of factual and expert witnesses in relation to these matters on each and every part of Ofcom's decision."*

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[34] CAT submission, paragraph 14. The CAT go on to cite five individual cases where the CAT's judgments make this point precisely.

[35] This term is taken from the Court of Appeal judgment in *T-Mobile (UK) Limited v Ofcom* [2008] EWCA Civ 1373. Section G also contains detailed analysis of a number of cases in which the appeal bodies exercised care to avoid being drawn into second-guessing or unwinding the lawful exercise of discretion by a regulator.

> *There is no evidence as to the basis for this statement. Ofcom's decisions are detailed and lengthy documents that take a layered approach to dealing with technical matters - with one element of the analysis building on another. Even small details can give rise to huge legal and financial issues. So it is not particularly surprising that appeals centre on points of detail. There is no evidence that hearings before the Tribunal (excluding price control matters whilst they are being heard by the Competition Commission) are longer than are typically the case for judicial reviews.*[36]

46. Properly analysed, this 'problem' rests on a simple question: is it a 'problem' when decisions that would withstand JR are overturned on appeal on the merits? This is an issue at the heart of the proper assessment of the costs and benefits of Option 2 (dealt with further in this report).

The *features* of the appeal process may raise incentives to appeal

47. From the IA:

> *features of the appeals processes in some sectors may act to increase firms' incentive to appeal. Firms can rightly be expected to have a strong incentive to appeal where a regulator's decision has 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.*

48. The first point to make is that the second sentence – that incentives to appeal rest on two concerns, one about the value at stake and the other about the chance of success – suggests that, by itself, the appeals process is actually only one factor amongst several affecting incentives to appeal.

49. These features are particularised in two respects in the IA:

> *there are concerns that:*
>
> - *Some decisions which are overturned are on the basis of new evidence provided at appeal, or through witness evidence which is heard during an appeal, which was therefore not part of the regulator's original evidence.*
> - *Some appeals appear to have limited 'downside risk' for the appellant – there is concern that the appeal might be a one-way bet, with the possibility of a more beneficial outcome if the appeal is successful, but little possibility of a worse outcome if the appeal is lost.*

50. We will now consider each of these two concerns.

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[36] CAT DCMS submission.

New evidence

51. The role played by '*new evidence*' is given significant weight in the BIS consultation and the IA, and therefore requires close scrutiny. It is an evocative image – Machiavellian litigants preparing to overwhelm the appeals bodies with compelling and voluminous evidence that they have husbanded through consultation until the appeals stage, when it can be used to bamboozle the judge, ambush the respondent and foil the plans of the policy-maker. It is invoked to illustrate how dysfunctional and unfair the current system is.

52. In truth, we are not aware of any evidence for this view and BIS consultation notes that the Government has a similar view:

> ***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.*[37]

53. This view is shared by others who are in a position to understand the issue:

> *… there is simply no evidence that material which could have been adduced at the administrative stage is somehow being withheld in order to be deployed on appeal. The CAT's current rules are perfectly adequate to enable it to exclude or limit evidence where the interests of justice so require.*
>
> *If restrictions of the kind set out in the paper are imposed on the CAT then, far from streamlining appeals, which is the ostensible object of this consultation exercise, it will almost certainly lead to additional and/or longer appeals both in the CAT and in the Court of Appeal, as the parties dispute the CAT's admission or exclusion of material by reference to the proposed statutory criteria.* [38]

54. This is without dealing in detail with a number of other general or specific problems with the approach taken by BIS to the issue of '*new evidence*':

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[37] BIS consultation at 3.23. Emphasis added.
[38] Gerald Barling, The 1st David Vaughan CBE, QC/Clifford Chance Annual Lecture on Anti-trust Litigation "Competition litigation: what the next few years may hold", 19 June 2013

- As a number of stakeholders have already pointed out (and the BIS consultation acknowledges) it is often the case that it is only after the full reasoning of a decision is available that the relevance of certain material becomes apparent.[39]
- A reading of the cases where evidence has been considered and allowed suggests that the amount of evidence tendered is generally mostly expert evidence (often, witness statements) and that it gives further support for points that have been made in the consultation phase but require further elucidation.
- In some cases (e.g. Rapture) the reason that the CAT has been lenient towards new evidence is apparent as a desire to avoid having a small and poorly-resourced litigant be disadvantaged by a complex process (although in that case, the patience of the CAT appeared, ultimately, to reach its limit).[40]
- BIS also cite the pay TV case and the volume of evidence in that matter as a specific example of the way that '*new evidence*' that is not available to the regulator can be raised in the conduct of an appeal:

  > *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.*[41]

  Closer examination of the facts suggests that this is an over-reading of events. Much of the evidence was not, in fact, '*new*' in the sense implied by BIS – in large part, it constituted factual evidence already available to Ofcom during the administrative phase (for example, much of it was appended to Ofcom's witness statements). And often, evidence responds to material in the decision where the regulator itself has 'put an issue in play' (for example, in the paragraph cited below, the issue of 'strategic incentives'). The CAT's Ruling on costs in that matter makes both these points specifically:

  > *Given the scale of this case, a just and proportionate result can best be achieved by reference to the issues in the appeal, represented by the separate grounds relied upon. On this basis Sky should have the costs of ground 2 on which it succeeded. In that regard Ofcom has noted in its written submissions in reply that*

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[39] See, for example, [2010] CAT 17 at 104, where the CAT noted that BT's evidence was required to be admitted because Ofcom's approach had changed ('*contrary to its previous statements'*). That finding on admissibility was upheld on appeal (by Ofcom) to the Court of Appeal: Ofcom v BT [2011] EWCA Civ 245.

[40] See *Rapture v Ofcom* [2007] CAT 34 (permitting Rapture to modify its notice of appeal and introduce new evidence) although also the CAT's Ruling refusing permission to appeal to the Court of Appeal, given at [2008] CAT 14). David Stewart exercised delegated statutory authority to resolve the Rapture dispute (i.e. the decision that was the subject of the appeal).

[41] BIS consultation, paragraph 3.22. This text is repeated substantially at paragraph 7.16.

> *the Tribunal found it unnecessary to resolve the difference of expert opinion on the sub-issue relating to the so-called strategic incentives. Nevertheless, we have concluded that the costs of that sub-issue should be included. Although ultimately we did not need to resolve this,* ***the strategic incentives were hares which Ofcom prodded into action and then pursued in the Statement itself: see paragraphs 164 to169 of the Judgment, and in particular the reference there to paragraphs 7.198 to 7.200 of the Statement. In view of the prominence given to the strategic incentives in the Statement, we can see why Sky might well have felt uneasy if it did not deal with them in its appeal****, notwithstanding Ofcom's later assurances (including at, and in the lead-up to, the main hearing) that they were non-essential to its core competition concerns. We should add that we see little if any merit in Ofcom's suggestion that its own findings on the subject-matter of ground 2 were based on less substantial oral and written evidence than that put before the Tribunal.* ***By far the most significant material in relation to the various bilateral negotiations with which we were concerned in examining ground 2 were the contemporaneous correspondence and documents. These were available to Ofcom at the time the Decision was made and were annexed to Dr Unger's witness statement.***[42]

In any event, that evidence could not determine the period taken to resolve that appeal, since as the CAT puts the point:

> *It is important to be clear as to what is meant by "new" evidence. It is true that grounds of appeal will be supported by statements and documents evidencing the specific points being made. However, such material simply involves highlighting and explaining to the CAT the points at issue, and their context. It is "old" evidence in "new" packaging, and to make it subject to an exclusionary regime would be wholly inappropriate and counter-productive. The reference (at paragraphs 3.22 and 7.16 of the Consultation) to the substantial evidence advanced in the Pay TV appeals is inapposite, as the CAT reached its view on the grounds of appeal disputing the factual basis of the "competition problem" in question primarily by reference to the evidence which was before OFCOM at the time it took its decision.*

55. We think that in the absence of evidence, it is not reasonable to rely on this 'feature' as part of the problem statement, and that the IA ought to be improved by removing it.

"Limited downside" risk

56. The question of 'downside risk' does not seem to be closely linked to the question of the standard of review. The core of the downside risk concern is that litigants choose their grounds of appeal, raising only points that they see as advancing their interests, and the regulator has no ability to threaten to re-open the other parts of its decision to offset the risk that the

[42] *BskyB v Ofcom* [2013] CAT 9 at 60. Emphasis added.

appellant will succeed. This is most often raised in the context of price control reviews, where the alternative approach of a full re-hearing has been available in some sectors.

57. A moment's thought reveals that there is unlikely to be any aspect of this 'problem' that is affected by the Government's proposals. Appellants seeking JR select their grounds of appeal with every bit as much precision and care as those seeking merits review today. They will inevitably challenge only those aspects of a decision that they would like to see changed. It is not clear that it would be a good idea, or consistent with basic principles of procedural fairness, to allow aspects of a decision that are presumably correct (and are not contested) to be revisited, as an implicit threat to those seeking to challenge other, more problematic elements that a regulator might have got wrong.

58. This is to be distinguished from the position in some sectors, where there is scope for a matter to be, for example, referred to the CC for consideration. If BIS' concern was truly the narrowness or 'one-way-ness' of appeals, then a wider application of the 'CC reference' model might be a more plausible fit as a possible reform. (That such an approach seems very much out-of-kilter with the general thrust of the Government's approach of wanting to streamline and reduce the time taken for appeals simply underscores, in our view, the incoherence in the IA and the BIS consultation as to the link between the problems identified and the proposed solutions).

59. In communications, specifically, a practical answer to this point is that there are conflicting appeals on many issues, and so there are fewer 'one-way bets' than might be supposed. For example, Ofcom's price control decisions are at least as likely to be challenged by access seekers concerned they are being asked to pay too much, as to be challenged by an access provider. It is not unknown (particular in relation to two-way access services such as mobile call termination) for a decision to be appealed by two sets of appellants, one group looking to increase the regulated price, the other to reduce it. In these scenarios, and given the 'repeated game' of a new price control review every three years, there may be both up-side and down-side risk for all involved. And of course, appellants also face the risk of paying the respondent's costs if they lose. Accordingly, their incentives are unlikely to be skewed in the way that the IA and BIS consultation suggest.

60. We suggest BIS consider dropping this point, given its irrelevance to the Government's proposals.

The risk of appeals makes regulators overly risk-averse

61. From the IA:

> *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. DCMS' consultation also suggests Ofcom*

is spending increasing amounts of time addressing appeals, time that could otherwise be used on potential improvements to consumer welfare.

62. In the summary sheets of the IA, this point is covered as '*causing unnecessary delays*' and '*holding back effective, timely decision-making*'.

63. This seems to us a striking example of a '*problem'* that is dependent for its existence on the perspective of the reader. Better transparency would assist here (for example, to understand the basis on which '*some regulators have strongly argued*' that the appeals regime affects their behaviour).

64. Properly parsed, what is left is the fact that the regulators are obliged to be responsive to the appeals regime. This is not surprising, and not, of itself, a problem. They must take account of it, for example by using the judgments of appeal bodies to improve their processes. They must pay careful attention to the comments made by appeal bodies about their work. They are not able to simply ignore what might happen on appeal.

65. This goes to the wider point about the incentive effects of the appeals regime on regulators. The IA (and the BIS consultation) make a number of references to the incentives on appellants, but relatively little about the incentive effects of the appeals regime on regulators – which is a significant omission, since it is the incentive to improvement that the risk of appeal provides to regulators that provides the wider indirect benefits of having an appeals regime in the first place (as opposed to simply doing justice in individual cases where regulators have got it wrong).

66. Is this need for regulators and competition authorities to be responsive to the appeals regime a good thing (a cautious, prudent approach, drawing on the accumulated wisdom of the appeal bodies and courts) or a bad thing (an unnecessary burden, leading to risk-aversion)? The answer depends in part on the balance between two risks: market failure and regulatory failure. Assuming away either of these risks seems to us an unwise approach for BIS to adopt.

67. We think the IA is deficient to the extent that it fails to take these incentives into account. Assessing the incentive effects on regulators as a way of predicting the effectiveness of public policy structures is a straightforward and reasonable approach to take. Regulators are like any other organisation, subject to the risks and issues arising when they do not face effective constraints on their actions. The NAO, for example, used an analysis of the incentives on regulators facing a choice between competition law and regulatory powers in their Competition Landscape Review.[43]

68. We also consider that BIS should address the false dichotomy between '*addressing appeals*' and '*potential improvements to consumer welfare*'. That ignores the fact that appeals may improve consumer welfare – a subject we discuss in more detail in section G.

[43] NAO Competition Landscape Report – see for example, Figure 3, 'Perceived incentives for and against use of competition enforcement powers by Regulators' at page 15.

Appeals can have a 'knock-on effect' on other decisions

69. From the IA:

> *Appeals can also result in regulators becoming unwilling to devote resources to new decisions until they have clarity on appeals against earlier decisions. Whilst regulatory decisions usually remain binding until the CAT has made its ruling, in many cases regulators must wait for an appeal to conclude before it can take action on other matters that may be related or unrelated to the case (due to the need for legal certainty and a more general need to make effective use of its internal resources). Such delays can also lead to consumer benefits being deferred as was the case in the 2.6Ghz spectrum auction. In this case the series of appeals against Ofcom decisions about the proper way to make spectrum available for 2.6 GHz mobile broadband served to delay the auction. This led to delay in the launch of services and hence to delivering benefits to consumers.*

How significant is the effect of 'entanglement'?

70. We are sceptical that there is evidence to support the very strong statement made in the IA about this dimension of the problem ('***in many cases regulators must wait*** *for an appeal to conclude before it can take action on other matters that may be related or unrelated to the case*'). The BIS consultation, which is more cautious on this point, cites a single example, and only that the case for delay having been imposed is '*arguable*':

> *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) 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. A number of other dispute cases were held up, pending the final resolution of this case.*[44]

71. We think the caution evident in the BIS consultation is better suited to the evidence. Fourteen months to have resolution of an extremely complex matter by an appeal body is not *prima facie* unreasonable, given the amount of money at stake and the consequential impacts on the various stakeholders. Nor, in truth was Ofcom's process delayed in a way that is a typical or normal impact – in fact, such delays are only possible in exceptional circumstances, as Ofcom's announcement on its Competition and Consumer Enforcement Bulletin makes clear – for example, in relation to one such dispute:

> *Ofcom has received a number of representations whether exceptional circumstances exist in this case, due to the apparent overlap with a number of the*

[44] BIS consultation, paragraph 4.7

issues raised in the imminent Partial Private Circuits ("PPC") case in the Competition Appeal Tribunal (case 1146/3/3/09). Ofcom considers that there is a significant overlap between the issues, and that the judgment in the PPC case is likely to have a bearing on the issues to be considered here. ***Ofcom therefore considers that exceptional circumstances exist and that as a result it may not be possible to resolve the disputes within four months.*** *Ofcom nonetheless intends to progress consideration of these disputes as far as possible in the meantime, in order to enable us to resolve these disputes as soon as possible.*

72. Self-evidently, it is not good policy to treat exceptional cases as if they were typical. In other cases (for example, in relation to the recent dispute resolved between Everything Everywhere and BT in relation to the terms of the Standard Interconnection Agreement), any delays have been relatively modest and disputes have been resolved notwithstanding the possible interaction between the dispute and ongoing litigation – in that case, the fact that BT has appealed the Court of Appeal's decision to the Supreme Court. [45]

How relevant is spectrum litigation in the context of merits review?

73. One specific example of delay that is cited in both the IA and the BIS consultation deserves particular attention – that is the question of delay by the threat and reality of litigation in relation to Ofcom's spectrum auction.

74. A number of points are relevant here to the question of whether this is an example that can reasonably be used as a 'problem statement' for the Government's proposals:

- The delays and issues in this case resulted from a dispute as to the jurisdiction to hear the appeal. This jurisdictional issue was specific to the Wireless Telegraphy Act 2006, and regardless of the relevant standard of review, needed to be determined in any event. That issue has now been effectively resolved by this litigation and any consequential delays and issues will not arise in the future, irrespective of the Government's proposals.
- The events leading up to the timing of the spectrum auction were complex, and a simple explanation that 'litigation' was the sole cause of material delay of the auction seems hard to sustain as a reasonable interpretation of the facts. The common assumption of DCMS and BIS seems to be that any and all issues arising in relation to the spectrum auction were a tactical gambit and that the need to address legitimate concerns or material questions of legitimate interest played no part in this picture. This seems an unduly harsh and unreasonable perspective to adopt.
- More significantly, even accepting for the sake of argument that an avoidable delay in the conduct of the auction might have occurred, it does not follow that it means this was a case of '*consumer benefits being deferred as was the case in the 2.6GHz auction.*' In fact, a critical

[45] See the *SIA Dispute Determination* at 2.46 and 2.47 (http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01083/2013August_SIA_Determination.pdf)

limiting factor driving availability of 4G services was not simply the conduct of the auction, but the need to clear spectrum that was previously used for analogue television. In October 2012, Ofcom's press release lauds its performance in bringing forward the availability of spectrum and makes the position clear as to what, by that stage, is the limiting factor driving consumer benefits:

> *Ofcom today welcomed the significant progress that has been made in moving forward the delivery of competitive 4G mobile services across the UK.*
>
> *This progress means that the 4G auction process is on track to begin at the end of the year to enable competitive 4G services across UK during the first half of 2013.*
>
> *Ed Richards, Ofcom Chief Executive, said: "The actions we have taken with industry and government* ***avoids the risk of significant delay*** *and is* ***tremendous news for consumers who might otherwise have waited a considerable period*** *for the next generation of mobile broadband services.*
>
> *"Ofcom's objective has always been to release the spectrum as early as possible and we remain focused on starting the auction by the end of the year."*
>
> *Ofcom plans to start the auction process to release spectrum at the end of the year, with bidding starting early in 2013.*
>
> *Ofcom's consistent objective has been to ensure that the 4G spectrum – at 800 MHz and 2.6 GHz – is made available as soon as possible. Following discussions with TV broadcasters, Digital UK and the transmission company Arqiva, Ofcom has secured the earlier release of frequencies that were previously used for digital-terrestrial broadcasting.*
>
> *This spectrum will now be cleared and ready for 4G mobile services across much of the UK five months earlier than previously planned, from spring 2013.* ***This has only become possible in the past few months as a result of the significant progress that has been made to date with the digital switchover and the clearance programme itself, which has been running ahead of schedule.***
>
> *This means that more UK consumers will be able to benefit from a competitive market for super-fast mobile broadband sooner than previously possible.*
>
> *For example, following intensive technical planning work, the clearance date for TV transmitters in Oxford and Waltham – which would otherwise prevent deployment of 4G mobile services to around 9 million people in cities including London, Birmingham, Coventry, Leicester, Nottingham and Sheffield – will be brought forward by five months to May 2013.*

Similarly, the clearance date for transmitters which impact around 1 million people in and around Glasgow and Edinburgh will be brought forward by more than three months to April 2013.[46]

We emphasise that the '*actions*' being announced were *not* related to the 4G spectrum auction itself; they were entirely in relation to the clearance of spectrum. Ofcom notes that spectrum could only be available '*following intensive technical planning work*' as early as April and May 2013 in various regions.

Ofcom announced the winners of the 4G spectrum auction on 20 February 2013.[47]

- In relation to the role played by the appeal bodies, the CAT itself contradicts the account given by BIS:

It is thus implied [in the BIS consultation] that the CAT was, at least in part, responsible for the delay to OFCOM's planned award of spectrum. This would not be correct, as the cases referred to in the Consultation (cases 1102 and 1103/3/3/08) are in fact examples of the CAT acting with extraordinary expedition to decide an important jurisdictional issue.

The main hearing in these cases took place within one month of the appeals being lodged, and the CAT delivered its judgment within nine working days of the hearing. The CAT thus disposed of both appeals with commendable speed, and a notion that the CAT was in any way responsible for regulatory gridlock or deferred consumer benefits would be entirely misplaced[48]*.*

75. Based on this evidence, it is clear that:

    a. this case is not relevant to these proposals – it did proceed by way of JR, and would not therefore be affected by the changes proposed;, and

    b. in any event, that a closer examination of the facts may not bear the weight that BIS seek to place on them.

76. We therefore suggest removing the example of the 4G spectrum auction from the problem statement.

[46] Ofcom, 'Delivering 4G mobile for consumers', 2 October 2012. http://media.ofcom.org.uk/2012/10/02/delivering-4g-mobile-for-consumers/. Emphasis added.
[47] Ofcom, 'Ofcom announces winners of the 4G mobile auction', 20 February 2013. http://media.ofcom.org.uk/2013/02/20/ofcom-announces-winners-of-the-4g-mobile-auction/
[48] [CAT submission], paragraphs 30 and 31.

Regulatory uncertainty created by appeals reduces economic growth

77. From the IA:

> *Delays in regulatory decision making adversely affect growth through the potential impact on prices and investment in key economic sectors. Consumers can benefit from lower prices (if incumbents aim to drive out competitors) but are likely to incur costs in the form of higher prices and worse service because regulatory decisions can be delayed or held up as a result of a reallocation of resources away from policy and enforcement work. Companies are less able to plan their investments in these key sectors because of the regulatory uncertainty caused by excessively length appeals and reduced speed of regulatory decisions. This is because the future structure of the market remains subject to change until an appeal is decided.*

78. We agree that the assessment of regulatory risk and its effect on investment and growth are an essential element to the assessment of the impact of appeals reform. But is there evidence of a problem currently?

79. The analysis in the IA is cursory, and, more importantly, does not engage with the available evidence about regulatory risk. Regulatory risk cannot be observed directly, but a useful proxy for that risk is the consolidated evidence available from the DCMS consultations. In that proceeding, stakeholders were, on balance, more concerned about the regulatory risk associated with a reduction in the scrutiny of appeals that any risk arising '*because regulatory decisions can be delayed or held up*'.[49] That evidence is, we think, clear, as to where the respondents believed the relevant risk lies.

80. Additionally, the IA appears to contain a selectively-read subset of the concerns about regulatory certainty set out in the BIS consultation. For example, the BIS consultation notes that:

> *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*

[49] We note in passing that we do not agree with the implication by BIS that defending a decision, or improving the quality of a decision to help reduce the risk that it is overturned on appeal is to be distinguished from 'policy or or enforcement work'. They seem to us to be part of the same exercise, which is to produce regulatory or competition law decisions that are most closely adapted to the relevant statutory duties of the agency, normally to serve the interests of consumers.

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.

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.[50]

81. We set out in section G of this review a close reading of decisions taken by appeals bodies that demonstrates little evidence for the proposition that the appeal body '*could act as a second regulator*' – in fact, appeal bodies make efforts to avoid precisely this situation (and we echo the point made by the CAT itself that the quote come from a Court of Appeal decision pointing out that this is exactly what should not occur).[51] The point here is the problem statement in the IA appears to choose the argument 'on the one hand' and to ignore the argument 'on the other hand', circumventing the balancing act described in the BIS consultation.

82. This is evidence in the first instance of a shortcoming in that part of the IA. A simple fix would be to drop this problem from the IA (since it is not really evidence of a 'problem' at all, but a balance between different impacts on regulatory certainty).

83. This reading also provides a signal of the wider theme of possible confirmation bias that runs through a number of the parts of the IA, where impacts that tend to make the case for change are accentuated, and impacts that undermine the case for change are downplayed, ignored or unquantified. We think that these problems mean that the IA may not present a balanced and accurate picture reflecting all the available evidence concerning the impact of the proposals, and as a result it seems to us unlikely that the IA as published, without significant modification, could be adequate or reasonable basis for action.

The 'problem' in relation to the electronic communications regime as identified in the DCMS consultation

84. The DCMS consultation framed the issue as one of gold-plating:

The Government is of the view that when the original 2002 Framework was implemented in 2003, it over implemented Article 4(1) of the Framework Directive introducing an unnecessarily high standard of appeal on the merits into section 192 of the Communications Act 2003. We think it is right that we now move to correct that previous gold-plating. That intention was made clear in the

[50] BIS consultation, paragraphs 3.17 and 3.18. Emphasis added.
[51] CAT submission, paragraph 18.

Government response to the Framework implementation published in April this year.

… the current standard of review leads to unnecessary lengthy and expensive appeals of the regulator's decisions. These delays in the implementation of remedies and decisions are bad for market certainty and ultimately bad for consumers.

The proposed change is not intended to reduce the number of appeals or reduce access to justice. Rather it is to introduce greater efficiency in the system and help ensure that only appeals that are material are considered.

The current transposition has been interpreted by some appellants as requiring a full rehearing of the case. Some contend that the UK transposition intentionally goes beyond the requirements of Article 4(1) and provides for a very high standard of appeal. In practice too, appeals before the CAT are considered by many to have become a full rehearing, with full consideration and interrogation of Ofcom's evidence, analysis and decision. This results in a lengthy appeals process, in which decisions lag behind the pace of technological change and market development.

85. This argument is no longer so central to BIS' analysis (the IA acknowledges that it may '*arguably*' be the case there is gold-plating), although it is not clear that all parts of Government share BIS' caution:

Whilst the right to appeal must remain, the Government is concerned that the length of the appeal process and ***the intensity of scrutiny is excessive****, reducing the effectiveness of the process and hampering Ofcom's ability to make timely decisions. This issue is particularly acute in the telecoms sector where EU requirements for the merits of a case to be* duly taken into account *have been over-implemented in UK legislation. This has been exacerbated by the extremely competitive nature of the sector, in which companies have a strong commercial incentive to appeal if an alternative analysis of facts can result in a more favourable outcome for them.*

[…]

Whilst judicial review is sufficiently flexible to accommodate requirements of EU law, the specified grounds approach overtly binds an appeal to the issue of materiality and ***removes the ability for companies to appeal simply because they disagree with a decision by Ofcom****. In light of this a specified grounds approach may be more effective in achieving faster, less costly and more focused*

appeals. The consultation also invites views on proposals to reduce the incentives of making unmeritorious appeals.[52]

86. It appears to us that the concern about gold-plating risks being something of a proxy for an underlying more substantive debate about whether regulators should be subject to very much by way of review on appeal at all – for example, in the Government's concerns about '*excessive'* scrutiny and the recurring tropes of '*unmeritorious'* appeals or those brought '*simply because they disagree with a decision by Ofcom*'.[53]

87. The question that is most relevant to BIS' assessment, we think, is not whether there is gold-plating *per se* (since even if there is, it is now surely a matter of historical significance only) but whether the case for a change from the status quo would be a good or a bad thing for consumers. If the interests of consumers are served by the existing arrangements (or would be harmed by the Government's proposal) then the fact that there is (in BIS' terms) '*arguably'* a degree of gold-plating is not something that should cause much concern. If there is a case for change one way or the other, the question of whether this produces a higher or lower degree of gold-plating is, we think, a second-order issue at best.

88. Therefore, we think it is helpful that the BIS consultation and IA have reduced the focus on '*gold-plating'* as being relevant to take account in weighing the case for change. It might be helpful to be more explicit about the situation and make it clear that the question of whether there is gold-plating is not relevant to the question of whether to change, only whether the UK may do so without triggering further issues under European law. (In that respect, we agree with the CAT's view that '*any derogation from the current standard of review*' is likely to face legal challenge, and so the costs of either a move to JR or focused specified grounds need to take account of that impact. This is discussed further in the relevant part of the IA review dealing with those transitional costs).

The problem as raised in the BIS stakeholder sessions

'Lots of appeals'

89. In some of the stakeholder sessions, we observed a common colloquial framing of the problem that ran through many of the discussions about the nature of the '*problem*'. It was not the nature of the appeals, or the specifics of them, but simply that there were *too many appeals*.

90. This is echoed in the Government's holding letter to respondents in the DCMS consultation, which notes the Minister's views in these terms:

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[52] DCMS Strategy Paper, Connectivity, Content and Consumers: Britain's digital platform for growth, July 2013, at page 45. Emphasis added.

[53] We deal elsewhere with the judicial evidence as to the falsity of the proposition that merits review enables an appeal to be brought '*simply because they disagree with*' a regulator's decision. Here we are concerned primarily with narrower observation about the way in which the choice of language reveals a propensity on the part of Government to think about the problem in terms of removing unwelcome constraints from regulators, rather than the question of what arrangements best serve the interests of consumers.

> *I remain concerned about the number and length of appeals against Ofcom's decisions and the impact this has on Ofcom's ability to regulate effectively in the best interests of consumers. … I am not yet convinced that changing the standard of appeal (to 'Judicial Review with merits') will, on its own, achieve the desired aims of faster decision-making at Ofcom and a reduction in the time and cost spent on appeals.*

91. If only there weren't so many appeals, this reasoning runs, Ofcom (and the other regulators and competition authorities, in the BIS extrapolation from DCMS' focus on communications) would simply be able to do more, and more quickly – and this would lead to better outcomes for consumers.

92. The problem with this reasoning is that it presupposes – or assumes away – the problem that the appeals process is designed to address: that regulators sometimes get things wrong, and that consumers can suffer as a result. This is the true 'problem' that the appeals process exists to address.

93. We suggest that BIS deal head on with this issue in the IA. If they do not, they leave open the inference that the proposals had in fact been crafted not to address the specific problems identified in a bottom-up way, but simply seek the most convenient method available to make it harder to challenge regulators' decisions.[54] If this were even in part guiding BIS' policy thinking, then that is a material error, and one that needs, at a minimum, to be counterbalanced by a consideration of the evidence about how merits review furthers the interests of consumers. Otherwise there is a risk the policy process descends into a simple struggle for supremacy between institutional members of the competition 'pantheon' rather than, as it ought to be, an evidence-based deliberation seeking the best outcome for consumers.

Analysis: Does the IA identify a problem?

94. The Green Book explicitly sets the bar for intervention with precision:

> *The first step is to carry out an overview to ensure that two pre-requisites are met: firstly, that there is **a clearly identified need**; and secondly, that any proposed intervention is likely to be worth the cost. This overview must include an*

[54] It is outside the scope of the IA to explore this issue further, but if 'too many appeals' really were the nub of the problem, then it seems to us that the Government's proposals cannot stand, particularly in the face of the numerous public statements that reducing the number of appeals was not the Government's objective. If these denials were no longer felt to be properly made, it would be (in our view) the only credible path for the Government to withdraw its proposals and re-consider, re-group and then re-consult on fresh proposals designed explicitly to *reduce* access to justice and hence the number of appeals. Of course, we expect such proposals would face fierce, well-merited resistance.

analysis of the negative consequences of intervention, as well as the results of not intervening, both of which must be outweighed to justify action.[55]

95. With that standard in mind, we summarize our views on the 'problem statement' in the IA in the following table:

Problem	**Concerns or issues**
'Wide variation between sectors' in proportion of decisions that are appealed	• Weak logic (Why should be observed similarity between sectors in proportion of decisions appealed?) • Lack of evidence
The cost and time taken for appeals	• Weak logic (Over-inclusion of time not attributable to merits review (e.g. Court of Appeal, preliminary issues on points of law)) • Problems in evidence (Over-reliance on outlier cases such as Pay TV and Tobacco) • Evidence presented suggests that, rather than being slow and/or expensive, the UK performs well on international comparison • Evidence (e.g. from the CAT) that JR and merits review have no significant difference in length of hearings
The features of the appeal process may raise incentives to appeal	• 'New evidence' point: Based on an error of fact (contrary to IA, there is widespread consensus it does not occur). Weak logic (Fails to recognise the need to retain appeal body discretion to do justice in each case) • 'Limited downside risk' point: Weak evidence (does not deal with complex reality of mullti-party appeals). Weak logic (the issue is unaffected by the Government's proposals)
The risk of appeals makes regulators overly risk-averse	• Analysis of language suggests an unbalanced perspective • Weak logic (problem is simply restated as 'regulators must take account of appeal decisions', it doesn't suggest it is a problem) • Based on false dichotomy between dealing with appeals and improving outcomes for consumers. Regulators improve outcomes when they take account of appeal risk, by reducing future costs and improving quality of decisions
'Knock-on' effects	• Weak evidence (IA overstates the factual case (compared with the consultation); lack of evidence that it is a significant issue) • Based on errors of fact in relation to spectrum litigation, coupled with the fact that spectrum issues are not logically linked to the Government's proposals
Regulatory uncertainty created by appeals reduces economic growth	• Weak logic (regulatory uncertainty is as likely to be created by reduced scrutiny as the time taken in appeals) • Failure to engage with available evidence on regulatory risk

[55] *THE GREEN BOOK: Appraisal and Evaluation in Central Government*, Treasury, July 2011 ('Green Book'), paragraph 2.6.

Gold-plating (DCMS)	• Weak logic (irrelevant to the case for change from the status quo)
'Lots of appeals'	• Illegitimate basis for action • Contrary to most statements that the Government is not trying to reduce the number of appeals *per se* • Reducing access to justice is contrary to the Government's objectives

96. Does the IA reveal a '*clearly identified need*' for action? Put another way: '*what, exactly, is wrong*'? For the reasons set out above, our view is that the IA's identification of the '*problem'*, properly amended to take account of the available evidence and removing tendentious elements, is far from convincing. Our analysis reveals a statement that is, at best, ambiguous and that lacks transparency. Even accepting some of the elements of the IA problem statement at face value, there are also significant gaps between that analysis and the nature of the Government's proposals, which seem to solve an entirely different 'problem'.

97. On one view, this could be the end of our review: an IA that does not reveal a real problem is, by definition, incapable of being a basis for action. Nevertheless, we have continued our analysis in the following sections taking at face value the problem statements made by BIS and assessing the proposed actions in that light.

D. Step 2: Specify desired objectives

1. The IA Toolkit specifies that in Step 2, it is necessary to be clear about the policy objective or objectives being pursued by the policy-maker.

The policy objectives as identified in the Impact Assessment

2. We have not reviewed the Government's objectives. We offer some comments on how they might be focused or made clearer, in light of the comments in the IA and BIS consultation.

'Support independent, robust decision-making, minimising uncertainty'

3. It might be useful to also specify 'high-quality' decision-making. By 'high-quality' we mean, specifically, that a regulatory decision that furthers, or operates in, the interests of consumers (including by protecting or - in sector regimes where this is provided for - by promoting, competition). A decision that is amended so as to better or more effectively further the interests of consumers has been improved.

4. It would also be helpful to include some reference to the evidence-based nature of decision-making. As the CAT notes in its response, a decision can be 'robust, but wrong'.

'Provide proportionate regulatory accountability'

5. Proportionality implies a choice between different options for securing the same outcome. For the reasons discussed in this review, we think that the better view is that merits review and a reduced degree of scrutiny under JR/focused specified grounds are not substitutable methods of achieving the same outcome: they are different approaches to the degree of review applicable to decisions. Properly analysed, therefore, the choice between them is not a question of which one is the proportionate option. Opting for greater or lesser scrutiny on appeal is a policy decision, and not simply a technocratic or administrative choice with a single 'proportionate' option. Reduced scrutiny will bring risks and costs that should be weighed up accurately in the IA.

'Minimise the end-to-end length and cost of regulatory decision-making, including the appeals stage'

6. We particularly stress the need to include all the elements of 'end-to-end' decision-making, including the appeals stage and subsequent re-hearing or re-consideration of matters on remittal.

7. To the extent that there are trade-offs between quality and efficiency in regulatory and competition appeals, we think that the evidence (in this review, and more widely) demonstrates that quality is far more significant in its impact on consumers than efficiency. Once the effects are properly quantified, even small variations in quality are likely overcome even very large variations in the speed of regulatory decision-making. This is particularly true where the final decision taken on appeal might not delay a decision taking effect immediately, so that the lion's share of consumer benefit can be achieved quickly, with adjustments on appeal fine-tuning and fixing errors, as well as providing guidance to future decision-making.

'Ensure access to justice to all firms and affected parties'

8. We think there would be value in BIS considering the view of the CAT about how this objective fits with their policy proposals:

> *The **fourth objective** is to "ensure access to justice" for small, as well as large, firms. This is something to be supported wholeheartedly, but unfortunately there is very little in the Consultation itself that deals with it. The proposals for "fast tracking" cases (already available in practice in the CAT) are likely to be outweighed by the proposal to create an imbalance in favour of the regulator in costs awards, which could be a considerable disincentive to appeals by smaller firms. And it is hard to see, as a matter of principle, how lowering the standard of review can increase access to justice.*[56]

'Provide consistency, as far as possible, between appeal routes in different sectors'

9. Consistency between sector regimes may be desirable but it should be, in our view, subordinate to efficiency, predictability and fitness-for-purpose, and the consistency of regulatory regimes within each sector. Given the high fixed costs associated with changes to procedures, rules and the standard of review (as each new rule is tested in court), we think that a high degree of caution about change purely to secure consistency seems reasonable.

Analysis: Does the IA identify clear policy objectives?

10. We consider that the IA does identify clear policy objectives, as required in the Framework Manual, and the IA Toolkit.

11. Some of those objectives are logically linked to the 'problem', some are not. We anticipate that BIS (and the Government generally) will want to use the next stage of the IA development process to lay out these links more clearly and use that exercise to narrow the focus of their proposals to those that are truly well-suited to advancing the Government's objectives.

[56] CAT submission, paragraph 8.

E. Step 3: Identify viable options that will achieve the objectives

The creation of options set out in the IA

'Option 1: Do nothing'

1. As required in the IA Toolkit, the IA identifies the maintaining the status quo as an option.

2. We note that, unlike the default position where the status quo might have no particular claim to be a strong or weak option, the assessment of Option 1 should have regard to the recent reviews of both the various sector regimes and the general competition landscape which have endorsed aspects of the appeals process generally or in particular sectors. This evidence suggests that there are benefits to the status quo (including the fact that considerable time and effort has been expended by regulators, regulated firms and appeal bodies to establish the basic working principles of the existing regimes) and the loss of these benefits needs to be properly reflected in the IA.

'Option 2 - Reduce the standard of review for some appeals'

3. Option 2 is described in paragraphs 37 and 38 of the IA. The IA notes:

> *Under this option, some appeals would be heard on a revised standard of review which could involve more defined grounds of appeal. The standard of review determines the scope of the review and the way that the appeal body will conduct its investigation. In broad terms, they can be considered as determining the 'intensity' of scrutiny applied by the appeal body to the regulator's decision.*

4. Adopting this reduced standard of review involves two changes. First, it applies a different standard (that is, instead of asking, 'is the decision wrong?', on JR the question asked is 'is the decision outside the lawful range of decisions that might be made?').[57] Second, as the IA and the BIS consultation observe to a number of times, this change also implies a lower level of scrutiny of the decision; for example, less evidence is required to consider the JR question, and it requires a less far-reaching examination of the regulator's reasoning and approach.

