Regulatory and competition appeals: options for reform - consultation responses A-H

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Affinity Water

Tony Monblat
Consumer and Competition Policy Directorate
Department of Business, Innovation and Skills
1 Victoria Street
London
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11 September 2013

Dear Tony,

Streamlining Regulatory and Competition Appeals
Consultation on Options for Reform

We welcome the opportunity to comment on the UK Government's proposals for streamiling regulatory and competition appeals, whilst noting that the water sector is not the primary focus of the review.

Affinity Water is the largest water-only company and the 7th largest water supplier, by population served, operating in England and Wales. We supply a population of c. 3.5 million people across three geographically separate regions within the southeast of England.

We support the drive by Government to support growth by maintaining stable regulatory regimes in order to support investment. We endorse the observations made by Water UK in its separate submission response and look forward to reviewing the outcomes of this consultation.

Yours sincerely

Christopher Offer
Head of Regulation

Allen & Overy LLP

Response to HM Government

Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform, 19 June 2013

11 September 2013

ALLEN & OVERY

ALLEN & OVERY LLP

LONDON

This response represents the views of law firm Allen & Overy LLP on the Department of Business, Innovation and Skills' "*Streamlining Regulatory and Competition Appeals - Consultation on Options for Reform"* (the **Consultation**), published on 19 June 2013.

Allen & Overy LLP is represented on both the Joint Working Party of the UK Bars and Law Societies on Competition Law (**JWP**) and the Competition Law Committee of the City of London Law Society (**CLLS**), and has participated in discussions on their responses to the Consultation.

In response to the specific questions raised 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?

1.1 No.

1.2 The current range of different standards of review across different types of regulatory appeal and across different sectors creates an unnecessarily complex system that is difficult to navigate. Some level of rationalisation and simplification would be welcome. In particular, we can see that there is scope for improving consistency across sectors.

1.3 However, we do not support a presumption that appeals should be heard on a judicial review standard and we do not believe the case for such a change has been made out. We would have particular concerns about moving to a judicial review standard for antitrust appeals, where we consider that a full merits appeal represents an essential procedural safeguard for the businesses involved in the investigation. Not only are companies exposed to substantial fines and reputational damage (including being branded as a recidivist in the event of future infringements, potentially leading to higher fines in future cases), but they may face follow-on damages actions as a consequence of an infringement decision. Directors may face disqualification. In these circumstances, it is vital that the regulatory authority should be held to account and we do not regard judicial review as providing an acceptable remedy.

1.4 In relation to price control determinations made by sector regulators, we believe it is an important part of the regulatory compact that companies concerned should have the ability to contest those determinations before a specialist economic regulator and we consider the CMA is best placed to fulfil that role.

1.5 Given that sector regulators now also have the power to impose substantial financial penalties for breach of licence conditions, there may also be a case for allowing a full appeal on the merits against such decisions, rather than the limited statutory grounds of appeal that currently apply. We note that this option does not appear to be canvassed in the Consultation, and we would suggest that further consideration could usefully be given to this issue.

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?

2.1 Again, we do not support this as we consider that the case for change has not been made out. In general, the proposed "focused specified grounds of appeal" seem based on an over-simplistic view of what regulatory decision-making involves.

2.2 The proposal seems to focus on "materiality", i.e. whether a decision is based on an error of fact, law or process that is "material". This appears to be based on a belief that resources are currently being wasted by parties appealing points that are not going to change the eventual outcome. In general, a party will not waste resources to bring an unmeritorious appeal and we do not believe there is any

evidence of such behaviour occurring in practice. (It is, of course, possible that a party would appeal a matter that will not change the outcome, perhaps purely as a delaying tactic. But that kind of conduct can easily be dealt with as part of active case management, costs awards, and throwing out of unmeritorious appeals: see the answer to question 35 below.) Instead, the "materiality" restriction is problematic because it seems to assume that regulatory decisions are currently liable to be overturned for "immaterial" errors, which we do not believe to be the case. As the CAT states in its response to the Consultation (paragraph 35(1)): "The term "material", is not used in the existing rules – rightly, because no rational tribunal would allow an appeal based on an immaterial point, and no party would (for that reason) seek to run an immaterial point." We agree with that observation. Introducing a materiality test is unnecessary and will be recipe for litigation as parties seek to establish what the test means, and courts have to grapple with the issue. It also wrongly contemplates a clear bifurcation between an authority's findings that were decisive to the overall decision, and those that were irrelevant. Very frequently findings are not so clearly classified. If "material" is interpreted narrowly, it will mean that perfectly legitimate grounds of appeal cannot be brought; if it is interpreted broadly, then it is likely to be little different to a full merits review.

2.3 More generally, requiring appeals to fit within pre-defined (and deliberately restrictive) categories:

(a) runs a significant risk that meritorious appeals are rejected simply because they do not easily fit within the pre-defined boxes;

(b) creates significant potential for further appeals as to whether the appellant's grounds were rejected when they should have been approved, or approved when they should have been rejected.[1]

2.4 The statutory definition (set out in Box 4.2, page 35 of the Consultation) is poorly drafted. It is not sufficient just to know which categories of error are alleged; the grounds of appeal should set out how those categories of error relate to the decision under review.

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

3.1 We are sceptical that moving to a judicial review standard will lead to any shortening of the overall appeal timetable or that it will necessarily reduce the costs of bringing an appeal. The assumption underpinning the Consultation that judicial review cases tend to be decided more quickly than full merits appeals is based on a false premise. A number of the judicial review cases cited in the Consultation were appeals against merger decisions, and were treated as urgent, leading to an unusually compressed timetable. But as the CAT points out in its response (Part II, paragraph 4(1)): "This is not a consequence of the standard of review, as such, but rather a consequence of the need to resolve those important cases quickly."

3.2 There is a risk that moving to a judicial review standard would have a number of significant drawbacks as compared with a full merits appeal:

(a) a successful full merits appeal could in practice be more streamlined than judicial review since the CAT could substitute the erroneous decision with its own new decision. In contrast, under judicial review principles, the CAT would be required to remit the case back to the CMA (or other regulator) for a second assessment and decision;

(b) a significant risk of a regulator taking precautions to "JR-proof" a decision – for example, by making clear that a decision is based on a "black box" weighing of qualitative factors and is

[1] The recent CAT case *TalkTalk v Ofcom* [2012] CAT 1 gives an illustration of the complexities that arise when there is a disagreement about how a statutory threshold of "material" change is to be interpreted.

thus a reasonable exercise of its discretion, rather than opening itself for challenge by setting out the full details of its reasoning with these facts;

(c) a decline in the accountability and hence the correctness of regulatory decisions. Given the long-term consequences that poor regulatory decisions can have in important parts of the economy, and in particular the specific negative consequences that a poor regulatory decision can have for a party directly affected, in principle we believe that the standard of review should be significantly more intrusive than judicial review.

3.3 As noted in response to question 1 above, we have further concerns about the effectiveness of review and the suitability of judicial review to supplant an appeal.

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?

4.1 No. We would question whether moving away from a full merits standard of review would be compatible with Article 4(1) of the EU Framework Directive.

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?

5.1 See answer to questions 1–3 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?

6.1 No. The same considerations mentioned in response to questions 1 and 2 above apply.

6.2 The specific proposal is that "imposition of any financial penalty or as to the amount of any such penalty" be subject to an unlimited review because of its "criminal" nature, while other decisions, including the finding of infringement, be subject to a more restrictive review.

6.3 We do not support this distinction; it is not in our view obvious that non-penalty Competition Act decisions should be subject to a constrained review before a court. A finding of infringement alone is still in a sense "criminal" in nature, regardless of how the TFEU deals with analogous appeal rights to the European courts. In particular, there are very grave reputational consequences for any company and its executives found to have been involved in any competition infringement, repeat infringements by the same company (recidivism) has a significant impact on the level of fines, and a finding of infringement is increasingly resulting in claims for follow-on damages (indeed, the Government is currently consulting on how private antitrust damages actions can be facilitated and encouraged).