5. Although we have not explored the issue further (which is focused on the IA), a number of the points covered in this review are also relevant in understanding some of the problems with the logic underpinning the creation of the policy proposal. For example, the Government posits the choice in Option 2 as being:

> *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.*

[57] See, for example, *Hutchison v Ofcom* [2008] CAT 11 at 164.

6. As noted in section G (and consistent with the evidence provided by the CAT), there is ample judicial evidence that the idea of that in engaging in merits review, there is a '*second body … reach[ing] its own regulatory judgment*' is a false construct and one that no reasonable person, properly advised, would consider a fair or evidence-based view of the status quo.

7. For the most part in this review, we have not explored in detail the distinction between JR or 'focused specified grounds'. For the purposes of this exercise, there is little distinction between them, since:

   - The most significant features of each in terms of their impact are identical. Both appear to achieve the Government's stated proposed 'reduced' scrutiny of regulator's decisions, meaning that in terms of their harm to the quality of regulatory decision-making (which, as discussed later in this review, we think is the most significant impact of the Government's proposals, albeit one that is not covered in the IA), the two approaches are indistinguishable.
   - In terms of the likelihood of legal challenge, the costs of transition and so on, there is little to distinguish the two, since both are likely to be involve a considerable time and effort to re-establish regulatory certainty in the wake of any change.
   - The BIS consultation makes it clear that, on the Government's own logic, it sees the two as, in effect, two paths to the same outcome, which is a reduced level of scrutiny of regulators' decisions.

   Accordingly, a more detailed analysis of the distinction between these two forms of reduced scrutiny is not necessary, within the scope of this review.

'Option 3 - Streamline the Regulatory Appeals Process'

8. Option 3 is described in paragraphs 50 to 54 of the IA. Unlike Option 2, these are a set of distinct initiatives that may be linked or that could be pursued in some cases individually:

> *In our review of the appeals process, several issues have been indentified [sic] that could reduce the cost and length of appeals. These measures are not mutually exclusive and the final measures will depend on the consultation.*
>
> *This option can be split into two broad sub options –*
>
> - *Option 3a: Reforms to the appeals processes and governance*
> - *Option 3b: Ensuring that resources and expertise of appeal bodies is used in the most appropriate and cost-effective way.*
>
> *These are considered together because their impacts, in terms of reduced time and cost of appeals, are similar.*
>
> *The measures in option 3a potentially include:*
>
> - *Making it easier for appeal bodies and/or regulators to strike out unmeritorious appeals;*

- *Making clearer rules on the admissibility of new evidence in an appeal, and awarding costs against new evidence which could have been brought earlier;*
- *Increased 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 in 'bad faith';*
- *Introducing (and where they exist reducing) target case time limits.*

The evidence at this stage suggests that these measures would streamline the system by:

- *Improving regulators' original decision making process;*
- *Focusing more on identifying material errors;*
- *Making it more accessible to all affected parties;*
- *Aligning incentives in the system with Government's objectives;*
- *Making the appeals processes as efficient and cost effective as possible.*

The measures in option 3b potentially include:

- *Communications price control appeals to go straight to the CC;*
- *All ex ante regulation cases go to the CAT;*
- *All ex post enforcement cases go to the High Court or CAT;*
- *Ofcom dispute cases go to the High Court;*
- *Energy reviews and codes go to the CAT.*

'Option 4: Option 2 and 3 together'

9. Option 4 consists of combining Options 2 and 3 and is the Government's preferred option.
10. We discuss the issues relevant to Options 2 and 3 specifically, since there are relatively few dependencies between Options 2 and 3 – meaning that it is an aggregation of what is, in reality, at least two different choices.
11. We have also included some points about the plausibility of building a picture of the combined 'benefits' (to the extent that there are any) by simply adding the two Options' impact assessments together. In summary, it seems unlikely that it will be reasonable to simply compound two sets of costs savings.

Options that are not included

12. We have not considered in detail what alternative options might be considered. The IA might benefit from 'unbundling' the different components of Option 3 to enable the different sub-options to be weighed up in a more transparent way.

Analysis: Does the IA identify viable options that will achieve the objectives?

13. The IA suffers because the link between the options identified and the problem identified is relatively weak, and could usefully be strengthened in the next iteration of the IA. Specific problems include that:

    - Evidence cited as part of the problem is, in some cases, not relevant to the conclusion being reached;
    - Evidence provided does not seem sufficient or proportionate to the level of concern being expressed (although this issue is, to an extent, capable of being resolved by a proper assessment of the impacts); and
    - To the extent there is any identified problem, the Options don't seem closely tailored to the address that problem.

14. The IA should be improved to address these concerns. For example:

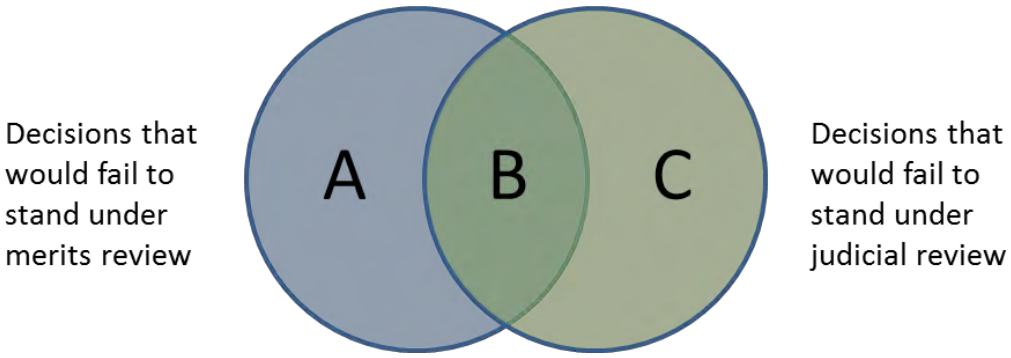
    - It would be helpful to narrow down the problems to exclude irrelevant or erroneous assertions, and then to revisit Option 2 to establish whether this is truly a problem that is matched against the question of the standard of review.
    - It would be useful to narrow the focus of Option 3, splitting out the various proposals to enable their impact to be assessed individually, rather than aggregated as currently.

F. Step 4: Identify the impacts

1. In Step 4, it is necessary to identify the impacts of the proposals. These will then be assessed in Step 5.

Option 2 (Standard of review)

2. To identify the impacts of the proposals under Option 2, it is helpful to consider three categories of case, as set out in the Venn diagram below.



3. Category A comprises those decisions that are wrong on the merits, but are within the range of lawful decisions that could be taken. Today, when these decisions are appealed, that appeal is allowed, and the appeal body normally replaces the deficient decision with its own decision– essentially, to correct the errors revealed on a review on the merits. In some cases, they may be remitted back (e.g. where there is insufficient evidence before the appeal body to support a decision). Under the Government's proposals, these decisions would stand.

4. Category B cases are those which are also wrong on the merits, but that also fall outside the range of lawful decisions. Today these decisions may either be corrected on the merits (or remitted back with guidance). Under the Government's proposals, these cases will:

   - In some cases (Category B1), still be overturned but will be remitted, since they cannot be corrected (since the tribunal will have evidence about legality, but not be able to establish whether or not the decision is wrong on the merits); or
   - In other cases (Category B2), not be overturned as points that would have led to JR-type errors being identified are missed because of the lesser degree of scrutiny applicable since merits review is no longer undertaken.

5. Category C cases are cases that will be overturned on JR but that would be upheld on review on the merits (that is, they are correct). These decisions are not wrong (if they were, they would be in Category B) but they are otherwise unlawful (for example, there might be a procedural irregularity). Today, these decisions are capable of being 'fixed' during an appeal, where there

is sufficient evidence to allow the appeal body to discern a clearly 'right' decision. Under the Government's proposals, these decisions will be sent back to be re-considered.

6. Today, cases in A, B and C are all corrected on appeal, with the appeal body able to substitute a new decision for the decision of the regulator where it has sufficient evidence before it to do so.[58] Under the Government's proposals, only B and C cases would fall on appeal, and the remedy would generally be limited to remittal back for a new hearing or consultation.

7. Mapping out the cases in this way assists in identifying the impacts that might be included in the IA in Step 4. These will vary as between these categories of cases, as shown in the table below:

Category	**Today**	**Under proposal**	**Impacts in the IA**	**Other impacts (not yet included)**
A – cases that are incorrect, but lawful	Corrected on appeal	Allowed to stand	'May be a cost' to regulated companies	Harm to consumers Regulatory risk (growth)
B1 – cases that are incorrect and unlawful	Corrected on appeal	Remitted back	Timing impact (faster to reach JR decision)	Timing impact (effect of additional work following remittal)
B2 – cases where the absence of merits review may adversely affect the efficacy of JR	Corrected on appeal	Allowed to stand		
C – cases that are unlawful but may not be incorrect	Remitted back or allowed to stand	Remitted back	Timing impact (faster to reach JR decision)	Timing impact (effect of additional work following remittal and loss of ability to 'cure' procedural defects through merits review)

8. This analysis provides a yardstick to measure the adequacy of the IA's identification of impacts (Step 4). Our assessment is that, in respect of this analysis, the IA as published for consultation has at least two material errors:

   - It does not identify or quantify the impact of allowing 'incorrect but lawful' (Category A) decisions to stand, except as a '*cost to regulated companies who wish to challenge regulators' decisions*'**. This misses the impact on consumers of poor regulatory decision-making, and on regulated firms of greater regulatory certainty, as well as on the wider economy, of allowing decisions that lead to poor outcomes to go uncorrected**.
   - Its assessment of the timing impact of the proposals is incomplete: it deals with the faster appeals as a result of JR being quicker than merits review but **it does not identify the impact**

[58] More precisely, the decision is remitted back following review on the merits with sufficiently precise orders that the regulator is able to make an effectively immediate decision consistent with the appeal body's findings. In the case of Ofcom, for example, this routinely occurs one or two working days after the CAT ruling. To avoid confusion, we refer to this as being the appeal body taking the decision or correcting the decision on appeal (which reflects the substantive outcome), and use the term 'remittal' to describe a situation where a decision is quashed and remitted back for substantive reconsideration by the regulator or competition authority.

of longer time to reach a further regulatory decision following remittal of a decision back to the regulator.

Option 2 in the IA: Are the included costs and benefits consistent with the IA Toolkit?

9. The following sections discuss first the impacts (that is, the costs and the benefits) that are identified for Option 2. We then consider whether there are any costs or benefits that are missing that ought be added in order to bring the IA into line with the requirements of the IA Toolkit.

10. Reflecting the IA Toolkit, in Step 4 we do not quantify or assess these costs or benefits (that is Step 5) but simply identify them.

Included cost: Regulated firms face reduced scope to consider merits of decisions

11. The IA identifies as a cost that '*reducing the extent to which appeal bodies can reconsider the merits of a decision may be viewed as a cost by firms who wish to challenge regulatory decisions*'.

12. It seems reasonable to us that the impact of '*reduced scope*' for reconsideration of decisions will be felt by firms affected by those decisions. However, on close reading, the IA appears to have a somewhat skewed framing of the likely nature of that impact. The use of passive voice serves here as a de-legitimising device (the effect '*may be viewed*' as a cost by the firms, but the author declines to acknowledge them as such) along with the positioning of the impact as the frustration of a mere '*wish'*, rather than a harmful impact to be taken into account. By implication, the reader is invited to form a negative attitude to '*firms who wish to challenge regulatory decisions*'.

13. This slant seems unwarranted, and may impair a more dispassionate assessment of the policy proposals. Rather than being a direct or indirect '*cost*' imposed on these firms, this impact is more properly considered as an increase in regulatory *risk*. Far from being illegitimate, or of narrow concern only to the regulated firm, this seems to us to be a very significant impact of the policy.

14. We agree with the general proposition that the costs should include the impact on regulated firms of a reduction in the standard of review. It would be more accurately cast as:

> *"Reducing the extent to which appeal bodies can reconsider the merits of a decision will increase the regulatory risk faced by firms affected by regulatory decisions"*

15. The effect of this regulatory risk on *other* stakeholders – in particular, on consumers and the wider economy – is not yet included in the IA. To make the IA more robust and adhere more closely to the IA Toolkit, these impacts should be included (see below).

Included cost: Regulated firms face transitional costs of implementation

16. The IA identifies as a cost that '*there may also be a transition cost to firms of understanding the new regime*' (then adding '*although we do not consider that these costs are likely to be high*').

17. These costs include the internal working costs of developing an understanding of the new rules, obtaining advice on the likely implications and building new business processes or governance to deal with the new regime.

18. We agree with BIS that this cost should be included in the IA. The question of whether these costs are 'likely to be high' is dealt with in Step 5 below. To foreshadow that discussion, we think dismissal of those costs by BIS is unrealistic, and inconsistent with the Framework Manual and IA Toolkit.

Included cost: All players face an increase in number of appeals to test a new rule

19. The IA identifies as a cost that '*there is a risk that changing the standard of review could prompt a short-term increase in the number of appeals as firms test the new jurisdiction*'.

20. We agree with BIS that the costs of these additional appeals and follow-on litigation should be included in the IA.[59] This covers the direct costs arising from cases that would otherwise be unnecessary or avoidable, including the incremental impact of making appeals that would occur more complex or longer, including possible additional consideration by higher courts in UK jurisdictions and in Europe.

21. The question of the scale of the impact is dealt with in Step 5.

Included benefit: All players benefit from shorter appeals

22. The IA identifies as a benefit '*shorter appeals, as a result of reducing the intensity of review*'.

23. We agree with BIS that this should be identified as a benefit of the policy proposals – if it is reasonable to conclude that it would occur.

24. The question of the scale of that benefit is dealt with in Step 5.

25. We think that this impact needs to be considered alongside the other impacts affecting timing to produce an overall view on the likely net impact of the proposals on timing (see below). For example, it is not appropriate to identify shorter hearings but to ignore the likely impact of remittals. It is also not appropriate to ignore the timing impact of regulatory and legal uncertainty arising from a change, the risk of satellite litigation and a range of outcomes from merely incurring significant costs through to the possibility of regulatory gridlock across a number of sectors. This includes the question of whether any shift from the existing standard of review might be at risk of being incompatible with the requirements of European law (e.g. in

[59] These costs are also, in a sense, 'transitional', and so could also be treated as part of the transitional costs listed above (e.g. compliance costs). As long as account is taken of it, and any double-counting is avoided, we don't see any problem with either splitting it out or grouping it with other transitional costs. We have followed the approach taken in the IA and treated them separately.

relation to the requirements of the communications regime or competition law). These are discussed further below.

Included benefit: Consumers benefit from earlier regulatory decisions

26. The IA identifies as a benefit '*Consumers are estimated to benefit … from receiving the benefits of regulation, through lower prices, sooner as a result of quicker appeals.*'

27. We think there is a strong case that BIS should not include this benefit, as it is based on a false premise: that the time taken to have a regulator's decision take effect is extended by the time taken to hear an appeal. This is not generally the case. Most regulatory decisions that are appealed take effect immediately, and [a number of sector regimes including communications] have explicit statutory provisions to that effect.[60] As a result, although shorter or longer appeals will confer benefits or costs on the litigants themselves (which should be reflected in the IA), consumers get the benefit of the original regulatory decision without delay, regardless of the length (or nature) of the appeal.

28. The approach taken in the IA also rests on an implicit assumption that regulation is driving prices down – that is, that regulated costs are always falling, never rising. This view reflects, perhaps, the history of this issue in the context of the communications sector, where some significant costs (for example, technology-driven costs of network equipment) have been falling over long periods, as a result of Moore's Law. In other sectors, this assumption does not hold – for example, in sectors such as water and energy, there are a variety of systemic factors that mean that some significant costs are rising, not falling – and price controls are often imposed at the retail, not wholesale level. This means that in the other regulated sectors, appeals arising are often retail regulated suppliers seeking to increase, not decrease, a regulated price.[61] The IA should reflect a better understanding of true position across the regulated sectors as a whole in relation to the price controls covered by the Government's proposals.

29. Therefore, BIS should consider the evidence it has compiled on regulatory appeals and ask itself: in what proportion of cases was the original decision not implemented pending the outcome of an appeal? If the answer is only a handful (or none), then there is no reasonable basis for including this consumer benefit as an impact (or, alternatively, it needs to be discounted accordingly).

30. If the BIS view is that there are significant numbers of cases where a regulatory decision is held up pending the outcome of an appeal, then it should consider a further question arising: what is

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[60] For example, Rule 61 of the Competition Appeal Tribunal Rules 2003 ('CAT Rules') provides for the CAT to make orders for interim arrangements but in these powers have never been used in relation to the electronic communications regime (i.e. outside of s.316). Also, A4(1) FD states that decisions shall stand absent interim relief.

[61] See, for example, the CC's consideration of Bristol Water's appeal against Ofwat's price controls (for a quick précis, see for example the CC's press release on 4 August 2010 at http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/bristol/pdf/27_10_bristol_water_final_determination.pdf).

the net effect on timing of the proposals? The question of whether consumers benefit from a faster decision or face additional costs of delay as a result of replacing merits review with JR depends on the balance between whether the proposals deliver:

- Faster decisions (for example, reaching an answer on JR quicker than merits review); and
- Slower decisions (for example, the additional time taken to consider a question on remittal to a regulator rather than having the appeals body determine the outcome)

31. (The question of how to quantify this impact is dealt with in Step 5, but, in summary, our instinct is that these two timing effects are likely to cancel each other out, resulting in little, if any, net effect).

32. Finally, if it is considered that there is a net impact on timing, the question arises whether that is likely to mean higher or lower prices for consumers, taking the sectors affected by the Government's proposals as a whole.

33. Therefore, if it is relevant to consider this impact, it may not be appropriate to assess it as a benefit or a cost until after a view is taken on the overall net impact of the proposals on timing.

Included benefit: Improving the regulatory environment

34. The IA notes that '*Faster appeals and more efficient economic regulation, as a result of fewer resources, including management time, spent on appeals, would improve the regulatory environment in the UK. This would benefit consumers and investors and have a positive impact on economic growth.*'

35. We are sceptical that this is an impact that is independent of other effects already discussed:

- '*faster appeals*' are already accounted for in the impacts dealing with timing.
- '*more efficient economic regulation*' means, we think, faster decisions that are prepared without the need to worry about the regulator's rationale facing the scrutiny of merits review. This is already accounted for in the impacts dealing with the effect of lower scrutiny.

36. If there is a desire to model the impact on economic growth, that needs to be the net effect of different effects on growth (most notably, the regulatory uncertainty effect associated with removing merits review). Without pre-empting Step 5, the initial evidence (for example, the evidence gathered in the DCMS consultation) suggests that risks of uncertainty are much more credible than the prospect of a 'dividend' resulting from a lesser degree of scrutiny of regulator's decisions.

37. On balance, this benefit appears to us more akin to a re-statement or double-counting of impacts that are already identified elsewhere.

38. We would not include this as an identified impact, unless it could be further particularised.

Adding in the missing costs and benefits to Option 2

Cost to include: Impact on consumers of poor decisions standing under reduced scrutiny

39. The IA should identify as a cost to consumers the impact of having decisions remain uncorrected that currently would be amended on appeal under merits review (i.e. 'Category A' and 'Category B2' cases). In section G, we discuss six specific cases and the reasons why we think that those cases would have been differently decided under the Government's proposed approach. As noted in that section, the quantifiable impact of some individual decisions can exceed £100m or more.

40. The IA summary sheet does not current acknowledge any impact on consumers as a result of a shift to a different standard of review. The explanatory text does note that:

> *We are clear that the new appeals standard should still allow for decisions to be appealed and for the factual and legal basis of the regulators' decisions to be scrutinised effectively.* ***However, there may be a risk that reducing the level of scrutiny that regulatory decisions are subject to may increase the likelihood of an incorrect regulatory decision not being overturned by an appeal body.*** *We have not attempted to monetise this cost, but intend to use the consultation to test views on the extent to which there is a material risk, and to consider the potential costs for different types of regulatory and competition decisions.*[62]

41. This question has already been tested in the closely-related DCMS consultation, although the IA currently does not engage with that evidence. Responses to the DCMS consultation suggest that, in the case of the communications sector at least, there is considerable evidence that this is a material risk. The point is put more clearly in the BIS consultation, and this language might usefully be adopted in the IA:

> *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 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.*[63]

[62] IA at 46. Emphasis added.
[63] BIS consultation, at 2.20.

42. In fact, as set out in the following section, there is extensive evidence available to BIS enabling them to assess how decisions might be scrutinised under different standards of review. Far from being merely a risk, this is an impact that should be recognised in the IA.

43. The question of how big an impact this is, and how many cases might fall into these categories, is considered in Step 5.

44. The case for inclusion rests on the proposition that the quality of regulatory decision-making is a material concern to *consumers*. To exclude or ignore (directly or effectively, by not quantifying it) that effect would be reasonable only if:

- there is no difference in the quality of decision-making as a result of the standard of review (that is, JR and merits review are equivalent in terms of their outcomes for consumers); or
- the level of quality of regulatory decision-making has no impact on consumers.

45. The first proposition (one standard of review is as good as another) seems to pre-empt the question being asked in the consultation.

46. Nevertheless, this error in approach is hinted at a number of times in the BIS consultation, with statements that purport to frame as equivalent the two forms of review:

> *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.*[64]

47. This implies an assumption that little will change in terms of outcomes for consumers as a result of changing the standard of review. We see no basis for such a generalization.

48. In any event, it is a proposition that can be tested on the evidence, looking at the already-decided cases that have been subject to merits review and establishing whether the outcomes for consumers would, in fact, have been different under a different standard of review (that is, whether there are real cases that fall into 'Category A'). We have performed this analysis and it is set out in section G below.

49. The second proposition (that quality in regulatory decisions does not affect consumers) is self-evidently inconsistent with the long-standing views expressed by Governments, regulators, consumer representatives and economic theory. We do not think it is a reasonable basis on which BIS should proceed.

50. Accordingly, it is essential that the IA include these impacts (to consumers, flowing from bad decisions going uncorrected) and, to the maximum extent it is reasonably possible, to quantify them, if the IA is to provide a reasonable assessment of the impact of the Government's proposals.

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[64] 4.11

Cost to include: Longer periods to reach a decision after remittals after JR

51. The IA should identify the impact on consumers and other stakeholders of some decisions taking longer as a result of the need to remit matters back to the regulator involved, rather than correcting a bad decision following merits review ('Category B1' impacts on stakeholders).

52. The BIS consultation does not deal with the question of whether, as part of the Government's proposals, the Tribunal's powers on disposal of an appeal (set out in section 195 of the Communications Act) will be amended (beyond removing the words '*on the merits and*').[65] Under the current regime, the CAT's decision '*must include a decision as to what (if any) is the appropriate action for the decision-maker to take in relation to the subject-matter of the decision under appeal.*'[66] In other contexts, the remedies available following judicial review are a mandatory order, a prohibiting order, a quashing order or an injunction.[67] What these remedies have in common is that they are orders imposed on the original decision-maker, who must then re-consider the original matter for decision in light of the findings of JR. In practical terms, this means that matters under JR are generally remitted back for re-consideration, not replaced by a decision taken by the appeal body.[68]

53. Today, under merits review, the appeal body's judgment or determination tells all stakeholders what the outcome will be. Under the proposals, this will no longer be the case. Since it will be unable to form any view as to the merits of particular actions, the '*appropriate action*' that the CAT can require a regulator to take under section 195(3) may be limited to something similar to the outcomes on JR – that is, to make orders for the regulator to re-consider the matter.

54. This point is made by the CAT in its submission:

> *Appeals on a "judicial review" standard are "all or nothing". Judicial review is based upon the premise that what is under review is the legality of an administrative decision and the decision-making process, rather than its correctness.* ***Therefore, where a decision is successfully challenged on a judicial review, the reviewing court has no option but to remit the decision back*** *to the administrator (here: the regulator) for the decision to be taken anew. That, of course, involves a fresh consultation and evidence-gathering exercise by the administrator, which in the case of competition and communications decisions is not a short process.* ***The consequence of a successful judicial review is often,***

[65] BIS consultation, Box 4.2 on page 35.
[66] Communications Act, section 195(3).
[67] CPR 54.2. This is a simplification.
[68] As previously note, in precise terms, the outcome of merits review is properly described in law as 'remittal' but it is, in fact, remittal with orders that often specify in detail the subsequent action that is to be taken. To avoid confusion, we use the term 'remittal' in this context to mean remittal back for re-consideration *de novo.* This sort of 'open' remittal can and often does take months or even years (and may not happen at all). It can be the outcome of JR or merits review - for example, the CAT's orders in the MNP case remitted the matter back to Ofcom for reconsideration - but it is characteristic of JR that there is no option to have a more targeted, 'substitutional' form of remittal as is normally the case in merits review). The MNP case is also an example of a case where the remittal resulted in the matter never re-surfacing again.

> ***therefore, delay*** *coupled with the risk that another reviewable error might be made when re-taking the decision, leading to further proceedings.*[69]

55. This re-consideration constitutes an additional step in the process of leading to a final extant decision. This additional time is an impact that should be included by BIS in the IA.

Example of a case that would have taken longer under JR: TalkTalk WBA

56. So, are there cases that would take longer to reach a final view under JR than merits review? There is recent direct evidence on this point – TalkTalk's appeal of Ofcom's 2011 decision on wholesale broadband (the 'TalkTalk WBA case').[70]

57. The facts are straightforward. On 20 July 2011, Ofcom made a market power determination with respect to BT and opted to impose a charge control on BT in relation to wholesale broadband services in the area where it has SMP as it was the only competitor ('Market 1'). After the market power determination, TalkTalk provided information about market circumstances (its future investment plans to unbundle further exchanges). Ofcom then made a decision to impose a charge control based on the existing SMP determination, considering that the developments described by TalkTalk did not constitute a 'material change' to Market 1. TalkTalk appealed the decision.

58. TalkTalk pleaded both a procedural irregularity and also submitted that the decision was wrong on the merits. The CAT's decision adopted an analytical framework derived from the case law on merits review:

> *The first requirement ("…on the merits…") makes clear that the appeal is conducted "on the merits" and not in accordance with the rules that would apply on a judicial review. [Citing the MNP case] … We consider that this [the MNP case] correctly states the approach we are obliged to take: the question is whether OFCOM's determination was right, not whether it lies within the range of reasonable responses for a regulator to take.*[71]

59. The CAT then stressed that it was not to be '*a second regulator waiting in the wings*' and stressed that even though it was not prevented on merits review from reviewing the decision once it was established to lie within the range of reasonable responses Ofcom could take, it should exercise restraint in doing so, quoting from the T-Mobile case:

> *To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching*

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[69] CAT submission, paragraph 6. Emphasis added.
[70] TalkTalk v Ofcom [2012] CAT 1. Towerhouse acted for the appellant, TalkTalk.
[71] TalkTalk WBA case, at 71-72.

the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.[72]

60. This reasoning is relevant more widely because it casts a spotlight on the nuanced approach taken by appeal bodies in relation to merits review, and their ability to combine elements of rigorous scrutiny and reluctance to substitute their own view for that of an expert regulator unless it is apparent that the decision is wrong on the merits. Critics of merits review often elide this nuance, suggesting that merits review represents simply the replacement of one exercise of judgment with another. The CAT's submission makes precisely this point:

> *Concerns that an "on the merits" review might lead to excessive second-guessing of regulators ought, by now, to have been laid to rest. Questions of policy or discretion are typically cases where there are several "right" answers. Where there are a number of competing, legitimate views, the CAT will not interfere in a regulator's decision unless it is clearly wrong.*[73]

61. TalkTalk challenged Ofcom's decision on two grounds: first, that Ofcom's consultation had not been adequate and second, that it was wrong (on the merits). In the event, the CAT determined that, because it was engaged in merits review, the procedural challenge was a secondary issue:

> *The reason we consider that – in the case of section 192 appeals – the level of consultation is at most a second order question is simply because of the Tribunal's own statutory obligation under section 195(2) to "decide the appeal on the merits". Thus, even if OFCOM's consultation process has been unimpeachably conducted, the Tribunal may nevertheless conclude that OFCOM's decision was wrong. Conversely, if the Tribunal is satisfied that OFCOM's decision was correct, then the fact that OFCOM's process of consultation was deficient ought not to matter (unless, as we have noted, that process was so deficient that the Tribunal cannot be assured that OFCOM did indeed get it right).*
>
> *We unanimously conclude, therefore, that because this appeal is "on the merits", the Tribunal must first grapple with the question of whether OFCOM's decision is right, and only then consider the process by which OFCOM's decision was reached.*

62. This analytical framework had a profound impact on the possible outcomes of the case:

> *We do not suggest that this binary outcome [whether the decision was right or wrong on the merits] necessarily renders all consideration of OFCOM's decision-making process by the Tribunal irrelevant and certainly does not preclude a party from raising such matters in an appeal. As TalkTalk rightly noted in paragraph 40*

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[72] *T-Mobile (UK) Limited v Office of Communications* [2008] CAT 12 at 82, cited with approval by the CAT in the TalkTalk WBA case at 74.
[73] CAT submission, paragraph 14.

of its Notice of Appeal, "Ofcom must be able to justify its decision as being adequately and soundly reasoned and supported in fact". Without adequate consultation, it may be unclear whether there has been a material change or not. To take a hypothetical example, suppose a case where OFCOM simply fails to consider or consult upon the question of material change at all. In such a case, it may be that it is impossible – without the benefit of a proper consultation – for either OFCOM or, on appeal, the Tribunal to determine whether there has, or has not, been a material change. ***In such a case, on an appeal, it may be that the proper course would be for the Tribunal to remit the matter to OFCOM with a direction that a proper consultation be carried out****.*[74]

63. Therefore, by engaging in merits review, the CAT was able to consider the core issue of whether the decision was correct (whether there had, in fact, been a material change in the market). If there was no material change, then Ofcom's decision to that effect was right, and it was a 'second order question' how the result had been reached.

64. The CAT found that Ofcom had reached the right decision, and accordingly, did not need to reach a concluded view on the procedural points. Noting that JR was defined, in a sense, by the principle that the court must not substitute its own view for that of the regulator (the 'substitutionary approach'), it contrasted merits review, observing:

As we have noted, appeals to the Tribunal under section 192 of the 2003 Act are not dealt with on a judicial review standard, but "on the merits". The Tribunal is obliged, by statute, to take the "substitutionary approach" that is not permitted in judicial review cases. In this respect, appeals to the Tribunal under section 192 are more intrusive than a judicial review would be: the Tribunal is concerned with whether OFCOM's decision was correct.

We consider that this has implications in those cases where – as here – the Tribunal has reached a conclusion that OFCOM's decision was, indeed, correct on the merits. In such a case, we do not consider that it is the function of the Tribunal also to review OFCOM's decision by reference to the judicial review standard.

This conclusion is reinforced by case-law dealing with appeals "on the merits" of decisions of administrative bodies other than OFCOM. It is clear law that where a decision of an administrative body, such as OFCOM, is subject to a full, on the merits appeal, such an appeal is capable of making good any deficiency in the procedure of the administrative body taking the original decision. In other words, a procedural failure at the level of the first instance administrative body can be remedied by a wide, on the merits, appeal.[75]

[74] TalkTalk WBA case at 76.
[75] TalkTalk WBA case, at 124-126.

65. The logical corollary of this point is that the opposite is true when merits review is not available: an appeal body is incapable of remedying a procedural failure and therefore the appeal body is more limited in its options – normally, sending the matter back for re-consideration or re-hearing. As a result, appeals where the standard of review is limited to some form of JR (as in the proposals) are likely to result in an additional step (re-hearing), delaying the benefits of regulation to consumers.

66. This impact should be included in the IA, and, after quantification, should be off-set against any benefits resulting from a shorter appeal process.

67. The TalkTalk WBA case is instructive not only in relation to the procedural point (JR cases tend to result in remittal whereas merits review cases are less likely to do so) but also because it is a case which illustrates the difference between merits review and JR in terms of the impact on consumers. The CAT's reasoning highlights the fact that what matters in terms of the interests of consumers is not whether a regulator's consultation process is adequately undertaken, but whether it leads to the best and most effective course of action being adopted. Merits review considers this question, and JR does not. The IA should take this into account.

68. The cost of this impact is discussed in Step 5.

Cost to include: Impact of greater regulatory risk on economic growth

69. As previously discussed, the evidence available (for example from the previous consultations) suggests that the Government's proposals are likely to introduce a significant degree of regulatory risk. The impact of this regulatory risk on economic growth should be considered as part of the impact assessment. Therefore, IA should include, as a cost to the wider economy, the impact of having decisions stand uncorrected that would be amended on appeal under merits review (i.e. 'Category A' and 'Category B2' cases). This is distinct from the cost imposed on *regulated firms* (which is already included).

70. The case for including this impact rests on the proposition that the quality of regulatory decision-making is a material concern to regulated firms and the wider economy.

71. How significant is quality and predictability in regulatory decision-making for business and the wider economy? The evidence suggests that it is very significant and we think that BIS should canvas:

    - Relevant economic theory
    - Evidence from DCMS consultation
    - Public statements about the impact of regulatory certainty on businesses and economic growth by the Government, the European Commission, Ofcom and others such as the OECD.

Cost to include: Increased barriers (reduced access) to justice for small litigants

72. The IA should include, as a cost faced by small or medium size organisations, the increased challenges that they will have in navigating a system that is, by design, more forbidding and demanding for appellants.

73. Any litigator with experience of explaining public law processes to those not familiar with them knows that JR is a more challenging environment for unsophisticated litigants than merits review. Review of the legality of a decision, without reference to whether or not it is right or wrong, is a counter-intuitive, even bewildering, proposition to the lay-person, who may have approached the appeal body specifically on the basis that they wanted to point out that a given decision had been (in their view) an error that needs to be corrected. Why is the appeal body not allowing points that go to the question of whether a mistake has been made to be put?

74. By raising the bar and narrowing the scope of matters that can be raised on appeal, a move to reduce the intensity of review (including either JR or 'focused specified grounds') raises costs for small firms, who are obliged to track issues earlier and make their points only at the right time if they wish to be heard.

75. This concern is accentuated in the context of the Government's proposals on costs, which threaten to raise additional barriers to entry. As the CAT submission notes:

> *As the Impact Assessment accompanying the Consultation makes clear, the costs of appeals falls most heavily on appellants, yet the proposal in the Consultation would significantly favour regulators. An asymmetric approach of the kind discussed in the Consultation risks unfairly deterring SMEs from appealing regulatory decisions, even if they are wrong. An SME is – in the case of such a regime – deterred from appealing even a strong case because it will appreciate that, save in the most extreme of cases, it not only risks paying the regulator's costs if it loses, but that even if it wins, it will still have to bear its own costs of establishing that the decision was wrong. A number of the appellants against the OFT"s Construction decisions were SMEs with a very low turnover and (in some cases) negligible profitability. Had these firms been precluded from seeking costs from the OFT, notwithstanding a successful appeal against the level of penalty imposed, it is very likely that they would have been deterred from bringing an appeal. The Consultation should not lose sight of its stated objective "to ensure access to justice is available to all firms and affected parties".*[76]

Summary: the revised list of costs and benefits for Option 2.

76. In order to meet the requirement in the IA Toolkit and the Framework Manual that IAs include '*the full range of possible impacts*', the IA should identify the following impacts:

[76] CAT submission, paragraph 90.

Impact	Affected stakeholder	Cost or benefit?	Already in IA?
Regulated firms face increased regulatory risk as a result of reduced scope to consider merits of decisions	Regulated firms	Cost	Yes (although requires modifying to reflect a less skewed view of the nature of the impact)
Regulated firms face transitional costs of implementation	Regulated firms	Cost	Yes
Increase in number of appeals to test a new rule	Appellants, interveners, regulators, appeals bodies	Cost	Yes
Shorter appeals as a result of shift to JR	Appellants, interveners, regulators, appeals bodies	Benefit*	Yes
Impact on consumers of decisions that would be amended under merits review left to stand under JR	Consumers	Cost	No – needs to be added
Longer periods to reach a decision after remittals after JR	Appellants, interveners, regulators, appeals bodies	Cost*	No – needs to be added
Impact of greater regulatory risk on economic growth	Wider economy	Cost	No – needs to be added
Increased difficulty in obtaining access to justice	Smaller firms who might be appellants or interveners	Cost	No – needs to be added

*These two impacts (one a cost, one a benefit) should be considered only after an overall view has been taken on the impact of the proposals has been taken on the Government's objective of '*minimising the end-to-end length and cost of regulatory decision-making*'. If a simplifying assumption of 'no net impact on timing' is adopted, then both can be omitted.

77. The revised IA should not include the current benefit of 'improving the regulatory regime', as this duplicates other benefits already listed, and nor should it include the putative benefit to consumers of having regulatory decisions take effect earlier (for the reasons noted above).

Identifying the impacts in Option 3 (Streamline the process)

78. We have not undertaken the same detailed breakdown of the costs and benefits of every aspect of Option 3 as for Option 2. To do so would require disentangling a number of discrete policy proposals, that we think that, in terms of best practice for impact assessments, might better be considered individually rather than lumped together into a single 'Option'. We offer a few comments, mainly focused on the question of how one might model the impacts of these proposals in the IA:

    (a) Making it easier for appeal bodies and/or regulators to strike out unmeritorious appeals

        (i) We are sceptical that this is a problem today. The CAT's Rules, for example, provide clear mechanisms for this to occur.[77] There is little evidence that truly hopeless appeals get very far – and ample evidence that when a case that might arguably be suggested is 'below par' is entertained, it is more likely to occur not because the CAT fails to be zealous in striking out bad cases, but because the CAT is doing its utmost to enable small, less-well-resourced or *in personam* litigants to make the best case that they can.[78]

        (ii) More generally, on this issue, we agree with the concerns raised in the CAT submission.[79]

    (b) Making clearer rules on the admissibility of new evidence in an appeal, and awarding costs against new evidence which could have been brought earlier.

        (i) There is ample evidence that the existing rules are sufficient to deal with these issues. We agree with the comments by the CAT in this regard.

        (ii) We have noted earlier in this document our view that there is no need to account for 'new evidence' being introduced in appeals; there is little evidence it has occurred and if it did, the current rules seem sufficient to address that situation. Therefore, there seems to be no 'problem' in respect of which a policy proposal impact needs to be assessed in this case.

        (iii) As a number of submissions or sources have pointed out, there are also good reasons why it is appropriate to provide the appeal bodies with a degree of discretion over such questions, so that they have the

[77] CAT Rules, 9 and 10.
[78] For examples of appeals involving litigants in person or appellants who stressed their small size and relative lack of resources, see, for example, the MMP or Rapture appeals (MMP v Ofcom [2006] CAT 12 and Rapture v Ofcom [2008] CAT 6. David Stewart exercised delegated decision-making authority in both the MMP and Rapture decisions. These are illustrative examples only, and for the avoidance of doubt, we do not intend any criticism of (and make no comment on) the arguments put by those appellants.
[79] CAT submission, paragraph 40.

independence and ability to take into account the demands of justice in an individual case.

(c) Increased use of confidentiality rings by regulators and/or greater transparency and more effective consultation

(i) This seems to us a good idea that could be easily introduced without needing to be linked to other policy changes. If it has broadly positive, and few identifiable negative, impacts, then it should be implemented, but not used to off-set or mask the negative impacts of some other, distinct policy decisions.

(d) Encouraging regulators to claim their full costs and clarifying that courts will only award costs against a regulator where they have acted in 'bad faith'

(i) There does not appear to be anything obviously wrong with the existing power of the courts to resolve costs issues.

(e) Introducing (and where they exist reducing) target case time limits.

(i) This seems to us to be a significant issue worthy of its own, discrete examination. Tighter timetables are likely to have a very material impact on decision-making, in substance as well as process (cf. Ofcom's disputes timetable, where a four-month statutory timetable exercises considerable influence over the extent of analysis that can be undertaken, or the nature of the CC's market investigation regime).

(ii) We think the risk of unintended consequences is likely to be quite high, given that the timetables for regulatory and competition appeals are already tight and challenging to all the organisations involved. Parties will either incur significant additional costs (raising barriers to justice for small players, and driving costs that will be passed onto consumers in the case of the large players) or decisions could be taken with far less evidence available, leading to an increased risk of poor decision-making.

(f) Communications price control appeals go straight to the CC

(i) On first blush, this seems to have potential benefits that should be included in the IA.

(ii) We recognise the points made in the CAT submission, that the current process provides a single starting point, forum for resolving contested issues (such as the specific questions to be referred) and so on. None of these seem to us to be insurmountable, if there is a strong will to enable direct approaches to the CC, although nor is it likely to be true that cutting out the CAT will simply reduce cost without other effects. For example, a preliminary stage of the CC process is likely to be necessary to consider the nature of the referral, the parties and any interveners, and so on – with

some costs simply 'pushed around the system' rather than truly saved by enabling the CC to undertake these tasks.

(iii) In any event, as with confidentiality rings, there is no linkage to any other reforms. It would be better to split it out and deal with it as a specific proposal, and not to tie to the passage of any other specific proposal.

(g) All ex ante regulation cases go to the CAT

(i) We make no comment on this issue.

(h) All ex post enforcement cases go to the High Court or the CAT

(i) We think that the evidence that the CAT is the better equipped seems very strong. It has the specialist expertise and track-record of dealing with cases involving technical, economic, policy and legal issues that arise in ex post enforcement cases.[80] As Mummery LJ noted in *Atttheraces*:

The nature of these difficult questions suggests that the problems of gaining access to essential facilities and of legal curbs on excessive and discriminatory pricing might, when negotiations between the parties fail, be solved more satisfactorily by arbitration or ***by a specialist body equipped with appropriate expertise and flexible powers****. The adversarial procedures of an ordinary private law action,* ***the limited scope of expertise in the ordinary courts and the restricted scope of legal remedies available*** *are not best suited to helping the parties out of a deadlocked negotiating position or to achieving a business-like result reflecting both their respective interests and the public interest. These are not, however, matters for decision by the court, which must do the best that it can with a complex piece of private law litigation.*[81]

(ii) Consolidation seems a reasonable proposition, in order to take advantage of the investment in the CAT as a specialist tribunal dealing with these issues. The effects should be properly assessed however.

(iii) There are procedural differences of some significance. For example, the CAT's processes reflect the fact that its decisions are seen as having a wider indirect effect (that is, a public policy benefit). For example, appeals brought to the CAT can only be withdrawn with the permission of the CAT. The impact of these differences should be considered in some detail to assess the impact of this proposal.

(i) Ofcom dispute cases go to the High Court

[80] See, for example, Whish at page 439, footnote 518.
[81] *Attheraces v BHB* [2007] EWCA Civ 38 at 7. Emphasis added.

(i) The IA seems to us to be missing a number of significant points that might imply significant costs arising from this proposal, perhaps based on a misunderstanding as to the nature of Ofcom's dispute resolution power. Ofcom's 'disputes' are not merely applying known principles to the facts of a particular case, but are the exercise of regulatory discretion and are, in a now well-rehearsed judicial formulation, '*a form of regulation in its own right*'.[82] Asking the High Court to hear appeals against dispute decisions therefore suffers from all of the same concerns and shortcomings as asking the High Court to hear appeals against other regulatory decisions – with its comparative lack of expertise and specialist focus (compared to the CAT) likely to be an issue. The most likely consequence is that this proposal would lead to longer, more difficult assessments with greater likelihood of remittal creating endlessly dragging on disputes, defeating the policy objective of the regime to have swift dispute resolution by an expert NRA.[83]

(ii) Energy reviews and codes go to the CAT

(I) We make no comment on this issue.

[82] Telefónica UK Limited v BT [2012] EWCA Civ 1002 at 63.
[83] Ibid.

G. Step 5: Value the costs and benefits and select best option

1. The final step in the IA Toolkit is to value the costs and benefits. Best practice in an IA is to quantify all benefits unless there is a clear reason why that is not possible or appropriate. The Framework Manual notes that:

> *Where quantitative analysis is not possible, qualitative analysis should be carried out with the same level of rigour*[84]

2. The IA Toolkit stresses the importance of quantifying impacts wherever possible:

> *2.3.54 Costs and benefits should be recorded in qualitative terms only when full quantification is not possible or proportionate.*
>
> *2.3.56 The lack of monetisation should not reduce the rigour with which the options are assessed. Multi-criteria analysis is a useful tool to assess non-monetised aspects.*
>
> *2.3.57 The Green Book (Chapter 5 Box 18) provides a simple example of this tool.*
>
> *2.3.58 Supplementary guidance on the Green Book website provides instructions on how to carry out a detailed multi-criteria decision analysis.*
>
> *2.3.59 However, while helpful, this is still a second best method of analysis compared to quantitative estimates of costs and benefits.*

3. In this section, we analyse the BIS IA valuation of costs and benefits, and identify specific evidence that might be useful to improve the IA by providing more precise quantification of various impacts.

4. We also set out some of the evidence available to BIS that is relevant to valuing the impacts that are currently missing from the impact assessment.

The approach taken to valuation in the IA

5. Some impacts are quantified in the IA and some are not. In a number of areas, as noted, BIS signal that they intend to use the consultation to obtain fuller information to enable some of the unquantified impacts to be assessed properly and quantified.

6. In a number of areas, we think that the BIS assessment of a lack of evidence about certain impacts may be overly pessimistic. In fact, there is a significant pool of evidence available to assist in quantifying different approaches to regulatory appeals, not least because each regulatory decision contains an impact assessment (and so the impact of particular decisions is often already quantified) and each decision by an appeal body sets out its reasoning in full.

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[84] Framework Manual, paragraph 2.2.9.

7. In relation to the communications sector, there are clues as to the likely views of affected commercial actors in the submissions to the DCMS consultation.

The valuation of impacts in Option 2 (Standard of review)

Costs

8. The following sections analyse each of the relevant costs of Option 2, first dealing with the impacts already identified in the IA, and then the other impacts currently missing from the IA that we have identified in section F.

Costs to firms who wish to challenge regulatory decisions

9. The IA notes at paragraph 46:

> *The main ongoing cost of this option is to firms who would want a more detailed appeal in order to challenge regulatory decisions which they disagree with. We are clear that the new appeals standard should still allow for decisions to be appealed and for the factual and legal basis of the regulators' decisions to be scrutinised effectively. However, there may be a risk that reducing the level of scrutiny that regulatory decisions are subject to may increase the likelihood of an incorrect regulatory decision not being overturned by an appeal body. We have not attempted to monetise this cost, but intend to use the consultation to test views on the extent to which there is a material risk, and to consider the potential costs for different types of regulatory and competition decisions.*

10. We think that despite this impact being described as a 'cost', we do not understand BIS to be suggesting it is a direct cost, but a disadvantage suffered by firms who are no longer able to challenge decisions that are would not stand up under merits review. This seems best dealt with as a question of regulatory risk (as the text above suggests).

11. The cost of these incorrect decisions on consumers (which we think is one of the most important impacts of the proposals) can and should be quantified. We discuss two methods for doing so in the relevant section below.

12. Quantifying the impact of this cost on regulated firms is more difficult. One proxy for an external quantification is to test, by gauging the responses to the consultation, the regulated firms' own view of these risks. The firms themselves have a very strong incentive to avoid regulatory risk. Contrary to the tone of the IA (which suggests that firms want to oppose regulatory decision-making in general), in many regulated sectors, many firms will find themselves in a position of resisting some regulatory decisions and supporting others. If this is the case, these firms do not have an incentive to 'talk up' their need to be able to challenge regulatory decisions, since any advantage in doing so by making it easier to challenge decisions they viewed as unfavourable, would be offset by making it easier for their competitors to challenge the regulatory decisions that they need to be effective, simply to enable them to trade. Instead, these submissions are likely to reflect the respondents' underlying view as to the risks that they face from regulatory action. The evidence from the communications sector, for

example, is that interventions are as often in support of Ofcom or an appeal body's decision as they are opposed. We see no reason to set aside, or fail to take the evidence of the regulated firms, taken as a whole, at face value on this issue.

13. If the firms are mostly strongly in support of the proposals, that indicates that they do not consider this regulatory risk to be significant. If they are mostly opposed to the proposals, that indicates that this cost, perhaps coupled with other costs, outweigh the putative benefits. This is indirect evidence as to the value of these costs.

Transitional costs of implementation

14. We understand these to be the direct costs to the regulated firms of adapting to and getting used to the new standard of review. The IA describes them as '*the transition cost to market participants of understanding the new regime*'. On quantum, the IA goes on to observe that:

> *We believe that these costs are likely to be low, since the changes to the standard of review are relatively easy to understand, and most of the affected firms are those in regulated sectors who have experienced legal and regulatory teams.*

15. In relation to the first point ('*the changes to the standard of review are relatively easy to understand*') we do not think this is a reasonable statement in light of the widely-recognised complexities associated with the legal issues underpinning the question of the standard of review. In any event, the point is best considered in assessing what are the costs, rather than dismissing the need for that assessment.

16. In relation to the second point (that firms have some experience and in-house expertise), this may be true at least of some (although perhaps not '*most*') of the firms affected by regulators' decisions – many of the affected firms are small or medium-sized enterprises, and there are far fewer '*experienced legal and regulatory teams*' in the regulated sectors than was the case prior to the financial crisis. In any event, it seems to us that this point could plausibly be dressed up as suggesting these costs might be higher – that is, that the presence of such teams, and the sophistication of approach implied in having a dedicated team of people focused on regulation and regulatory litigation, suggests there will be efforts to pick holes in any new provisions, triggering further litigation.[85] And this statement is not applicable to the extent that the proposals also apply to competition law which, by definition, affect undertakings in all sectors, including those that have little or no sector-specific regulation.

17. In any event, the IA seems to assume that as these costs are sunk, there is no need to be concerned with them. That seems to us unreasonable, and inconsistent with the Framework Manual, which states that, in relation to these 'regulatory costs':

[85] To be clear, we do not think this is a good point, merely an illustrative exercise to demonstrate that the way the point is made in the IA is not robust.

Regulatory costs

2.3..38 Regulatory costs can be categorised as administrative burdens and policy costs.

2.3.39 Administrative burdens include costs associated with familiarisation with administrative requirements, record keeping and reporting, including inspection and enforcement of regulation. The Standard Cost Model gives a framework for measuring administrative burdens.

2.3.40 Policy costs are the essential costs of meeting or complying with the policy objectives and include all costs which are not administrative burdens.

2.3.41 You should calculate impacts on businesses based on the existing business population and expected changes. Changes could be due to the natural turnover in businesses (captured in the counterfactual) or change driven by the policy proposal.

2.3.42 When calculating the NPV, business NPV and EANCB, you should not include any costs (for example fines or penalties) incurred by companies for non-compliance with the regulation.[86]

18. In our view, BIS should produce some reasonable estimate of these costs, presumably in light of the information received from the consultation process.

19. Our preliminary estimate is that a reasonable figure, taken across all the regulated sectors and those affected by competition law decisions over a ten-year period, would be at least in the low £m in aggregate, and may be higher.[87]

20. BIS should be able to produce a more robust and accurate figure, particularly in light of the submissions received to the BIS consultation.

Testing the new regime

21. It is widely expected that any new standard of review will be tested. In this regard, there is little to distinguish between either variant of Option 2. In the case of 'pure JR', there will be the need to explore how to apply the requirements of various European requirements such as the ECHR in the case of competition law and the FD in the case of the communications regime. In the case of the competition law regime, the process of adapting the Court's approach to review to accommodate ECHR requirements has been an on-going process, and one that has taken significant judicial time and attention. In the case of 'focused specified grounds', these issues will also arise and there is likely to be an additional question of whether these statutory codifications of JR principles are themselves consistent with European law or not. In the case

[86] Framework Manual, paragraphs 2.3.38 to 2.3.42.
[87] Ten years is the indicative period provided in the Framework Manual/IA Toolkit for the 'forward look' of an impact assessment.

of the communications regime, for example, it is not a given that focused specified grounds, as a novel statutory codification of some grounds of judicial review, falls within the scope of the decision of the Court of Appeal that 'judicial review' is sufficiently flexible to accommodate the requirements of Article 4 FD. It may be; it may not be. The point is untested.

22. As the CAT noted in its submission, there is no 'safe harbour' here in either form of judicial review:

> *It is questionable – for the reasons given in answer to those questions – whether the envisaged changes would achieve the ends anticipated in the Consultation. Rather, there would be a risk, at least in the short term, of increased cost and increased litigation. The regime under the Communications Act 2003 is now well-established, and its limits and operation clarified in a series of cases (many at Court of Appeal level) in the last decade.*
>
> *That said, the appropriate standard of review is a matter of policy, and the CAT will apply whatever standard of review is established by the legislature. For this reason, this answer to* ***Q4*** *confines itself to some general observations on the consequences (in relation to communications cases) of a move away from the present "on the merits" regime to a regime based upon a "judicial review" standard:*
>
> *(1) There may be a challenge to the legality of the regime… [the CAT cites Art 4 FD and then continues:]*
>
> *The Communications Act 2003 was enacted with a view to complying with these (and other European law) provisions. It is possible that* ***any derogation from the present standard of review would result in a legal challenge, with a reference to the Court of Justice under Article 267 TFEU.***[88]

23. The resolution of these issues may be possible wholly within the system of UK courts, or it may necessitate referral of one or more points to the European courts.

24. This effect should be quantified, and there is a salient example to draw on: the time and effort taken to reach a stable position with respect to the current standard of merits review in relation to competition law and in each of the sectors where it is applicable – most significantly, the communications sector. How much has it cost to get from the taking effect of the Communications Act 2003 to, say, the statement of consolidated principles set out at p40 of the CAT's pay TV judgment in August 2012? We think that any reasonable estimate of this historic cost is that it has been very significant:

- Virtually every case has discussed the standard of review.

[88] CAT submission, paragraphs 40 – 41.

- The CoA has dealt with the issue several times.
- The Supreme Court may consider these issues in BT's current appeal in the 08x matter.
- The evidence of the 'bulge' of cases during the period over 2008-2009 gives a sense of the scale of the *possible* impact (there 18-20 more appeals in 2008 and 2009 in aggregate than the long-run average implied during the period 2010 to 2012).[89] This does not include the period from, say, 2003 to 2007, increasing the likely incremental costs further.

25. The return on this collective investment of time and effort is only now starting to be felt, as regulators and regulated firms adjust to their shared understanding of the appeal body's approach. One of the critical concerns flagged by stakeholders in the DCMS consultation, and in the BIS stakeholder sessions, is that by pressing the 'reset' button on this process, all players including the appeals bodies themselves will need to build a new set of decisions articulating the way any new standard of review operates.

26. So how should BIS estimate the cost of future test cases to establish the parameters of a new regime? We think that BIS should quantify this cost by estimating the cost of a mid-range scenario where the standard of review requires, say, in the case of the competition law regime:
    - 4 decisions by the appeal bodies, each involving 1 appellant, 1 regulator and 3-5 interveners
    - 2 decisions by the Court of Appeal, each involving the same number of parties as the primary decisions
    - 1 referral to the ECJ, discounted by 50% to reflect the uncertainty that it will be needed.

27. This would need to also include the testing of these points in relation to the communications regime (and, perhaps, each other sector regime affected by the Government's proposals), with an incremental impact of a further:
    - 2 decisions by the appeals bodies, as above
    - 1 decision by the Court of Appeal
    - 1 referral to the ECJ, discounted by 50% to reflect the uncertainty that it will be needed

28. This cost, aggregated, seems to us to be a reasonable conservative estimate for a ten-year projection of these costs (which is what the IA Toolkit requires). It is certainly easy to imagine scenarios where the proceedings are much more complex, involve many more parties and the costs are much higher.

29. Our preliminary estimate, using the costs for appeals given in the BIS consultation and IA as a rough guide, and drawing on our experience advising prospective appellants and interveners, is that this direct cost could be in the order of at least £10m to £15m (although this figure is a lower bound, assuming none of the cases are of the scale of the 'outlier' cases). A more dramatic but still reasonable scenario might include knock-on impacts on *dozens* of cases over a

[89] BIS consultation, Figure D1 at page 84.

number of years (noting the figures for 2008 and 2009, for example). The risk of wider entanglement is downplayed, in a way that seems inconsistent with the discussion of the status quo. The IA emphasises the materiality of 'knock-on' effects in relation to the current arrangements when making the case for change, then assumes away, or downplays, precisely the same risk when weighing up the impacts of the proposals. As with previous examples of a possible slant in perspective revealed on a close reading of the IA, this is both a flaw that needs to be fixed, and wider evidence of a possible systemic problem of approach that may mean the IA does not correctly reveal (and may obscure) the true impact of the Government's proposals.

30. These direct costs are in addition to the indirect costs resulting from the effects of regulatory gridlock, potentially encompassing not merely a single large regulated sector, but more than one – or even most – of these vital areas of economic activity. Regulatory uncertainty would not bring the sectors themselves to a stand-still, but it is hardly alarmist to note that uncertainty about the legality of regulatory appeals that touched on regulation and the competition law regimes (including for example, the merger regime) could have wide-spread harmful effects over a ten-year period before eventually being resolved. It is easy to imagine scenarios where this sort of jurisprudential 'reset' could delay needed reforms, harm investment, harm national growth and damage the UK's hard-won reputation for having a world-class regulatory and competition regime.

31. The IA should include a reasonable estimate of the direct costs of this impact, and some reasonable assessment, risk-adjusted, of the wider impacts that are likely to arise as indirect costs.

Benefits

Benefits to litigants ('Shorter appeals, as a result of reducing the intensity of review')

32. The IA explains the approach taken to quantify this benefit:

> *We assume that reducing the standard of review (from merits to JR or more defined grounds) reduces the time cases take by 25% and thus also the cost by 25%. This assumption is a conservative version of the assumption made by DCMS in the Reforming the Appeals Regimes for the Electronic Communications Sector Impact Assessment for communications appeals. There is some evidence that our estimate is too conservative - for example cases currently taken by the CAT on a judicial review basis take an average of 4 months compared to an overall average of 9.07 months of all CAT cases between 2008 and 2012 (although this is comparing different types of case as well as different standards of review). We will use the consultation to test this assumption.*

33. Are JR cases quicker? BIS concludes that on average they seem to be, although we note that a complex set of facts will always require a complex assessment on appeal. That said, it is important to focus on the majority of cases. We suggest a better approach, rather than lumping all the cases together and averaging them, is to segment them, setting aside the true outliers

(such as the pay TV and Tobacco cases) and focusing on the core of cases that comprise the majority.

34. The CAT's view has been, in the case of the communications sector regime, strongly to the contrary:

> *There is no evidence that hearings before the Tribunal (excluding price control matters whilst they are being heard by the Competition Commission) are longer than are typically the case for judicial reviews.*[90]

35. If BIS agreed with this assessment, then the right approach is simply to strike out this benefit altogether. We think that would be a reasonable approach to take.

36. If they are not minded to do so, we suggest that BIS adopt a two-step assessment, to ensure that it is engaged in a proportionate assessment of these impacts (as the IA Toolkit requires). The first step is whether it is likely that there are both costs and benefits associated with the length of end-to-end regulatory decision-making. If that is the case (which we believe it is – it is hard to see how one could rule out the possibility) then BIS might opt for a 'no net impact on timing' simplifying assumption.

37. If not, then the second step is that the positive and negative impacts would need to be separately assessed and set-off against one another.

Benefits to consumers as a result of shorter appeals.

38. The IA proposes a quantification of the benefit to consumers of quicker appeals (as opposed to the costs saved by the litigants and appeal bodies themselves). For the reasons given in Step 4, we think that it there is unlikely to be any true time-saving, since (a) decisions are not delayed pending appeal; (b) even if they were, remittal delays are likely to off-set any reductions in timing and (c) it is not correct to assume that quicker appeals mean lower prices to consumers in all sectors.[91]

39. A better and more reasonable approach would be to drop this impact from the IA.

Quantifying the missing costs:

Impact on consumers of poor decisions that stand under a lower degree of scrutiny

40. The IA does not currently ascribe any value to the impact of consumers of decisions that would be overturned or amended under merits review, but that will stand under JR – that is, the cases that fall into Category A or Category B2.

41. This impact is <u>the</u> most critical issue in the impact assessment and worthy of particular attention. Given that centrality, we do not think it is suitable for dealing with by assumption or not dealing with it at all.

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[90] CAT DCMS submission.
[91] See the discussion of the water and energy sectors in section F above.

42. We offer two different ways of quantifying this impact.

43. The first ('bottom-up') analysis looks at cases that have already been considered on appeal on the merits and asks: what would have happened under the Government's proposed standard of review? Are there, in fact, any cases that fall into Category A?

44. When this question was put to the BIS team at one of the BIS stakeholder sessions, the team replied that their view was that there were no decisions that would be differently decided under JR as opposed to merits review. When a stakeholder representative pointed out that this undermined the case for change at all, the team replied that it was, in any case, impossible to know.

45. In fact, it is possible to answer this question with some precision because in each case, the standard of review was a point raised on appeal, given due attention by the appeal bodies and the grounds of appeal were clearly identified. Often, the appeal bodies themselves comment specifically to make a comparison between the approaches they take on review on the merits and on judicial review. In the case of price control appeals in telecoms, in some cases we are able to compare side-by-side the assessment of the CC as it reviews Ofcom's decision on the merits, and the JR of the CAT of the CC on precisely the same point. Contrary to the concerns of the BIS team, this detailed evidence enables a very clear comparison to be built up about how the reasoning and approach varies between the two standards of review.

46. This bottom-up analysis provides an answer to the question: what would have been the impact of the Government's proposals to 2013, if they had been adopted in, say, 2003? This provides a point of comparison to the question asked in the IA, which is: what will the impact of the Government's proposals be, if they are adopted from 2013 to 2023?[92]

47. A second ('top-down') analysis could look at the scale of the regulated sectors and asks: by how much would merits review have to be superior, in terms of the quality of regulatory decision-making, to fully off-set a given level of benefits of moving to JR?

48. We have not performed this top-down analysis, but BIS should be in a position to do so. We suspect that even on conservative assumptions, very small improvements in the quality of regulatory decision-making are likely to bring benefits that will outweigh the procedural 'benefits' (if any) of the Government's proposals.

[92] The IA Toolkit and the Green Book specify that, in the absence of any other period, a ten-year examination is appropriate for impact assessments. It is a coincidence that the Communications Act was passed roughly ten years ago, allowing a simple decade-to-decade comparison.

Bottom-up analysis[93]

49. We have identified in the sections that follow six cases where our analysis suggests that JR might have resulted in a significantly worse outcome for consumers as result of allowing a decision, revealed on merits review to be erroneous, to stand, or materially reduced the chance that sufficient basis for overturning a decision on JR grounds was uncovered, as a result of lesser scrutiny (Categories A and B2 respectively).[94]

50. We then make some general observations about ways that BIS might fulfil their obligation to quantify this impact.

MCT 2007 (1.1ppm from 2007 to 2011)

51. On 27 March 2007, Ofcom issued the outcome of its reconsideration of H3G's SMP in the 2004 MCT review ('04') (remitted on appeal in November 2005 in [2005] CAT 39) and imposed MCT price control in 2007 ('07') covering 2G and 3G services of the 2G/3G MNOs, and H3G.

52. H3G appealed the SMP findings (04 and 07), remedies decision (07) and price control (07). BT appealed the 07 price control, arguing prices were too high.

53. On 18 March 2008 the CAT referred 8 questions to the CC as specified price control matters arising in the appeals. The first question related to BT's appeal; questions 2 to 7 related to H3G's appeal and question 8 asked the CC to assess the impact of any errors identified. On 16 January 2009 the CC notified the CAT of their determination. On questions 2 to 7, the CC's analysis disclosed no errors on the part of Ofcom. In relation to question 1, the CC determined that Ofcom had erred in two respects: in relation to assessing spectrum costs, and in including a network externality surcharge in the regulated price.

54. As reported by the CAT in the subsequent challenge on JR grounds to the CC's determination, the issue was a complex one:

> *The CC rejected the way that OFCOM had dealt with 3G spectrum costs and found in particular that OFCOM had erred in relying on the fees paid for 3G spectrum by the MNOs in the spectrum auction held in 2000. None of the parties is seeking to*

[93] The review of the cases in this section is based on the publicly available information and our own views, as indicated. As with all of this review, the views in here are ours, and not those of any client of the firm, past or current. We have assessed each case applying its own internal logic, and offer no commentary or engage in any way with the question of the merits of any case. **No points made here constitute a statement or an admission by the firm or any of its clients with respect to any of the matters discussed herein.** In particular, the quantification exercise is not designed to be fit for any purpose other than illustrating to a rough order-of-magnitude level the possible impacts associated with deciding cases under different standards of review.

[94] We have not attempted a full or comprehensive analysis of the longer-term effects of these adjustments, but that does not mean that they are immaterial. For example, the 'follow-on' effect in setting a charge control is that the end-price of one charge control period forms the starting point of a glide path in the following charge control period – meaning that there can be further distortions arising in the next review. We have not sought to quantify these additional effects, but BIS should do so, if it proposes to rely on the IA.

reinstate the way in which OFCOM valued 3G spectrum in the March 2007 Statement.

… Having rejected that approach, the CC then considered an alternative approach proposed by BT. This approach was referred to as the 2G cap … The justification for the 2G cap approach to valuing 3G spectrum was as follows. The CC found that there is no material difference in the quality of the service that is provided when a call is terminated on a 3G network as compared to when it is terminated on a 2G network. In a competitive market, therefore, MNOs would not be able to charge a higher wholesale price for termination on the 3G network than the price charged for 2G call termination. The price for 2G voice call termination would therefore be the cap or upper bound of the amount that MNOs can charge for terminating calls using 3G spectrum. Secondly, it was accepted that 3G technology is more efficient than 2G for carrying voice traffic. The 2G price cap would allow the MNOs to keep any cost savings that they derived from using 3G technology for terminating voice calls. As the CC put it (paragraph 2.9.12 of the Determination) "to the extent that 3G spectrum could be said to have been acquired to save costs in the provision of voice services, efficiently incurred costs could be reimbursed by adopting the principle of the 2G cap".

55. To cut a long and complex story short, the overall impact of the CC decision was to adopt the 2G cap approach, and that the final-year TAC was cut from 5.1ppm (in the original Ofcom decision) to 4.0ppm.

56. A number of instructive and relevant points arise here:

- The appeal involved complex questions of economic judgment, which the CC was able and willing to engage in on appeal, and which the CAT (properly, given its jurisdiction in relation to price control matters) did not dislodge on an appeal on JR grounds. Thus, we consider that this case is one in which the original decision did not withstand review on the merits – it was based on not one error, but two. And it is extremely unlikely that a court or tribunal applying JR or 'focused specified grounds' would have engaged in the kind of detailed scrutiny undertaken by the CC. The CAT clearly did not do so, when applying a JR standard. Therefore, the case falls in Category A.
- The primary error was a serious one, and had a material consequence for consumers.

57. Using Ofcom data for the volume of fixed to mobile calls, we estimate that if Ofcom's original decision had been upheld (i.e. under JR) then fixed consumers would have paid higher charges of approximately £120 million in 2009/10 and £145 million in 2010/11.

58. The Annex contains further detail of our calculations of this impact.

MCT 2011 (1 year quicker glidepath to pure LRIC)

59. On 16 May 2011, BT, Vodafone, H3G and EE appealed Ofcom's price controls imposed in the March 2011 MCT Statement.[95] All the appeals raised price control matters that were referred to the CC in seven reference questions on 30 June 2011. On 9 February 2012, the Commission notified the CAT of their determination, finding that Ofcom had erred in relation to using a four-year (rather than a three-year) glidepath and relying on overstated radio equipment costs. It dismissed the remainder of the arguments.

60. In reaching its decision, the CC observed that:

> *While we accept that there is regulatory judgement involved in Ofcom's decision on the length of the glide path, this is not to say that Ofcom's choice is not open to challenge if, for example, the reasons given for its choice are manifestly unsound or if Ofcom has failed to adequately justify its choice between alternatives, particularly if, on the face of it, Ofcom appears to have adopted an inferior solution.*[96]

61. What is important about this observation (which is otherwise unremarkable; other cases contain similar statements about the CCs' role) is that it makes clear that in this case, merits review was not simply a question of one exercise of judgment being replaced by another exercise of judgment. Ofcom's decision was being held up to scrutiny and tested to see if it was compelling in its logic and whether it most effectively advanced the best outcome for consumers (the best '*solution'*). This lays bare the mechanism by which merits review enables the quality of a regulatory decision to be improved, in a way that would not be possible under JR.

62. In the event, the CC set out its reasoning over several pages, considering the various factors that Ofcom had identified as being relevant and concluded:

> *As Ofcom elected to adopt a LRIC cost standard and recognized in principle that it should align prices with LRIC as quickly as it reasonably could, we find there to be force in BT's arguments, supported by Three, that Ofcom needed good reasons to adopt the longer option. We agree with BT and Three that the reasons for preferring a four-year glide path are not convincing. Additionally, while both a three-year and a four-year glide path would miss the target date of the Recommendation, we have been presented with no compelling reason why the greater departure from it is justified.*[97]

63. Ultimately, Ofcom was held to account by its own logic – that is, the decision to align prices to LRIC as quickly as possible implied the fastest reasonable glide path, and Ofcom did not apply

[95] David Stewart exercised delegated authority to impose the 2011 MCT charge control.
[96] CC Determination, 5.48
[97] CC Determination, 5.75.

its conclusions consistently to the different parts of its decision. This error was corrected by the CC.

64. Vodafone and EE applied to the CAT seeking to set aside the CC's determination, applying principles under JR. EE submitted that the glide path calculation by the CC should be set aside on JR grounds by the CAT.

65. The CAT's judgment provides a side-by-side comparison of the difference between merits review and JR. When the CAT considered the glide path issue, this was their reasoning (in full):

> *As we noted, the question of glide path is pre-eminently one of judgement. Contrary to EE's submission, we find that the Commission formulated the question before it entirely properly. It may very well be that there are other ways of formulating the question – although we do not consider the sort of minute weighing of the relative advantages of LRIC and LRIC+ contemplated in paragraph 116 of EE's JR Grounds to be a remotely plausible or practicable approach.* ***Our role, as we have noted, is not to determine whether the Commission formulated the question correctly or answered it correct, but whether the question as formulated and the answer as found is susceptible of challenge on a judicial review. The answer to this question is a very clear-cut "No".***

66. Had this been the attitude of the CC/CAT to Ofcom's reasoning (that is, on JR) we think it is reasonable to conclude that the glide path would have remained one year longer – an adverse outcome for UK consumers, on the logic and findings of the regulator's decision (as amended by the CC). And even if Ofcom's reasoning on the glide path had been considered to be so faulty as to fall foul of JR (which we doubt) then that matter would have been remitted back to Ofcom for them to reconsider it, necessitating further delays.

67. Using Ofcom data for the volume of fixed to mobile calls, we estimate that if Ofcom's original decision had been upheld (i.e. under JR) then fixed consumers would have paid higher charges of approximately **£47 million** in 2012/13, **£41 million** in 2013/14 and **£4 million** in 2014/15 (all in current 2013 prices). The same caveats apply as in the previous estimate.

68. The Annex contains further detail of our calculations of this impact.

<u>LLU 2010 (lower LLU prices)</u>

69. On 22 May 2009, Ofcom set a price control for BT's LLU services, taking effect on 19 June 2009 and covering the period to 31 March 2011. On 22 July 2009, CPW appealed that decision.

70. On 27 November 2009 the CAT referred the various price control matters to the CC; the CC issued its determination on 31 August 2010.

71. As the CAT subsequently reported:

> *The CC rejected some of the challenges raised by the CPW but found that some of the challenges to the LLU Decision were well founded. The successful challenges were those encapsulated in Reference Questions 1(i), 1(v), and 2. The CC*

determined in relation to Question 1(i) that OFCOM had materially erred by underestimating the rate of efficiency savings which Openreach could reasonably be expected to achieve over the period of the price controls. The CC also upheld CPW's challenge when answering Question 1(v) in relation to OFCOM's assessment of inflation of wage and energy costs. The CC determined in response to Question 2 that OFCOM had made certain errors in relation to specifying the price caps for baskets of ancillary services.[98]

72. The CC's determination formed the basis for the CAT's orders, adjusting the prices of LLU services to correct for the errors identified by the CC.

73. Given the volumes of these services bought by other communications providers in 2010/11, these changes resulted in reductions in costs for LLU providers of **£5.3million per annum** (ignoring other welfare effects).

74. The Annex contains further detail of our calculations of this impact.

LLU/WLR 2012 (lower LLU/WLR prices)[99]

75. On 7 March 2012 Ofcom set a charge control on BT's LLU and WLR services from 1 April 2012 until 31 March 2014.

76. On 8 May 2012 Sky and Talk Talk jointly appealed Ofcom's decision; BT also appealed Ofcom's Decision separately. Broadly speaking, Sky and TalkTalk raised points that tended to lower the regulated price of BT's wholesale services; BT raised points that tended to increase the price. BT, Sky and TalkTalk were granted permission to intervene in each other's appeals and EE was also granted permission to intervene in both appeals. Both appeals raised price control matters that were referred to the CC on 24 and 28 July respectively; the timetables of both appeals were subsequently aligned. In essence both appeals included questions requesting the CC to consider whether Ofcom had erred in the way it had set the price controls under the Statement.

77. In setting out the approach it would adopt, the CC referred to the Tribunal in the TalkTalk WBA case:

73. That said, we are mindful of two other important dicta regarding the Tribunal's role on a section 192 appeal. First, Jacob LJ in T-Mobile (UK) Limited v Office of Communications [2008] EWCA Civ 1373 made absolutely clear that the section 192 appeal process is not intended to duplicate, still less, usurp, the functions of the regulator. In paragraph 31, he stated:

'After all it is inconceivable that Article 4 [of the Framework Directive], in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for

[98] Carphone Warehouse Group plc v Ofcom [2010] CAT 26 at 7.
[99] Towerhouse acted for one of the appellants (TalkTalk) in relation to its appeal and interventions in each of the other appeals.

appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator has got something materially wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision.'

74. Secondly, and following on from this point, in T-Mobile (UK) Limited v Office of Communications [2008] CAT 12, the Tribunal noted (at paragraph 82):

'It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.'

78. In its Determination the CC demonstrates how, as a matter of practice, it <u>does not</u> carry out the role of "regulator waiting in the wings":

'…On the basis of the above, and in the context of the 2012 Statement, we do not think that the price variance approach [proposed by Sky and TalkTalk] *was an 'obvious and natural' methodology to adopt. As noted in the Introduction at paragraph 1.49, it is appropriate for a margin of appreciation to be afforded to Ofcom to the extent that different ways of modelling are available, each with advantages and disadvantages, and where the methodology proposed by the appellant is not demonstrated to be clearly superior to that used by Ofcom. [100]'*

and further:

'Ofcom's decision to base its modelling on BT's forecasts rather than using an indexation approach was an exercise of modelling judgement, in respect of which it was entitled to a wide margin of appreciation on appeal.[101]'

79. On 27 March 2013 the CC published its Determination upholding two reference questions in favour of Sky and Talk Talk and four questions in favour of BT – that is, the CC found six areas where Ofcom erred in its approach or calculations. On 29 April 2013 the CAT issued a ruling directing Ofcom to give effect to the CC's Determination. Ofcom gave effect to the CAT's Direction, correcting the charge control the next day on 30 April 2013.

80. A number of relevant points flow from this case:

[100] CC Determination, page 12 – 10, paragraph 12.68.
[101] Ibid page 13-7, paragraph 13.31.