6.4 Following consultation on the creation of the CMA, the Government decided to keep an administrative system for Competition Act cases (rather than move to a prosecutorial system) on the grounds that appeals against the CMA's infringement decisions would be subject to an appeal on the merits. In its March 2012 response to the consultation paper, the Government stated:

"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".

6.5 It is not at all clear to us why the Government's reasoning should be questioned just over a year later. The new CMA will only win credibility if all its appealable decisions are subject to, and largely stand up to, challenge on the merits.

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?

7.1 Concerning a move to judicial review, the answer to question 3 above applies.

7.2 The most appropriate means of keeping the length of appeals in check is to allow the CAT to engage in active case management (as it currently does).

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?

8.1 No. See considerations in response to questions 1 and 2 above.

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?

9.1 See answer to questions 1–3 above.

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?

10.1 We do not comment on this question.

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?

11.1 See answer to questions 1–3 above.

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?

12.1 See answer to question 1 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?

13.1 See answer to questions 1–3 above.

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

14.1 Yes, potentially. Our impression of CAT case management conferences is that they become focused just on (i) allocating an acceptable hearing date and (ii) dealing with some preliminary evidential or other straightforward timetabling matters ahead of that hearing date.

14.2 As they currently operate, case management conferences are not typically targeted at truly understanding the nature of the dispute between the parties (except where necessary to understand some other issue) or how these might be handled most efficiently – the assumption is that the issues will lie as stated in the grounds of appeal until at or near the hearing. This means that few issues are actually resolved until the hearing; an appeal remains largely unchanged over that period and is unlikely to settle.

14.3 As we discuss in response to question 35 below, we would suggest that the CAT Rules require the tribunal members to receive an agreed summary of the essential issues and to decide on the most efficient way of using the time available to resolve the points at issue.

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?

15.1 Yes. We support the Government's proposal to legislate to enable the heads of the UK judiciaries to deploy appropriate judges to sit as a chair of the CAT if they are High Court judges of England and Wales or of an equivalent level in Northern Ireland or Scotland.

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.

16.1 Yes. We support the Government's proposal to legislate to enable judicial office holders to sit in the CAT free of any restriction in terms of length of their tenure. The current 8 year term limit is anomalous and we can see no justification for it to continue.

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

17.1 Yes. For some preliminary issues, raising procedural points or issues of law, it may well be appropriate for the CAT to be constituted as a single judge. However, we would not want that to become the norm.

17.2 In most cases, the fact that a case is at the CAT suggests that the appeal raises questions of a complex factual, economic and legal nature. In those situations, unless a single judge has all of the relevant expertise, a panel is likely to be required. Many developed common law jurisdictions have acknowledged that questions of this nature will often benefit from being heard by a court with a "lay member" or other expert assisting the court: the CAT panel system simply formalises this and this arrangement should continue.

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

18.1 Yes. Price control decisions are often particularly technical and detailed; they are likely to be well-placed to benefit from the CMA's resources and accumulated expertise. Likewise, we consider that the CMA is best placed to continue the work of the CC in relation to licence modification references.

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?

19.1 Yes, we can see some benefit in streamlining the process in the manner suggested.

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

20.1 Yes. We agree that appeals of these matters should not usually involve significant further factual inquiry or a more in-depth investigation; to the extent they do, the CAT should in our view be well placed to handle those aspects.

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

21.1 Yes. It strikes us that the current system in which the CC hears such appeals is anomalous and that it would be more logical for such matters to be heard by the CAT.

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

22.1 Yes. We believe there is a case for all such enforcement appeals to be heard by the CAT, given the range of skills and experience that it can offer. We note that there is no discussion in the Consultation about the grounds of appeal, which we find surprising. Given that sector regulators now have the ability to impose substantial financial penalties for licence breaches (albeit that such cases are not common), we consider there may be a case for a full merits review of these types of infringement decisions, rather than the limited statutory grounds of appeal that currently apply.

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?

23.1 No. In some cases, whether or not a breach has occurred can involve complex economic or analytical questions. As noted in response to question 22 above, we consider the CAT to be the obvious forum for such appeals.

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?

24.1 No comment.

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

25.1 Yes.

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?

26.1 The CAT is likely usually to be the better placed body.

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

27.1 Yes. The CAT should have jurisdiction to hear all appeals under the Competition Act 1998 since, as a specialised tribunal, it has the necessary knowledge and experience to deal with such cases.

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

28.1 No. The use of confidentiality rings can be a pragmatic way of streamlining the access to file process and can unquestionably reduce the administrative burden on competition authorities and regulators of costly and time-consuming redaction exercises. They should be facilitated and actively encouraged in appropriate cases through the publication of guidance.

28.2 However, we do not support the Government's proposal to give competition authorities and regulators additional powers to impose confidentiality rings with appropriate sanctions. The right of parties to have their confidential information protected from competitors and customers is paramount. Parties should not be obligated to become part of a confidentiality ring in an administrative procedure if they are not comfortable with the set-up.

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?

29.1 We consider that the CAT, as an independent, expert and flexible tribunal, would be well-placed to supervise the operation of any confidentiality ring, especially in the event of dispute. There would undoubtedly, however, be resourcing issues.

29.2 Often it can be very helpful to have in-house lawyers within a confidentiality ring given their greater commercial knowledge and greater authority to make decisions. But this should be reviewed on a case-by-case basis given that some in-house counsel may have too great a business involvement to be able to receive competitively sensitive information that they cannot later "un-know".

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?

30.1 No. We are concerned about the proposals to restrict the introduction, on appeal, of "new evidence" along the lines: "the person wishing to introduce it shows good reason, the evidence could not reasonably be expected to have been placed before the administrative authority, the evidence is likely to have an important effect on the outcome of the appeal and it is in the interests of justice (including any potential prejudice that other parties might suffer) that the evidence be admitted".

30.2 First, evidence is only put before an independent judicial tribunal once an appeal is made to the CAT: earlier during the administrative procedure the process is inquisitorial. Parties are therefore not strictly introducing "new evidence" before the CAT, i.e. evidence that has not been considered previously by a court at first instance and is then introduced for the first time on appeal.

30.3 Second, the proposed statutory requirements for introducing new evidence seem extremely high.

(a) By specifying not only "interests of justice" but three further requirements, it follows that there may well be cases where adding the new evidence would be in the interests of justice, but still will not be allowed. This runs the risk that the appeal will proceed in an artificial vacuum, with its decision based on facts that do not reflect reality.

(b) It will also incentivise the parties to "evidence-dump" on the regulator, even on points not likely to be significant, so that they are more likely to be able to rely on the evidence on appeal should it become critical.

(c) The CAT is likely to find it difficult to judge whether "evidence is likely to have an important effect on the outcome of the appeal" at the (early) stage at which it will be required to apply the test to new evidence.

30.4 Third, the introduction of these requirements will in many cases actually result in additional and/or longer appeals since parties are likely to appeal the CAT's decisions to admit or exclude material by reference to the statutory factors.

30.5 Potentially a more efficient outcome would be to provide for cost consequences should new evidence be introduced on appeal, even where relevant and permitted by the interests of justice, if it could have been introduced at the administrative stage. It is of course also open to the CAT to exclude or limit evidence in the interests of justice. In our opinion, the CAT appears to be successfully managing the evidence issue, and will be better-placed to do so if given greater discretion in case management (see answer to question 35 below). There is no need to legislate on the process.

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?

31.1 We can see that there may be more of an argument for streamlining the process for admitting evidence in appeals heard by the CMA, so that the same approach is adopted across all regulated sectors. However, we would not want this to be used as a pretext for introducing a requirement for leave to be obtained before an appeal can be brought, in relation to sectors which do not currently have such a requirement (notably, water)..

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?

32.1 No. We strongly disagree. It is fundamentally unfair for business to have any greater potential liability to costs than the regulatory authorities. We assume that the impetus for this proposal may be related to the catalogue of costs awards that were made against the OFT following the debacle of the Construction appeals. However, whilst it is a matter of concern that the OFT was forced to spend large amounts of public money in reimbursing successful appellants who challenged the OFT's decision, the fault for this lies at the OFT's door. The prospect of ultimately having to bear the costs of the winning side is an important constraint on the behaviour of any public authority, and should incentivise it to ensure that its decisions are properly reasoned and that the relevant legal principles are correctly applied. We also agree with the point made by the CAT in its response (paragraph 90) that an asymmetric approach risks unfairly deterring SMEs in particular from bringing appeals, which in our view would be wholly unfair.

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

33.1 No. We agree that regulators should claim their costs where an appeal lacked merit and did not lead to development of an important precedent. But an expectation of recovering internal legal costs and other sunk or non-out-of-pocket costs (i) risks inefficient deployment of in-house staff and creates difficult issues of why an "overhead" like staff costs should be treated as appeal-specific given that the employment of staff does not result in any incremental costs being incurred; and (ii) is not likely to be significant in comparison to external costs.

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?

34.1 This question implies that regulatory authorities do not currently give sufficient consideration to the question of whether there is scope to challenge grounds of appeal by way of a strike-out application. We would assume that if a clearly hopeless appeal were to be lodged, the regulatory authority concerned (which will typically be represented by experienced counsel) would raise the point, but in our experience such cases are not common. We do not see any particular need to formalise this by requiring the CAT to carry out an initial screening of whether a case should be struck out.

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

35.1 As discussed in response to question 2, we favour a system of active case management rather than limiting parties' grounds of appeal.

35.2 For example, one possibility would be for the appellant and regulatory authority to be required to agree on the points at issue and how they relate to each other; the regulatory authority would then be able to apply to "strike out" (or obtain a decision summarily) any points that it does not consider to be seriously arguable or does not consider could change the outcome of the case. In respect of the remaining issues (which are likely to be evidentially or substantively more involved), once the CAT has a clear idea of how the issues interact with each other, the CAT should decide how best to handle them sequentially to reduce the extent of preparation and workload for points that may not ultimately be necessary or relevant.

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

36.1 Yes. In general, the antitrust changes are helpful and would helpfully contribute to the tool kit of options available to regulators to deal efficiently and correctly with regulatory cases.

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?

37.1 Regulators should be encouraged to experiment with consultation processes, particularly with a view to ensuring that facts are elicited that might otherwise only become apparent on appeal.

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

38.1 No. It is already a matter of some concern that the CMA and the sector regulators have the power to require individuals to answer questions in the context of an antitrust investigation, and we would not support extending this power to other types of regulatory investigation. The Consultation states (paragraph 6.34) that "it is not clear that a power to require individuals to answer questions should be part of the regulatory framework". We would go further than this: it is clear to us that such a power has no place in the regulators' tool-kit. Regulators already have extensive powers to require the production of information and in our view this is sufficient; we note that no evidence is offered in the Consultation to suggest that this is a problem in practice.

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

39.1 We agree with the comments of the Competition Law Committee of the City of London Law Society (CLLS) that such decisions should continue to be appealable, for the reasons given in the CLLS's response.

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?

40.1 No. Moving to a default timescale of six months for straightforward cases should be achievable, but, in our view, the CAT should remain free to depart from this timescale (or go beyond the three month extension) where it considers it sensible or more efficient to do so (rather than only being able to do so applying some high threshold of "necessity" or similar).

40.2 Our concern is that a shorter target timescale for appeals, applied except where some very high threshold is exceeded, could actually increase the resources that need to be expended by both sides, and by the CAT, because it will not be as easy to resolve issues sequentially. Instead, a compressed timetable could mean all issues will need to be prepared to be argued in parallel, even though many issues will not ultimately be relevant, being contingent on other factors.

40.3 We do agree that it is necessary to strike a balance between allowing the issues in the case to be determined efficiently and accurately, and not allowing the resolution of the question under the appeal to be delayed – and we accept that in some cases delay can have the greater cost. We would suggest that the length of the appeal process and the cost of delay be factors that the CAT should consider when making case management directions. For example, we would expect a shorter time period to be justified if there was an overwhelming consideration in favour of industry certainty in resolving a particular question (and that this would outweigh on some set of facts the longer-term costs, and costs to the appellant, of getting a decision wrong). In that connection, the CAT has already demonstrated its ability to handle urgent cases quickly. The best example of this is the appeal by the Merger Action group against the Lloyds/HBOS merger clearance decision, which was dispatched in only 10 days (as the Consultation notes at paragraph 7.11), with the CAT delivering a judgment that is a model of clarity and concision.

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

41.1 No. As for the answer to question 40 above.

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?

42.1 No. We do not believe the case for change has been made out and therefore do not support this.

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?

43.1 It may be sensible to trial a fast-track process, although the CAT's record on handling urgent merger appeals speedily is already good. Our impression, however, is that a limit on the volume of witness evidence will make such a process unattractive to many appellants and parties may be concerned about prejudicing their position if evidence cannot be produced. A cap on costs may be difficult to agree at the outset of an appeal, and raises the issue that the costs incurred by the regulatory authority are typically much lower than those incurred by appellants in the private sector.

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?

44.1 The comments in response to question 40 above apply particularly for communications appeals.

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?

45.1 No. The case management powers in the Civil Aviation Act are primarily about timetabling and admission of new evidence. They do not deal with the serious case management measures that would be needed to streamline significantly how appeals are conducted.

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?

46.1 The comments in response to question 40 above apply.

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

47.1 Yes: see answer to questions 14 and 35 above.

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

48.1 No further comment.

Allen & Overy LLP

Anglian Water Services Ltd

Response by Anglian Water Services Ltd to Consultation on Streamlining regulatory and competition appeals-options for reform
11 September 2013

Background

1. This response has been prepared by Anglian Water after consultation with Water UK and takes 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. In the next section of the response, we consider whether there might be any more specific justification for change.

Lack of justification for review

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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 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.

Consistency

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

Substantive issues

- **Appropriate appeal routes**

20. 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.

21. 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.

22. 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**

23. 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.

Anglian Water
11] September 2013

Arriva UK Trains Limited

Arriva UK Trains Limited

Consultation response: Streamlining regulatory and competition appeals – options for reform

This paper contains the response of Arriva UK Trains Limited ("Arriva") to the Government's consultation document, dated 19 June 2013, relating to the reform of regulatory and competition appeals (the "Consultation").

Arriva is responding in this manner, rather than by completing the response form, as its response relates only to a small number of the Consultation questions.

Arriva owns train operating companies ("TOCs") that operate on the UK rail network. A TOC operates under a licence issued by the Office of Rail Regulation ("ORR").

Among the various questions posed by the Consultation, the Government asks whether there should be reform of the arrangements for appeals against decisions of the ORR which modify licence conditions. Arriva considers that the arrangements for these appeals do not need reform.

The Government has acknowledged in the Consultation that some sectors may need reform, whereas others may not[1]. In the rail sector, the Government's own statistics show that there have been no appeals against ORR decisions since 2008[2]. This shows that the arrangements for appeals in rail, unlike in other sectors, are not causing lengthy or expensive litigation, nor regulatory uncertainty. In short, in the rail sector there is no problem to be fixed.

As regards appeals under the Competition Act, in the rail sector there is therefore no need to move to a judicial review-type system, as the current arrangements are not causing problems.