- As with previous cases, the appeals bodies stress that they do not simply substitute their own judgment for that of the specialist regulator (and their reasoning makes it clear that they have not, in fact, done so);
- Ofcom made submissions that it either agreed with, or did not object to, the remedies proposed in light of the CC's findings. That is not to suggest that Ofcom did not defend its original decision (it did so, with entirely appropriate vigour) but simply to make the point that, in the event, errors identified in merits review can relate to matters that the regulator itself, had it been in a position to correct them during the administrative phase, might have been inclined to adopt. In this case, no party raised any points on appeal of either the CC's Determination (which could been challenged on a JR basis in the CAT) or the CAT's subsequent Ruling.

81. The outcome was a significant reduction in the price set by the WLR/LLU charge control.[102] This reduction in costs to the Appellants and others who purchase the services reduced costs in the (competitive) downstream fixed retail voice and broadband markets, with flow-on benefits to be expected to consumers as a result.

82. However, one of Sky and Talk Talk's reference questions where the CC found that Ofcom had erred, upholding Sky and Talk Talk's appeal, the CC referred back to Ofcom to determine the quantum of error before correcting the charge control, on 29 April 2013. At the time of writing (early September 2013) there has still been no determination from Ofcom of the adjustment to the charge control in relation to that error – so that the re-consideration has taken four months so far, with consultation still, we assume, to occur. This illustrates clearly the risk of delay on remittal that is in the nature of a JR-based standard of review.

83. We estimate that this decision reduced the costs of CPs buying LLU and WLR by approximately **£14 million per annum**.

84. The Annex contains further detail of our calculations of this impact.

<u>TRD (lower 3G costs in final years of 2004 charge control)</u>

85. The 2004 MCT charge control regulated 2G but not 3G MCT. MNOs started 'blending' their rates (starting with Vodafone in Sept 2004), triggering disputes about whether that was permitted under the price control. Various blended rate disputes were referred to Ofcom, relating to BT rejected proposed blended rates (T-Mobile, O2) or proposing reductions to previously agreed blended rates (Vodafone, Orange). Separately, H3G rejected rates proposed by Orange and O2.

[102] That is, there was an overall reduction in the charge control taking into account the increases in the charge control resulting from the appeal issues that BT was successful on against the appeal issue that Sky and TalkTalk were successful on.

86. Ofcom resolved the disputes, in summary upholding the blended rates. Various operators appealed those decisions.[103]

87. Early in the TRD case, Ofcom argued, as it has done in a number of cases, to pre-empt the scope of merits review by arguing for that regulators should not face '*interference'* in of matters of judgment or falling within their 'margin of appreciation':

> *OFCOM accepts, as it must, that the Tribunal's jurisdiction in this appeal is to determine the issues "on the merits" in according with section 192 of the 2003 Act. However, they argue that it would be inappropriate for the Tribunal to allow a complete opening up of the subject matter of the disputes going beyond the confines of the matters that had been raised by the parties in the course of OFCOM's investigations of these disputes. Moreover, OFCOM says, the Tribunal should be "slow to interfere" where errors of appreciation are alleged as opposed to errors of fact or law.*

88. The CAT re-stated the principle that merits review already includes an element of judicial restraint:

> *It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.*[104]

89. Such restraint was, the CAT concluded, unwarranted in this case. In dealing with the substance of the case, where it exposed what it characterised as '*serious flaws*' in Ofcom's approach to resolving the disputes, particularly in relation to the '*gains from trade*' test used by Ofcom to assess the appropriateness of prices charged by different operators:

> *The Tribunal's conclusion is that the gains from trade test is seriously flawed and should not have been used by OFCOM in resolving these disputes. It is not an appropriate methodology to adopt in order to arrive at a result which is reasonable in either of the senses which we have held constitute the test under the dispute resolution procedure, namely reasonable as between the parties and reasonable from OFCOM's perspective as the regulator. It does not assist in arriving at a price which is fair as between the parties because it focuses entirely on the question whether BT makes any profit, in the sense of a contribution in excess of their long run incremental costs, and does not consider whether the*

[103] T-Mobile v Ofcom [2008] CAT 12 ('TRD').
[104] TRD at 82.

MNOs are making an excessive profit at BT's expense (or at the expense of BT's customers).[105]

90. Although the CAT characterised Ofcom's errors as including an '*error of law*', what was at stake in the case was Ofcom's approach to the balance between two different sets of powers (to set SMP conditions, and to resolve disputes). This is in part a matter of the correct legal construction of Ofcom's powers, but it is, more fundamentally, about the trade-offs between Ofcom's different statutory roles and the application of their duties. Dealing with such matters is the business of merits review, and appellants seeking JR face often insurmountable obstacles to have such arguments even considered.

91. The TRD decision was a significant milestone in the development of the jurisprudence concerning Ofcom's dispute resolution power – a process that is on-going, has involved cases where hundreds of millions of pounds are at stake and that had led all the way to the Supreme Court. Had the CAT accepted Ofcom's submission that it should adopt a JR-like degree of deference to Ofcom's consideration of its own powers, that decision could well have been that the question of whether blended rates should be dealt with in policy-making or dispute-resolution was a matter that should be left to the regulator's discretion, and not a matter in which the Tribunal should '*interfere*'.[106]

92. If that had been the outcome, then prices for all mobile call termination (that is, billions of minutes per annum) sold by the 2G/3G MNOs who offered blended rates would have remained higher than otherwise, during the period from when blending began until the end of March 2007.

93. We have not sought to quantify this impact, since the relevant information is not in the public domain to enable us to do so. However, if BIS wished to understand to what extent this decision affected MCT prices, then Ofcom should be in a position to provide it with a consolidated figure or non-confidential broad estimate.

<u>MNP (saving costs of central database and systems)</u>

94. On 29 November 2007, Ofcom amended General Condition 18 (that deals with number portability) to require: (1) direct routing using a single database and (2) recipient-led porting with a 2-hour porting time. Vodafone appealed Ofcom's decision.[107]

95. The CAT considered the standard of review and noted that, in relation to merits review:

… the Tribunal may, depending on particular circumstances, be slower to overturn certain decisions where, as here, there may be a number of different approaches

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[105] TRD at 118

[106] This process is on-going, in terms of Ofcom's approach to resolving disputes (Ofcom recently issued new guidelines on its approach to applications for costs orders in disputes, for example) and at the CAT (for a more recent example, see *Telefónica UK v Ofcom* [2012] CAT 28 (the 'flip-flopping' case)).

[107] *Vodafone v Ofcom* [2008] CAT 22.

> *which OFCOM could reasonably adopt. There may be a variety of entirely legitimate reasons why the amendment of the current system of number portability in the UK is a desirable aim in pursuance of OFCOM's statutory duties (for example, conflicts of interest between different operators may prevent united action without regulatory intervention). Vodafone accepted that there were a number of approaches open to OFCOM in arriving at the Decision. However it is still incumbent on OFCOM, in light of their obligations under section 3 of the CA 2003, to conduct their assessment with appropriate care, attention and accuracy so that their results are soundly based and can withstand the profound and rigorous scrutiny that the Tribunal will apply on an appeal on the merits under section 192 of the CA 2003.*[108]

96. This illustrates a number of relevant points. First, that the approach taken by appeals bodies on merits review can be, and is, sensitive to the facts of the case and that the developed case law has established an approach of restraint particularly in cases where '*there are a number of different approaches which OFCOM could reasonably adopt*'. Second, that the question the CAT is concerned with here – has Ofcom conducted their assessment with '*appropriate care, attention and accuracy*' would not arise under consideration under JR (since the decision Ofcom took was within the range of '*different approaches Ofcom could reasonably adopt*').

97. The CAT concluded that:

> *In considering the CBA as a whole, the Tribunal finds that it was not carried out to the requisite standard and does not withstand the level of scrutiny which we are required to apply under section 195 of the CA 2003. In particular, for the reasons given above, the CBA contained unreliable estimates of the costs of direct routing, relied upon insufficiently justified or explained benefits, and is therefore flawed to an extent requiring a remedy from this Tribunal.*[109]

98. It would be an overstatement to say that it is inarguable that Ofcom's MNP decision would have stood under JR (i.e. that it falls in 'Category A'). There were procedural irregularities relating to Ofcom's consultation pleaded by the appellant and the main thrust of the CAT's reasoning (that Ofcom had not equipped itself with a sufficient understanding of the facts to take a decision) is also available as a line of argument on JR.[110] But the depth of analysis needed to reach the conclusions that CAT reached might not have even been attempted on JR, where courts and tribunals are notoriously sceptical of what they view as attempts to dress up points going to the merits of the case as points arising under JR. Our view is that if it is not a Category

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[108] MNP at 46

[109] MNP at 126.

[110] See, for example, MNP at 95 ('This Tribunal finds that, in the circumstances, the process undertaken by OFCOM did not allow stakeholders fully to provide intelligent and realistic responses to the questions asked of them … *OFCOM deprived themselves of the opportunity properly to inform their analysis of the potential costs of their proposals*.') (emphasis added)

A case, then the MNP case is one that is likely to fall into Category B2: that is, cases where the absence of merits review makes the flaws of the decision less likely to be apparent on JR.

99. We have not sought to quantify this impact, since the relevant information is not in the public domain to enable us to do so. However, if BIS wished to understand to what extent this decision could have affected operators' costs, BIS could either ask those operators directly, or ask Ofcom to produce a non-confidential estimate of the aggregate figure.

Conclusion: a summary of the quantified impacts of moving from merits review

100. The aggregate picture of the bottom-up analysis is set out in the table below. We stress that the quantifications are crude measures, and not fit-for-purpose in any context other than to provide a 'thumbnail sketch' of the possible magnitude of the effects from changing the standard of review and also to demonstrate that it is not true that these benefits are impossible to quantify.

Case	Category	Outcome under JR/FSG	Effect on litigants	Quantum of effect
MCT 2007	A	MTRs would have been higher	1.1ppm added to final year TAC in 2007 charge control	**£120m** in 09/10 **£145m** in 10/11
MCT 2011	A	MTRs would have been higher	I year longer glide path in the 2011 charge control and higher LRIC	**£47m** in 12/13 **£41m** in 13/14 **£4m** in 14/15
LLU 2010	A/B2	LLU prices would have been higher	Increased costs to LLU providers	**£5.3m per annum** from 11/12
LLU/WLR 2012	A/B2	LLU and WLR prices would have been higher	Increased costs to LLU and WLR-based providers	**£14m per annum** from 12/13
MNP	A/B2	MNP systems costs would have been incurred	Wasted/stranded expenditure on systems	Higher costs (BIS to quantify)
TRD dispute	A	MTRs would have been higher	Blended rate paid for 2G/3G traffic during final months of 2004 charge control	Higher costs (BIS to quantify)

Longer processes as a result of remittals rather than decisions on the merits

101. As noted above, we think a simplifying assumption in relation to the direct impact on the time and cost of appeals is that changing the standard of review will have a net zero impact (and this is, we think, erring on the side of generous to the case for change). But if BIS is not minded to

adopt this simplifying assumption, then it will need to engage with the question of what is likely to be the net impact on timing.

102. The available evidence from submissions to the DCMS consultation and the CAT submission suggests the additional steps of remittal with full re-investigation or re-consultation are likely to be extremely significant impacts on the 'end-to-end' timing of regulatory and competition law decisions:

> *the Government's view appears to be based on a misunderstanding of what dictates the intensity of review on appeal and the length of cases. Put simply, one can have "light" full merits review and "heavy" judicial review. Indeed,* ***in judicial review cases, the need to remit a case to the regulator for a fresh decision (which may itself be appealed) extends the overall time*** *("end-to-end" in the Government's words) that a case takes and it is at least open to question whether, taken overall, judicial review cases are shorter.*[111]

103. Regulators may not necessarily be quick to address matters remitted back to them unless it meets their own view of their priorities to do so. While no one doubts that regulators will do what they can to be responsive to the appeal bodies' desire to see matters finally resolved after an appeal, the reality is that the regulators see themselves as having their own duties to husband their resources effectively and to de-prioritize matters where there is a greater need to take some other action. Indeed, regulators have been prepared to appeal orders by appeal bodies that constrain their ability to set their own timetable and to decide whether or not a given decision really does merit further examination.

104. In quantifying this impact a obvious starting point might be the analysis that BIS propose to use to assess the benefits of faster decision-making:

> *In addition, consumers would benefit from faster appeals as they will be able to receive the benefits of regulation sooner. Ofcom estimates of the cost of delay of regulation to UK consumers suggest a benefit of faster appeals of £0.8m per case per month of delay avoided. We treat this number with caution as we are looking at a wider range of sectors and case types. We assume a benefit of £0.1m per case per month of delay avoided with a high of £0.8m and a low of £0.05m.*

105. Based on our experience, we think that with goodwill and effort by the regulators, the most high-profile and significant matters will get fast-track treatment and swift re-consideration on remittal – swift, in this context, meaning in the order of 6 to 12 months to reach a fresh decision, following appropriate consultation.[112] This may not be the norm, however, and decisions that are not seen as having any major significance to the regulator's own agenda and duties (regardless of the impacts on those regulated firms affected by the decision) could easily

[111] CAT submission, paragraph 14. Emphasis added

[112] This is based on experience of existing processes, and noting that the period for consultation for a material proposal will normally be 12 weeks (based on Ofcom's consultation guidelines).

languish as low-priority cases for a number of years or more. This is not speculation; there are examples of existing cases where this has occurred following remittal.[113] And regulators have been zealous to ensure that their independence in respect of their priorities is preserved, meaning that if a particularly regulator does not relish returning to a task that it has already undertaken once (only to have its first effort quashed), it is unlikely that any external agency will find it straightforward to hold them accountable for that decision.[114]

106. A particularly problematic area of impact here is in relation to price controls in telecoms, where market reviews must be completed every 3 years. Under the Government's proposals, we see little chance that re-consideration on remittal could be completed in time to have a meaningful effect before the expiry of the relevant charge control (since it generally takes 12-18 months to reach the outcome of the initial appeal). Under that regime, decisions generally take effect immediately and the position in law is clear that price adjustments are forward-looking, not retrospective.[115]

107. In that scenario, appeals against any decision against a telecoms price control, no matter how flawed, would be a sterile exercise. In one sense, this could certainly 'streamline' matters considerably, since no-one would appeal a decision if doing so meant no direct benefit to them even if they are vindicated on every point. A moment's thought, however, exposes the extent to which such a situation would be a serious undermining of the rights of regulated firms, damaging of regulatory certainty (an impact over and above the impact of the Government's proposal to change the standard of review) - and we observe that the substantive effect of that change might itself be argued to fail to meet the requirements under the Framework Directive for an effective appeal mechanism.

Impact of greater regulatory risk on economic growth

108. We also think that the IA should contain some quantification of the risks to economic growth as a result of the undermining of regulatory certainty as a result of moving from the existing standard of review.

109. It is important to be precise about the impact we are considering here. This is the impact that flows from the fact that, if the regulators are left to always 'have the last word', then they will have less need to listen to dissenting voices, less need to accommodate inconvenient or inconclusive evidence and less concern about the risks that their logic will be considered and found to be in error. This arises both because a shift away from merits review implies a lesser

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[113] [insert footnote of examples].

[114] See *Ofcom v Floe* [2006] EWCA Civ 768, in which Ofcom (supported by the OFT) successfully appealed to the Court of Appeal to overturn a CAT order requiring Ofcom to complete a re-investigation within a defined period and to attend a case management conference and also the preliminary issue considered in the IMS case (*IMS v Ofcom* [2007] CAT 29) in which Ofcom argued successfully (as the OFT has done in similar cases) that its resourcing decisions are outside the scope of merits review and are only reviewable to a JR standard. David Stewart exercised delegated authority in relation to the IMS decision. .

[115] [Cite statutory provision and CoA decision on timing]

degree of scrutiny and also because the Government's proposals would enshrine the regulator as the first and last decider of most matters – replacing a current process of deliberation and examination with a process whereby there is a single point of failure. It increases the risk in the system, harming the UK's economy as firms who invest in regulated sectors face increased cost to reflect that risk.

110. This seems to us to be a a very significant risk, judging by the evidence of the DCMS consultation responses, the BIS stakeholder sessions and wider statements by HMG about need to get competition/regulatory regime right (e.g. in recent statements concerning new CMA, etc). We are concerned that BIS officials seem to downplay this risk despite the very clear evidence.

111. We are conscious of the challenges in quantifying such a risk. Economic evidence about quantifying impact of regulatory risk on economic growth is difficult to marshall and should be interpreted cautiously, and we think the points made by Frontier Economics in their study for BIS last year are relevant here:

> *However, the relationship between regulation and growth is complex. Regulations can have a positive impact on growth by removing certain market failures and improving economic efficiency. Regulations can have a negative impact on growth by creating substantial compliance costs, undesirable market distortions or unintended consequences. The overall impact of regulation on growth depends on which effect is larger and this can vary depending on particular circumstances.*[116]

112. Nevertheless, public statements by regulators and others about regulatory certainty suggest that it is a significant impact on outcomes for consumers, and it is one that we think requires consideration to address the shortcomings of the IA.

113. Given the scale of the regulated sectors, even an unquantified risk of harm to economic growth is seems to us to be material. Given the Government's over-riding policy objective (across all portfolios) is economic growth, it should be treated with the utmost gravity.

The valuation of impacts in Option 3 (Streamline the process)

114. The IA notes the following costs:

    (a) Additional costs to regulators as a result of better decision-making process.

    (b) Poorer, rushed decisions by appeal bodies, encouraging further appeals

    (c) Transitional costs of implementation

115. The IA notes the following benefits:

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[116] Frontier Economics, '*The Impact of Regulation on Growth: A Report for the Department of Business Innnovation and Skills*', May 2012 at page 5.

(a) ‘Shorter appeals, as a result of streamlining and fewer appeals as a result of improvements in the original decision-making process.’

(b) ‘Consumers benefit … from receiving the benefits of regulation, through lower prices sooner, as a result of quicker appeals.’

(c) ‘Faster appeals and more efficient economic regulation, as a result of fewer resources, including management time, spent on appeals, would improve the regulatory environment in the UK. This would benefit consumers and investors and have a positive impact on economic growth.’

116. We think that these costs and benefits should be re-considered in line with the points that we have made in relation to Option 2 (and the language used in many cases is identical, and we do not repeat our earlier points here). This could usefully be done in light of the submissions received to the BIS consultation.

117. More generally, we see scope to split out the choices amongst Option 3 to enable a more granular picture of the Government’s policy options and their impact.

The valuation of impacts in Option 4 (combining Options 2 and 3)

118. What would a true valuation of the combination of Options 2 and 3 look like? We think that the simple aggregation of the two IA outcomes is unlikely to a be reasonable approach since:

a. It compounds cost savings – for example, the 25% cost saving is repeated in both Options, and it is unlikely this is a true or accurate picture of the likely impacts. This is separate from the points we have made earlier about the overly-optimistic nature of those cost savings in any event;

b. The uncertainty associated with litigation to test a new standard of review is likely to be compounded by uncertainty about new processes, new institutions or appeal bodies and so on. This effect is not quantified (or recognised) in the assessment of Option 4.

c. The wider context of reform of the competition landscape is not recognised – and this is likely to accentuate any ‘uncertainty’ impacts discussed above.

H. Annex: Notes on quantification

MCT 2007

1. The decision of the CC/CAT was to reduce the starting charges and the value of X for the charge control for call termination to the mobile network operators. In a publication on 2 April 2009, Ofcom set out how the changes would affect the charge control.[117] We use Ofcom's figures regarding the changes in the TACs (target average charges) to calculate the difference in costs to the fixed network operators. For the purposes of this exercise, we ignore the changes to the mobile operators themselves as their net position would depend on the traffic patterns of calls to and from each other.

2. Using Ofcom data for the volume of fixed to mobile calls, we estimate that the change in TACs will have resulted in a reduction in costs to fixed network operators of approximately £120 million in 2009/10 and £145 million in 2010/11. This is an extremely simple measure of the impact of the change decision, and as noted above, we do not interpret these figures as changes in welfare.

3. There has been intense debate for many years about the precise impact of changes in mobile termination rates. One argument that has been put forward suggests the presence of a 'waterbed effect', whereby reductions in termination revenue will lead to relatively higher prices for mobile services. As a result, the impact on consumers of reductions in termination rates is ambiguous.

4. As such, we do not place much weight on our simple calculation as a measure of consumer benefits. However, our figures provide a reasonable indication of the impact on the fixed telecoms industry. Furthermore, taking our cue from Ofcom, other national telecoms regulators, and the European Commission, we would expect that the at least some of these cost savings would have been passed on to consumers.

5. As a sense check on the simple approach outlined above, we have also considered an equilibrium model of the mobile industry to estimate the impact on welfare of a change in termination rates. This is a complex exercise, which would benefit from further work. However, the initial work that has been undertaken serves to highlight two points: first, that quantification of the change in welfare is possible; and secondly, that the estimates provided by our simplistic approach set out above are plausible as estimates of the welfare impact of the changes in regulatory decision.

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117 http://stakeholders.ofcom.org.uk/binaries/consultations/mobile_call_term/statement/CTMAmendment2009final.pdf

6. We use a general model of competition in the mobile sector developed by Hoernig, but calibrated to the circumstances in the UK[118]. The model simulates competition between a number of differentiated mobile operators and a single fixed network operator. In order to run the model, we need to supply a number of assumptions. For example, we need to provide specific a demand function, which in turn requires an assumption about the elasticity of demand.[119]

7. Welfare is measured as the sum of consumer and producer surplus. That is, for any reductions in price we are taking account of both the benefits to consumers of lower prices and also the reductions in profits to the suppliers. The model is static and therefore does not estimate the potential dynamic efficiency benefits resulting from changes in regulation. However, given that it models a competitive equilibrium, it should take account of potential 'waterbed' effects.

8. To compare welfare levels we run the model with the termination rates from the original Ofcom decision and then using the revised prices as amended by the CC/CAT. Under a variety of scenarios for the remaining input assumptions, we estimate a net annual impact in the region £100million for the change.[120]

9. As noted, this estimate would benefit from further refinement, but is sufficient to support the contention that our original simple estimates are of the correct order of magnitude, and are plausible estimates of the welfare impact of the change in decision.

MCT 2011

10. The decision of the CC/CAT resulted in a change in the glidepath of the current charge control, and a revised value for LRIC. On 2 May 2012 Ofcom published a statement setting out exactly how its original decision was to be changed.[121] We use the figures from table 2 in this document to calculate the impact of the change in the decision. As with the previous estimate we focus on the change in costs to the fixed network operators. We make some simple assumptions to forecast fixed to mobile call volumes, expecting them to continue to decline at a rate of just over 10% per year.[122]

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[118] Details of the model are presented in a number of papers. We derived our simulation model from the description provided in: Harbord, David and Hoernig, Steffen (2010): *Welfare Analysis of Regulating Mobile Termination Rates in the UK (with an Application to the Orange/T-Mobile Merger).* Available to download from, http://mpra.ub.uni-muenchen.de/21515/.

[119] We assume a linear demand function, and an elasticity of demand of 0.3. The other parameters of the demand function are then calibrated using volume and revenue figures from 2009 as published by Ofcom.

[120] The output of the model is highly sensitive to the assumption about the level of call externality. This is a measure of the benefit to the called party from receiving a call – something that is not explicitly taken into account in the economic decision of the calling party. We take a prudent approach and assume very low values or zero for the call externality factor. Higher values for this call externality factor will result in much higher estimates of the impact of lower termination rates.

[121] http://stakeholders.ofcom.org.uk/binaries/consultations/mtr/statement/smp_conditions.pdf

[122] This is based on the average quarterly decline over the past 3 years.

11. Given these assumptions, the change in regulated prices will result in a reduction in costs to fixed network operators of approximately £47million in 2012/13, £41million in 2013/14 and £4million in 2014/15 (all in current 2013 prices). The same caveats apply as in the previous estimate, but given a difference of over £90million to fixed network operators, this simple calculation does show the significance of the change in the decision.

LLU 2010

12. The decision of the CC/CAT resulted in a reduction in MPF and SMPF prices in 2010/11. Specifically, the MPF annual rental price reduced from £85.92 to £89.10, and the SMPF annual rental price reduced from £15.24 to £15.04. Given the volumes of these services bought by other communications providers, these changes resulted in reductions in costs for LLU providers of £5.3million in 2010/11.

13. These changes will most likely have affected the starting prices for the subsequent charge control. As such, the impact of the CC/CAT decision is in the order of magnitude of £5million per year.

14. As with our quantification of the MCT decisions, this is a simple calculation which does not attempt to model net changes in welfare. It merely gives an indication of the significance of the change in decision, and the sensitivity to small movements in regulated prices.

LLU/WLR 2012

15. This decision resulted in a reduction in MPF, SMPF and WLR rental prices, and changes to the connection charge for SMPF and transfer charge for MPF. The table below shows the changes in prices.[123]

	Old price	New price	Price reductions
WLR	£ 94.75	£ 93.27	£ 1.48
MPF	£ 85.04	£ 84.26	£ 0.78
SMPF	£ 10.40	£ 9.75	£ 0.65
MPF Transfer / SMPF connection	£ 30.82	£ 30.65	£ 0.17

As with the LLU decision, we look at the impact on CPs buying these services from BT. Using volume data from BT's regulatory accounts, we estimate that this decision will have result in an annual cost reduction to CPs buying LLU and WLR of approximately £14million. The changes in MPF/SMPF transfer and connection prices have only a limited immediate impact, but it should be noted that these may have a greater beneficial over the longer term by reducing the costs of switching supplier and thereby encouraging competition.

[123] These figures come from Ofcom's amendment to the original Statement, published on 30th April 2013. http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/statement/Amendment.pdf

Trading Standards Institute

Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

BIS consultation 2013

Response of
The Trading Standards Institute

September 2013

About The Trading Standards Institute

The Trading Standards Institute is the UK national professional body for the trading standards community working in both the private and public sectors.

Founded in 1881, TSI has a long and proud history of ensuring that the views of our broad church of Members are represented at the highest level of government, both nationally and internationally.

TSI campaigns on behalf of the profession to obtain a better deal for both consumers and businesses.

We are also taking on greater responsibilities as the result of the government's announcement in October 2010 that trading standards is one of the two central pillars of the new consumer landscape (the other being Citizens Advice).

The TSI Consumer Codes Approval Scheme, established at the request of the government to take over from the OFT scheme, went live in April 2013 and was formally launched in June 2013.

TSI is a member of the OFT's Consumer Protection Partnership which was set up by the government to bring about better coordination, intelligence sharing and identification of future consumer issues within the consumer protection arena.

We have taken over responsibility for business advice and education.

TSI is also a forward-looking social enterprise delivering services and solutions to public, private and third sector organisations in the UK and in wider Europe.

We run events for both the trading standards profession and a growing number of external organisations. We also provide accredited courses on regulations and enforcement which deliver consistent curriculum, content, knowledge outcomes and evaluation procedures, with the flexibility to meet local authority, business and operational needs.

In compiling this response, TSI has canvassed the views of its Members and Advisers. The response has been composed by TSI Lead Officer for Civil Law David Sanders. If you require clarification on any of the points raised in the response, please do not hesitate to contact David at email locivillaw@tsi.org.uk.

TSI does not regard this response to be confidential and is happy for it to be published.

Trading Standards Institute
1 Sylvan Court, Sylvan Way
Southfields Business Park
Basildon, Essex, SS15 6TH
Tel: 0845 608 9400
www.tradingstandards.gov.uk

Streamlining Regulatory and Competition Appeals: consultation on options for reform

Trading Standards Institute response – September 2013

The Trading Standards Institute appreciates the opportunity to respond to the consultation on Streamlining Regulatory and Competition Appeals. Many of our members work in the private sector for companies affected by Appeal decisions. The majority however work in the public sector and are engaged in monitoring the economic activities of companies of all sizes to determine whether such activities adversely affect the economic interests of consumers and indeed other companies in the same market.

TSI appreciates that, in the main, this Appeals process may only impact indirectly upon our members' daily work. However, members in Enforcement often feed data regarding consumer complaints to organisations directly affected. Furthermore the principles behind the consultation prompting these reforms are ones our members support and attempt to adhere to.

TSI recognises that the reputation and credibility of all regulators depends upon them acting appropriately, proportionately, and fairly; and that they are subject to oversight by a process that enhances the Regulator's standing. In this Consultation it is apparent that such principles dominate, as indeed they should, over the need for speed and economy in obtaining a result.

TSI supports the adoption of judicial review where appropriate. But where the dispute is narrowly focused on one issue, the "merits review" approach in accordance with the consultation should be followed.

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?

Yes

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?

Yes

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

TSI believes that moving to Judicial Review may not have major time or cost implications but that these are more a product of the resources in the Appeals system. It does feel that the emphasis on protecting the standing of the Regulator, whilst adding gravitas to the appeal, is the correct one.

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?

Yes. TSI recognises that this question deals with the standard of review and thus supports Judicial Review. However, this should not affect the mechanism of review, thus a 'focused specific grounds' could be adopted where circumstances deem it appropriate.

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?

TSI has no evidence that would conflict with the Government conclusion.

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?

Yes, TSI supports option 1 for judicial review for the standard of review whilst permitting the most appropriate format for review in the circumstances.

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?

TSI would not seek to challenge the Government view that Judicial Review may have some advantages in cost and time. This may take time to be realised as expertise is built up and will inevitably be affected by available resources.

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?

Judicial review but as for Question 6.

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?

As per Question 7.

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?

No comment.

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?

As per Question 7.

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?

This may depend on the legislation involved, but no other reason is apparent.

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?

As per Question 7.

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]?

TSI is content that the full review to be carried out this autumn will identify any issues of concern.

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?

Yes

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.

Yes

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

Yes

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

Yes TSI supports the Government view.

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?

Yes, TSI has no direct experience of the appropriateness of the Civil Aviation Act 2012 model.

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

Yes

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

Yes

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

Yes

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?

Yes

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?

No comment

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

Yes

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?

Yes

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

Yes

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?

Yes

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?

If it is decided confine the use of confidentiality rings to legal representatives then there are sanctions that might be imposed for abuse by the professional bodies. However to maximise the benefit of confidentiality rings there may be a need to share information among the parties more widely. Therefore a range of criminal and civil sanctions might be appropriate.

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?

Yes

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? 73

Yes

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?

The issue of costs should be permissive and not prescriptive but the question does contain an appropriate approach to the issue.

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

No

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?

Yes

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.

Yes

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

TSI recognises the valid concerns of Government expressed in Para 6.29 of the consultation and whilst the Enterprise and Regulatory Reform Act 2013 may pave the way for improvements in the way that investigations of anti-trust prohibitions are conducted, and which could be applied to regulatory decision making, TSI does not see that their adoption would necessarily result in the desired objective.

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?

It is difficult to generalise about such situations but experience, training and clear guidelines are a good basis.

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

Reaching a result that is seen to be fair and balanced is difficult when questions remain unanswered. The power to ask questions is therefore regarded as important if not essential, and as in Court cases inferences could be drawn from a failure to answer.

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

TSI has no strong position on this policy issue.

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?

Yes, provided resources permit.

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

Yes

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?

Yes

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?

This might have limited application, but it is a valid and welcome option where parties have identified the contentious issues between them.

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?

Yes

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?

Yes

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?

TSI supports the Government view on reducing the extension of time to 2 months.

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

There should be a regular review of procedures on an annual basis with a view to revision of management procedures on a best practice basis.

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

Should a review of the aforementioned proposals show that they have achieved their objectives then no further measures should be needed.

Trading Standards Institute – September 2013

UKCTA

UK COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION

10 Fitzroy Square
London
W1T 5HP
W: www.ukcta.com
E: info@ukcta.com
T: 0870 801 8000
F: 0870 801 8001

Regulatory and Competition Appeals Consultation

Consumer and Competition Policy Directorate

Department of Business, Innovation and Skills

1 Victoria Street

London

SW1H 0ET

Dear Sirs

Regulatory and Competition Appeals: Options for Reform

1. Introduction

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com. UKCTA welcomes the opportunity to respond to this consultation document since the subject matters which it encompasses are of fundamental importance to our member companies (which includes both SMEs and larger organisations). We responded to the previous BIS Consultation on reform of the appeals regime and also to the DCMS Consultation on the possible reform of competition law which touched in part on many of the very same issues as the current consultation. We would refer the Department to our earlier responses which are published on our web site[1].

[1] http://www.ukcta.org.uk/public_doc_11/110624%20UKCTA_respose_BIS_competition_law.pdf and http://www.ukcta.org.uk/public_doc_11/UKCTA_response_to_appeals_consultation%20final.pdf

2. Summary

UKCTA believes that our members' right to appeal regulatory and competition decisions is vital. As stated in the consultation this right *"is central to ensuring robust decision-making and holding regulators to account in the interests of justice"* and that "*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*".

However, UKCTA believes that the case set out in the consultation for radical reform of the appeals system is weak. The statistics published on the CAT's web site reveal a declining number of appeals (as is to be expected now that a body of jurisprudence has been established).

Year	Number of appeals
2003	1
2004	4
2005	2
2006	3
2007	11
2008	4
2009	5
2010	7
2011	4
2012	2
2013	1

The fact that a significant proportion of appeals by communications providers ("CPs") have resulted in Ofcom determinations being successfully challenged clearly bears out our contention that the issue is not so much with the volume of appeals but rather with the quality of regulatory decision making[2]. To be clear, there is no inherent desire on the

[2] In research published in 2010 Towerhouse Consulting confirmed that of 31 appeals 12 had been won either in whole or in part by the appellants. Ofcom's decision had been wholly overturned in 8 of 31 appeals and Ofcom's decision had been confirmed in 7 of 31 appeals.
(http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf Paragraph 3 (b)

part of industry to appeal Ofcom decisions, but it has shown to be necessary all too often in order to arrive at the correct outcome. The figures suggest that, contrary to the Government's perception, the majority of Ofcom decisions are not in fact appealed.

UKCTA does not support the proposals to implement a new standard of review and to restrict the ability of parties to present evidence to the CAT. UKCTA does support any measures which can be taken to improve the appeals process, to improve efficiency and to streamline the operation of the system. However we are very sceptical about the proposals for more radical change, which will do more harm than good.

The Government notes that a great deal of cost is incurred in the electronic communications sector in defending appeals by CPs. But nowhere is it acknowledged that these costs are actually borne by the providers themselves in the form of administrative fees. Indeed Ofcom recently announced a 28.5% increase in these charges, and linked this increase at least in part to a rise in appeal litigation work. There is therefore a very real incentive on CPs (particularly the larger CPs) to avoid litigation wherever possible, since not only will they face their own costs but they will also face increased charges from Ofcom as the regulator seeks to recover the costs of litigation from industry.

The appeals system must be compliant with the provisions of the Framework Directive – the threshold set out in the Directive is an appeal on the merits. There is a significant risk that the proposals set out in the consultation do not satisfy this requirement. What is known, and is acknowledged in the Consultation paper itself, is that any change to the standard of review will inevitably cause upheaval and uncertainty. UKCTA can find no basis for the Government's assertion that the upheaval will be any less than that which followed the introduction of the present system. Jurisprudence has only really become established in this area very recently and the system has taken 10 years to bed in. The Government asserts that development of jurisprudence will not take as long but presents no evidence to back up this assertion.

We note from both the consultation and the BIS workshops held recently, that one of the primary drivers for change is the need to ensure consistency of approach across different sectors. UKCTA does not believe that a one size fits all approach spanning all sectors of industry is necessarily a good thing particularly since different sectors have varying levels of competition and complexity. The processes currently in place are tailored to the sectors to which they apply and are well known and understood by companies operating in those sectors. We speak only for the communications sector, but certainly the current appeals system provides a highly effective means of challenging regulators' decisions where necessary. It would be incredibly damaging to the industry, and ultimately the interests of competition and consumers, were we to lose the current process in an effort to harmonise across sectors. The Government's Impact Assessment appears not to have considered fully the cost to consumers of appeals which have previously succeeded but would not be possible under the proposed regime.

Finally, we note that the CAT has raised many of the same issues which we have identified in our response. UKCTA believes that the CAT is uniquely well placed to comment on the strengths and weaknesses of the current system and to advise on the implications of the changes proposed by Government. UKCTA strongly urges the Government to take heed of the points raised in the CAT's response to the consultation.

3. The Case for Reform

UKCTA believes that the case set out in the consultation for radical reform of the appeals system is weak and does not support the degree of change being proposed. In particular UKCTA agrees with the CAT's concern that the Government's stated objectives seem to be "rather high level in nature and to show a degree of confusion and contradiction".[3]

The response by the CAT identifies a number of deficiencies in the objectives for reform advanced the Government, UKCTA concurs with all of these. Namely:-

1) The Government's definition of an effective appeal system omits any requirement for regulatory decisions to be soundly based on evidence.
2) The Government suggests change is needed to allow regulators to set a clear direction over time but there is nothing in the current system which prevents them doing so.
3) The Government wishes to reduce the end to end length of the decision making process, but the reforms proposed in relation to the standard of appeal and the use of so called "new" evidence will increase the likelihood of litigation and will reduce the pressure on regulators to make sound decisions in the first instance.
4) Access to justice for smaller firms is stated as an objective but the proposals do not address this and arguably they threaten to undermine existing access to justice.
5) Cross sectoral consistency is set out as an objective but the consultation then largely addresses the electronic communications sector and pays lip service to other sectors.
6) The core purpose of the case for reform advanced by the Government appears to be to lighten the load for regulators but UKCTA shares the CAT's concerns that this will inevitably lead to an increased burden for our members.

UKCTA members take issue with the suggestion in the consultation that CPs in particular see the appeals system as a safe "one way bet" with little downside. The cost of

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3 http://catribunal.org.uk/files/Streamlining_Regulatory_and_%20Competition_Appeals_Response_220813.pdf at paragraph 3.

mounting any appeal, in terms of money, resource and time, (which includes the diversion of management time) mean that our members do not enter into any appeal lightly, and only the most significant decisions, with the greatest prospects of a successful outcome, are appealed.

The stated aims of Government are to

> *"Support independent, robust, predictable decision-making, minimising uncertainty" and "Minimise the end-to-end length and cost of decision-making – partly through making the appeal process itself as streamlined and efficient as possible"*

As with the previous consultations in this area it is hard to argue with such objectives and indeed UKCTA believes that these outcomes would be in the best interests of all parties. However, UKCTA is extremely dubious as to whether the Government's proposals are the best way of achieving the objectives.