As regards appeals from licence modification decisions, although they may be seldom brought, the availability of these appeals is vital to TOCs as it secures their ability to participate in changes to the regulatory regime. To date, ORR and TOCs have cooperated on changes to the licensing regime, because of a mutual desire to avoid appeals. This fosters cohesion in the industry, and is preferable to the situation seen in other sectors, where there is less cooperation and more litigation. The Consultation alleges in paragraph 4.90 that the rail sector has seen "protracted negotiations to secure agreements to licence modifications", but that assertion is not supported by any evidence or discussion of any alleged delays, and ignores the benefits of cooperation.

Question 11 in the Consultation asks whether appeals from ORR's licence modification decisions should be removed from the jurisdiction of the Competition Commission ("CC"), and whether they should be limited to a judicial review model. Again, Arriva considers that these changes should not be made.

Licence modification appeals in the rail sector are forward-looking, determining how the industry is regulated in the future. Decisions on these appeals will affect the revenues and core profitability of regulated companies, and for this reason the CC's economic and regulatory expertise is central to achieving fair, robust and accurate resolutions. As the Consultation states, the CC "will balance a number of factors in the same way that the regulator was required to when taking its decision". This is precisely what is required in adjudicating on licence modification disputes, and it is an expert rather than a judicial function.

Box 4.1 of the consultation sets out principles for non-judicial review appeals. In a licence modification or Competition Act dispute, a TOC is unlikely to be concerned with material errors of law, fact, exercise of discretion or procedural irregularities. Of concern to TOCs are the "judgments or predictions" of the ORR as set out in Box 4.1 under the heading "*Unreasonable judgments or predictions*". We do not agree with the statement at bullet point three that in a non-judicial review

[1] Consultation, paragraph 3.33
[2] Consultation, figure 3.2

appeal "*Where a regulator has made a judgement or prediction, the appeal body should defer to the regulator's expertise. In practice this test should be the same under a judicial review or any other kind of appeal. It should focus on whether the judgement or prediction was reasonable*." The question is not always going to be one of whether the ORR has behaved in a reasonable manner. Rather the questions to be looked at by the CC in such cases relate to the ORR's analysis, interpretation of economic evidence and so forth. It is a genuine appeal on the 'merits' not just the procedure.

These appeals will also affect the interests of other regulated companies beyond the individual appellant, meaning that they are not a simple adversarial situation between two litigating parties. Again this means that the CC is the appropriate forum (with its investigatory expertise and emphasis), rather than the more adversarial courts.

For the same reasons, it would not be appropriate to limit the appeals to judicial review principles, or statutory grounds of appeal, in this context. The CC is an expert rather than a judicial body, and is not appropriately constituted to determine which arguments, as a matter of law, amount to admissible grounds of judicial review (or statutory appeal). The CC's role in these appeals is to answer questions of detailed economic regulation, and it is important to all concerned in the industry that it is able to investigate fully, unconstrained by rules regarding admissible arguments. Were a system of judicial review introduced in this context, there is a risk that a claimant might end up with a different outcome to other entities regulated under the same provisions of the same licence. The CC is able to consider the matter in the round, avoiding this risk.

Finally, TOCs are subject to contractual obligations imposed in franchise agreements, and perceive there to be a strong risk of double jeopardy between this and their licence obligations. Again the CC is able to consider these matters when reviewing a licence modification in the round, which might not be possible if licence modifications are subject only to judicial review-type challenge.

Ashurst LLP

RESPONSE OF ASHURST LLP ("ASHURST") TO THE CONSULTATION ON "STREAMLINING REGULATORY AND COMPETITION APPEALS"

1. EXECUTIVE SUMMARY

1.1 Ashurst welcomes the opportunity to respond to the consultation on "*Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform"* (the **"Consultation Document"**). We confirm that nothing in this response is confidential.

1.2 This response is made on our own behalf, drawing on our experience of advising clients on UK and EU competition and regulatory law, including acting for them before the Competition Appeal Tribunal (**"CAT"**), the English courts and the EU courts. We are not responding on behalf of any particular client.

1.3 Whilst we broadly agree with the aims of the Consultation Document and some of the proposals, we have fundamental concerns in relation to a number of them. Moreover, although the Consultation Document purports to be a comprehensive review of the end-to-end regulatory appeals process, it focuses only on the role of the CAT, thereby eschewing the opportunity to consider and rectify the root cause of many of the concerns which have been identified.

1.4 We disagree with the focus on the CAT and the scant regard to other aspects of the end-to-end decision-making process, in particular to the decision-making of regulatory bodies at the administrative stage. Indeed, we find the focus on the role of the CAT and, in particular the standard of review that it exercises, surprising, not least because the Government stated in March 2012 that in competition law cases "*it would be wrong to reduce parties' rights*" in relation to the standard of review and therefore decided to retain a full merits appeal in relation to competition law infringements.[1] The Consultation Document does not explain what has changed since March 2012 to warrant such a "u-turn". In this regard, we are unaware of calls from industry or the legal profession for widespread changes to the framework for appeals before the CAT. In our experience, the CAT is an internationally highly regarded institution that does an excellent job in resolving appeals efficiently and effectively. We therefore welcome and agree with the decision to retain a specialised CAT.

1.5 More specifically, we have serious concerns in relation to the proposal to change the standard of review for certain appeals from full merits to a more restricted standard, specifically a form of judicial review or, where this may not be appropriate, to statutory defined grounds of appeal. We do not believe that the case for changing the standard of review has been made out. This is because:

(a) the current "full merits" review standard works wells and, in fact, meets the objectives of the Government as set out at page 5 of the Consultation Document. There is, therefore, no need to implement the significant reforms to the standard of review as put forward in the Consultation Document (see section 2 below);

(b) the reasons for the proposed changes as set out in Chapter 3 of the Consultation Document are not well-founded (see section 3 below). In this regard, the Consultation Document specifically states that the current standard of review discourages regulators from taking "*radical or controversial decisions*".[2] We are not convinced this is actually the case but, in any event, we are strongly of the view

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

[2] Consultation Document, paragraph 1.12.

that as "*radical and controversial decisions*" can give rise to very serious negative repercussions (for individual firms, the economy more generally and consumers), it is essential that such decisions are subject to proper and robust judicial scrutiny;

(c) changes to the standard of review would give rise to serious unintended negative repercussions, ultimately undermining the objectives of the Government (see section 4 below); and

(d) the Consultation Document has been able to quantify only very modest benefits arising from the proposals (even at the upper limit) which go nowhere near justifying the very considerable risks and detriments associated with the proposals (see section 5 below).

1.6 We set out our responses to the specific questions asked in the Consultation Document in section 6 below.

2. FULL MERITS APPEALS WORK WELL

2.1 We believe that the current "full merits" standard of review works well. In this regard, a full merits standard is consistent with the Government's own objectives as set out at page 5 of the Consultation Document (which we assume the Government considers to be the hallmarks of an effective decision-making regime), namely:

(a) supporting independent, robust, predictable decision-making and minimising uncertainty;

(b) providing proportionate regulatory accountability – the appeals framework needs to be able to correct mistakes made by a regulator and provide justice to parties, but allow the regulator to set a clear direction over time;

(c) minimising end-to-end length and cost of decision making – partly through making the appeal process itself as streamlined and efficient as possible, but also by encouraging timely decision making by the regulator or competition authority;

(d) ensuring access to justice is available to all firms and affected parties – not just to the largest regulated firms with the most resources and experience; and

(e) providing consistency, as far as possible, between appeal routes in different sectors – while acknowledging that the specific characteristics of each sector may require tailored approaches.