Indeed the whole case for change seems relatively weak. Section 3 of the consultation presents a variety of statistics which show a relatively low level of appeals (and a continuing trend of declining numbers). It is also significant that the figures demonstrate that Ofcom also loses more appeals that it wins.

This would suggest that the problem is not the number, scope or duration of the appeals, but rather with the quality of decision making in the first place. We remain of the opinion that the best way to minimise appeals is to address the cause of these appeals so that they are not necessary in the first place. There is nothing in these proposals that will encourage better decision making on the part of regulators, indeed a reduced risk of being challenged on appeal would arguably reduce the incentives to make good decisions.

4. Standard of Review in Appeals

UKCTA does not believe that there is any case set out by the Government which justifies the introduction of a novel standard of review. As recently as last year the Government concluded that there was no need to reform competition law to move from the current administrative system to a prosecutorial model and that a full merits based appeal system would continue. As Sir Gerald Barling noted in his recent lecture on anti-trust legislation:-

> *"It is therefore puzzling to say the least that these apparent second thoughts should have arisen so soon. Any change of the kind envisaged would be ironic, given the current lively debate in Europe about the adequacy of the General Court's jurisdiction to review the Commission's infringement decisions."*

The consultation refers to this previous statement (in relation to Competition Law appeals) at paragraph 4.52 but then provides no explanation to support the apparent reversal on the previous position adopted by the Government.

The Government believes that the appeals in the Communications sector take too long at present and that this can be resolved by changing either to a judicial review standard (which it implies means cases are dealt with more quickly) or to a system of pre-defined grounds of appeal.

The Government expresses concern that the current system allows CPs in particular to have a complete re-hearing of their case by the CAT if they disagree with Ofcom's decision. This has not been the experience of UKCTA members and is in contradiction to established case law. The CAT, in our experience, has been not simply repeated the entire investigation in each and every case with a view to replacing the original Ofcom decision but rather has concentrated on re-examining those aspects of a decision where they found serious errors by the regulator. This was very clearly set out by the CAT in 2010 when it made very clear that appeals were to be focussed on identifiable errors highlighted by an appellant:-

> *"What is intended is the very reverse of a de novo hearing. OFCOM "s decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points*".[4]

UKCTA is very concerned that, given the regulator has in the past been shown to have made very serious errors in its decision making process, there is a risk that this will happen again and that a more restricted standard of review would lead to those errors going unchallenged. The outcome of this is likely to be very significant in terms of consumer harm and has a knock on effect on growth and UKCTA has seen no consideration of this by the Government either in the consultation or in the related impact assessment.

Similarly UKCTA does not agree with the Government's view that the length of time taken to decide appeals is necessarily something which can be easily reformed. The Government has not set out any convincing evidence to demonstrate that the length and complexity of appeals is in any way caused by the standard of review. Indeed the CAT, which is much better placed than Government to reach an informed view on these matters, concludes that the Government has based its proposals on a

> *"misunderstanding of what dictates the intensity of review on appeal and the length of cases"*. [5]

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[4] British Telecommunications Plc v OFCOM [2010] CAT 17.

[5] http://catribunal.org.uk/files/Streamlining_Regulatory_and_%20Competition_Appeals_Response_220813.pdf paragraph 13

UKCTA believes that the length and complexity of appeals is determined more by the nature of the subject matter than the standard of review in the appeal. The Pay TV case was not typical of most appeals in the Electronic Communications sector and it would be disproportionate to base a decision for wholesale reform of the system on such a case. But even in more typical cases, the decisions which tend to be the subject of appeal in the sector, involve extremely complex subject matter, frequently involving detailed economic consideration. The decisions being appealed have themselves more often than not taken Ofcom years to reach, so the fact that the appeal then takes a long time to resolve should not be seen as the result of the conduct of any of the parties to it. Nor does the stated average length of an appeal (which is skewed by exceptional cases in any event) look disproportionate when considered in the context of lengthy regulatory investigations.

As the CAT has highlighted in its response to the consultation, the move to a Judicial Review standard may in fact prolong the end to end decision making process:-

> *"in judicial review cases, the need to remit a case to the regulator for a fresh decision (which may itself be appealed) extends the overall time ("end-to-end" in the Government's words) that a case takes and it is at least open to question whether, taken overall, judicial review cases are shorter."*

The rules of the CAT already permit a great deal of flexibility in terms of the conduct of the appeal and the CAT has powers to ensure efficient and effective case management. We are concerned that imposition of arbitrary time limits of the disposal of appeals would do little to produce better decisions.

The Government has proposed two possible standards of review:- a judicial review based standard, and a system of pre defined grounds of appeal. The precise nature of the proposals is open to interpretation, however, regardless of which standard the Government proposes to adopt any change to standard of review will inevitably cause upheaval and uncertainty – a fact acknowledged in the Consultation paper itself. These are apparently the very things the Government is seeking to remove or reduce. As set out above, there are also questions as to compatibility with the Framework Directive.

Such upheaval is the inevitable consequence of change which requires a new body of jurisprudence to be developed, for example the introduction of an entirely new standard of review. Many of the reasons cited to justify reform (uncertainty, increased number of appeals etc) resulted from the process of jurisprudential development following the introduction of the current rights of appeal, a point supported by the CAT in its response to the consultation[6]. Nor is this a view confined to UKCTA and the CAT.

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6 http://catribunal.org.uk/files/Streamlining_Regulatory_and_%20Competition_Appeals_Response_220813.pdf at paragraph 20

> *"Recent experience at the CAT has also shown that its review jurisdiction has reached a level of maturity at which the key questions of its scope and reach have largely been settled. Most importantly, whereas in the early years of the CAT the question of what constitutes an „appealable decision" for the purposes of ss 46 and 47 of the Competition Act 1998 was a hot topic of dispute, there have been scarcely any such disputes in recent years."*[7]

It would be very odd indeed to seek to deal with these problems by repeating the cycle as will happen if the Government proceeds with its current proposals.

UKCTA believes the proposals will result in greater regulatory uncertainty (thereby deterring investment) and will increase legal costs for both industry and the regulator while a fresh body of jurisprudence is established (which is likely to take years). Uncertainty is of course not good for business but neither does it help the regulator. In the face of greater uncertainty the regulators will have less clarity of what is expected of them in terms of their decision making.

As set out in UKCTA's response to the previous (DCMS) Consultation, the Government appears to be taking a huge gamble on these reforms. Furthermore it is gambling without having first identified and explained the risks of that gamble. Nor does the Government appear to have explained what consideration it has given to the responses received to the earlier DCMS consultation documents (the large majority of which were opposed to the reforms) nor to have considered how it might mitigate the risks of the negative consequences of the proposed changes.

5. Cost to regulators of appeals

In the consultation, much emphasis is placed on the cost to regulators of running appeals, this is said to be a particular issue in the case of Ofcom and the electronic communications sector. But the consultation fails to take into account that the cost of litigation is borne not by the regulator but by industry. As was recently made clear to UKCTA by Ofcom's Finance Director, Alastair Smith, and by CEO ED Richards in his evidence to the CMS Select Committee[8], this year's 28.5% increase in Ofcom's annual administrative charges (i.e. the fees paid by CPs to Ofcom) was introduced in order to recover the cost to Ofcom of litigation rather than allowing the burden to be borne by the taxpayer. Not only does this undermine the Government's assertion that there is a need to control the cost to Ofcom of defending appeals against its decisions, but, since the costs are ultimately borne by CPs, it provides yet another disincentive to CPs to mount appeals in all but the most important cases. Far from being a one way bet for CPs, with a good outcome, it might be argued that the current system is a one way bet that

[7] H Davies QC, Competition Litigation: Practical Thoughts in Developing Times [2011] Comp Law 274

[8] http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/uc508-i/uc50801.htm

CPs will face serious costs when mounting an appeal, not only will they have to meet their own legal costs but they will face increased administrative charges to help defray Ofcom's legal costs.

This is exacerbated by proposals in the consultation to take a very one sided approach to costs awards to the benefit of the regulator.

6. Procedural reform

In general, despite the comments made above on radical reform, UKCTA does support sensible and justifiable reform to improve and streamline the appeals process. Given that CPs already have to bear a proportion of the regulator's costs via the Administrative Charges regime (**see paragraph [ref] [above/below]),** anything which reduces cost and or speeds up the process ought to be welcomed by industry, so long as it does not undermine the established rights of appeal against an economic regulator – this is vital for businesses so they can hold the regulator to account. For example we welcome the proposals in relation to the use of confidentiality rings (having argued for such a development in our response to the previous consultation).

As will be evident from our earlier comments set out below, UKCTA believes that the current system could benefit from incremental, reform of the process. But we believe that such reform is best left to the CAT since they are much better placed to determine what is likely to achieve the desired effect than central Government. Indeed experience in the telecoms sector shows that the CAT already enforces strict case management. For example it takes a very strong line on permissible interventions in proceedings, timetables and the length of submissions. We would suggest that the Government is simply too remote from the practice and procedure of the appeals system to make well informed decisions in this area. As UKCTA has previously stated incremental reform of the current system has the potential to deliver the improvements which Government seeks but without the upheaval, cost and uncertainty which DCMS have said their proposals will produce for the next few years. Once again we question the basis on which DCMS believes these negative aspects of their proposals can be justified.

The Consultation infers that the CAT has permitted CPs to lodge appeals with little merit and that regulators should be more robust in challenging appeals that have no merit and the CAT should be required to scrutinise appeals at a preliminary stage to weed out appeals with no merit. While superficially an attractive option, in the context of the current system this seems simply to be developing process for its own sake. The CAT already assumes a very proactive role in this regard and invests time and effort in encouraging parties to reach agreement in advance of hearings on as much as possible. The current rules of the CAT already provide the means to dispense with any such appeals. As the CAT notes in its response to the consultation, the fact that there have

been so few appeals rejected at an early stage is not down to the absence of a "strike out" power but rather because:-

> *" this is because generally speaking few if any obviously hopeless appeals are actually commenced."*

UKCTA also endorses and welcomes the CAT's conclusion that

> *" It needs to be borne in mind that appellants in the CAT are almost invariably responsible companies represented by skilled specialist lawyers whose professional obligations and reputation provide a constraint on the commencement of wholly unmeritorious appeals. Certainly no evidence is advanced in support of the view that too many such appeals are getting through the net."*

Appeals can take some time but, as noted above, this is an inherent feature of the complexity of the cases rather than any failure or weakness of the system; and in any event the length of cases is typically not out of line with the time taken to reach the Ofcom decisions in the first place.

UKCTA believes that actually the real problem lies with the quality of decision making in the first place. Rather than attempting to streamline the appeals stage using an arbitrary measure, should the Government not instead be looking to have a limit commensurate with the complexity of the case concerned (perhaps this could be determined with reference to the time taken to reach the original decision being appealed).

Although UKCTA supports the proposal to introduce the use of confidentiality rings there are very real concerns about the proposal to reduce the number of persons hearing a case to a single legally qualified judge. One of the main advantages which the CAT has over a standard court is the fact that appeals are heard by a panel comprising persons with both legal and other appropriate specialist knowledge. In the electronic communications sector at least, the majority of appeals are based heavily on economic analysis. It might be that in the most straightforward appeals, those concerning only points of law for example, that a single judge would be appropriate but such cases are likely to be the exception rather than the norm and such cases will not always be clear at the outset. UKCTA is therefore very concerned that the Government wishes to dispense with this specialist knowledge. It is not clear on what basis this can be justified. If the Government believes that cost savings can be achieved UKCTA would be very sceptical that this is the case. UKCTA does agree with the Government's proposal to send price control appeals directly to the Competition Commission. This has the potential to simplify the process significantly. UKCTA believe that while in most cases it will be obvious whether the appeal is a price control case; there may well be occasions where this is not immediately apparent.

UKCTA welcomes the proposal to continue to refer ex ante regulatory appeals to the CAT.

UKCTA is however much more concerned about the proposals to restrict the use of what the Government describes as "new" evidence. The government appears to be primarily concerned with the use of expert evidence, but in cases as complex as those seen in the communications sector, expert evidence is often fundamental to a consideration of the issues. It is also worth noting that the Government is wrong to describe such evidence as being "new evidence" since the CAT is the court of first instance and often the first time the parties will have had an opportunity to fully develop their case.

As Sir Gerald Barling noted recently,

> *"what is being spoken of as "new evidence" is nothing of the kind. In the administrative procedure, evidence is not placed before an impartial court or tribunal: this first happens on appeal to the CAT. So it is somewhat misleading to confuse that with the Ladd v Marshall situation, where a matter has been heard and decided by a lower court and a party seeks to adduce new evidence on appeal to a higher court."*

UKCTA also strongly refutes the implication that appellants are prone to holding back evidence for the appeal stage which could and should have been made available to the regulator at the initial stages. Again as Sir Gerald Barling noted

> *"there is simply no evidence that material which could have been adduced at the administrative stage is somehow being withheld in order to be deployed on appeal."*

In its response, the CAT also robustly refutes any suggestion that there is any practice of holding back for the appeal stage, evidence which could and should have been put before the regulator

> *"The CAT has never encountered such a practice and there are good reasons to believe that it does not occur."*

Furthermore of such behaviour ever did occur the CAT's rules are flexible enough to deal with any likely disadvantage to either party which might arise. As the CAT notes;

> *"To the extent that evidence is produced at the appeal stage which could reasonably have been brought before the regulator in the course of the investigation, the CAT "s current rules are perfectly adequate to enable it to admit, exclude or limit evidence where the interests of justice so require."*[9]

Any prejudice could be dealt with by means of an application by the regulator to stay proceedings pending reconsideration of the original decision in light of the evidence, and the CAT's wide discretion in relation to awards of costs could be used to penalise any particularly deliberate late production of evidence.

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9 http://catribunal.org.uk/files/Streamlining_Regulatory_and_%20Competition_Appeals_Response_220813.pdf at paragraph 42

At present, CPs are able to respond in a relatively concise manner to Ofcom and yet Ofcom already complain that they are overwhelmed by the volume of information received at the investigation stage. If the Government proceeds with the proposal to restrict the opportunity to lodge evidence before the CAT then it may cause CPs to err on the side of caution and to load even more evidence on to the regulator at the Administrative stage, thereby exacerbating the regulators' problems. The fundamental point in this regard though is that parties cannot know in advance of seeing a decision from Ofcom, what evidence will be required to challenge the regulator's reasoning. It is vital that parties be permitted to submit all relevant evidence to challenge decisions when they believe the regulator has made an error.

If the Government is minded to restrict the introduction of evidence as set out in the consultation, UKCTA believes that the result will be lengthier rather than shorter appeals. We agree with Sir Gerald Barling that:-

> *"it will almost certainly lead to additional and/or longer appeals both in the CAT and in the Court of Appeal, as the parties dispute the CAT's admission or exclusion of material by reference to the proposed statutory criteria."*

UKCTA believes that the Government's proposals are unnecessary and will exacerbate rather than resolve any perceived shortcomings of the current system. Ofcom previously tried to argue that a more precise test be introduced in relation to the admissibility of evidence at the appeal stage but this was rejected by the Court of Appeal which endorsed the current approach of the CAT[10]. UKCTA does not see any justification for the Government to revisit this matter at this moment in time.

If there are concerns that expert evidence is causing lengthy hearings then we suggest the UK ought to look to international experience. In particular we believe much could be learned from Australia where so called "hot tubbing" is used. Formally this is known as concurrent expert evidence or witness conferencing [11]. -

We understand that there are good grounds for expecting that hot tubbing will save both time and money following a review of the use of this method in Australia – where hot tubbing was developed and has proved successful – and a pilot scheme undertaken in the Manchester Technology and Construction Court and Mercantile Court.

According to a recent article in Legal Week, (Scrubbing Up Expert Evidence – The Pros And Cons Of 'Hot Tubbing'):-

> *"Of course, counsel could achieve the same result, but perhaps not as efficiently because hot-tubbing ensures that the relevant witnesses are present at the same*

[10] British Telecommunications Plc v OFCOM [2011] EWCA Civ 245.

[11] at paragraph 11 of the Practice Direction to Rule 35 of the Civil Procedure Rules: http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part35/pd_part35

time and are subject to a form of contemporaneous peer criticism. Both experts have to explain their points of view to the judge at the risk of being immediately contradicted by the other expert witness."

7. Access to Justice for smaller CPs

The government has stressed both in the consultation and the follow up meetings with stakeholders that they are concerned that the current appeals system is too expensive to allow smaller stakeholders to have access to it and that this allows larger CPs an advantage in that they can use the system to delay regulatory changes which they perceive to be unfavourable. Despite this apparent desire to address the needs of smaller CPs, the Government has proposed little or nothing to deal with the needs of smaller CPs. Indeed the proposals to restrict the grounds of appeal available to parties and to limit the evidence (particularly expert evidence) which can be used in support of an appeal will do nothing to improve access to justice regardless of a company's size. It will restrict access to justice for large and small alike.

UKCTA's membership includes not only the major UK CPs but also some of the smaller, niche operators. These smaller CPs do not agree with the BIS view that their larger rivals abuse the system to detriment of smaller CPs. Smaller CPs sometimes have similar views to the larger companies. The costs of litigation (whether of appeals or litigation more generally) do tend to discourage them from participating so typically they rely on the larger CPs to run the appeals and the smaller CPs will reap the benefits. But they do occasionally participate in appeals against Ofcom decisions. However, whereas a larger CP may wish to challenge a range of aspects of a regulatory decision, smaller CPs often have an interest in relatively minor point in a wider appeal. It would greatly aid such companies' access to justice if there could be some mechanism to permit them to express their views without having to mount a full blown intervention in a wider appeal. This could be something similar to being an interested party in a dispute before Ofcom - in other words a light weight intervention process.

The proposals set out in the consultation would effectively limit access to justice of the smaller CPs, contrary to the Government's stated objective.

Finally, UKCTA believes that there is a risk that a reduced scope for appeal represents a lower standard of scrutiny and review. This potentially removes a powerful incentive for Ofcom to ensure that their investigations and decision making are as diligent and robust as possible. This risks producing poorer decisions and could actually cause an increase in the number of appeals.

8. Conclusions

UKTCA believe that the Government's case for reform is not proven and is concerned that the proposals do not appear to be compliant with either the European Convention on Human Rights nor the Framework Directive.

UKCTA has very serious concerns about the proposed change to the standard of review in appeals and the restrictions on evidence which can be used in an appeal.

Contrary to the Government's assertions, UKCTA shares the view of the CAT that the proposals are likely to lead to more rather than less litigation and more protracted timescales in terms of an end to end decision making process

UKCTA believes that if implemented, the proposals will in fact reduce pressure on regulators to make sound decisions and this is not in the interests of either consumers or CPs.

Nevertheless there are a limited number of proposals with which we do agree, for example the proposal to make use of confidentiality rings and allowing Scottish and Northern Irish judges to sit in the CAT.

10th September 2013

United Utilities Water PLC

United Utilities Water PLC
Thirlmere House
Lingley Mere Business Park
Lingley Green Avenue
Great Sankey
Warrington WA5 3LP

Telephone 01925 237000

unitedutilities.com

Tony Monblat
Department for Business, Innovation & Skills
1 Victoria Street
London
SW1H 0ET

Direct line 01925 678044
james.bullock@uuplc.co.uk

11 September 2013

Dear Tony

RESPONSE TO BIS CONSULTATION ON STREAMLINING REGULATORY AND COMPETITION APPEALS

This is a response from United Utilities to the BIS consultation paper 'Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform'. United Utilities is the appointed supplier of water and sewerage services to 7 million people and 200,000 businesses in the North West.

The observations we set out below are predicated on the assumption that the discussion in the consultation document is aimed as much at the water sector as the other regulated industries. We have not sought to answer the specific questions that the consultation document poses, but thought it would be helpful to give our perspective on some of the key issues that BIS has raised.

Appeals on merits versus judicial review standard

The first of these key issues is the question of whether appeals against regulatory decisions, including price control decisions, should be heard on the merits or be made subject to JR standards of review.

Our perspective on this matter is that of a company that has approximately £10 billion of outstanding equity and debt capital, with a potential additional external financing requirement of over £3 billion over the next five years. The appeals mechanisms in the sector rank high up in the list of factors that investors in the sector pay attention to when they decide whether and at what price they are willing to make finance available to water companies. This is because the right of appeal constitutes the key protection that investors have against regulatory risk. It is therefore of utmost importance to us and to our customers that BIS considers the impact of possible reforms on the climate for investment.

Our experience is that the existing rules and arrangements have contributed to perceptions of low investment risk, thus helping United Utilities and other companies in the sector to access capital markets at very low rates. Specifically, investors see considerable merit in a statutory framework

United Utilities Water PLC
Registered in England & Wales No. 2366678
Registered Office: Haweswater House,
Lingley Mere Business Park, Lingley Green Avenue,
Great Sankey, Warrington, WA5 3LP

which enables companies to ask an independent expert – in the form of either the Competition Commission (CC) or the Competition Appeals Tribunal (CAT) – in effect, to step into the sectoral regulator's shoes and look again at licence modifications, price control determinations and competition law decisions with a fresh pair of eyes.

This is a very different set of arrangements compared with judicial review, which does not obviously provide the same protections. Investors have observed that in previous judicial review proceedings involving regulated industries, judges have expressed a reluctance to second-guess and overturn decisions made by expert economic regulators. This has given rise to a perception that it is virtually impossible for a regulated company to overturn a decision made by its economic regulator via JR.

In these circumstances, investors are likely to perceive an increase in risk if there were to be a switch from appeals on the merits to a JR standard of review. Ultimately this may make the investment case for the sector more difficult.

As evidence of this, we recommend to BIS that it considers carefully the 2012 CC inquiry into Phoenix Natural Gas's price control. Phoenix last year rejected a price control decision from the Northern Ireland Utility Regulator that would have seen its RAB reduced in value by 17%. This triggered a reference to the CC, which decided, on the merits of the case, that there were no grounds for RAB adjustments and that Phoenix's RAB should be kept intact.

Importantly, the same outcome would not have been forthcoming if Phoenix's only right of challenge to the Utility Regulator's original decision was via JR. This is because there was never any suggestion in this case that the regulator had operated outside of the law, only that there was weak economic logic in the adjustment that the regulator proposed.

On the basis of this case, the implications of the BIS proposal are clear: Phoenix would not have been able to have a decision reversed which ultimately, in the eyes of the CC, was not sound. This would have been to the detriment to Phoenix's investors and customers It would also been a matter of concern for all investors facing exposure to similar decisions, again with implications for customers.

<u>Regulatory reference model or specified grounds of appeal</u>

A second key issue that the consultation paper raises is the question of whether the CC should be asked to start afresh or whether its work should be bounded by specific grounds of appeal against a regulator's earlier decision.

BIS highlights in its paper some of the downsides of narrow appeals, drawing mainly on experience in the communications sector. However, there may also be some downsides to having unbounded appeals/determinations, as is the case currently in the water sector for references to the CC in relation to licence modifications and price controls. Chief among these is the amount of wasted time, effort and cost that comes from having to look at all issues in a CC inquiry, starting completely from scratch rather than focusing from the outset on the handful of key issues that have prompted the reference.

As a consequence of these things, companies in the water sector currently set a very high hurdle before they contemplate a reference to the CC. The effect of this high hurdle can be seen in the fact that there have only been five CC inquiries in the water sector since 1990 (excluding mandatory merger references).

The case for allowing broad or narrow appeals is more finely balanced than the BIS consultation suggests. Appeals should not happen so often such that they become an inevitable part of the regulatory process, and this had not been the case in the water sector. Conversely, BIS should also evaluate whether it is in customers' and investors' best interests for there to be a very low likelihood of independent, third-party scrutiny of a regulator's decisions.

Ability to introduce new evidence during an appeal

The consultation paper floats the possibility that the parties to an appeal or redetermination might be barred from introducing arguments or evidence that were not previously put before the regulator.

We are firmly against such a change. The nature of the regulatory decision-making process is such that important matters are often only settled very late in the process. It should not be assumed that companies always have ample opportunity to understand or challenge a regulator's analysis prior to the publication of the regulator's final decision document. We also very much agree with the contention that there may be circumstances when it may only be after a determination that a company understands the importance a regulator has attached to certain pieces of information.

Further, we do not believe that companies are incentivised to "game" a regulatory process by withholding information with the purposeful intention of putting it forward during an appeal. Indeed, companies are strongly incentivised to present the best evidence available to a regulator in forming its initial decision, precisely to avoid having to make an appeal.

Finally, we would note that if there were to be a blanket bar on the introduction of new evidence, then this may place a curious incentive on regulators to be less forthcoming and less transparent during their consultations. This would be contrary to the significant increases in transparency that have been achieved over the last decade.

Timescales

BIS gives some attention in its consultation document to the timescales for deciding appeals.

Our sense is that the UK already benefits from a comparatively speedy process for resolving disputes between regulators and companies. Certainly the CC and the CAT are acutely aware of the uncertainty that their inquiries create and, hence, the value of timely decisions.

Tony Monblat

11 September 2013

We would not be in favour of reforms which shortened existing timescales or which prevented the CC and/or the CAT from seeking extensions to statutory deadlines when required. The CAT and CC must be given sufficient discretion and flexibility as to timings and extensions in order to ensure that they are confident that they are able to act fairly in reaching decisions as they see fit. New limits on this discretion and flexibility may impact adversely on the quality of decisions – i.e. we fear that there would be cases in which the CC/CAT not have sufficient time to analyse the complex economic issues raised in a reference and would feel compelled to make a decision prematurely.

It is interesting in this regard to see that the CC has asked for extensions in its two most recent price control inquiries (two months in the case of Phoenix Natural Gas and six months in the case of Northern Ireland Electricity). We think this shows that the standard six-month timescale for a CC inquiry is highly challenging, given the complexity of the issues that have to be confronted when setting a new price control. If BIS looks more closely at the regulator's decisions to grant extensions in these cases, we think it will see that it was in all parties' interests that the CC was given extra time and that the changes it is considering have the potential to give rise to disbenefits that more than outweigh the potential savings in administrative costs.

Expertise

We would, however, emphasise how important it is for the new Competition and Markets Authority (CMA) to cultivate and retain a pool of expertise in economic regulation which can be immediately deployed on regulated inquiries, even if there are considerable gaps between such cases. This is the best way of ensuring that the CMA reaches robust decisions in a timely manner.

Similarly, we are very clear that the CAT rather than the High Court should hear other, non-CC/CMA appeals that are dealt with on the merits. The original rationale for the creation of the CAT, principally arising from the benefits of giving expert economic as well as legal scrutiny to decisions, remains just as valid today.

Right of appeal to the CAT on enforcement orders and financial penalties

On one specific point, the consultation document notes in passing that the water sector is now sitting out of line with other industries (aviation, energy, post, telecoms) in that water companies can only challenge the making of an enforcement order and the levying of a financial penalty via JR, whereas in other sectors companies are appeal to appeal on the merits to the CAT.

We think that this discrepancy should be addressed so that the statutory framework in the water sector can be aligned with current best practice. This would mean amending the Water Industry Act to give companies a right of appeal to CAT in respect of decisions made under sections 18 and 22A of the Act.

Other possible appeal mechanisms

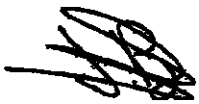
A final observation we can make is that BIS focuses in its consultation document on a fairly narrow range of appeals mechanisms. There are other methods of resolving disagreements including, but not limited to, arbitration and expert determination.

Tony Monblat

11 September 2013

BIS might like to consider whether there is more scope for these alternative dispute resolution routes to play a role in the regulated sectors, especially in sectors which are open or opening up to competition and where disagreements are as likely to involve two companies as a company and its regulator. In such cases, it may be possible to make use of novel approaches such as pendulum arbitration in order to ensure that parties face appropriate incentives when considering, constructing and actioning an appeal.

Yours sincerely



James Bullock
Director of Economic Regulation

uSwitch.com

uSwitch.com
Centro 3
19 Mandela Street
Camden
London
NW1 0DU

Tuesday 10th September, 2013

BIS Consultation on the appeals process - uSwitch.com response

To whom it may concern,

uSwitch.com has been helping consumers to make informed decisions about utility suppliers, including the Telecoms, energy and personal finance market, for more than ten years. By providing information and impartial advice we help them engage with the market to secure the best value deals for their individual needs and save money on their household bills.

As regulators, Ofcom and Ofgem need to ensure that the Telecoms and energy industries operate fairly and with consumers' interests in mind. The regulators must also ensure that any practices that have a negative impact on consumers are questioned, and where necessary, stopped as quickly as possible.

A lengthy appeals process is a barrier to regulators fulfilling their role, as it can delay the need for consumer-friendly changes being recognised and being implemented. Within the Telecoms sector in particular consumer-friendly decisions have been delayed due to the appeals process. In fact our research shows that a third of consumers say that Ofcom takes too long to implement consumer-friendly changes.

As a result, we strongly believe that the current appeals process isn't fit for purpose - there needs to be more balance between ensuring that suppliers' complaints are genuine and the needs of consumers for a simple and speedy process. A move to judicial review as the standard of review for appeals brought under the Communications Act 2003 should bring about this change. It's also essential that unfounded and unnecessary appeals don't delay or prevent policies being implemented that could be of benefit to consumers.

In Telecoms, we have seen some decisions delayed in the past which have been detrimental to consumers. One of these relates to one of the biggest obstacles to switching broadband - the hassle and complication of switching - and in particular the requirement for consumers to call their provider to say they are leaving. Our research, which was submitted to Ofcom for its consultation on broadband switching, shows that 22% of consumers think it's too much hassle to switch and 11% say it's too complicated. Of those who have switched, 22% say that providers' retention tactics are too pushy.

We believe that all of these fears will be allayed by the new Ofcom proposals to improve switching. These plans were first proposed in 2006, only to be appealed by Vodafone in 2007. It was only recently that Ofcom announced plans to implement the changes, and even if these proposals are brought in as soon as possible, it won't be before 2015. Therefore, for 9 years, consumers have

remained vulnerable to harm that could have been resolved. Consumers can save an average of £120 by switching broadband providers - this suggests they may have missed out on up to £1,000 of savings waiting for this change to come into effect.

Another example of consumer harm because of the appeals process is the sale of the 4G spectrum. Although this may not have caused direct financial harm to consumers, we believe that the delays will have had a negative impact on mobile users, who were prevented from enjoying the benefits of 4G. Also, 4G's faster speeds could be beneficial to businesses, meaning that some may have been financially impacted by the delays.

These are just a couple of examples that illustrate why the appeals process needs to be re-assessed. A faster and more efficient appeals process, as well as consistency across all sectors is vital and long overdue.

There should be no further delay in making the proposed changes, which could lead to real benefits to consumers in a number of ways. Firstly, they would help to shake up the markets by giving an alternative to the current incumbents. This needs to happen if smaller players and new entrants are to be given the chance to bring real competition and innovation - which will be of huge benefit to consumers. We have seen smaller players, such as First Utility and Three in the Energy and Telecoms sectors, provide more choice for consumers, greater competition and lower pricing when they entered the market. It's vital that big incumbents are no longer able to delay, or even reverse decisions on new policies that aren't in their favour if consumers are to continue to benefit from competition.

We also feel that there needs to be consistency across all areas. For consumers to have trust in all regulators, there needs to be a level playing field in how policy can be appealed. It's also vital that all providers - whether broadband or energy - are treated equally when it comes to appealing a decision from a regulator.

In terms of the proposals, we agree with the Government's principles for non-judicial review appeals as set out in the consultation, and feel that they cover all necessary grounds for an appeal while ensuring that only founded appeals will be successful.

We also agree though that appeals should be heard on the judicial review standard. This should also be the case in the Telecoms sector, that there is a move to a judicial review standard (unless there is ground for a wider standard of review). This move will have a significant positive impact on the length, cost and effectiveness of the appeals framework.

Cutting the length of time will help ensure that consumer-friendly changes are implemented as quickly as possible. Cost-cutting could also benefit consumers - who may be left paying the price for appeals through increased services costs. Improving the effectiveness of the appeals process will help the image and respect of regulators, whose credibility has been questioned by some recently, and improve consumer trust in industry.

We also believe that the process for bringing appeals against price control decisions in the Telecoms sector should be simplified so that these appeals go directly to the Competition Commission as it would help cut the total length of time that the process takes. It should follow the same model as

the Civil Aviation Act 2012, which would also help ensure consistency and fewer complexities between sectors.

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 needs to change if decisions aren't to be continuously delayed. Any stakeholder with an interest in delaying a decision - which may be consumer-friendly, but detrimental to them - is likely to appeal because the process is low risk.

The consultation period is also key to the appeals process being as quick and efficient as possible - it should be an opportunity for providers and other stakeholders to submit evidence before a decision is reached. By allowing new evidence to be used in an appeal, regulators risk stakeholders withholding evidence to use in the appeals process to delay changes being implemented.

Similar changes were proposed for the Telecoms sector back in 2011, but pressure from established and incumbent stakeholders saw the Government drop measures. This is despite recognition from DCMS that "there is no doubt that a more streamlined process would benefit everyone" and that they remain "concerned about the number and length of appeals against Ofcom's decisions and the impact this has on Ofcom's ability to regulate effectively in the best interests of consumers."

This can't happen again. If it does those who are against the changes will appear invincible, and will continue to use the appeals process to suit them. Therefore we urge BIS to act in the interests of consumers and help regulators to fulfil their role of helping consumers while ensuring a fair and competitive market place.

We are delighted that BIS has already demonstrated such a firm grasp of the need for change, and hope that consumer protection can be increased while ensuring a competitive market.

Yours faithfully,

Ann Robinson

Director of Consumer Policy

Verizon UK Limited

BIS consultation on "Streamlining Regulatory and Competition Appeals"

Introduction and summary

1. - This is a response by Verizon UK Limited (Verizon) to the BIS consultation entitled "Streamlining Regulatory and Competition Appeals".

2. - Verizon UK is a wholly-owned subsidiary of Verizon Communications Inc. - one of the world's largest telecommunications companies with an annual turnover of over $100bn. In the UK, Verizon operates solely in the enterprise market, offering a wide range of services including data and voice communications, security solutions, machine-to-machine, cloud computing and network connectivity solutions to large and medium sized businesses and government agencies.

3. - Please note the views expressed in this response are specific to the UK market environment and regulatory regime and should not be taken as expressing Verizon's views in other jurisdictions where the regulatory and market environments could differ from that in the UK.

4. - As an international company, we approach such policy issues as this from a particular perspective. We operate in over 140 countries and are therefore used to dealing with diversity – it is a normal part of doing business internationally. Once we are in a market, however, we greatly value regulatory stability and consistency – a theme to which we return below.

5. - Verizon has participated in a number of appeals of Ofcom decisions, sometimes as an appellant and on other occasions in support of Ofcom. However our overwhelming preference is not to be involved in appeals at all. We depart from this only when absolutely necessary. We would never even ***consider*** appealing an Ofcom decision unless we believe Ofcom has got something seriously wrong. Where we do need to engage in the appeals process, we keep our involvement to an absolute minimum.

6. - Part of the reason for this is the level of cost and internal management effort involved in bringing appeals in the current regime. These factors weigh heavily in our thinking about whether appeals are justified and create a significant threshold against appeals which are not material.

7. - We therefore approach this consultation with no preconceptions. Verizon considers that the Appeals regime for the UK's electronic communications sector already functions well. However if there are improvements that can be made at the margins, we would welcome that.

8. - There may be a case for procedural changes to streamline some process aspects of appeals, provided each option for reform was weighed carefully and the costs and benefits properly assessed; we deal with this below in the answers to individual questions.

9. - However, Verizon does not support changes to the standard of review. We believe this type of change would be a serious mistake for the following reasons:

(a) - Firstly, the implementation of the new standards would create significant regulatory uncertainty. The Competition Appeal Tribunal [CAT] and the Court of Appeal [CA] have built up a significant body of jurisprudence on the current regime. This means it is broadly well-understood; this, in turn, creates a level of regulatory stability which is highly valued and relied upon by stakeholders. The proposed new standards would rely on the courts unravelling complex questions of the relationship between UK and EU law. For this reason, although the words "judicial review" suggest a well-understood regime, the real meaning of the new standard in this sector is not at all clear.

(b) - Secondly, far from simplifying the appeals process, the implementation of a new standard would result in years of costly and prolonged debate about exactly what the standard means. This would add greatly to the complexity of the process for years to come.

(c) - Thirdly, the current standard applies an appropriate level of scrutiny to regulatory decisions. While the precise meaning of the new standards is unclear, there is certainly the possibility that the proposals would fundamentally undermine the ability of appeals bodies to overturn incorrect decisions. It would be nice to think that regulators always get it right but that is not always the case. The current regime encourages good decision-making and corrects bad decisions. It would be bad for the electronic communications market and for the UK more generally if this were lost.

10. - Verizon does not welcome this potential new source of regulatory uncertainty. We are surprised that the government would want to introduce new sources of regulatory instability into the UK market. As noted above, Verizon operates in a large number of jurisdictions across the world. However, costly and unnecessary change is not something we welcome anywhere and the changes proposed for the UK would make it a less attractive destination than it currently is for Verizon's international investment programme.

11. - In addition, Verizon simply does not recognise some of the criticisms which are said to derive from the current standard. For example, the introduction to the consultation states that the objective of the change would be to correct "mistakes which have a material impact on outcomes." However, the appeals bodies already consider materiality, often at some length.

12. - It is worth noting that a significant proportion of appeals against Ofcom determinations have been successful – which suggests that the appeals heard are of a high quality and indeed important to ensure that the correct decisions are reached. It also suggests that there is a need to focus on the quality of regulatory decision making as much as the volume of appeals[1].

13. - To conclude our general comments: Verizon notes that the very first objective set by the government is that the appeals regime should:

Support independent, robust, predictable decision-making, minimising uncertainty.

14. - This is a laudable goal. But we consider it is largely met by the current standard. The proposal to change the appeals standard will go against this objective in every single respect. This proposal would just be change for change's sake[2]. We strongly urge the government to reconsider this element of its proposals.

Consultation Questions and answers

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?

Verizon strongly disagrees with this suggestion. Verizon considers that merits review is a crucial element, within the UK and EU framework, of the end-to-end regulatory regime. It promotes better regulatory decision-making and provides a crucial check on regulatory errors and regulatory creep.

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?

Verizon does not agree with Box 4.1. As indicated above we consider that the merits review is crucial and there is no compelling evidence that any change to the current regime is warranted.

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

It would be quite unlikely to make things shorter on an end-to-end basis. The cost benefit analysis ignores the effect of remittals which would add many months to the process and subject the market to additional layers of regulatory uncertainty.

[1] In research published in 2010 Towerhouse Consulting confirmed that, of 31 appeals, 12 had been won either in whole or in part by the appellants. (http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf Paragraph 3 (b)

[2] Apart from anything else, it is by no means clear to us where this suggestion has come from. We have heard it said that the specific idea being proposed came from Ofcom. However we have not seen any written proposal from Ofcom and, so far as we can see, Ofcom has never responded to any government consultation on the matter.

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?

Verizon does not agree with this suggestion. It would be very unlikely to result in the changes the government seeks; if anything, it would be a retrograde step.

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?

Verizon is not convinced the outcomes would be materially different. It is true that some appeals – notably the tobacco litigation – have been very lengthy. But this is not generally true of communications appeals and certainly it is not clear that there will be a marked reduction in the length or cost which would justify the very significant upheaval that would inevitably be caused at least in the short and medium term.

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?

In line with our position as set out earlier in this response, Verizon does not agree there should be such a change.

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?

See the answer to Q5 above.

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?

Verizon strongly disagrees with this proposal, it is simply not warranted at least in terms of the communications sector.

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?

Verizon considers that the impact would be minimal but that any likely impact would on balance be negative given that a new standard would generate significant uncertainty which would lead to a more costly process and add risk. This may be justified where significant tangible benefits could be realised, but this is simply not the case here.

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]?

It would be worth considering allowing price control appeals to proceed directly to the Competition Commission (CC). This would no doubt save time and a degree of cost and administrative burden. In most if not all appeals it is clearly apparent which body (either the CAT or the CC) will need to consider the matter, so this should be a relatively straightforward change to implement with no obvious drawbacks.

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

Yes, in relation to price controls. Licence modification appeals are not currently heard by the CC in the communications sector.

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?

Yes- see answer to Q14.

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

Yes

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

Verizon does not consider there is any special merit in this, but has no objection to it provided the body is the CAT, not the High Court.

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?

The CAT is clearly better placed to deal with these appeals, especially those in the communications sector. This is not least due to the type of appeal typically raised in this sector, which involve complex economic/financial accounting, legal or technical matters (and often all three). The CAT set-up is to include specialists in the relevant fields on the Panel – which makes it ideally placed to understand the arguments and get to the right answer. This also makes it a more efficient and swifter process than would be the case say in the High Court, saving time and cost for all parties.

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

Verizon does not consider there is any special merit in this, but has no objection to it provided the body is the CAT, not the High Court.

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?

The CAT is clearly better placed to deal with these appeals.

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

Yes.

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?

Yes

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?

There is ample precedent from the CAT for contractual confidentiality 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?

We do not consider this is necessary. The CAT has an established practice for dealing with new evidence. In addition, Verizon considers that concerns about new evidence are significantly overstated.

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?

No.

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

Verizon does not agree with this approach. It rather suggests that the regulator is likely to be "right" when in fact most companies will only appeal a decision if there is a real concern about a regulator's approach. We also note that, at least far as the communications section is concerned, the industry already pays Ofcom's costs, including litigation costs, via administration fees – so in effect appellants would be paying twice.

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?

This is a course already open to them.

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.

This sounds like a reasonable idea but it is hard to see what it would add in practice. The CAT already has the jurisdiction to reject appeals if there are no legitimate grounds (Rule 10(1)). In any event as indicated above, Verizon and no doubt all prospective appellants take a great deal of time and care to weigh up the chances of success, and typically employ external counsel to help them conduct a thorough review of the pros and cons of a case. Therefore in effect this exercise is already carried out pre-CAT involvement.

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

Unfortunately this question is not entirely clear. Verizon offers no view on this at the present time.

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?

Regulators should not introduce radical changes to proposals without an opportunity for comment. A short reconsultation is appropriate in these circumstances. The body of jurisprudence built up by the CAT over the last years has helped to guide Ofcom in its thinking and has arguably led to more considered decision-making and better consultations. If the current appeals process were radically overhauled, it could lead to more appeals not less.

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

Regulators already have the power to require the disclosure of information and they can, of course, always ask questions. We are not sure that this proposal would add anything.

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

They should. An incorrect non-infringement decision can be just as significant to consumers and competition as any other decision.

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?

Verizon has no objection to these proposals in principle, but notes that the CAT is generally efficient at case management already and takes appropriate steps to hear cases as quickly and efficiently as possible.

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?

The CAT already has this power in respect of Communications Act appeals. Verizon has no comment on its application elsewhere.

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?

This sounds like a promising proposal but it might be complicated to implement in practice.

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?

In exceptional cases a longer limit may be needed but this proposal is consistent with the length of recent proceedings.

Virgin Media

"STREAMLINING REGULATORY AND COMPETITION APPEALS"
VIRGIN MEDIA'S RESPONSE TO THE GOVERNMENT CONSULATION OF 19 JUNE 2013

INTRODUCTION AND EXECUTIVE SUMMARY

Virgin Media is a leading entertainment and communications business which offers a "quad play" of broadband, fixed line telephony, mobile telephony and TV services. Virgin Media has invested over £13.5 billion in the rollout of its network across the UK in order to be able to provide ultrafast broadband and TV services to consumers.

As a key participant in the telecommunications sector, Virgin Media has strong and informed views about the Government's proposals set out in the "Streamlining Regulatory and Competition Appeals" consultation (the "**Consultation**"). Given the sector in which it operates, and its experience with Ofcom and telecoms/broadcasting appeals, Virgin Media's response focuses primarily on appeals under the Communications Act 2003 ("**Comms Act**"). However, its comments apply equally to the proposed changes to the standard of review under the Competition Act 1998 ("**CA 1998**").

The UK's telecommunications sector - and the thriving £80 billion digital economy that is built upon it - has proven to be a resilient source of growth even in the challenging economic conditions of recent years. That resilience has been predicated on the confidence of the market to continue investing in world leading telecommunications infrastructure with certainty that a robust and proportionate regulatory framework is in place to underpin competition in that market. At a time when Government is looking to digital infrastructure to act as a catalyst to new frontiers of economic growth – whether through extension of superfast broadband to rural communities where it is not currently available, encouraging investment in mobile connectivity (4G and WiFi) to keep pace with exploding demand, or through stimulating demand amongst small and medium businesses for next generation connectivity in UK cities – it will continue to fall to the private sector to make the investments needed to deliver those foundations for economic growth. As the market looks to that next phase of investment, it is therefore vital that the regulators and competition authorities retain the confidence of the private sector in their ability to take strong, decisive, and above all, well-evidenced action to protect against distortion of competition.

Whilst Virgin Media welcomes the aims of the Consultation 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*", it has significant concerns about a number of proposals contained in the Consultation, in particular a change in the standard of review for certain appeals from "full merits" to judicial review or defined statutory grounds of appeal.

Virgin Media considers that the current "appeal on the merits" standard of review is an important and necessary part of the regulatory decision making process. A full merits review - which is now well established - has proven to be an important discipline on Ofcom and the competition authorities (encouraging them to engage with the evidence during the administrative phase and reach decisions that are adequately supported by the evidence) and creates certainty for businesses. Appeals to the Competition Appeals Tribunal ("**CAT**") (including the reference of price control appeals to the Competition Commission ("**CC**")), have played a fundamental role to date (i) providing important and necessary guidance both to Ofcom and to industry on the scope of particular regulatory provisions; and (ii) overturning erroneous decisions by the regulators. This means better regulatory decisions, which then encourages investment and growth in the sector as a whole. Erroneous, and therefore unwarranted, regulatory intervention leads to a distortion of competition/markets and both direct and indirect consumer harm. In this regard, some appeals correcting erroneous regulatory decisions have resulted in direct benefit to consumers in the form of reduced prices.

Given that a full merits standard of review has clear and important benefits, Virgin Media considers that there is no case for changing to a narrower standard of review. Indeed, the Consultation itself does not adequately make out a case for change. Many of the reasons the Government provides on why change is necessary are based on misconceptions (such as what a merits appeal means in

practice and whether regulatory decisions are delayed pending appeal) or are substantiated by cases that are, for one reason or another, anomalous or extreme decisions. The evidence provided in the Consultation does not support key findings by the Government that, for example, appeals are excessively long, or that there are too many appeals.

In any event, and even if there were a case for change, the proposals will not achieve the aims expressed by the Government. It is Virgin Media's view that a change to the standard of appeal would not result in an appeals regime which is more efficient, more effective, nor more able to achieve better regulatory decisions. In fact, it could have quite the opposite effect. For example, a change to a limited standard of review is likely to result in increased uncertainty and delay and a change in the standard of review will only make it more difficult, rather than easier for SMEs to bring appeals. If the Government wants to achieve better, more efficient and more effective regulatory decision, it needs to address the root cause of appeals.

Regulators and the competition authorities have the power to take decisions that have far reaching consequences on businesses: the activities of industry participants can be affected; imposition of significant financial penalties; and in the case of competition law infringements, damages claims, director disqualification orders, potential criminal sanctions, and potential uplift in fines if found again to breach competition law (as a result of being a "recidivist"). Given these powers, it is crucial that these decisions should all be subject to a standard of review that examines not only the procedure by which the regulator/authority reached that decision, but also the substance of that decision, and in particular, the extent to which that decision is adequately supported by the evidence. Simply put, a regulator will only be as good as the standard to which it is held.

Virgin Media also refers to its previous consultation responses in relation to proposed changes to the appeal regime[1]. Virgin Media's previous objections to these consultations – together with significant opposition from the majority of respondents - are not addressed in this Consultation and Virgin Media believes that this Consultation continues to be founded on a number of significant misconceptions. It is incumbent on Government, as part of its current consultation to address concerns previously raised by respondents, even where the arguments are not in line with the adopted policy.

Virgin Media fully supports proposals which retain the CAT as the specialist tribunal for telecoms and broadcasting appeals and for competition cases. Virgin Media's experience of the CAT's case management functions has been a positive one and – whilst one party will inevitably always disagree with its judgments - we welcome its expertise. However, we do believe there is some scope for streamlining the processes on price control appeals so that these go directly to the CC/CMA.

The remainder of this response addresses the key themes running through the Consultation.

THERE IS NO CASE FOR CHANGE

In this section, Virgin Media addresses each of the reasons the Government identifies in its case for change. Given that any change will necessarily result in uncertainty and would have a consequential impact on growth, we would maintain that the case for change should be extremely strong and underpinned by robust evidence and argumentation. In reality, the case for change set out in the Consultation is weak. There are a number of misconceptions in the Consultation, and the evidence on which the case for change is founded either does not support the conclusions drawn or relies on anomalous cases. In addition, the impact assessment itself considers the upper limits of the benefits to be £8 million per annum.

"Regulatory appeals have evolved differently across sectors"

The subtext of this stated rationale for change appears to be that there are more appeals – and implicitly too many - in the telecoms sector than in other sectors. If this is the implication, the Consultation fails to consider why this is the case. The main reason for this is simply the fact that Ofcom takes many more decisions than other regulators, not least as a result of its obligations to conduct market reviews every three years under the EU Regulatory Framework for Electronic Communications.

[1] In particular its response to the DCMS Consultation on Implementing the Revised EU Electronic Communications Framework – Appeals, dated October 2011.

As to the point of whether there are too many appeals, the Government's own statistics contained in the Consultation actually show a decline in the number of appeals, and that only a small proportion i.e. less than 20% of Ofcom decisions are appealed.

The fact that there are a number of different regulatory bodies applying competition law and regulation makes it more important to have appeals determined by reference to a full merits standard, i.e. in order to ensure that those regulators are applying competition law and regulation consistently in substance and not just in process.

"Appeals take a long time"

It is in the interests of all of interested parties that appeals should be concluded as quickly as possible. However, Virgin Media would question whether appeals are currently taking a "long time".

Whilst the concern expressed in the Consultation is the end-to-end length of regulatory decision making, the focus of the Consultation also appears to be only on the length of the appeal. Frequently, decisions that are subject to appeal are the result of lengthy regulatory investigations which may span two, three or more years (for example the Pay TV investigation was over three years and market reviews take around two years). Whilst proposals to introduce confidentiality rings would be welcomed[2], it is questionable whether these would significantly reduce the overall length of regulatory decision-making together with the appeals. In the context of such lengthy investigations, an average time of 10 months[3] for an appeal does not appear to be disproportionate – particularly where the decision will remain in force pending the resolution of any appeal (see further below).

The Consultation also fails to recognise that the data presented relating to the length of appeals is potentially artificially inflated/skewed by exceptional cases. The Pay TV case – to which Virgin Media was a party – is one such case. Virgin Media notes that there were a number of unique factors that mean this case should not be considered as a single, standard appeal, namely: (i) the case before the CAT related not only to the Pay TV statement but also dealt with two other interconnected Ofcom decisions[4]; (ii) in relation to the Pay TV statement also, there were actually four appellants in that case, together with a large number of interveners; and (iii) the Pay TV statement was a very detailed and complex decision (over 650 pages in length, excluding annexes).

Importantly, the Consultation appears to be founded on a premise that judicial review cases take less time than merits appeals. Although Virgin Media may not be best placed to provide certainty on this point, it would encourage the Government to consider whether this is factually correct. Virgin Media has had the opportunity to read the response of the CAT to the Consultation, and would refer to paragraphs 13 – 15 of that response.

Another significant misconception which is contained in this Consultation (and in prior consultations) is that decisions together with any resulting benefits for industry and consumers are delayed pending an appeal. This is simply not the case. Under the current regime, an appeal in no way affects the legal impact of a decision made by Ofcom. Instead, a decision by Ofcom can only be delayed pending an appeal if the appellant can meet the strict standard set for a grant of interim relief. The standard applied by the CAT is "serious and irreparable harm'. The decision itself and the imposition of remedies or conditions have full legal effect irrespective of any appeal until the outcome of that appeal. Any benefits to consumers are therefore only suspended in exceptional cases where interim relief is granted by the CAT. Even where interim relief is granted, this will not always fully suspend implementation of the decision. For example, in the Pay TV case where partial interim relief was granted, the wholesale must offer remedy imposed by Ofcom came into effect for certain interested and qualifying market participants.

The Consultation places heavy reliance on the spectrum case as the basis for this proposition. Virgin Media would however caution against such reliance being given on this case given the very particular circumstances it concerned and the fact that it arguably contradicts the Government's conclusion. The case study (Annex E to the Consultation) suggests that the consultation process carried out in relation to the auction was contested by T-Mobile and O2, which had the effect of delaying the auction. Virgin Media questions whether this is in fact an accurate reflection of what took place. As we understand it, Ofcom was, in effect, directed to abandon the auction by the government, who in

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2 This responds to Question 28 of the Consultation.

3 Even though this figure is likely to be skewed by exceptional cases.

4 Referred to as the Conditional Access Module and Set Top Box appeals.

their Digital Britain Report required that a double, concurrent auction be held for the 800MHz and 2.6GHz frequencies. Given that the 800MHz band could not be the subject of any auction until such time as the digital TV switchover had been concluded, the auction could in any event not have taken place before 2012.

It is also Virgin Media's understanding that appeals against the auction proposal were lodged by T-Mobile both in the CAT and in the High Court as a judicial review. The substantive CAT case was dealt with in less than 3 months from appeal, as it declined jurisdiction. Although appeals went to the Court of Appeal, the judicial review was not resolved before the decision by Ofcom to withdraw the auction (on Government direction). It would therefore seem inappropriate to imply that the delay was down to the CAT process and that a change to the standard of review would have avoided this.

To the extent that there was any delay, it was substantially due to: (i) a lack of clarity as to the proper standard of review; and (ii) the serious concerns of interested parties about the proposal for running the auction, as put forward by Ofcom. In this regard, many had the view that Ofcom's proposal was wrong and the effect of the delay and subsequent Government intervention prevented Ofcom continuing with the mistaken approach. A second potential delay to a spectrum matter was avoided in 2012 in relation to Ofcom's decision to allow EE to use its existing 1800MHz band for 4G[5]. Whilst an appeal was a possibility, Virgin Media understands that there were discussions between Ofcom and stakeholders which meant an appeal did not result. This is arguably an example of stakeholders actively avoiding an appeal rather than being incentivised to appeal.

"Appeals are a "one-way bet" (i.e. there is a strong incentive on parties to appeal)"

Virgin Media fundamentally disagrees that a decision to appeal a regulatory decision is a foregone conclusion and is taken lightly by affected parties.

A decision to appeal will have been the subject of intense internal discussion and taken after having sought expert Counsel's advice on the prospects of success. For businesses, appeals are not just costly from a financial perspective, i.e. the cost of external solicitors and barristers, but also costly in that they consume significant management time (especially for witnesses of fact) and the time of internal lawyers. Bringing an appeal can also have reputational issues.

An appellant is also always well aware of the risk of an adverse costs award against it if it loses its appeal; under its existing powers, the CAT has a wide discretion in ordering costs. This is a significant consideration and will be taken into account when weighing up whether or not to appeal. In addition, costs act as a powerful constraint on an appellant's behaviour when it does appeal, i.e. parties focus on stronger arguments rather than "throwing in the kitchen sink", limit the length of documents and the number of expert instructions. The threat of an adverse cost order is not just a theoretical risk; recent decisions of the CAT demonstrate that costs orders are becoming more prevalent (see the Partial Private Circuits case and the 08x appeals).

Virgin Media fundamentally disagrees with the Government's proposal for a regulator to be able to recoup its costs when successful unless it has acted unreasonably and that when it is unsuccessful, costs should not be awarded against it unless it has acted unreasonably. Costs rules must be applied in a symmetric manner; any presumption that costs should be awarded on an asymmetric basis would be unfair[6]. Such a costs rule could act as a deterrent in bringing perfectly valid appeals against incorrect regulatory decisions. It should also be remembered that in the telecoms sector, it is industry participants that bear Ofcom's costs of operation.

Furthermore, Virgin Media disagrees with the statement that the current standard of review is an "incentive". The issue of the standard of review is dealt with in the next section of this document.

Virgin Media would be interested to understand which appeals the Government would consider to have been "unnecessary" or "unmeritorious". The CAT's response also makes it clear that there have been few, if any, hopeless appeals[7]. As set out above, even where an appeal is unsuccessful,

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5 Decision to vary Everything Everywhere's 1800 MHz spectrum licences to allow use of LTE and WiMax technologies, 21st August 2012

6 This responds to Questions 32 and 33 of the Consultation.

7 This responds to Question 35 of the Consultation

appeals have played a fundamental role to date in providing important and necessary guidance both to Ofcom and to industry on the scope of particular regulatory provisions or on processes.

Successful appeals benefit not only the appellant, but also wider industry. In Vodafone v. Ofcom, Ofcom was found to have conducted a cost benefit analysis the rigour of which was significantly below an acceptable standard. That has changed markedly Ofcom's practice in respect of the impact assessments its conducts, in a way that Virgin Media believes has been very positive for industry and for the robustness of Ofcom's decision making.

Virgin Media is equally puzzled in relation to the section of the Consultation which deals with "new evidence"[8]. This is an area where there is already established jurisprudence (see the decision of the Court of Appeal in the 08x case) and Virgin Media is concerned that the proposals contained in the Consultation are not clearly justified to warrant a change in the established practice. The Consultation also appears indicate that this concern only arises by virtue of appellants' approach to litigation, when in reality this is common to all parties, including regulators.

In addition to the jurisprudence, the CAT's Rules of Procedure themselves provide the CAT with the discretion to admit, exclude or limit evidence in an appeal, whether or not the evidence was available at the time the disputed decision was taken. The impetus on a party is always to make its strongest case at all stages of the process rather than try and tactically control the disclosure of evidence, and any advice to the contrary would be imprudent. The Consultation states that there is no evidence that parties have been deliberately withholding evidence; however the basis of the Government's concern remains unclear. In addition, the Consultation provides no reasoning as to why the current rules are not appropriate to prevent such an issue.

Any attempt to restrict the admissibility of "new" evidence will only result in uncertainty and, more worryingly, in further litigation (in particular the need for the CAT to determine more preliminary issues, such as whether evidence is "new" and therefore inadmissible). This demonstrates that the proposals will have the opposite effect of the Government's aims. Virgin Media would once again refer to the response of the CAT to this Consultation, where these arguments are conveyed convincingly. One of the key questions is whether witness statements and oral testimony are "new". The Consultation itself recognises that the regulator is not in the same position as a court of first instance which will hear evidence from both sides and allow this evidence to be tested under cross-examination. Virgin Media was a party to the Pay TV case (oft cited in the Consultation) and would cite this as an example here – much of the evidence that was before the CAT had been presented to Ofcom in the administrative phase.

The Consultation also appears to assume that a party will always have an opportunity to submit all evidence at the administrative phase, which is linked to the question of what the root causes of an appeal are. It is not uncommon for a regulator to change its argumentation and the evidence it provides in support of its decision between its interim statement and its final decision. It may also be the case that a significant period of time will have passed between the two. An appeal may well be the first opportunity for a party to challenge those findings. The OFT Tobacco case is the best example of both of these points. In addition, in relation to Pay TV, it was not until Ofcom's final statement that the parties were in a position to fully understand Ofcom's conclusions on pricing and how this would work (one of Virgin Media's grounds of appeal), not least because after Ofcom having included movies in its consultation documents for the period of three years of the investigation, these were removed in the final decision.

The CAT's response to the Consultation (at page 53ff.) provides examples of how it has used its current powers to address matters of evidence.

Inconsistency between appeal routes across sectors

Virgin Media would agree there may be some scope to make appeal routes consistent across different sectors, but it is not clear how this is addressed by amending the standard of review. In addition, the Government should be cognisant of the fact that intricacies and differences between various sectors are sometimes the result of the characteristics of the relevant sector; different sectors have varying levels of competition and complexity. Accordingly, one size does not necessarily fit all.

[8] This responds to Question 30 of the Consultation.

Virgin Media would observe that it is even more important that regulators apply competition law and economic principles (key to various regulatory regimes) consistently. An efficient and transparent way to ensure this is to have those decisions subject to a full merits review by a single specialised body, i.e. the CAT.

THE STANDARD OF REVIEW

It is Virgin Media's strong view that a change to the standard of appeal would not result in an appeals regime which is efficient, effective, and helps to achieve better regulatory decisions. In fact, it could have quite the opposite effect[9].

As set out in the summary above, regulators and the competition authorities have the power to take decisions that have far reaching consequences on businesses. Given these powers, it is crucial that these decisions should all be subject to a standard of review that examines not only the procedure by which the regulator/authority reached that decision, but also the substance of that decision, and in particular, the extent to which that decision is adequately supported by the evidence.

Virgin Media considers that the current full merits standard of review is an important and necessary part of the regulatory decision making process. A full merits review - which is now well established - has proven to be an important discipline on Ofcom and the competition authorities (encouraging them to engage with the evidence during the administrative phase and reach decisions that are adequately supported by the evidence) and creates certainty for businesses. Erroneous, and therefore unwarranted, regulatory intervention leads to a distortion of competition/markets and both direct and indirect consumer harm. In this regard, some appeals correcting erroneous regulatory decisions have resulted in direct benefit to consumers in the form of reduced prices that may not have been achieved under a judicial review standard.

In addition to the reasons above, Virgin Media's strong view is that a change to the standard of review would be inappropriate because:

- The change would be inconsistent with the Framework Directive;
- The case for change is based on a misapprehension of what a full merits review actually entails;
- A full merits standard of review gives rise to real and important benefits; and
- The statutory defined grounds, as suggested a an alternative to judicial review also raise serious concerns and offer no improvement to the current framework.

Each of these points are discussed in turn below.

The change would be inconsistent with the Framework Directive

Article 4 of the Framework Directive is clear in its explicit wording that an appeal should take into account the merits. Any change to the standard of review therefore raises questions as to its compatibility with the Framework Directive and could well be subject to challenge and would almost inevitably result in litigation seeking to clarify this point (including, potentially, actions before the European courts.

What does an appeal on the merits actually mean?

Virgin Media questions whether the Government continues to operate under a misconception about what the level of review is carried out in a merits appeal. The role of the CAT in an appeal is one which has been long-considered and is well understood by industry. An appeal on the merits is neither a complete rehearing of the case, nor does the CAT act as a duplicate regulator waiting in the wings.

Judicial precedent emphasises that a merits review is not inconsistent with preserving a proper regard for role of the primary decision maker – a merits review does not create a duplicate regulator in the wings. As the case law from the CAT makes clear, an appeal under section 192 of the Comms Act is the very reverse of a "de novo" hearing. Instead, the CAT will consider the regulator's decision is reviewed through the prism of the specific errors that are alleged by the appeal in its grounds of appeal, with the CAT taking account of the merits as they are relevant to the specific

[9] This section responds to Questions 1 – 9 of the Consultation.

errors[10]. As set out in the legislation, the appellant is required to set out in its grounds of appeal sufficient detail as to the extent (if any), it is contesting the regulator's decision based on an error of fact and/or; and to what extent (if any) the appellant is appealing against the exercise of a discretion by OFCOM, by the Secretary of State or by another person. This is explicitly contained in section 192(6) of the Comms Act.

There are a number of examples of the CAT deferring to regulatory judgements made by Ofcom; the CAT's response to the Consultation sets out at page 31ff a list of cases which demonstrate the approach the CAT has taken to its role in a merits appeal.

Why a merits appeal is important

Encourages good decisional practice

Virgin Media would argue that reducing the level of scrutiny of decision-making would in fact not achieve the Government's desired objective and not result in better decisions or decision-making practices. To encourage poor decisional practice by weakening the power of the CAT to intervene could result in worse outcomes for consumers and hamper growth by undermining investment.

A full merits review - which is now well established - has proven to be an important discipline on Ofcom and the competition authorities, encouraging them to engage with the evidence during the administrative phase and reach decisions that are adequately supported by the evidence. In the absence of a full merits review, this incentive could be undermined, as the focus will shift to procedural matters. Simply put, a regulator will only be as good as the standard to which it is held.

Given the wide reaching powers of the regulators and competition authorities (see above), it is crucial that decisions should all be subject to a standard of review that examines not only the procedure by which the regulator/authority reached that decision, but also the substance of that decision. In relation to CA 1998 cases, Virgin Media does not consider that drawing a distinction between the standard of review applicable to the substantive decision and the level of the fine is appropriate. Given the consequences of a negative finding on substance (e.g. impact of that case on future cases in the context of recidivism and the possibility of damages actions), it is crucial that this part of the decision is subject to full judicial scrutiny. The Consultation puts this point very well itself and in a succinct manner in paragraph 3.17.

As set out in its response to a prior consultation, Virgin Media notes that regulators have often welcomed judicial oversight of its decisions. In a speech given in 2008, the OFT said the following about judicial oversight and the benefits of appeals:

"*Aside from the obvious benefits of judicial guidance on the substantive elements of competition policy and law, proper judicial oversight of procedural matters can give valuable guidance to an authority on what is required of it from an administrative perspective. This can enhance the professionalism of the work undertaken at the investigation, case preparation and decision-making phases of a case. This benefits both the parties to the case and the authority in terms of the evidence sought and obtained, the resources involved and the time required to carry out the administrative procedure and take a decision.*

Both from a substantive and procedural viewpoint, therefore, judicial oversight provides strong motivation to the authority's staff to maintain and improve the quality of their work, to ensure consistency and to maintain a sound and reasonable approach to decision making.[11]"

Virgin Media would challenge an assertion by a regulator that it feels compelled to "appeal proof its decisions". A regulator's focus should first and foremost be on ensuring its decisions are robust, proportionate, well-reasoned and evidenced.

Merits appeals serve ultimately to protect consumers

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[10] BT v. Ofcom.

[11] Stimulating or Chilling Competition: Speech to the Fordham Annual Conference on International Antitrust Law and Policy in New York. John Fingleton Chief Executive, Office of Fair Trading, 25 September 2008, paragraphs 67-70.

The following example clearly illustrates how full merits appeals serve ultimately to protect consumers reducing the distortion to competition, driving consumer benefits and minimising consumer harm. This example is the Mobile Call Termination case in relation to the glide path[12]. In their statement, Ofcom set a glide path charge control for mobile call termination rates to drop from a level in excess of LRIC+ to LRIC over a 4 year period. This was appealed by BT (supported by mobile operator 3). One of the grounds was that the charge control was not steep enough and that it should have been set over a three year period[13]. The CC (to whom the appeal was referred by the CAT as a price control matter) concluded that Ofcom had erred in its decision and that the benefits in providing lower consumer prices quicker outweighed the countervailing factors identified by Ofcom. Arguably, if this had been reviewed under the judicial review standard, the CC would have been restricted to the question of whether Ofcom was able to come to a 4 year decision as a reasonable conclusion.

In the context of the review standard, it is of note that the CC dealt with this issue at the outset of their determination, going through the legislation and case law to determine that, as a specialist expert body they had jurisdiction to undertake "profound and rigorous scrutiny" of Ofcom's decision, but having regard to errors that were sufficient to vitiate the decision at hand, and having regard to the role of Ofcom as a specialist regulator exercising its own judgement that should not readily be dismissed. This was consistent with the Court of Appeal judgment in the 08x appeal.

Enables failures to be remedied

One aspect that is not addressed in the Consultation is the fact that the current merits review process can allow a regulatory decision to be "saved". In the event of a successful judicial review, if failures are identified, the matter is then remitted to the regulator to take a revised decision. This naturally has the effect of extending rather than shortening the overall process. Virgin Media considers that this point has been well addressed by the CAT's response to the Consultation.

In other consultations the Government has recognised the need for a merits review

In the context of the establishment of the new Competition and Markets Authority, the Government considered the issue of full merits appeals. The Government decided not to adopt a prosecutorial model because the rights of the parties (which would be affected by the move from two bodies to one) would be protected by the full merits appeal. There are clearly recognised concerns (such as confirmation bias and review by an impartial body) arising from having one body as the decision maker, without having adequate rights of appeal.

Specified grounds of appeal

Virgin Media has some concerns about the move to specified grounds of appeal – particularly given the formulation expressed in the Consultation. We also question whether this aspect has been fully considered in the round. For example, the formulation contrasts with that used in the Civil Aviation Act, where there is no requirement for materiality. In addition, there is no reference in the Consultation to the current statutory requirements for grounds of appeal as set out in section 192(6) of the Comms Act. Additionally, as with a move to a judicial review standard, these specified grounds would almost inevitably result in litigation seeking to clarify their scope (including, potentially, actions before the European courts).

THE CHANGES PROPOSED DO NOT ACHIEVE THE GOVERNMENT'S AIMS

In addition to the fact that the Consultation does not make out a case for change, Virgin Media has significant concerns that the proposals will not achieve the aims expressed by the Government. In many cases the exact opposite of the Government's aims will result.

The stated aims of Government are to: "*Support independent, robust, predictable decision-making, minimising uncertainty"* and *"Minimise the end-to-end length and cost of decision-making – partly through making the appeal process itself as streamlined and efficient as possible*".

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[12] http://www.competition-commission.org.uk/assets/competitioncommission/docs/appeals/telecommunications-price-control-appeals/final_determination.pdf

[13] The mobile network operators also appealed on different grounds.

Certainty

If the objective is to increase certainty, to encourage investment and growth, businesses need to have confidence in the regulatory system and to know that erroneous decisions by the regulators can be overturned or corrected. A change in the standard of review will only reduce this certainty. As the CAT points out in its response to the Consultation, a change in the standard of review could have the effect of reducing the incentives on regulators to get their decisions right. This does not contribute to the stated aim of ensuring justice is available to all.

Timeliness

If the objective is to decrease the likelihood of a delay in proceedings, then a number of the proposals will not achieve this. A change to the standard of review will result in delay whilst various questions are litigated (namely, whether the new standard is compatible with Article 4 of the Framework Directive and if so what the new standard actually means). The clarity around the current standard is itself a result of years of litigation. The Consultation acknowledges this risk, but fails to consider its true impact. In what are constantly evolving markets, this uncertainty will have an impact not only on appellants, but also on the regulator.

The same is true for the proposals on limiting "new" evidence, which would undoubtedly lead to preliminary issues being raised and determined by the CAT, lengthening appeals.

In terms of the overall timing of the end-to-end process, the Consultation, although purporting to consider the entire decision-making process, in substance focuses on the appeals process with little consideration of the administrative decision-making process. This is a flaw of the Consultation. In this regard, we note that none of the proposed changes will result in quicker administrative decision-making unless the Government is willing to accept the contention that a regulator will conduct its investigations in a less rigorous manner.

Additionally, as set out above, there is no compelling evidence that a judicial review standard is quicker, not least due to the fact with judicial reviews that there is less scope for a decision to be corrected, and decisions have to be referred back to the regulator to reconsider.

Access to justice for all

If the objective is to encourage SMEs to appeal (and more generally ensuring access to justice to all), then the proposals on changing the review standard or tightening the rules around the ability of the regulator to claim internal and external costs, will only seek to discourage appeals by such companies. It is counter-intuitive to suggest that making appeals more difficult and riskier (for example in terms of exposure to costs awards) would lead to more appeals by SMEs.

Alternatives

Virgin Media fully supports less radical measures which have the effect of improving the appeals process.

Virgin Media questions whether attempts to introduce rigid CAT rules (for example in relation to timing and evidence) are the way forward[14]. The key question is whether leaving the CAT with flexibility to deal with matters on a case-by-case basis, would be a better way of achieving the aims of Government. It is Virgin Media's view that how such procedural improvements are made are best left to the CAT itself given its experience and views on what is likely to be most effective. If the Government believes that the powers of the CAT and the rules of evidence are ambiguous or more certainty is needed, then the CAT could consider whether incremental changes could be made. What is key is a consistent application of the CAT rules between different hearings.

Finally, in relation to the discussion of Ofcom's costs and resources Virgin Media considers that Ofcom is able to determine the role it wishes to play in any appeals on a case-by-case basis. It was made clear by the Court of Appeal in BT v. Ofcom that Ofcom should not necessarily feel compelled to defend its decision and should not feel under an obligation to use public resources in being

[14] This responds to Questions 14, 40 – 44 and 47 of the Consultation.

represented on each and every appeal. Virgin Media understands that Ofcom has done this on occasion (see for example the NTS termination case and the ongoing Ethernet Dispute Appeals, in relation to the award of interest).

Virgin Media does consider there to be merit in proposals to introduce confidentiality rings at the administrative phase (after careful consideration of the pros and cons on a case-by-case basis).

APPEAL BODIES, INCLUDING PRICE CONTROL APPEALS

Virgin Media fully supports proposals which retain the CAT as the specialist tribunal for telecoms and broadcasting appeals and for competition cases[15]. Virgin Media's experience of the CAT's case management functions has been a positive one and – whilst one party will inevitably disagree with its judgments - we welcome its expertise. However, we do believe there is some scope for streamlining the processes on price control appeals so that these go directly to the CC/CMA[16].

Price control appeals are generally the longest running appeals in terms of the length of time from the appeal being lodged to the final judgment. This is partly because such appeals are heard both before the CAT and the CC. The appeal is lodged with the CAT and the CAT must refer the relevant price control matters to the CC. There may be a preliminary question to be decided by the CAT as to whether the matter is or is not a price control question and there is generally a level of debate as to the questions to be referred to the CC. When the determination from the CC is returned to the CAT, there is then a stage where the CAT considers whether the CC's determination could be overturned on the basis of judicial review.

The number of procedural steps currently within price control appeals clearly provides scope for change in order to speed up the overall length of time spent on the appeal. As the Government has identified, a direct appeal to the CC without the requirement to go to the CAT first could be instituted. Virgin Media understands that there is precedent for this in the Postal Services Act 2011 for appeals on Ofcom's price control decisions in the postal sector.

Alternatively, the rules in relation to the way in which the appeal document is formulated could be changed for price control matters, so that the party is required to identify the price control questions to be sent to the CC separately in order that these can be dealt with at the first case management conference before being sent to the CC immediately.

The (legal, economic and accounting) expertise of the CAT is very much valued by industry and Virgin Media would therefore have reservations about the proposal to reduce the number of individuals hearing a case. Whilst a single legally qualified judge may be appropriate in some cases (although we question whether this is the case for telecoms appeals), it is often difficult at the outset to determine what expertise is needed in a given case and these types of appeals are likely to be in the minority[17].

VIRGIN MEDIA
SEPTEMBER 2013

[15] This responds to Question 20 of the Consultation.
[16] This responds to Questions 18 - 19 of the Consultation.
[17] This responds to Question 17 of the Consultation.

Vodafone Limited

STREAMLINING REGULATORY AND COMPETITION APPEALS: HM GOVERNMENT CONSULTATION ON OPTIONS FOR REFORM

RESPONSE OF VODAFONE LIMITED

1. Introduction and summary

1.1 Vodafone Limited ("Vodafone") welcomes the opportunity to respond to HM Government's consultation about improvements to the established appeals regime governing regulatory and Competition Act decisions. As a mobile and fixed line communications provider active in the UK for more than two decades, we consider that the way in which the Department for Business, Innovation and Skills ("DBIS") approaches this matter is critical to creating the conditions that enable the investment and consequential economic expansion that DBIS is rightly seeking to achieve.

1.2 Vodafone agrees that it is right that all legislative and regulatory schemes should be subject to periodic review to ensure that they are operating in the way that most efficiently delivers the wider underlying policy objectives. It would be unfortunate were any regime to become ossified and incapable of adapting to changing circumstances. In this context, we would note that our experience of both regulatory decision making processes and the appeals regime, in the application of the *ex ante* sector specific regulatory framework and the Competition Act, reveals that there are some improvements that can and should be made.

1.3 However, it is more critical, as a matter of policy and law, that any changes are implemented in accordance with the principle of proportionality; this means that changes should firstly be capable of realising the desired policy objective and outcome and secondly should be no more intrusive or burdensome than necessary to attain the stated policy objective. The importance of the principle of proportionality means that the DBIS Impact Assessment assumes particular significance; regrettably, this Impact Assessment is unlikely to be capable of generating a reliable estimate of the costs and benefits of different options.