2.2 Before considering each of these objectives in turn, we note that the Consultation Document's concerns about a full merits standard of review may result from a misapprehension of how the CAT conducts such reviews. The CAT does not act as a second stage regulator rehearing the entire case. The CAT limits its review to the specific grounds set out in the Notice of Appeal and, as is now largely settled, only interferes in a regulator's decision where it is clearly wrong. By way of example, the CAT has recently observed that "*the Tribunal should apply appropriate restraint and should not interfere with OFCOM's exercise of a judgment unless satisfied that it was wrong.*"[3]

Objective 1: Support independent, robust, predictable decision-making, minimising uncertainty

2.3 We agree that independent, robust and predictable decision-making minimising uncertainty is important. We also believe that a full merits review facilitates independent,

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[3] *Pay TV* Appeals, Cases 1156/8/3/10 etc., *British Sky Broadcasting Limited and others v Office of Communications and others* [2012] CAT 20, paragraph 84.

robust and predictable decision-making and minimises uncertainty. This is because *inter alia*:

(a) a full merits review serves to ensure that both the decision-making process and the substantive analysis undertaken are consistent and correct (in contrast, the purpose of judicial review is to ensure that the decision-making *process* is not unfair or irrational). Full merits reviews are able to do this through a review of the substantive analysis of the case, including the evidence relied upon;

(b) a full merits review disciplines regulators when they fail to reach correct and well-founded decisions and therefore provides an incentive on those regulators to conduct, at the administrative phase, a thorough substantive analysis by fully engaging with the evidence. In contrast, a more restricted judicial review or defined statutory grounds of appeal may only incentivise regulators to focus on their decision-making processes in an attempt to avoid successful applications for judicial review; and

(c) a full merits review by the CAT also serves to promote consistent and correct decision-making across the various regulators by working to ensure consistency of legal application, assessment and approach.

2.4 Robust, predictable and correct decision-making, as promoted by a full merits review, leads to a number of real benefits for consumers, businesses, markets and the economy more generally, including:

(a) consumers and businesses are better able to assess whether conduct complies with the relevant legal requirements;

(b) businesses are able more confidently to make commercial decisions (including decisions to innovate or invest more generally) against a backdrop of a predictable legal/regulatory environment; and

(c) parties will only be penalised for conduct which is genuinely unlawful and deserving of sanction.[4]

2.5 The detriments arising from incorrect decisions being upheld or otherwise remaining uncontested are set out in more detail in section 4 below.

Objective 2: Provide proportionate regulatory accountability – the appeals framework needs to be able to correct mistakes made by a regulator and provide justice to parties, but allow the regulator to set a clear direction over time

2.6 We agree that proportionate regulatory accountability is important and that the appeals framework needs to be able both to correct mistakes and to provide justice to parties. We believe that full merits appeals do this well.

2.7 We note that competition and regulatory decisions have profound effects on consumers, businesses, markets and the wider economy; incorrect decisions can lead to very serious, and potentially irreversible, repercussions (see section 4 below for more detail). When considering whether an appeal framework promotes proportionate regulatory accountability, it is vital that proper regard is taken of these very serious, and potentially irreversible, repercussions. The Consultation Document fails to do this.

2.8 By way of example, we refer to the recent successful appeals against the OFT's decision in the *Tobacco*[5] case in which Imperial Tobacco (which was incorrectly found by the OFT to

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4 By way of example, an incorrect finding of infringement of Article 102 TFEU/Chapter 2 of the Competition Act 1998, may have the effect of prohibiting conduct which may actually be lawful and in the consumer interest.

5 *Imperial Tobacco and others v OFT* [2011] CAT 41.

have infringed competition law and was subsequently exonerated by the CAT) was alone fined £112 million by the OFT. As a result of the OFT's incorrect decision, the parties were also exposed to: the risk of follow-on damages actions; an uplift for recidivism should they be found to have infringed competition law again in the future; brand and reputational damage; and potential scrutiny by regulators in other jurisdictions. Directors could also have been subject to director disqualification orders.

2.9 There can be no guarantee that a judicial review or similar process would have identified and corrected the fundamental errors in the OFT's approach. It was essential that the factual evidence was examined in detail including through cross-examination. The CAT concluded that:

> "*If the OFT had tested the* [leniency witness's] *evidence more stringently… it might have become clear sooner that* [the leniency witness's] *evidence… did not appear to be consistent with the OFT's findings in the Decision.*"[6]

2.10 An appeals framework would only provide proportionate regulatory accountably if it enabled such injustices to be corrected. Anything less would result in disproportionate regulatory accountability (i.e. too little).

Objective 3: Minimise end-to-end length and cost of decision making – partly through making the appeal process itself as streamlined and efficient as possible, but also by encouraging timely decision making by the regulator or competition authority

2.11 Whilst it is worthy to minimise end-to-end length and cost of decision-making, correct decision-making should not be sacrificed in the interests of perceived speed. In any event, in our view, a full merits review is not inconsistent with this goal. This is because full merits reviews:

(a) enable the CAT to resolve the issue before it and avoid having the matter remitted to the regulatory body for reconsideration;

(b) enable the CAT to focus on the true areas of disagreement between the parties, avoiding contrived litigation of narrow, technical, judicial review grounds;

(c) avoid disagreement and litigation over jurisdiction and whether grounds of appeal fit into the narrow judicial review standard of review; and

(d) can nevertheless be run very efficiently, as demonstrated by the *Construction* appeals, where, of the 25 appeals heard, 24 appeals (which were heard by reference to a full merits standard) were heard and resolved in less than 18 months.

Objective 4: Ensure access to justice is available to all firms and affected parties – not just to the largest regulated firms with the most resources and experience

2.12 We consider that a full merits standard of review is key to providing access to justice to all, especially access to justice for parties that have good "merits" arguments supporting an appeal of an incorrect decision.

2.13 Importantly, a full merits standard also provides access to all parties and not just the largest regulated firms. In this regard, any move to a standard of review that restricts the ability to appeal will make it more difficult for all parties (including SMEs) to access justice via appeals. In this regard, we observe that smaller firms are able to access justice

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6 *Imperial Tobacco and others v OFT* [2011] CAT 41, paragraph 85.

notwithstanding the existence of a "full merits" standard of review (for example the *Construction* appeals).

Objective 5: Provide consistency, as far as possible, between appeal routes in different sectors – while acknowledging that the specific characteristics of each sector may require tailored approaches

2.14 Whilst consistency is desirable, it is important that the specific characteristics of different sectors and different types of decisions are taken into account. Accordingly, retaining a full merits standard of review does not mean that the appeals framework is inconsistent. It will be essential to look at the actual decision being taken and whether that decision should be subject to full merits judicial scrutiny. In this regard, where the evidence supporting a decision has only been considered by a single administrative body, it is likely that a full merits standard of review will be necessary (such as competition law infringement and ex ante regulatory decisions). In contrast, where two separate bodies undertake independent analyses of the evidence, it may be acceptable to subject a final decision to judicial review (as is the case in relation to merger control and market investigation decisions by the CC).

2.15 Finally, full merits review by the CAT provides another form of consistency: ensuring that the various regulators apply competition law and regulatory/economic principles consistently. This is particularly important in relation to the application of competition law where the various regulators have concurrent jurisdiction.

3. THE RATIONALE FOR CHANGE IS ILL-FOUNDED

3.1 Essentially the Consultation Document suggests that change is necessary because *inter alia*:

(a) regulatory appeals have evolved differently across the different regulated sectors;

(b) there seem to be strong incentives to appeal; and

(c) there is scope for appeals to be wide-ranging, lengthy and costly.

3.2 These reasons for change are not adequately supported.

Regulatory appeals have evolved differently across the different regulated sectors

3.3 Although regulatory appeals have evolved differently across the different regulated sectors, it is not clear to us why this necessitates a change from a full merits standard of review. We refer to our comments set out in section 2 above on why and in which circumstances consistency is important.