1.4 In the context of this consultation, we are sceptical about the stated rationale underpinning the case for what must be considered to be, on any analysis, a radical upheaval to the appeals regime. Close scrutiny of some of the concerns articulated by DBIS reveals that these concerns are substantially over-stated or simply non-existent.

1.5 Against that background, we consider that there is a serious risk that some of the government's proposed changes – particularly in relation to the legal standard of

review applied in appeals – seek to address non-existent issues, and will, in reality, frustrate the stated objective of securing a stable legal and regulatory framework upon which industry stakeholders so heavily depend for investment decisions. To the extent that a credible case can be made by DBIS for changes to the standard of review, we consider that there are more limited and proportionate changes that can be adopted that are less likely to cause to uncertainty and disruption.

1.6 By contrast, we can see a case for improvements to court procedures that reduce the amount of time and resource being consumed in litigation proceedings, that will assist in judgments being handed down more speedily than is sometimes the case today. Similarly, we would strongly endorse the recognition by DBIS that the scope and nature of appeals will be affected in part by the quality and transparency of the original regulatory decision making process. Whilst the introduction of measures such as confidentiality rings raise some practical challenges, these innovations should certainly be explored further.

1.7 Our response to this consultation is structured as follows:

- In **section 2**, we identify and comment upon the overarching policy objectives and desired outcomes articulated by DBIS. In summary, we would largely agree with these policy objectives. However, as explain in further detail, we are concerned that were the proposed DBIS approach relating to the legal standard of review in appeals to be adopted, there is a real risk that these policy objectives will be frustrated.

- In **section 3**, we consider the concerns articulated by DBIS about the operation of the current appeals regime that would justify the proposed form of intervention. As we reveal, some of these concerns do not withstand close inspection, calling into question the need for some of the proposed reforms.

- In **section 4**, we consider in more detail, the proposed changes to the standard of review to be applied in regulatory and Competition Act appeals. Specifically, we identify the risk of disruption and uncertainty that has to date not been fully appreciated by DBIS in its consultation document or its Impact Assessment. As part of this analysis, we also propose an alternative approach that still would specify more precisely the grounds of appeal that would succeed without creating the legal uncertainty that is inherent in the current DBIS proposal.

- In **section 5**, we examine the proposed reforms of court procedures and propose measures that may assist in reducing the duration of litigation proceedings and the earlier handing down of judgments to the benefit of all parties.

- In **section 6,** we review the DBIS approach to changing incentives for stakeholders to litigate, notably through the use of the costs regime. As we explain further, the DBIS proposals are asymmetric in nature and need to rebalanced.

- In **section 7**, we discuss the DBIS proposals to improve the transparency of decision making at first instance and comment more broadly about how simple behavioural changes on the part of regulators could assist in ensuring that appeals are more focused and consequently consume fewer resources of the court and parties to litigation proceedings.

- At **annex 1**, we set out our proposed alternative text for grounds of appeal in both regulatory and Competition Act appeals.

- Separately, we will provide a report prepared by Towerhouse Consulting, commissioned by Vodafone in conjunction with a number of other stakeholders, analysing the Impact Assessment prepared by DBIS. As that report reveals, there are significant questions about the assumptions and data used in that Impact Assessment. The separate quantification exercise undertaken by Towerhouse Consulting demonstrates some of the deficiencies in the Impact Assessment and are sufficiently significant as to call into question its reliability for the purpose of adopting the approach proposed in the consultation document.

Vodafone's submission necessarily relates to those areas of the consultation document in which it has most familiarity, mostly gleaned from its engagement with regulatory decision making processes and its involvement in regulatory litigation proceedings; we therefore have not commented upon every proposal or assertion put forward by DBIS.

In summary, we have material reservations about certain aspects of the DBIS consultation and specifically conclude that:

- the case made by DBIS for a drastic refashioning of the appeals framework is far from convincing and conspicuous for the absence of credible evidence in support of a number of core assertions; and
- there is a real and material risk that the proposed changes to the appeals framework, particularly in relation to the standard of review, will serve only to create confusion and uncertainty amongst all stakeholders.

We do, however, agree that proportionate adaptations to the existing framework, reflecting the experience of the past decade, may result in the more efficient operation of the litigation process. In particular, we would support:

- pragmatic changes to the rules governing admissibility of evidence;
- improvements to ways of managing the length of proceedings; and
- a balanced extension to the 'losing party pays' principle current applied in the award of costs.

We believe the adoption of these proportionate measures, rather than an ill-considered change to the standard of review, will do far more to realise DBIS's stated policy objectives.

Considering the proposed package of reforms in its totality, we would strongly urge DBIS to reflect further upon the views of all stakeholders before adopting legislative changes that are more likely to frustrate than to further its policy objectives.

2. HM Government's policy objectives and desired outcomes

2.1 The consultation document reveals that, at the highest level, the commitment to growth and expansion is the central objective driving the approach of DBIS.[1] DBIS rightly recognises that the appeals regime governing decisions of regulators and competition authorities has an important role to play in realising that objective through:

(i) Providing a stable and certain legal framework within which industry stakeholders can operate and safely adopt strategic investment decisions;
(ii) Ensuring that regulators are effectively held to account;
(iii) Ensuring that decisions of regulators and competition authorities at first instance are more likely to be objective and robust;
(iv) Ensuring that industry stakeholders do not incur unnecessary costs in litigation proceedings;
(v) Providing access to justice to the widest possible range of stakeholders.

2.2 We would strongly support the above-mentioned policy objective and the importance attributed by DBIS to the role played by the appeals framework in securing that objective. Vodafone is a stakeholder forming part of an organisation with a global focus that has taken on significant risks and committed very significant investment in the UK mobile (and now fixed) telephony markets over three decades (whether in the form of infrastructure, technology or retail operations that serves the needs of UK consumers). This year alone, Vodafone is set to commit £900 million simply on improvements to its network and the deployment of the next generation of mobile communications services (4G) that will serve the needs of mobile consumers. Over the past 5 years, Vodafone's capital investment in the UK has been in the region of £4 billion (including the acquisition of new spectrum that will enable the deployment of new technologies to the benefit of mobile consumers). We are consequently able to attest that unpredictable and unstable legal frameworks are highly likely to damage incentives to invest and innovate. The current appeals regime is well-established and well-understood by stakeholders; it is therefore critical that DBIS approaches any reform of the appeals regime with caution, given the implications for the government's wider growth agenda.

2.3 A credible appeals regime is, as DBIS itself acknowledges, central to the delivery of a stable legal and regulatory framework where it acts as a discipline on the conduct of regulators and competition authorities. Where these regulators do not face effective judicial scrutiny, there is plainly a greater likelihood of original decisions being determined in an arbitrary or even retrospective way that is ultimately damaging to the welfare of UK consumers. Conversely, the existence of an effective regime will be more likely to generate decisions that are well-reasoned and substantiated by compelling evidence.

[1] HM Government, *Streamlining Regulatory and Competition Appeals. Consultation on Options for Reform* (hereafter DBIS consultation), 19 June 2013, Executive Summary, p,7 and Chapter 1, paragraph 1.6

2.4 In this regard, Vodafone's experience is that the current UK appeals regime does currently operate to deliver this outcome. The proposed regulation of telephone number portability some years ago provides a compelling example of the way in which the appeals regime leads to proportionate, objectively justifiable decisions:

- In 2007, Ofcom originally proposed to introduce a new regulatory regime governing the system of telephone number portability in the UK. This proposal would have involved very significant changes to the existing arrangements for the porting of mobile numbers (both in terms of the technological solution used for handling calls to ported numbers and the consumer-facing process for enabling porting of numbers).[2]

- Ofcom's cost-benefit analysis contained material flaws (and most notably was conspicuous for the absence of an estimate of the costs of implementation of the proposed new system of number portability) causing Vodafone to appeal Ofcom's final statement in January 2008.

- The Competition Appeal Tribunal (the "CAT"), reviewing Ofcom's final statement pursuant to the merits-based legal standard, found, in September 2008, that statement to be deficient, largely because Ofcom's cost-benefit analysis contained material errors and called into question Ofcom's claimed consumer benefits resulting from its regulatory intervention. Specifically, the CAT highlighted that Ofcom's cost-benefit analysis should be capable of withstanding the scrutiny of industry and the courts. It therefore remitted the matter back to Ofcom for reconsideration with directions designed to enable Ofcom to generate a credible estimate of costs and benefits of changing the system of number portability.[3]

- Ofcom proceeded to review the matter afresh in light of the CAT judgment. Having sought to obtain the input of industry as directed by the CAT, it established that the scope of its original proposals relating to a new technological solution for the routeing of calls to ported numbers was not supported by a revised cost-benefit analysis. The outcome therefore differed materially from that reached in Ofcom's original 2007 statement.[4] In 2010, Ofcom proposed a more moderate and proportionate form of intervention that still realised a number of net consumer benefits .[5] No party sought to challenge this final statement.

2.5 The case study of mobile number portability demonstrates that a regulator, fully appreciative of the likely reaction of a court to speculative or poorly reasoned

[2] Ofcom, *Telephone number portability for consumers switching suppliers,* Concluding Statement, 29 November 2007.
[3] Case 1094/3/3/08, *Vodafone v Ofcom* [2008] CAT 22
[4] Ofcom conceded that the prospect of net consumer benefits from even a scaled back version of its original proposal were very uncertain, "…*the CBA reflects forecasts and assumptions. Changes to some of our forecasts or assumptions could turn the NPV negative…The potential benefit for consumers (assuming cost savings were fully passed thorough) is small".* See summary at http://stakeholders.ofcom.org.uk/consultations/gc18_routing/statement/ and Ofcom, *Routing calls to ported numbers*, Statement, 1 April 2010.
[5] Ofcom, *Changes to the Mobile Number Porting Process*, 8 July 2010.

decisions, will be considerably more likely to reach evidence-based conclusions. It is undeniable that such an approach to decision making may result in a longer process; however, given that the outcome of the decision making process has clear consequences for consumer welfare, it would be curious for any public body to adopt a policy position that elevated the need for speedy decisions over *objectively justifiable* decisions that would be more likely to operate in the public interest.

3. HM Government's case for change and proposed reforms

3.1 The DBIS rationale for reforms to the existing regime is expressed in a number of different parts of the consultation document. A review of the document reveals that the following common themes emerge that appear to form the basis for the reasoning of DBIS for its proposed intervention:

(i) The number of appeals across different sectors varies with a 'high' number of appeals being a characteristic of some industries;
(ii) The current standard of review and procedure makes litigation a one-way bet with no or little downside for appellants;
(iii) Appeals are unnecessarily lengthy, consuming the resources of the courts, regulators and litigants, thus generating additional cost for all parties;
(iv) Litigation proceedings delay the adoption of regulatory decisions (and implicitly defer the generation of consumer benefits);
(v) The threat of litigation acts as a brake on the conduct of regulators, inhibiting the adoption of 'radical' or controversial decisions.

We examine each of the above-mentioned claims in more detail to determine the extent to which they can be substantiated by evidence.

Claim1: The number of appeals is disproportionately high

3.2 Whilst the data cited by DBIS at Table 3.2 of the consultation document reveals that there have been over a five year period a number of appeals in some regulated sectors, when considered as a proportion of the total number of regulatory decisions adopted, these do not appear particularly voluminous. Examining the data for the communications sector, Table 3.2 reveals that Ofcom adopted 160 regulatory decisions in the period 2008-2013. Approximately 15% of these decisions were subject to subsequent litigation, representing no more than 24 appeals over a 5 year period. A number of these appeals were withdrawn by the appellant prior to proceedings commencing or being concluded. Examining the data for the period prior to 2008 reveals that almost exactly the same number of appeals (23) were lodged at the CAT over a five year period, confirming that there has been no exponential growth in regulatory litigation since the Communications Act came into force.

3.3 What is clear is that – as DBIS itself acknowledges – there are a number of issues that are more likely to be susceptible to legal challenge. DBIS notes that of 9 wholesale price controls in the past 5 years, 7 have been the subject of litigation. But there is nothing surprising about this statistic. Stakeholders are naturally more likely to challenge decisions that appear ill-founded *and* have a damaging effect on

their commercial position and correspondingly the intensity of competition in the adjacent markets on which they may operate.

3.4 Price controls are the most intrusive form of regulatory intervention. They not only inhibit the commercial freedom of private market actors, but also prescribe the range of costs that may be recovered by these private market actors and, in some instances, the way in which the level of price control should be computed. Parties subject to wholesale price controls in the communication sector typically operate in downstream retail markets that are subject to vigorous competition.[6] Given that these markets are fiercely contested, a risk that there is an error in the methodology adopted to derive a price control or in the computation of a model may represent hundreds of millions of pounds that would, as a matter of basic economics, otherwise be competed away in downstream retail markets. When Vodafone sought to challenge Ofcom's approach to the regulation of mobile termination rates in 2011, it did so on the basis that the methodology it considered more likely to attain Ofcom's statutory objectives would generate an additional £100 million per annum of interconnection revenues; these revenues would be ultimately used to serve consumers in the retail mobile market.

3.5 We consider the allocation of radio spectrum in greater detail under Claim 5. However, for the purposes of considering the types of issue that are subject to legal challenge, it is important to appreciate the significance of spectrum, as a scarce resource and critical input to the operation of mobile communications networks and consequently the intensity of competition. The way in which spectrum is allocated (for example via an auction framework) and subsequently managed has, as Ofcom itself recognised in its recent spectrum auction consultation, significant consequences for the emergence and deployment of new technologies and the future competitive landscape.[7] It is therefore a subject that would logically be of interest to any existing or potential provider of mobile communications services and more likely to be susceptible to litigation.

Claim 2: Litigation is a one-way bet for a prospective appellant

[6] Certainly, in the context of the retail mobile market, Ofcom's recent assessment found that margins in the UK are lower than in all other equivalent markets in Western industrialised nations. It noted that these margins are indicative of a competitive market. See Ofcom, *Wholesale mobile voice call termination*, Statement, 15 March 2011, paragraph 2.5

[7] See Ofcom, Consultation on assessment of future mobile competition and proposals for the award of 800 MHz and 2.6 GHz spectrum and related issues, 22 March 2011, paragraph 1.3 "*Access to this spectrum is expected to be vital to the future commercial success of existing and prospective new entrant mobile network operators. The proposals set out in this consultation are likely to shape the future competitiveness of the mobile sector for at least the next decade.*"

3.6 DBIS appears to have formed a preliminary view that the current regime positively incentivises appeals on the basis that there is little disadvantage to an appellant from bringing such an appeal. Were that the case, however, it would have been logical to expect a considerably higher figure than the 10-15% of decisions identified by DBIS that have been the subject of legal challenge. What these historic figures suggest is that any prospective litigant will engage in a balancing exercise, typically weighing up the significance of the issue, the prospect of success and the impact upon its reputation and credibility in the longer term of bringing an unmeritorious or spurious appeal. Vodafone's own experience as a litigant would bear out this thesis; in the period between 2003 to 2012, Vodafone sought to challenge only 2 Ofcom decisions, whilst also intervening in support of 2 Ofcom decisions in the same period.

3.7 Nor is it always the case that an appeal is a one-way bet with the appeal court deciding to maintain the status quo or to uphold the appeal. Where one party (Party A) elects to challenge a regulatory decision, there is, of course, the risk of an appeal from another party (Party B) with a different perspective and on separate grounds that may result in the original outcome for Party A being exacerbated. Whilst these cross appeals have been relatively infrequent, Vodafone's experience of the mobile termination rate litigation proceedings is that the risk of a cross-appeal would suggest that it is simplistic to characterise the appeals regime as being a one-way bet for litigants.[8]

Claim 3: the duration of regulatory and Competition Act appeal proceedings is unduly long and creates uncertainty

3.8 The review by DBIS of the average duration of regulatory and Competition Act appeals before the CAT reveals, in the context of an international comparator analysis, that the UK appeals regime, with average 10 month end-to-end process, either outperforms or is on a par with other jurisdictions in the European Union. Certainly, there is nothing in the DBIS study pointing to the operation of an appellate process that is unduly protracted or inefficient. This data also raises a doubt as to whether the existing standard of review can genuinely be said to be one of the root causes of unduly lengthy litigation proceedings (as is alleged by the consultation document). Certainly, there may have been cases where the length of the end-to-end process has been excess of the 10 month average. However, Vodafone's experience has been that such delays may, on rare occasions, be ascribed to shortcomings in case management and timetabling in some very specific cases.[9] This is a matter to which we return in section 5 of our submission where we consider simple adjustments that could be made to improve the speed of existing procedures.

[8] In that case, whilst Vodafone's appeal may have secured an improved outcome, BT and H3G also appealed Ofcom's decision that would have resulted in a 'worse' outcome for Vodafone. Ultimately, Vodafone's appeal was unsuccessful, whilst elements of the appeals lodged by BT and H3G were allowed by the CC. See Cases 1180-1183/3/3/11, Competition Commission, Final Determination, 9 February 2012.

[9] Vodafone's main experience of a less satisfactory instance of effective case management arose in the BT 08x termination charges case (Case 1169/3/3/10 *British Telecommunications v Ofcom*), when a full year had elapsed from the date when BT's notice of appeal had been lodged at the CAT before a hearing could take place. Whilst some delay was due to argument between the appellant and respondent about admissibility of evidence, stricter timetabling could have avoided such a long drawn out process.

3.9 The remaining concern articulated about the length of current regulatory and Competition Act litigation proceedings is that actions for judicial review of regulatory decisions appear – on average – to take less time to be concluded. This statistic seems, at first blush, revealing and would point to deficiencies in the current appeals framework. However, closer examination of this issue suggests that the variance in duration between judicial reviews and appeals based on the merits is somewhat illusory.

3.10 In the first instance, in regulatory appeals where the grounds of appeal allege pure errors in law (in effect akin to a judicial review), the end-to-end process can often take as long to resolve as appeals involving more detailed review of the original assessment of the facts. This proved to be the case in the appeal brought by Telefonica O2 against Ofcom's determination of a dispute regarding variations in mobile termination rates by a number of mobile operators (including Vodafone). Telefonica's appeal was expressly stated by the appellant to be a narrowly focused one, alleging an error in law on the part of Ofcom when determining a dispute.[10] The proceedings involved a very limited number of parties (3 interveners with 1 playing a very minimal role in the proceedings). Yet, the case still took almost a year to conclude under the following timetable:

14 November 2011 - Telefonica lodges appeal at the CAT;
December 2011 – applications for permission to intervene considered and granted;
25-26 April 2012 – 2 day hearing at the CAT;
30 October 2012 – judgment handed down by the CAT.

3.11 Given that one of the proposals under a consideration in the consultation document is that challenges to dispute determinations should be brought by way of judicial review in the High Court, it is worth considering the typical time frame for a judicial review in the High Court. Data disclosed by the Ministry of Justice ("MoJ") in June 2013 indicates the average duration of a judicial review has remained, over a five year period, at around a year. This has fallen recently to just under a year because the MoJ has found that the number of complex cases being considered has fallen.[11] That last statement, in and of itself, suggests that judicial reviews involving a range of complex technical issues are plainly capable of taking at least as long as appeals where the merits-based threshold is applied.

3.12 The prevailing merits-based standard also has advantages over a judicial review in that it enables the appeal court to correct the decision of the regulator if it deems appropriate (in effect substituting its judgment for that of the regulator). This is a right relatively rarely invoked by the CAT. However, it is undoubtedly useful in price control appeals that are complex and lengthy proceedings where the CC is able, at the end of the process, to modify the price control rather than remitting the matter

[10] Case 1189/3/3/11 *Telefonica UK Limited v Ofcom* [2012] CAT 28, paragraph 13, "*It is expressly stated in paragraph 5 of the notice of appeal that "the appeal solely involves questions of law", and that "Telefónica does not seek to argue the substance of the underlying dispute before the Tribunal".*

[11] Ministry of Justice Statistics Bulletin. Court Statistics Quarterly January-March 2013, p.50

back to the regulator for further consideration. That option would simply not be available where some alternative standard (such as judicial review) that only allowed the appeal court to set aside the original decision and remit it to the regulator – a process that would certainly consume more time than that taken by the CC to decide upon and issue a modification.

3.13 The DBIS claim that actions via way of judicial review appear to be concluded more swiftly than appeals on the merits is based on the speed at which judicial reviews are resolved in the very specific context of challenges to decisions by the UK competition authorities under the merger control regime. That is, as we have noted, not the appropriate reference point for determining whether regulatory and Competition Act appeals are unnecessarily protracted. The issues involved are often much narrower than those in regulatory and Competition Act appeals and require expeditious treatment; plainly if a prohibition decision has been issued by the UK competition authorities, it is imperative that the process for hearing and disposing of such a challenge to that decision is swift. Parties to the proposed commercial transaction will thus still retain the possibility of implementing that transaction in accordance with their original timetable if the prohibition decision is to be set aside.

Claim 4: litigation prevents the adoption of regulatory decisions

3.14 The DBIS assertion that regulatory and Competition Act litigation may delay the adoption of decisions at first instance is a particularly surprising one given that it is not capable of being borne out by any evidence. In the context of appeals against regulatory decisions, the enshrined legal principle is that any decisions remains legally binding until or unless it is set aside by an appeal court. The only exception to this basic rule is where an appeal court, upon receipt of an application, grants interim relief holding the original regulatory decision in abeyance until the outcome of the appeal is known.

3.15 The threshold for securing interim relief is, however, an extremely high one. According to the CAT's guidance and decisional practice, an appellant must demonstrate that it would suffer serious and irreparable harm from the original decision and in the absence of judicial intervention. In practice, this test requires the appellant's commercial position to be adversely affected to the extent that it would be at risk of exiting the market on which it operates. To Vodafone's knowledge, no regulatory decision in the sphere of communications over the past decade has been suspended following an application for interim relief. This means that all parties affected by any regulatory decision would be forced to comply with it until such time as an appeal were upheld.

3.16 Indeed, this proposition is borne out by Vodafone's own experience from the mobile number portability appeal that it lodged in 2008. As noted earlier, Ofcom's proposed changes to the system of number portability in the UK required significant changes to be made within specified timeframes and material capital costs to be incurred to enable these timeframes to be met. Because of the very strict way in which the test for a grant for interim relief is applied, Vodafone did not seek to apply for interim relief and complied fully with its legal obligations until the CAT handed down its judgment

setting aside Ofcom's decision. There was no suggestion that any party had failed to engage and give effect to the requirements mandated by Ofcom during this time.

3.17 Thus the concern described by DBIS simply does not materialise in the context of regulatory appeals. However, DBIS notes that in the context of Competition Act appeals, the decision of the competition authority does not come into effect and any financial penalty is deferred until the outcome of the appeal is known. This position would seem to be an eminently prudent one given both the very significant reputational and financial consequences for a firm found to have infringed competition law.

3.18 As the consultation document recognises, recent European jurisprudence means that infringements of competition law involve the imposition of penalties that are quasi-criminal in nature.[12] Moreover, UK competition policy in recent years has sought to create additional deterrents to anti-competitive conduct by enabling third parties to bring follow-on claims for damages against parties that have engaged in anti-competitive conduct. Section 47A of the Competition Act, which gives effect to that policy objective, stipulates that any party who has suffered damage flowing from a competition law infringement may bring a claim once an infringement has been *confirmed* by the relevant competition authority or the CAT. In other words, it would be inequitable to impose any liability upon a party until the infringement has effectively been confirmed as final by either the competition authority or an appeal court. More recent proposals have included new legislative provisions enabling claimants to seek redress more easily from parties found to have infringed competition law through the pursuit of standalone and collective claims for damages before the CAT.[13] Against that background, it would be reasonable that no penalty should arise before the decision is confirmed as being final.

Claim 5: the threat of litigation inhibits the approach of regulators or indirectly delays the adoption of decisions

3.19 Vodafone finds this claim to be characterised by a notable inconsistency. From the outset of the consultation document, DBIS professes its desire to preserve an

[12] *A. Menarini Diagnostics S.R.L. v Italy,* no. 43509/08. 27 September 2011 (ECHR) paragraphs 38-45; Opinion of Advocate General Kokott in Case C-681/11 *Schenker and Co AG and Others*, paragraphs 40, "*The starting point for the analysis of this problem should be that although antitrust law is not part of the core area of criminal law, it is recognised as having a character similar to criminal law. This means that regard must be had in antitrust law to certain principles stemming from criminal law which can ultimately be traced back to the rule of law and the principle of fault."*

[13] The draft Consumer Rights Bill proposes amendments to the existing Competition Act that would enable standalone claims for damages for infringements of competition law (thus meaning that the CAT would not be limited to hearing 'follow-on' claims only. The draft bill also proposes to extend the ambit of the collective redress regime so as to enable a wider group of bodies to bring claims on behalf of consumers.

appeals framework that provides for legal certainty. That certainty can, as explained earlier in this document, only be created where regulators reach, on a consistent basis, well-informed and objectively justifiable decisions. The appeals framework has an important role to play in securing this outcome where it acts to disincentivise arbitrary or speculative decisions.

3.20 Given these policy statements, we would be surprised if the DBIS proposals were designed to increase the margin of discretion afforded to regulators so as to enable the adoption of speculative and poorly reasoned decisions. No responsible government agency or regulator committed to facilitating investment and growth would, we assume, wish to create this kind of legal and regulatory framework. In this context, it should be recognised that intervention by appeal courts can – given the reluctance of these courts to interfere routinely in the judgment of the sector-specific regulator – secure a positive outcome for consumers. As the example of telephone number portability reveals, largely because Ofcom's claimed consumer benefits arising from its proposed course of action were essentially speculative, there was a risk that consumers would not obtain any benefit from the original decision. The intervention of the CAT ensured firstly that consumers were not harmed through a speculative decision and ultimately caused Ofcom to adopt a course of action with greater prospect of an improvement to consumer welfare.

3.21 The outstanding issue for consideration is that of the allocation of radio spectrum, which is cited by DBIS as an example of how the appeals regime indirectly delays the implementation of regulatory decisions or impedes the adoption of decisions. DBIS describes how legal challenges to the proposed auction of the 2.6GHz band held up the release of that spectrum band for exploitation by mobile operators (presumably with the loss of a consumer benefit from the early allocation of the spectrum band). There are a number of points that should be highlighted at this juncture, which indicate that the inferences that DBIS seeks to draw from this particular case are not as compelling as has been claimed.

3.22 Firstly, as explained earlier, radio spectrum is a scarce resource and a key input to the operation of a mobile network. The way in which it is managed and allocated will have material consequences for the development and intensity of competition in the retail mobile market. A poorly designed auction framework or erroneous assumptions about the technical characteristics or properties of particular spectrum bands may generate an inefficient outcome by placing a critical scarce resource in the hands of a user that does not place a sufficient value on that spectrum. A rushed and ill-thought through approach to spectrum management can therefore generate adverse effects on competition and consumer welfare over the long-term. The case for a regulator to be proportionately more rigorous and to address the concerns of all potentially affected stakeholders in this type of ex ante analysis before reaching any final decision is especially compelling. It is worth noting that when Ofcom did undertake a rigorous analysis and consulted over an 18 month period between 2011 to 2012 upon its proposed approach to the allocation of the 800MHz and 2.6GHz bands, no party sought to challenge the auction or its outcome.

3.23 Furthermore, we would also note that the alleged consumer harm resulting from the spectrum litigation in 2008 is unlikely to have been as significant as has been

portrayed. For these purposes, we assume that the spectrum litigation in 2008 was without merit and the welfare loss is the period between when the 2.6GHz band might have been available for exploitation for the deployment of new technologies and the period when it was actually released (following the spectrum auction in March 2013). The reality is that whilst the band may have been capable of being auctioned, it would not been fully capable of exploitation by winning bidders until 2010-2011 at the earliest.[14] Moreover, it is doubtful that any mobile operator would have been capable of building a credible national 4G network using only blocks of 2600MHz spectrum because of the propagation characteristics of that band. This much was recognised explicitly by the European Commission as part of its review of the joint venture between T-Mobile UK and Orange UK in 2010.[15] The 2.6GHz band could only in practice be used to provide a capacity layer for a 4G mobile network, pointing to the need for a sufficient holding of spectrum sub-2GHz that could be operated in conjunction with a holding in the 2.6GHz band (i.e. in the 1800MHz, 900MHz or 800MHz bands). Thus, it can be concluded the optimal outcome was in fact secured by the ultimate auction framework adopted by Ofcom in 2012 that involved the release of the 800MHz and 1800MHz bands in 2013. Neither of these bands were available for exploitation in 2008.

3.24 Nor does the 2008 spectrum litigation provide credible evidence that the current merits-based standard of review either impedes the ability of regulators to adopt decisions or delays (indirectly) the implementation of regulatory decisions. Challenges to the design of auction frameworks would be brought by way of judicial review that took account of the provisions of the pan-European Common Regulatory Framework (the CRF") governing telecoms appeals (the approach or standard that would result were the DBIS proposals adopted) as they would involve a challenge to auction rules laid down by statutory instrument.[16] According to the DBIS reasoning, any appeal in these circumstances, irrespective of the legal standard applied would remain problematic simply because it created uncertainty. Taking the DBIS position to the logical extreme, that uncertainty – inherent in any appeal proceedings – could only be addressed through the removal of a right of appeal. Nothing in the consultation document indicates that DBIS is even contemplating that form of intervention.

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[14] Ofcom paper of 16 November for Ofcom Policy Executive at the time of the T-Mobile/Orange merger *"No new entry in the short term is expected before the next tranche of spectrum (the 2.6GHz band) becomes available in 2010/11 (at the earliest)."*

[15] As part of its review of the creation of the joint venture between T-Mobile UK and Orange UK, the Commission was forced to consider whether alternative 4G networks might emerge, for instance using other frequency band other than those held by the merging parties. The Commission specifically considered whether the 2.6GHz band could enable the deployment of a credible national network and found that this was not be viable: "*the 2600 MHz spectrum presents lower coverage performance compared to the 1800 MHz spectrum, **which makes it hardly suitable for areas other than urban**."* [emphasis added] Case no COMP/M.5650 T-Mobile/Orange, 1 March 2010, paragraph 128.

[16] In *Telefonica O2 and T-Mobile UK v* Ofcom [2008] EWCA Civ at 51, the Court of Appeal found that challenges to auction regulations would be by judicial review as such challenges could not fall within the scope of section 192 of the Communications Act 2003 that allows for appeals of Ofcom decisions (that would be heard 'on the merits').

The proposed solution(s) to the alleged litigation 'problem'

3.25 To remedy the concerns identified above, DBIS proposes an unprecedented wide-ranging set of reforms to the appeals regime, which notably include:

(i) A change to the current legal standard of review in regulatory or Competition Act cases, resulting in the move to challenges on specified grounds or by way of judicial review;
(ii) Changes to existing court procedures, through amendments to the rules on the admissibility of evidence, appeal routes and timeframes for the resolution of appeals;
(iii) Amendments to the costs regime that re-base incentives for bringing appeals or encourage appeals to be conducted in a more narrowly focused way;
(iv) Improving the regulatory decision making process at first instance in a way that may reduce the scope for future litigation.

We consider the justification for and the benefits and detriments arising from each of these options in further detail below.

4. The legal standard of review

4.1 This is now the third time in a three year period that HM Government has contemplated a revision to the standard of review applied in regulatory and Competition Act appeals (which, in its own way, does not assist in creating legal and regulatory certainty). The analysis put forward by DBIS about the defects of the current legal standard of review in this latest consultation is, without doubt, the most controversial element of the consultation document. This is largely because of the paucity of evidence underpinning some of the claims about the way in which that standard of review is applied by the courts and the consequences of the approach of the courts. We have already examined the core assumptions or assertions in some detail in section 3 of this submission and identified the most significant evidential deficiencies. In the interest of brevity, we do not repeat them in detail in this section, although they are plainly relevant to any analysis of the standard of review in regulatory and Competition Act appeals.

4.2 DBIS evidently considers the existing standard of review to represent the root cause of much that is wrong in the current appeals process. It therefore proposes a radical change to the existing standard of review that will, at a stroke, in its view, act as a panacea to the concerns that it has identified. This is, with respect, simply not a tenable position. As described in section 3, many of the problems of the current appeals regime described by BIS do not appear accurate; this fact alone undermines the government's case for change. However, as we explain below, there are also compelling policy reasons why any changes to the standard of review should be limited.

4.3 Whilst the reasoning underpinning the BIS position is diffused throughout its consultation document, the following common themes emerge about its view of the legal standard of review:

(i) The intensity of review means that appeal courts act as a second regulator, frequently undertaking a *de novo* analysis;
(ii) The intensity of review leads to protracted litigation proceedings;
(iii) The intensity of review has a chilling effect on the readiness of regulators to adopt 'radical' decisions or results in regulators taking longer than necessary to issue decisions;
(iv) The intensity of review makes the appeals system a one-way bet for appellants;
(v) In the case of the Communications Act 2003, the current provisions relating to appeals, 'gold-plate' the requirements mandated by the harmonised CRF governing the communications industry.

4.4 Themes (ii)-(iv) have already been addressed in some detail in section 3. These assertions are based on a misunderstanding or misrepresentations. Once they are analysed in detail, it is clear that they cannot act as the basis for the government's preferred form of intervention. We consider themes (i) and (v) below.

The existing standard of review is both necessary, well-established and understood by stakeholders

4.5 The government's stated policy objective and desired outcome is one in which the appeals regime is capable of holding regulators to account. Although the consultation document does not appear to make this connection, the presence of an effective appeals mechanism is what acts as a check or balance on the conduct of regulators, ultimately contributing to legal and regulatory certainty. This is certainly the case where the financial consequences of regulatory and Competition Act decisions for stakeholders can be very significant, often running into hundreds of millions of pounds. There is no suggestion that DBIS wishes to undermine this outcome; indeed we note that the Impact Assessment, upon which DBIS relies, is notable for the fact that DBIS does not foresee a reduction in the number of appeals over the medium to long term following the imposition of its changes. Were the intention of the government to render immune a significantly greater proportion of regulatory decisions from subsequent legal challenge, it would have been logical to have expected the number of appeals to have fallen in the future over a 10 year timeframe.

4.6 The current merits-based standard of review in regulatory and Competition Act appeals secures the government's policy objective; unlike an action for judicial review, the merits-based appeal, as DBIS itself acknowledges, enables the appeal court to go beyond establishing mere procedural irregularities to determine whether the regulator's assessment of the facts is credible and soundly based. Whilst that level of scrutiny may cause a regulator to act judiciously and take longer to reach a robust decision than the government might prefer, it must surely be in the interests of consumer welfare that decisions taken are objectively justifiable and accordingly less likely to be the subject of litigation. The example of telephone number portability, cited earlier in this submission, where Ofcom reviewed inputs from stakeholders and investigated a range of options in a thorough fashion ultimately resulted in an outcome where no party challenged the final decision.

The same outcome arose when Ofcom consulted and deliberated carefully upon the auction of the 800MHz and 2.6GHz bands between 2011 to 2012. The significance of these outcomes should not be lightly dismissed given that there were a number of stakeholders each with very divergent perspectives on the subject matter of Ofcom's final statements.

4.7 Moreover, in the case of Communications Act and Competition Act appeals, Community law imperatives mean that the intensity of review undertaken pursuant to a merits-based standard are not simply desirable from a policy perspective, but necessary to enable DBIS to discharge its Community law obligations. In the case of the communications sector, the provisions of the CRF (and in particular, Article 4 of the Framework Directive) make clear that Member States must ensure that "the merits of the case are duly taken into account" in any appeal. Accordingly, as a matter of law, there is a clear obligation upon the UK government and the courts to give effect to the provisions of the Framework Directive. In the case of Competition Act appeals, recent case law reveals increasing awareness that the provisions of the European Convention on Human Rights (the "ECHR") - specifically Article 6 - relating to the right to a fair hearing would appear germane given the quasi-criminal nature of a finding of an infringement of competition law.[17] It must surely be preferable for DBIS to avoid any ambiguity about compliance with these obligations by retaining the existing legal provisions or by making sure that any new provisions specify that the merits-based standard shall apply in these types of appeals.

4.8 The outstanding issue requiring consideration is the extent to which the current standard of review results in the appeal court conducting a *de novo* hearing, thus operating as a *de facto* regulator in its own right. In this regard, DBIS appears to have misunderstood the purpose and effect of the merits-based of review.

4.9 The merits-based review is fundamentally designed to enable the appeal court to scrutinise and understand the evidence put before the regulator and to enable that court to assess the validity of the regulator's original conclusions based on the evidence. Whilst the standard of review provides for detailed scrutiny of the analysis of the regulator, it quite clearly does not confer upon the CAT the ability to seek additional information under statutory powers or to comment upon the policy objectives set by the sector-specific regulator.

4.10 The response of the CAT to the DBIS consultation reveals a consistent trend in regulatory and Competition Act judgments over the past few years; in these judgments, the CAT (and most recently the Court of Appeal) has repeatedly noted it must not interfere with the judgment of the regulator where that judgment is one that would be considered reasonable against a backdrop of a range of possible decisions.[18] It is clear that the appeal courts do give effect to this proposition in

[17] Case C-386/10 *Chalkor v Commission*

[18] See for instance the dictum of the Court of Appeal in *Telefonica & Others v BT* [2012] EWCA Civ 1002, at 67 "…*if the regulator has addressed the right question by reference to relevant material, any value judgment on its part, as between different relevant considerations, must carry great weight."* Almost identical approaches were followed in *Telefonica UK Limited v Ofcom* [2012] CAT 28,

practice. In the recent mobile call termination appeals, the CC rejected the appeals of Vodafone and Everything Everywhere Limited relating to the choice of methodology and the computation of the model, whilst only allowing specific elements of appeals lodged by H3G and BT where it was clear that Ofcom could not justify its position or where its evidence was capable of being corrected by actual up-to-date information.[19]

4.11 In other words, stakeholders should now be fully cognisant of the proposition that where the regulator's original decision is soundly based, the prospects of an appeal succeeding, even in circumstances where an appellant could point to an alternative regulatory option, are in reality remote.