Incentives to appeal

3.4 The Consultation Document does not adequately explain why a full merits standard of review incentivises parties to appeal. A decision which results in significant negative repercussions for a business (see paragraph 4.3 for more detail) will create an incentive to appeal, regardless of the standard of appeal. More fundamentally, however, in our experience, in deciding whether or not to appeal a relevant decision, businesses carefully weigh up the pros and cons of the appeal (which includes a consideration of a number of downsides including direct legal and expert costs, exposure to costs in the event of losing, the internal management time and cost that will be incurred, the commercial consequences of focussing on litigation rather than other commercial priorities, and reputational issues). The Consultation Document does not reflect the complexity of this decision.

Scope for appeals to be lengthy and costs

3.5 We believe that the Consultation Document does not adequately establish that full merits appeals lead to longer and costlier appeals (or end-to-end decision-making in general). This is because *inter alia*:

(a) there are obvious errors in the Consultation Document in the treatment of some cases which leads to an over-estimate of the time taken to resolve some full merits appeal. For example, in relation to two recent appeals in which we have direct experience:

(i) the Pay TV appeal was actually 4 separate appeals (and a large number of interventions) of the Pay TV Statement and further appeals (with a number of separate interventions) of two additional yet interconnected decisions; and

(ii) the *G R Tomlinson* appeal was actually part of 25 separate admissible appeals which were subject to uniform case management (with one case management conference for all the appeals) and heard concurrently;

(b) the Consultation Document places too much weight on extreme cases such as *Albion Water, Tobacco* and *Pay TV* which distort the figures on average duration of appeal; and

(c) it appears that the Consultation Document does not take into account factors unrelated to the standard of review and outside of the control of the CAT (for example, interim relief hearings and stays granted at the request of the parties).

3.6 Further, by focussing on appeals before the CAT, the Consultation Document loses sight of the real issue – the length and cost of end-to-end decision-making. In this regard, the Consultation Document fails to take into account that appeals heard by reference to a judicial review standard can lead to the matter being remitted to the administrative body for reconsideration (with consequential delays). Moreover, it is also necessary to compare the length of CAT appeals with the corresponding regulatory investigation. We note that the OFT took almost 7 years to investigate and reach a decision in *Tobacco*, whilst the CAT's review in the *Tobacco* case, which took only 18 months,[7] was highly efficient.

4. CHANGES TO THE STANDARD OF REVIEW WOULD GIVE RISE TO SERIOUS NEGATIVE REPERCUSSIONS

4.1 The proposal to change the standard of review away from full merits, as set out in the Consultation Document will not be good for consumers, business or the wider economy.

4.2 First, the appeals framework will become lengthier, costlier, less predictable and, in general, less effective. Based on our experience before the CAT, English courts and EU courts, we are unconvinced that appeals decided by reference to a more limited standard, such as judicial review (flexed to take into account EU law and European Human Rights obligations) or defined statutory grounds, would result in quicker end-to-end decision making. This is because:

(a) judicial review cases can be very lengthy; see for example the review launched by British Sky Broadcasting of the OFT and CAT's decision in relation to its acquisition of a stake in ITV plc, which took 23 months;

[7] The appeal notice was dated 15 June 2010. The CAT's judgment was dated 12 December 2011.

(b) as set out in paragraph 3.5 above, the statistics in the Consultation Document which purport to demonstrate that judicial reviews conducted by the CAT are faster than full merits reviews are not sound;

(c) appeals before the EU's General Court and Court of Justice, although conducted on more limited grounds than a full merits review, generally take significantly longer than appeals before the CAT;

(d) a judicial review decision may not resolve the issue – it may be necessary to remit the matter to the administrative body thereby lengthening the end-to-end decision-making process;

(e) a change to the standard of review will result in a new wave of litigation in order to determine how that new standard should apply. We expect that this litigation would take a very long time, not least because of the piecemeal way in which such litigation develops and the potential for referrals to the ECJ; and

(f) a change to the standard of review may not affect the far more significant part of the end-to-end decision making (i.e. the administrative review by the regulator), which in our experience is consistently longer than appeals before the CAT (see paragraph 3.6 above).

4.3 Secondly, less effective judicial oversight will lead to an increased risk of incorrect decisions. This raises very substantial concerns for individuals and business because they could be subject to:

(a) severe sanctions, such as large financial penalties and, in relation to competition law infringements, director disqualification orders, potential damages actions, potential uplift in fines imposed in respect of any subsequent competition law infringements;

(b) reputational and brand damage;

(c) potential increased scrutiny by regulators in other jurisdictions; and

(d) limitations on the commercial freedom of market participants (for example, Ofcom's Pay TV Statement required Sky to supply certain TV channels (intellectual property) at mandated prices to qualifying retailers[8]).

4.4 Thirdly, businesses could be forced to refrain from pro-competitive conduct which might otherwise lead to consumer benefits (for example, if a firm is incorrectly found to be dominant it might need to refrain from cutting prices, offering discounts and attractive bundles).

4.5 Fourthly, a less effective appeals framework risks reducing business confidence, delaying commercial decisions and reducing innovation, all of which may lead to lower investments (such investment might be diverted to jurisdictions with more certain and fairer regulatory regimes, especially in relation to industries which require businesses to make massive, long-term investments, such as telecommunications).

4.6 Fifthly, lowering the standard of review will make it more difficult for interested parties to seek justice, including smaller parties with fewer resources and less experience.

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[8] Ofcom Pay TV Statement, 31 March 2010.

5. THE GOVERNMENT HAS FAILED TO IDENTIFY SUFFICIENT BENEFITS TO JUSTIFY ANY CHANGE TO THE STANDARD OF REVIEW

5.1 In its impact assessment, the Government has calculated that the benefits arising from the implementation of all of the proposals would be, at the upper limit, only £8.03 million per annum. These very small benefits would be completely outweighed by:

(a) the costs incurred adapting to a new regime;

(b) the additional litigation that is likely to arise as a result (especially given that the Courts have now largely settled how the existing full merits standard of review should be applied);

(c) the very serious negative consequences of a single incorrect decision being upheld (see paragraph 4.3 above); and

(d) more generally the numerous negative unintended consequences set out in section 4 above.

5.2 The Consultation Document makes no attempt to measure the claimed benefits against these negative consequences (some of which are so significant that quantification is very difficult).

5.3 Further, the Consultation Document does not adequately consider whether less intrusive (and therefore more proportionate) reforms could be made instead of changing the standard of appeal, such as:

(a) further consideration of how to improve the quality and efficiency of administrative decision-making (especially given that administrative decision-making makes up a more significant part of the end-to-end decision-making process); and

(b) more focussed reforms to the CAT's processes could be considered in more detail (as suggested in the Consultation Document).

5.4 To the extent that any such reforms are considered by the Government, it is essential, given their interdependence, that they are considered in conjunction with the recent changes to, for example, the OFT's internal practices and the formation of the CMA. It is artificial to consider all these moving parts independently without a consideration of how they will interact.

6. RESPONSE TO SPECIFIC QUESTIONS ASKED IN THE CONSULTATION DOCUMENT

STANDARD OF REVIEW (CHAPTER 4)

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?

6.1 No. As set out in sections 2 to 5 above, the case for any such presumption has not been made out. We also consider that it is completely unjustified to introduce statutory grounds of appeal when no case for change has been made out.

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?

6.2 No. We think that a move to statutory grounds of appeal would raise the same issues raised by a move to judicial review. We refer to general observations in sections 2 to 5 above.

6.3 We also consider that statutory grounds of appeal would inevitably generate a large wave of satellite appeals (which the Consultation Document underestimates). We refer to paragraph 4.2(e) above.

6.4 We also consider that it is unjustified to introduce statutory grounds of appeal when no case for change has been made out.

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

6.5 A move to a judicial review standard is likely to result in a longer, costlier and less effective appeals framework. We refer to section 4 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?

6.6 No. The existing full merits standard should be retained in order to:

(a) promote robust (i.e. correct) predictable and consistent decision-making (especially in light of the fact that many of these decisions are complex, fact-specific decisions that are only subject to the full review of a single regulatory body, i.e. Ofcom); and

(b) ensure consistency with EU law, in particular Article 4 of the Framework Directive and avoid satellite litigation on this point.

6.7 Contrary to the implications in the Consultation Document, we do not believe that Ofcom has been unduly hamstrung in making regulatory decisions or taking regulatory action:

(a) only a minority of Ofcom decisions are appealed and only a minority of those appeals heard by reference to a full merits review are overturned;[9] and

(b) in circumstances where Ofcom was recently overturned in the Pay TV Appeals,[10] Ofcom has opened a new investigation into Sky's conduct (albeit in relation to different aspects). If Ofcom felt hamstrung after its defeat in the Pay TV Appeal, one would not expect it to open such an investigation.[11]

6.8 We do not believe that the full merits standard of review is delaying the implementation of Ofcom decisions. Pending determination of appeals to the CAT, Ofcom decisions can be (and are) implemented (subject to arrangements protecting the financial position of the relevant parties). This occurred in relation to Ofcom's *Pay TV Statement*.

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?

6.9 A change to a narrower appeal procedure may well result in a longer (and therefore costlier) appeals framework, as explained in paragraph 4.2 above. The Consultation Document does not sufficiently evidence its claim that a change to a more limited standard of review would result in faster and more efficient decision making.

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[9] Consultation Document, pages 88 to 89. Only 17 per cent of appeals against Ofcom's ex-ante regulatory and ex-post competition decisions (which are determined by reference to a "full merits" review) have resulted in Ofcom's decision being completely overturned.

[10] *Pay TV* Appeals, Cases 1156/8/3/10 etc., *British Sky Broadcasting Limited and others v Office of Communications and others* [2012] CAT 20.

[11] See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/.

6.10 We also believe that a change in the standard of review will lead to confusion and satellite litigation (see paragraph 4.2(e) above).

6.11 We also believe that such a change would render the appeals framework less effective as it would be less able to identify and correct substantively wrong and/or inconsistent decisions. An increase in the scope for incorrect decisions will have serious negative consequences (see section 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?

6.12 No. We refer to sections 2 to 5 above.

6.13 We note that it would be particularly wrong to subject decisions of a quasi-criminal nature to a judicial review standard (especially given the repercussions of such decisions (see paragraph 4.3 above).

6.14 We consider the distinction between appeals of substantive decisions and appeals of decisions setting the level of penalties to be artificial and unfounded. It strikes us that in order to reach a decision on the level of penalty by reference to a full merits standard, the CAT needs to consider the extent to which the conduct amounts to an infringement and the nature of that infringement (i.e. the substantive case).

Q.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?

6.15 A change to a narrower appeal procedure may well result in a longer (and therefore costlier) appeals framework, as explained in paragraph 4.2 above. The Consultation Document does not sufficiently evidence its claim that a change to a more limited standard of review would result in faster and more efficient decision making.

6.16 We also believe that a change in the standard of review will lead to confusion and satellite litigation (see paragraph 4.2(e) above).

6.17 We consider that such a change would render the appeals framework less effective as it would be less able to identify and correct substantively wrong and/or inconsistent decisions. An increase in the scope for incorrect decisions will also have serious negative consequences (see section 4 above).

Q.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?

6.18 See response to question 9 below.

Q.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?

6.19 We respond to questions 8 and 9 together.

6.20 We are not in a position to comment in detail on price control decisions. We observe, however, that it would be sensible to wait until the recent legislation and the various institutions have had the opportunity to "bed in" before considering any additional changes.

6.21 Notwithstanding this, we observe that any change to a more limited standard of review will raise the same concerns as those discussed in relation to questions 1 and 2 above. We also refer to sections 2 to 5 above.

Q.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?

6.22 We have no comment.

Q.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?

6.23 We have no comment.

Q.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?

6.24 We do not agree with a move away from a full merits review to a more restricted review. We refer to sections 2 to 5 for more detail on why we consider a move to a more restricted standard of review is not appropriate.

Q.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?

6.25 We refer to our responses to questions 3 and 5 above and our representations in section 4 above.

APPEAL BODIES AND ROUTES OF APPEAL (CHAPTER 5)

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

6.26 The CAT's Rules provide sufficiently flexible powers to the CAT; the CAT is able to make any directions "*it thinks fit to secure the just, expeditious and economical conduct of the proceedings*."[12] We would encourage the CAT to use these powers more frequently to ensure that appeals are conducted efficiently as it did in the *Construction* appeals (including being more disciplined in granting extensions (in particular to regulators) for key milestones).

Q.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?

6.27 We 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.

6.28 We consider that it may be appropriate to take measures to ensure that appointed Chairmen have specific competition law and regulatory expertise (this could be achieved by having a shorter list of qualifying judges drawn from the Queen's Bench, Commercial and Chancery divisions (and their equivalents in Northern Ireland and Scotland).

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[12] CAT Rules, 19(1).

6.29 In relation to appeals heard by reference to a judicial review standard, we consider that it may be appropriate to take measures to ensure that appointed Chairmen have expertise in judicial review and competition/regulatory law.

Q.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.

6.30 We agree that these judicial officers should not be limited to a term of 8 years. We also consider that the 8 year term limit should not apply to CAT Chairmen who do not hold another judicial office. The current limit has the effect of unnecessarily disqualifying judges with significant and relevant knowledge and expertise.

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

6.31 We welcome the proposal to expand the ability of the CAT to sit with a single judge so long as there are safeguards to ensure that this is only in relation to appropriate cases (such as those dealing with a discrete point of law). Further, whether to sit with a single judge should be decided by the President on a case-by-case basis following consultation with the parties.

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

6.32 We believe that the CC should continue to hear appeals against price control and licence modification decisions because the CC has relevant and extensive experience in undertaking the detailed analysis required in such appeals. However, this is subject to the CMA retaining this expertise (in particular through the retention of the Panel Members).

Q.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?

6.33 Yes. We agree that it would be more efficient for such appeals to be simplified so that they go directly to the CC (subject to the possibility of judicial review by the CAT).

6.34 We note that the Civil Aviation Act 2012 model is new and has not been sufficiently tested, and therefore we are unable to recommend it as an appropriate model to follow.

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

6.35 Given its experience across of number of disciplines, we believe that the CAT is the most appropriate appeal body to hear these appeals (except in relation of price control and licence modification decisions as discussed in response to question 17 above).

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

6.36 Yes. We consider that, because they are adversarial in nature, Energy Code modification appeals should be heard by the CAT rather than the CC.

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

6.37 See response to question 23 below.

Q.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?

6.38 We respond to questions 22 and 23 together.

6.39 Regulatory enforcement appeals can give rise to complex legal, economic and regulatory issues and, accordingly, we believe there are real advantages in having the CAT, as a single appeal body, hear these appeals (especially given its extensive expertise across the legal, economic, regulatory and business disciplines).

Q.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?

6.40 We have no comment.

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

6.41 See response to question 26 below.

Q.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?

6.42 We respond to questions 25 and 26 together.

6.43 Dispute resolution appeals can give rise to complex legal, economic and regulatory issues and, accordingly, we believe there are real advantages in having the CAT, as a single appeal body, hear these appeals (especially given its extensive cross-disciplinary experience).

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

6.44 We consider that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998. This could help to avoid delay and cost (we refer to, for example, the *City Hook* appeals[13] and the more recent *Construction* litigation (in particular the successful judicial review by Crest Nicholson PLC[14])).

6.45 We also reiterate our observation at paragraph 6.29 above that Chairmen in CAT judicial review appeal hearings should be judges with both judicial review and competition/regulatory experience.