The DBIS proposed changes create significant new uncertainty and disruption for all stakeholders

4.12 DBIS has clearly expressed a preference for all appeals to be heard on a judicial review standard, or in the alternative, a 'specified-grounds' basis. What is not considered, beyond the most cursory of references, is the potential for debate and argument as to how these specified grounds accommodate and comply with wider EU law obligations. The 2008 spectrum litigation mentioned in the consultation document should also be considered more carefully by BIS for what it reveals about the prospects for significant satellite litigation about the meaning of a new and untested standard of review in regulatory and Competition Act cases.

4.13 There is a real risk that appeals, following the introduction of a new standard of review, will focus on the meaning and application of that new standard, with parties (including the regulator) potentially challenging CAT judgments before higher courts and seeking references to the European Court of Justice in Luxembourg for its view on the compatibility of any new legal standard with either the provisions of Article 4 of the Framework Directive or Article 6 of the ECHR. This will undoubtedly be a very time-consuming process. Vodafone's own experience of litigation in Luxembourg is that it would take at least two years for a case to be referred, heard and disposed of.

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paragraph 45; *T-Mobile (UK) Limited v Ofcom* [2008] CAT 12, paragraph 82; *TalkTalk v Ofcom* [2012] CAT 1, paragraphs 71-72; *Mobile Termination Rate Appeals* [2012] CC Final Determination, paragraph 1.33 "*In a case where there were a number of alternative solutions to a regulatory problem with little to choose between them, we do not think it would be right for us to determine that Ofcom erred simply because it took a course other than the one that we would have taken."*

[19] The CC found that Ofcom's unit costs for network equipment should be corrected following the submission of price book information from H3G: "*The evidence on equipment costs supplied by Three as part of its appeal, and that supplied to Ofcom during its consultation, indicates that the unit costs assumed for radio equipment in the 2011 Model were overstated relative to the direct evidence on costs available.*" CC, Final Determination, 9 February 2012, paragraph 6.13. The CC also found the length of the glide path proposed by Ofcom (by which cuts in termination rates would be phased in) was also not supported by credible reasoning: "*we find there to be force in BT's arguments, supported by Three, that Ofcom needed good reasons to adopt the longer option. We agree with BT and Three that the reasons for preferring a four-year glide path are not convincing. Additionally, while both a three-year and a four-year glide path would miss the target date of the Recommendation,* ***we have been presented with no compelling reason why the greater departure from it is justified****."* [emphasis added] CC, Final Determination, paragraph 5.75

That process would be in addition to the time taken for initial appeals to be heard in the UK courts. Thus, industry needlessly faces a potential six-year period of uncertainty whilst these critical legal questions are resolved by higher courts.

4.14 This uncertainty would be exacerbated by the fact that the CAT would be uncertain as to how to apply an alternative standard of review in the interim. There would accordingly be a series of cases (and parties to these cases) all affected by ongoing pre-existing litigation. These are very real adverse consequences that do not appear to have been considered properly in the consultation document or, equally importantly, as a new and significant cost to industry in the Impact Assessment. As such, these omissions render any decision to adopt the proposed changes to the standard of review unsafe.

4.15 Nor could the conclusion of proceedings in the higher courts in the UK or in Luxembourg necessarily be said to resolve the debate about the application and operation of a new legal standard. Assuming that DBIS were to proceed with 'specified grounds of appeal' that require a materiality threshold to be met before an error of fact, law or procedural irregularity could be established, the almost inevitable corollary in each case will be an argument between appellant and respondent about the extent to which alleged errors are material for the purposes of the legislative framework. Further debate would be likely to ensue about whether one error of fact or law would be sufficiently material to vitiate a regulatory decision or if a series of minor errors in aggregate would constitute materiality for the purposes of the legislation. These types of debates would be likely to consume a considerable amount of court time, which has implications for the claim in the Impact Assessment that a new standard of review would contribute to a material reduction in the duration of proceedings.

Any modifications to the standard of review must be proportionate

4.16 The case for change to the existing standard of review is therefore far from compelling. However, in the case of the Communications Act, if DBIS simply wishes to avoid technical gold-plating, there is an obvious and simple solution. That solution involves replicating verbatim the provisions of Article 4 of the Framework Directive and removing the novel materiality threshold currently proposed in the consultation document. This approach – which is set out at Annex 1 to this submission – would have the benefit of enabling the government's intention to ensure that stakeholders are aware of the specific grounds of appeal that must be satisfied for any appeal to be successful. Equally, errors of law or fact are well understood in jurisprudence, so lengthy debates about the meaning of materiality could be avoided, as would arguments about the compatibility of the new legal standard with provisions of European law.

5. Procedural improvements

5.1 Our review of the claims made by DBIS in section 3 reveal that there are no serious or endemic failings in the current appeals regime, requiring very intrusive intervention. That, of course, does not preclude the introduction of changes that would enable regulatory and Competition Act appeals to be conducted more

efficiently or to be resolved more swiftly. In this section, we consider a number of ways in which proceedings could be made more efficient without compromising the efficacy and credibility of the judicial process.

A more focused approach to the admissibility and use of evidence in litigation proceedings

5.2 DBIS rightly seeks to establish whether the submission of large volumes of evidence or the way in which that evidence is scrutinised unnecessarily extends litigation proceedings and delays the efficient disposal of cases. Like DBIS, Vodafone has not encountered numerous instances of parties submitting evidence that should reasonably have been put forward to the regulator during the original decision making process. The sole occasion on which this occurred arose from a flawed understanding of the facts by the CAT and subsequent ineffectual case management, resulting in 3 weeks of court time being allocated to the consideration of evidence that was never put in front of the regulator during the original decision making process.

5.3 In the BT 08x termination charges case (cited by DBIS in its consideration of the rules on evidence), at issue was whether BT could have correctly divined in the dispute resolution process the case being put to them and submitted evidence during that process. The CAT concluded – contrary to all the evidence in the case – that BT could not possibly have anticipated these arguments and allowed the submission of new 'expert' economic evidence that was not previously put before the regulator. This decision (later upheld by the Court of Appeal on the grounds that it fell within the CAT's wide margin of discretion) had material consequences for the management of the case, with BT then submitting a total of 16 economic reports, even with additional material being adduced on the morning of the first day of the hearing. What this case suggests is that this sub-optimal outcome could have been avoided through more effective case management and tighter controls on the conduct of the parties.

5.4 By and large, regulatory and Competition Act appeals tend to generate significant volumes of evidence because the issues being considered *are* typically very technical and complex. An appeal against a price control may, for example, involve arguments about the merits of a particular methodology or the validity of key inputs in any model. However, were DBIS minded to proceed with a change to the current presumption about admissibility of 'new' evidence in these appeals, some modifications will be required to enable a new presumption to be sufficiently flexible to accommodate a range of different scenarios.

5.5 Currently, the procedural rules afford a very wide margin of discretion to the CAT, allowing it to decide whether or not to admit evidence, whether or not it was available to the appellant at the time when the original decision was taken. More broadly, the CAT appears empowered to compel the production of evidence where it deems appropriate.[20] The DBIS approach would mean that the CAT would only allow the

[20] The Competition Appeal Tribunal Rules 2003 (SI 2003/1372), Rule 22 stipulates *"(1) The Tribunal may control the evidence by giving directions as to – (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires to decide those issues; and (c) the way in which the evidence is to be placed before the Tribunal. (2) The Tribunal* ***may admit or exclude evidence,***

admission of evidence that was not before the regulator at first instance in exceptional circumstances. We would agree that such a rule would give parties a very strong incentive to ensure that relevant evidence was submitted to the regulator during the decision making process. However, were a rule of this kind applied very formalistically, it could result in real substantive and procedural unfairness. Accordingly, we would propose that any accompanying guidance to this new rule should make clear that:

(i) Expert or factual evidence that seeks to clarify or amplify arguments or submissions previously made to the regulator could still be admitted; and
(ii) Expert or factual evidence that constitutes reply evidence in relation to points made by the defendant or any other party to the litigation would still be permitted.

5.6 Although not identified in the DBIS consultation document, we would also propose that consideration be given to the general rule that parties taking issue with factual or expert evidence should be required to cross-examine witnesses to demonstrate their opposition to the arguments or claims put forward in this evidence. This requirement often causes hours and days of court time to be allocated to the cross-examination of witnesses with the little tangible gain for any party or for the court. A truly streamlined or simplified approach would establish that objections to factual or expert evidence could be established on the papers without a need for oral cross-examination, unless the court found that such cross-examination would be necessary or helpful to clarify points at issue.

Identifying the appropriate forum for particular appeals

5.7 DBIS correctly seeks to identify whether efficiencies might be secured in proceedings through the elimination of certain procedural steps that currently exist. Its most obvious example of how cases might be dealt with more swiftly is in the context of price control appeals. Under the current legislative scheme, all price control appeals are initially heard by the CAT, which confirms that the matter subject to appeal involves a challenge to a price control and then refers a number of questions (agreed by all parties) to the Competition Commission ("CC"). Were the DBIS approach to be adopted, this intermediate step would be abolished, with any appeal being lodged with the CC and any grounds of appeal and questions being specified by the CC. Given that the CAT has little role in determining the actual issues in a price control (save only where it is engaged in a judicial review of the CC's determination), this would appear an eminently sensible approach. The CC has both the resources and expertise to handle points of law as well substantive issues; enabling the CC to be seized of the issues much earlier would potentially result in what are often complex and technical issues being resolved earlier than at the current time. Were there to be any debate about whether the appeal did involve a price control issue, there should be no reason why the CC should not be able to resolve such a question satisfactorily.

***whether or not the evidence was available to the respondent when the disputed decision was taken**.'*[emphasis added]

5.8 However, the case for referring appeals to dispute determinations to the High Court, rather than the CAT, is less compelling. No obvious efficiency arises in terms of time savings. In fact, there is a real risk that such appeals would take longer to resolve than in front of the CAT given that these cases would be subject to the vicissitudes of the listing office and may compete with any number of commercial (contractual) dispute litigation cases. Given that the CAT has the ability and resource to hear such cases, there is no obvious benefit that would arise from a change to the forum for hearing such cases. Equally importantly, disputes referred to Ofcom for determination can only, as a matter of law, relate to the terms of access and interconnection at a wholesale level between communications providers. As interconnection is a bottleneck service, the CRF requires that Ofcom does not handle disputes as a commercial arbitrator, but as a regulator seeking to attain broader objectives relating to competition and the position of consumers. It would therefore seem logical for any challenge to Ofcom's regulatory assessment to be heard at first instance by the specialist body created to review Ofcom's decisions.

Setting stricter limits for litigation proceedings

5.9 As noted in section 3 of our response, it is far from obvious that appeals, as a general rule, are often needlessly prolonged or that such appeals could be disposed considerably more speedily than at the present time. The consultation document proposes the introduction of targets for the resolution cases that would vary according to whether they were 'straightforward' or 'complex' cases. Whilst the setting of more aggressive targets would undoubtedly be welcome, seeking to delineate between straightforward and complex cases will most likely serve to generate debate in proceedings about the criteria to be satisfied to establish the existence of a complex or straightforward case. Moreover, the recent mobile termination price control appeals in the communications sector, which must surely be deemed to be complex for the purposes of the consultation document, involved numerous parties and consideration of large volumes of evidence and were disposed of by the CC within a strict 6 month time limit.[21] To the extent that DBIS wishes to set a new target for the resolution of appeals, the recent 6 month timeframe in price control appeals would therefore appear to be an appropriate benchmark for *all* appeals to be heard and resolved.

5.10 In the alternative, we would propose that specific time limits be set for the handing down of judgments from the closure of the oral hearing. Currently, little information can be gleaned from the CAT about the likely timeframe for the handing down of judgments and Vodafone's experience has been that this varies greatly, often with little or no explanation or indicated being provided by the CAT about the date of publication. Whilst Vodafone's mobile number portability appeal was resolved within 3 months (precisely) from the date of the hearing, judgment in Telefonica's 'flip-flopping' appeal was not handed down until almost 6 months after the oral hearing.

[21] The CC's own guidelines for the disposal of price control appeals under the Communications Act 2003 propose a timeframe of 4 months, but concede that appeals will typically take longer. Price Control Appeals under section 193 of the Communications Act 2003, CC Guidelines, paragraph 3.4

6. Setting incentives for all parties to litigation proceedings

A consistent application of the losing party pays principle

6.1 The consultation document proceeds on the assumption that the use of costs orders in litigation proceedings could be used to (dis)incentivise parties when contemplating whether to bring unmeritorious appeals that (allegedly) delay the adoption of regulatory decisions. This outcome would be secured through a consistent application of the losing-party-pays principle to any unsuccessful appellant, with that appellant being liable to pay for the in-house costs of the respondent regulator. Simultaneously, respondent regulators would be, as a general rule, immune from any costs orders. Whilst, this appears a superficially attractive proposition, further scrutiny suggests that it would require considerable refinement before it could be adopted.

6.2 It would be an extravagant claim that the threat of a more punitive costs regime could eliminate, in their entirety, some appeals. In the first instance, DBIS has adduced no evidence that there has been a plethora of vexatious cases brought by parties simply to delay the adoption of regulatory decisions (largely because appeals cannot, as we have demonstrated, hold up such decisions). Moreover, the risk of an unfavourable costs order is unlikely to be a material factor in the decision of a party as to whether an appeal should be lodged at all. Where the costs regime may assist in realising the government's streamlining objective is in relation to the scope and grounds of an appeal. Parties to appeal proceedings *may* be more likely to respond to the incentives in a more punitive costs regime by lodging narrower, more tightly focused grounds of appeal (although this response is far from certain).

6.3 Firstly, it should be noted that costs awards can be granted by the CAT today when an application is made by the regulator. Many appeals do not result in applications for costs by the regulator, suggesting that all parties (including regulators) recognise the issues involved are very complex and often finely balanced – reinforcing that there has not been a swathe of vexatious or spurious litigation in the past decade. However, Vodafone is aware that in recent cases, the CAT has been inclined to find that a party whose grounds of appeal have been comprehensively rejected (with no issues of public or industry-wide interest at stake) should be liable to pay the costs of the regulator upon an application.[22]

[22] See Case 1189/3/3/11, Telefonica UK Limited v Ofcom [2013] CAT 3, Ruling (Costs), paragraph 4 *"Telefónica's appeal against Ofcom's determination has been comprehensively rejected by us on each of the five grounds which were argued. On any reasonable view, Ofcom must be regarded as the successful party, and in the absence of good reason to the contrary we think simple justice would require that Telefónica should pay Ofcom's reasonable costs of successfully resisting the challenge to its determination.";* See also Case 1168/3/3/10, *Everything Everywhere Limited v Ofcom* [2011] CAT 45, Ruling (Costs), Paragraph 9(a) and 9(b) *Having been unsuccessful in that appeal, and put OFCOM to the cost of defending the determination by reference to the grounds of appeal, it is just that EE be required to pay OFCOM's reasonable costs incurred thereby… The Tribunal noted at paragraph 24(b) of the PPC ruling that "where issues of genuine, industry-wide importance are raised in an appeal, it may be inappropriate to order the losing party to pay the costs of such issues." However, the Tribunal concluded that this was not true of BT's appeal in that case, and we have come to the same conclusion in relation to this appeal by EE.*

6.4 If the losing-party-pays principle, traditionally applied in the commercial courts, is to be extended into the realms of regulatory and Competition Act appeals to incentivise improved conduct in litigation proceedings, then the current asymmetric model (imposing liability on unsuccessful appellants only) proposed by DBIS appears unreasonable. Regulators that have been found to have reached ill-considered decisions that put at risk the welfare of the consumers (in whose name they act) should equally face the appropriate sanctions in the form of a costs order. On the basis that costs orders do, as DBIS claims, create appropriate incentives for parties to litigation, then there is no reason why the costs regime should not incentivise regulators to reach robust and objectively justifiable decisions.

6.5 Finally, the proposal that regulators that have successfully defended their original decisions should be able to claim for their full in-house legal costs is unprecedented and unjustifiable. Regulators with in-house legal functions are no different to any corporate organisation in that the lawyers in these functions will have been recruited not simply to provide preliminary legal advice about the merits of a decision, but the prospects of defending that decision and any litigation strategy to be pursued in the event of any subsequent litigation. In simple terms, it is a cost of doing business that government recognises when funding the operation of regulators such as the Office of Fair Trading. However, in the specific context of the communications industry, the proposal that Ofcom should be able to recover its full in-house costs would be particularly inequitable; these costs are already being borne by industry stakeholders through the administrative charges that Ofcom is entitled to levy pursuant to the provisions of the pan-European regulatory framework.[23] We would assume that DBIS is not proposing a model that would enable double-recovery of costs by a sector-specific regulator in these circumstances.

7. Securing better decision making by regulators

7.1 DBIS has rightly recognised the nexus between regulatory decision making and the *conduct* of appeals. It would not be credible to claim that some appeals would be avoided completely by more open and transparent regulatory decision making processes; if the overall outcome of a regulatory decision is one that has a significant impact upon the position of a stakeholder, the transparency in the decision making process would not necessarily cause that party to refrain from bringing an appeal. However, a more open process between regulator and stakeholders likely to be affected by the impact of any regulatory decision could lead to some points of issue being clarified or resolved and thus not being ventilated as part any subsequent appeal. Appeals would then potentially become more focused on fewer grounds, with less time and fewer resources being consumed in the litigation process.

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[23] Directive 2002/20/EC on the authorisation of electronic communications networks and services, (as amended) Article 12. Ofcom has also indicated that the level of administrative charges would be set with reference to any forecast litigation, confirming that litigation costs are not being borne by the taxpayer. See http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/uc508-i/uc50801.htm

7.2 The focus of DBIS appears to be upon procedural changes that might be adopted, notably the introduction of confidentiality rings in the decision making process. However, procedural changes will not alone foster a culture of dialogue and transparency between regulators and their stakeholders. A paradigm shift and commitment on the part of regulators to operate in a different manner will be necessary to achieve the DBIS objective in practice. Vodafone's experience to date is that issues could be aired and resolved at the decision making stage through a greater willingness on the part of regulators to engage with stakeholders about the content of their submissions. This failure has on occasion led to issues and evidence being considered as part of subsequent litigation, as we describe below.

7.3 As part of the assessment of the proposed regulatory framework governing mobile termination rates, Vodafone sought to understand the effects on allocative efficiency of a particular methodology used to set termination rates. Specifically, Vodafone conducted and shared with Ofcom in June 2010 a distributional effects survey showing the potential effects upon different customer segments and demographics of a significant cut in mobile termination rates. No questions were raised by Ofcom about the survey results or the methodology until March 2011 when Ofcom issued its final statement. In that final statement, Ofcom revealed a number of criticisms of Vodafone's survey methodology and questions. Given that Vodafone had no opportunity to hear and respond to these questions previously, it was forced to consider these issues as part of an appeal and ran a new survey that took account of the Ofcom criticisms. When this survey was submitted as part of Vodafone's appeal in May 2011, Ofcom queried its admissibility, resulting in the parties in engaging further correspondence and debate about this evidence before the CAT confirmed the admissibility of the survey.[24] The inescapable conclusion is that had the regulator chosen to make use of the 8 month period prior to the publication of its final statement to discuss its criticisms with Vodafone, this sterile debate, consuming court time and resources, could have been avoided. Certainly, there was no issue of confidentiality that would have inhibited Ofcom from engaging in this dialogue.

7.4 The proposal for the introduction of confidentiality rings in the decision making process appears to be predicated on the assumption that a regulator may be engaged in assessing potentially confidential information of a number of stakeholders when formulating its decision. Currently, this information and the regulator's use of the information cannot be made available to stakeholders, potentially causing grounds of appeal to be expanded due to the lack of clarity in the decision making process. We would, in principle, consider this proposal to be a prudent one that should be investigated further since it could lead to litigation proceedings being

[24] See also the description of this issue by the CC in its final determination, which explains the various procedural steps that were pursued: "*On 30 September, Ofcom wrote to us contesting the admissibility of the ICM Survey adduced with Vodafone's Notice of Appeal (NoA)31 and on 3 October we wrote to parties advising them to apply to the Tribunal for a direction. On 7 October, Vodafone applied to the Tribunal for a direction in this matter. On 17 October 2011, the Tribunal issued a direction directing the admission of the ICM Survey."* Competition Commission, Final Determination, 9 February 2012, paragraph 1.39

conducted more efficiently. However, as we explain below, there are some questions that do require resolution before this proposal could be adopted.

7.5 The enhanced transparency that the confidentiality rings are seeking to achieve will only be realised if the individuals with the appropriate expertise are able to be admitted to the confidentiality ring. Minimal benefit will be secured if access to the confidentiality ring is limited to external lawyers and economists or in-house lawyers since this approach would achieve little beyond generating an additional layer of costs for the use of external parties even before any appeals process commences. Typically, the substantive issues requiring the use of confidential information will typically involve complex modelling or methodological questions. Thus, it is the presence of in-house finance specialists that will enable issues to be scrutinised and understood properly. Any provisions enabling the creation of such confidentiality rings would need to recognise the need for in-house specialists to have access to the relevant materials. Undoubtedly, stakeholders would express reservations about commercial harm and risks to the competitive process by allowing access to in-house specialists. Regulators would therefore need to be empowered to issue directions to all parties about the rules and operation of the confidentiality ring.

7.6 Were confidentiality rings to be adopted, a number of changes to the existing legislative framework will also need to be adopted:

(i) We would suggest that the regulator would need to be satisfied that the individuals proposed by a party for admission to a confidentiality ring were the appropriate individuals and that the risk of any commercial injury and distortion to competition from their access to the data were minimal;
(ii) We would also suggest that regulators be given specific powers to impose specific commitments, in certain circumstances; where the information is forward looking and relates to future commercial strategy, the party may be required to commit that the individuals concerned shall be ring-fenced from particular commercial activities for a period of time;
(iii) To provide all parties with assurance about the operation of the confidentiality ring, appropriate corporate and personal sanctions should be made available to regulators for breaches of any confidentiality or specific undertakings that have been mandated;
(iv) Existing provisions of legislative schemes that make the disclosure of any confidential information a criminal offence (in circumstances where there is no applicable exemption) will need to be amended to enable regulators to disclose data as part of a confidentiality ring.[25] We would suggest that this exemption would fall within the scope of a general provision relating to the

[25] Currently, section 393(10) of the Communications Act specifies that: "A person who discloses information in contravention of this section is guilty of an offence and shall be liable— (a) on summary conviction, to a fine not exceeding the statutory maximum; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both". This sanction applies save where an exemption in section 393(2) is relevant.

attainment of the statutory objectives of the regulator mandated by Parliament.

8. Concluding remarks

8.1 Our detailed review of the important issues raised by the DBIS consultation serves to reinforce the continued need for a credible appeals mechanism that can enable appeal courts to examine rigorously the decisions reached by regulators. The merits-based standard currently used to assess regulatory decisions enables an appeal court to perform this role. This is because the existing standard requires the court to go beyond assessing simple procedural errors or errors of law and instead actually confirm that the regulator's decision does attain the statutory objectives of that regulator mandated by Parliament (or where relevant Community law).

8.2 This means that appeals that are driven purely by commercial motivation with no obvious impact on the welfare of consumers are unlikely to have much prospect of success. Appellants must therefore be satisfied that their grounds of appeal will persuade the appeal court that a decision to allow such an appeal would be more apt to serve the public interest than the original regulatory decision. As the recent jurisprudence of the CAT reveals, that is a significant hurdle to overcome.

8.3 Equally, the examples provided by Vodafone in this response demonstrate that the level of scrutiny applied by an appeal court to a regulatory decision does achieve the government's objective of ensuring that the appeals mechanism constitutes an effective form of discipline on the policy and decision making process of the regulator. The government's proposals for alternative legal standards of review will be unlikely to secure that policy objective, in large part because these alternatives will be likely to result in significant uncertainty and debate as to their meaning and application both in the short and long term.

8.4 Ultimately, it should not be forgotten that the appeals framework serves the public interest. Regulatory decisions that are set aside or remedied (where the appeal court elects to modify an original decision) as a result of the appeals process should not be seen as frustrating the will of a regulator. It is a flawed starting premise – as is suggested in the DBIS Impact Assessment – to assume that all regulatory decisions axiomatically generate consumer benefit; as the examples of spectrum and telephone number portability that we have highlighted demonstrate, some decisions will be deficient and will not always operate to promote consumer welfare. Accordingly, the current appeals system must be valued for providing the 'constitutional' checks and balance upon the conduct of regulators, importantly ensuring that flawed decisions can be corrected to result in a positive outcome for consumers. It is critical that any revisions to the current appeals framework respect and preserve this fundamental principle.

Vodafone Limited

3 September 2013

Annex 1

Proposed alternative standard of review

"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 an ~~material~~ error of fact;

(b) that the decision was based on an ~~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" insert "by ensuring that the merits of the case are duly taken into account"

Water UK

Water UK Response to Consultation on Streamlining regulatory and competition appeals-options for reform
11 September 2013

1 Background

1. This response has been prepared by Water UK, a members' organisation which represents most of the UK's water and sewerage undertakers. While individual members of Water UK may wish to respond individually to the consultation questions, this response deals with some broader issues that the consultation raises. In doing so, we also take account of comments made by BIS officials during the workshops held to consider the consultation in July 2013.

2. Our comments are focused on appeal procedures in relation to Water Industry Act 1991 (WIA) matters.

3. We note that the water sector is dealt with relatively briefly in the light of the review being undertaken by Defra into the licence modification process under the WIA. We agree that it is appropriate for appeals against licence modification decisions to be considered once that Defra review has concluded.

4. The broader background to this review is that over the period since privatisation, some £111 billion has been invested in the UK's water and sewerage networks, leading to substantial improvements in both drinking water quality and the treatment of waste water. The OECD has recently reported that the UK is a world leader in terms of satisfaction with drinking water quality.

5. These successes have been achieved within the current legislative framework and while we would not suggest that there is necessarily a direct connection between the two, the fact that so much has been delivered on the basis of the current legislation suggests that caution should be exercised before changing that legislation.

6. This approach is based on the limited information in the consultation as to how the water sector might be treated in the future. The water sector might well adopt a different approach if it were to be suggested that appeal rights in the water sector could be broadened, for example, to follow the model of the aviation sector. We would welcome the

opportunity to examine and comment on any specific proposals to this effect.

7. In the next section of the response, we consider whether, based on the current consultation, there might be any more specific justification for change.

2 Lack of justification for review

8. The appeals regime for the water sector has been in place since 1991 and, as the consultation acknowledges, in the period since then there have been very few appeals against regulatory decisions in the sector. Annex E to the consultation refers to only five cases in the period from 2008 to 2012, two relating to price controls (Sutton and East Surrey and Bristol), two challenges to inset appointments (Thames Water and Dwr Cymru Welsh Water) and the final case, Albion, a Competition Act margin squeeze case.

9. Our primary concern therefore is that there is only limited evidence on which to base any argument in favour of a change to current appeal arrangements. If the few cases that have occurred had revealed particular flaws in appeal procedures which were considered to be of general application, we could perhaps understand why changes to the current regime were being mooted but we note that no such reference is made in the consultation.

10. One justification which is cited for possible change is that for some types of appeal, the decision to undertake an appeal is a "one way bet". Those water companies that have appealed regulatory decisions do not recognise this characterisation of the process, the results of appeals not having been uniformly beneficial. Regardless of outcome, launching an appeal is a process requiring the investment of significant resources and management time so that it is not something to be undertaken lightly. This is consistent with the approach taken in paragraph 3.20 of the consultation and does in our view remove a further potential reason for considering changing current appeal arrangements in the water sector.

11. As regards the period taken for appeals, the consultation acknowledges that timescales are "broadly in line" with international comparators.

While there is some evidence of speedier decision making in particular jurisdictions, we would suggest that quality of decision making is at least as important as the speed with which proceedings are dealt with. Unless there is evidence of harm having been caused by delay, we do not, therefore, consider delay as such to be a factor which might justify changes. In relation to the water sector, no such evidence is presented.

12. Indeed, the two price control cases in the water sector are both recorded as having been completed within six months and we are not aware of any complaints having been made by any of the parties either in relation to the substance or in relation to the time taken for the appeal.

13. We would also note that the Thames and Albion cases were based on very case-specific facts and do not seem to have any general application. The Thames case was the first occasion on which the inset provisions of the WIA had been judicially considered and the Albion case, like many competition law cases, involved complex factual issues. We regard the course of events in the Albion case and the time taken as being exceptional and again, therefore, we do not consider that it can be used to justify changes to the treatment of competition cases generally.

14. Numbers of appeals are notably higher in some other sectors. We observe that there could be many reasons accounting for these disparities. Examples would include the speed of change in the different sectors and the frequency with which major decisions need to be taken, inadequacies in the underlying legislation, the range of parties potentially affected by regulatory decisions and the quality of regulatory decision making. Whatever the cause of the differences between sectors, it would seem more appropriate to identify why numbers of appeals are higher in certain sectors and if necessary address issues identified in those sectors rather than relying on that fact to justify changes in sectors where no particular problems have been identified.

3 Consistency

15. A rationale of consistency could potentially justify changing procedures in one sector to take account of changes necessitated in other sectors but the consistency arguments that are presented are unconvincing.

16. The consultation document refers to appeals helping to ensure consistency "between sectors and over time". For companies, investors and other interested parties, consistency over time within a sector is highly desirable as it allows decisions to be made against the background of a stable understanding as to how the applicable legislation will be interpreted.

17. On the other hand, the need for consistency between sectors is less obvious. While the different sectors under review are all regulated, circumstances vary significantly between the sectors, both in relation to market structure and in relation to the degree of competition. The water sector, for example, is differentiated by the degree of vertical integration that exists. This will continue to exist even after the introduction of business retail competition. This affects the number of parties who might have a direct interest in challenging regulatory decisions in the sector. We would suggest that such differences make it difficult to make an assumption that consistency between sectors is necessary or even desirable.

18. Further, much of the legislation which might be the subject of an appeal is water specific, an example being the Thames and Dwr Cymru Welsh Water inset cases referred to above. We strongly doubt that learning from other sectors could be brought to bear in resolving such cases while in relation to other cases such as on price controls, there is no reason why the Competition Commission/CMA cannot achieve consistency by taking account of relevant decisions taken by other bodies.

19. The BIS Principles of Economic Regulation includes the principle of predictability:- "*the framework for economic regulation should provide a stable and objective environment enabling all those affected to anticipate the context for future decisions and to make long term investment decisions with confidence*". We appreciate that this is not an immutable rule but it does imply that the presumption is in favour of

not making changes without compelling justification and no such justification has been presented in the consultation.

20. If despite the arguments presented above, the government is minded to include the water sector in any proposals for change to the current appeals regime, we would ask for the following comments to be taken into account.

4 Substantive issues

- **Appropriate appeal routes**

21. We support the proposal to continue to have price control and licence modification appeals heard in the Competition Commission/CMA as the inquisitorial and more flexible nature of these hearings is in our view appropriate for these fundamental issues.

22. Paragraph 5.33 of the consultation refers to the possibility of appeals against code modifications being heard in the CAT and raises the question of whether such appeals are in fact closer to licence modifications. We believe that this is an appropriate analogy as while code issues could appear to be purely technical in nature, they may involve balancing a complex range of factors including a detailed consideration of the impact of a change on companies' finances. We are not convinced that the more adversarial approach of CAT proceedings is the right way to approach such issues and in the absence of convincing evidence to the contrary, would prefer that these kinds of appeals be heard by the CC/CMA.

23. As regards other types of regulatory appeal, we are not convinced of the need to move these from the High Court to the CAT. As the consultation notes, these decisions are taken on the basis of judicial review principles and it is not clear why the CAT would be the more appropriate forum for such cases. The limited grounds of appeal available in such cases would not seem to merit the attention of a specialist tribunal and it would be more beneficial if reviews could be conducted by the tribunal with the greatest experience of judicial review, namely, the High Court.

- **Review period**

24. Paragraph 7.22 raises the prospect of a reduction in the supplementary period allowed for CC/CMA cases from 6 months to 2 months. While we could appreciate the rationale for change if there were evidence of extensions having had to be granted frequently, this is not the case and we therefore do not consider that there is evidence warranting a change from the current arrangements. The CC/CMA is very conscious of the need to limit the period of its reviews and while a six months extension may only be needed in rare cases, we see no reason to limit the ability of the CC/CMA to be granted such extensions in cases where it considers it necessary.

5 Concluding comments

25. It seems clear from the consultation document that the primary motivation for the review is the position in other sectors, particularly telecommunications. From the perspective of the water sector, therefore, we would welcome an approach which involved analysing whether problems that have been identified in the telecommunications sector could be remedied by improvements to procedures in that sector, so avoiding the widespread and far-reaching changes suggested in the consultation.

Water UK
11 September 2013

Which?

Which?, 2 Marylebone Road, London, NW1 4DF
Date: 11.09.13 **To:** Consumer and Competition Policy Direcorate (BIS)
Response by: 'Pula Houghton

Consultation Response

Consumer and Competition Policy Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform

Introduction

Which? is an independent, not-for-profit consumer organisation with around one million members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through our own activities, such as the sale of Which? consumer magazines, online services and books. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Which? response

Which? is broadly in favour of the direction of travel outlined in this consultation document. Our overall objective is to see a framework for economic regulation that delivers fair, consistent, timely and effective oversight of UK consumer markets.

In line with our desire for effective regulation, we are also supportive of the need for regulatory decisions to be taken in a fair and transparent manner and, as such, we are supportive of the need for an appeals process that ensures that those affected by decisions have confidence in those decisions. Whilst Which? is not likely to be the subject of regulatory decisions ourselves, in our role as a consumer representative we do have an interest in effective process and would consider judicial review if the circumstances merited it.

Based on these objectives, we would share the observations made in this consultation that the balance between effective and timely decisions and the rights of firms to challenge these are not currently optimal. In light of this, we agree that there is a case for a more balanced way of meeting these (sometimes) competing objectives. In particular, we would suggest that the current regime gives too much scope for complete review of regulatory decisions. In practice, this means that those hearing the appeals, such as the Competition Appeals Tribunal, are effectively acting as a second regulator and therefore in many cases duplicating efforts. We do not consider this to be a good use of resources. Regulators spend considerable

effort and time in making important decisions and there should be more respect and confidence in their abilities.

Our concern is that the impact of the current framework is that it is too easy to make an appeal, even if it is unlikely to succeed and is not justified. Indeed, in some situations such as price controls, appeals seem to be almost the default response to a regulatory decision. In some situations, the ability to essentially have the decision reviewed means there are opportunities for companies to 'try their luck'. The worst case scenario is that nothing changes, the best case that the decision is changed more in the company's favour, and in either case, the impact from implementing the decision has been delayed for some time. Some specific cases where this appears to have been the case in the communications area are around Ofcom's decisions on mobile termination and on 2.6GHz where there was a window of opportunity to release spectrum for a rival technology to LTE (e.g. 4G) which appears to have been averted via tactical means.

In our view, the lessons from these types of situations are that effective regulatory activity is harmed in a number of ways. These are broadly as follows.

Firstly, and perhaps most importantly, the regulatory process is significantly slowed down. This happens in two main ways. At the outset, the anticipation of a likely appeal means that regulators are likely to spend more time and resource on ensuring that their decisions are 'bullet-proof' against appeals than may be strictly necessary. This is particularly difficult in many regulatory decisions where outcomes can't be precisely predicted but instead are based on judgments or forecasts. The outcome of this is that regulators may be prevented from taking other actions because their resources have been tied up on the matter in hand. A current example of this is Ofcom's work on non-geographic numbers where an attempt has already been made to appeal the work even though Ofcom's final view has not yet been published. Delay is also caused by delays in the appeals process itself, which can frequently be a slow mechanism.

A second, and related, impact of the current approach is the potential chilling effect that the more or less permanent threat of appeal has on the appetite for decision making. In many cases, regulators know they are going to be appealed even before they have published their final view. In some cases this may act as a deterrent from taking an important action or decision. In any case it is likely to act as a delaying factor as regulators are forced to spend time assessing the likelihood of challenge and thus the extent to which this will need to be factored into decisions about their overall programme of work.

A third harmful impact of the current way of operating is that the appeals process leads to a hiatus whereby the full impact of a decision is not felt until after any appeal. Under the current system, a regulatory decision is binding until it is overturned on appeal. However, in practice, there is often a period during the appeal when firms do not treat the decision as final and so fail to progress to implementation. This means that even where a decision is upheld there is still a frequent delay in ensuring that positive benefits for consumers are realised.

It would be our view that it is not just consumers that would benefit from reform. Instead, we would suggest that the majority of businesses would also benefit from a more focused appeals process. Not all firms, especially in a networked industry such as telecoms, are equally regulated and many firms would actually benefit from regulators who are freed up to pursue a wider range of initiatives and are able to more quickly implement decisions. It is frequently likely to be incumbents that have most to lose from regulatory action. In light of the fact that

a goal of competition is to help new entrants to enter a market, realising these benefits has the potential to promote and enhance competition.

Answers to specific questions

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?

We agree with this approach. We think the case has been made to bring consistency to the way in which appeals can be made and we would prefer to see this tightened up to make the test a more stringent one that currently exists through the 'on the merits' test.

On balance our preference would be to move to a judicial review standard for all instances. We agree that a regime should allow for legitimate appeals to be made in a number of circumstances including where the regulator has got the law wrong, the facts wrong or has come to an unreasonable decision. We would contend that a judicial review standard already allows for this. To that end, we would question whether the list of principles for non- judicial review appeals (set out in box 4.1) is helpful or necessary.

If, however, these principles are introduced, we would sound a note of caution about the way in in which discretion and judgment are assessed. There is limited detail in the consultation document about exactly how these will be employed but it is important to note that discretion and judgment are core elements of regulatory practice and care should be taken that these allowances do not make it too easy for firms to continue to appeal where such an appeal is not merited. There needs to be a balance between having so wide a definition that there is no meaningful change and the desire for certainty.

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?

Our preference would be for the same approach to be introduced across all regulatory decisions, as one of the objectives of this reform is consistency. We would note that the current arrangements do appear to have been a particular problem in the area of communications and so we are particularly supportive of reform in that area.