GETTING DECISIONS AND INCENTIVES RIGHT (chapter 6)

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

6.46 See response to question 29 below.

Q.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?

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13 Consultation Document, paragraph 5.42.

14 [2011] CAT 1.

6.47 We respond to questions 28 and 29 together.

6.48 We agree that it could be helpful to increase the use of confidentiality rings by regulators (in particular the power to impose such confidentiality rings). This could lead to a number of benefits including:

(a) reducing the length of the administrative process (especially where an otherwise time-consuming redaction process would need to take place);

(b) better decision-making and reduced likelihood of appeals (as a result of parties being able to better understand the case against them at an administrative phase); and

(c) reducing the length and cost of any subsequent appeal (for example, by reducing the need for "new" evidence).

6.49 However, confidentiality rings should only be imposed in appropriate cases and following careful consideration by the CAT (and in consultation with the parties) of key factors such as: who will access the information; what information should be disclosed; and, given the limitations placed on disclosure/use of the information, whether the disclosure will actually enable parties to understand and use the information in the exercise of their rights of defence.

6.50 We see value in the CAT having a role in supervising such confidentiality rings, not least because the CAT has substantial experience in drafting, administering and enforcing confidentiality rings. Further, where the CAT has a formal supervisory role, we would hope that the regulators would be more inclined to follow the CAT's processes rather than, as can happen now when the regulators impose confidentiality rings, adopting their own processes leading to protracted negotiations between parties and the regulator.[15]

Q.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?

6.51 We note that the CAT has wide powers to admit "new" evidence. The CAT also has the power to sanction the late production of evidence (via a costs order). Further, we believe that the inherent flexibility that the CAT has to admit new evidence has benefits as it enables the CAT to adapt its approach to the specific case before it.

6.52 We are concerned that setting out in statute factors which the CAT should take into account in exercising its discretion to admit new evidence may lead to a less efficient appeals process (and indeed increase satellite litigation on how those factors should be applied and whether the CAT has sufficiently taken account of those factors).

6.53 We also observe that the Consultation Document appears to be under a misapprehension as to the nature of "new" evidence as admitted by the CAT. The CAT is often admitting evidence that has not been adduced before a court before, such as evidence which has informed the regulator's decision during the administrative phase but was only made available to the parties either in the regulator's final decision or during the appeal process. This should not be properly regarded as "new" evidence. In this regard we refer to the *Tobacco* litigation where key economic evidence relied upon by the OFT only came to light during the appeals process.

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[15] In our experience, regulators (in particular the CC) have insisted upon unreasonably strict undertakings which actually include obligations which can be impossible to comply with.

Q.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?

6.54 The approach to new evidence in Schedule 2 to the Civil Aviation Act 2012 is new and untested. Given that the existing rules work well, we see no reason to change to a different and untested regime.

Q.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?

6.55 See response to question 32 below.

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

6.56 We respond to questions 32 and 33 together.

6.57 We believe that any presumption as to when costs should be ordered should be the same for all parties, i.e. the same for appellants and regulators. It would be unfair for appellants to be subject to a greater risk of a cost award than a regulator as a result of a blunt presumption that costs should only be awarded if a regulator has acted unreasonably whereas regulators should be encouraged to recover their full costs. Such an unfair presumption would given rise to a number of detriments, including:

(a) less incentive for regulators to take well-reasoned, meritorious decisions which are properly supported by evidence;

(b) less incentive for regulators to act proportionately during appeals (for example, they would have an increased incentive to argue every point, regardless of its merit); and

(c) greater risk for appellants in bringing appeals which could discourage meritorious appeals (in particular appeals by SMEs which are more sensitive to such risks). This is particularly worrisome given that incorrect regulatory and competition decisions give rise to serious negative repercussions (see section 4 above.

6.58 We also believe that if the regulators are able to claim internal costs (which we do not think they should be able to), parties should also be able to claim these costs in the event that they are successful.

Q.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?

6.59 See response to question 35 below.

Q.35 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?

6.60 We respond to questions 34 and 35 together.

6.61 We do not believe that a case for changing the existing practice has been made out in the Consultation Document:

(a) there is insufficient evidence that appellants are bringing unmeritorious appeals which should be "struck out";

(b) the existing CAT's rules already enable the CAT to deal with grounds of appeal on such a basis;

(c) the rules on costs awards already act to dissuade unmeritorious appeals;

(d) "strike out" actions can actually result in delays to the appeals process and therefore it would be wholly inappropriate to encourage such actions as a matter of course or to oblige the CAT to undertake such an initial assessment in every case; and

(e) in our experience, regulatory and competition cases are often large and complex for which the "strike-out" process is often inappropriate.

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

6.62 We agree that the principles proposed for decision-making in antitrust changes should be applied to regulatory decision-making. We think these proposals may result in more robust decisions and therefore fewer appeals.

Q.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?

6.63 We would urge the Government to consider measures that increase transparency at the administrative phase as, in our experience, greater transparency leads to more robust decisions, which may reduce the number of appeals.

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

6.64 The regulators already have sufficient investigatory powers (albeit that they may not be using their powers effectively) and therefore we are not convinced that these powers should be extended.

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

6.65 We consider that non-infringement decisions should continue to be appealable decisions, not least because such decisions have important consequences for parties (for example if they are a victim of an incorrectly "cleared" cartel or abuse of dominance). Further, for completeness, we can see no reason why such decisions should be subject to a restricted standard of review (such a judicial review).

MINIMISING THE LENGTH AND COST OF CASES (CHAPTER 7)

Q.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?

6.66 We do not agree with the proposal to introduce a target time limit for straightforward cases. This is because:

(a) the CAT already can (and generally does) manage well the time taken for appeals;

(b) delays are often the result of factors outside the control of the case (such as counsel availability and interlocutory actions brought by the parties);

(c) it is not immediately clear to us how "straightforward" cases could be defined;

(d) excessively short timeframes could encourage the CAT to remit matters back to the regulator thereby lengthening the end-to-end decision-making process; and

(e) time limits may compromise a fair trial.

6.67 Instead, the CAT should consider setting administrative targets for itself (in consultation with interested parties, including the regulators).

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

6.68 We do not agree with the proposal to introduce target time limits for all other regulatory appeals heard at the CAT. We refer to the reasons set out in the response to question 40 above which apply equally[16] as regards a 12 month time limit for regulatory appeals. We also note that many regulatory appeals are very complex matters which will require careful and detailed consideration by the CAT.

Q.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?

6.69 We do not agree with the proposal to provide the CAT with new powers to limit the amount of evidence and expert witnesses. The case for such a change has not been made out in the Consultation Document. We note that the CAT already has sufficient powers to limit such evidence, as indeed it has done in a number of cases (see, for example, *BAA Limited v Competition Commission*[17] and OFCOM's *Ethernets* determination[18]).

Q.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?

6.70 We note that a fast-track approach is only likely to be appropriate in very few cases and therefore we are unconvinced that there is a general need for such formal procedures, not least because the CAT already has wide powers to deal with cases quickly where necessary.

Q.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?

6.71 We have no comment.

Q.45 If so, do you agree with the proposal to use the Civil Aviation Act 2012 as a model to ensure the Competition Commission has the relevant case management powers?

6.72 The case management powers under the Civil Aviation Act 2012 are new and untested. Therefore we are reluctant to recommend it as an appropriate model to follow.

Q.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?

6.73 We have no comment.

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16 Except for paragraph 6.66(c) above.

17 Case 1185/6/8/11 *BAA Limited v Competition Commission* [2012] CAT 3

18 Cases 1205-1207/3/3/13.

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

6.74 We have no comment.

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

6.75 We have no comment.

Ashurst LLP
13 September 2013

Association of Train Operating Companies (ATOC)

Association of Train Operating Companies

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

Dear Mr Monblat,

Thank you for providing us with the opportunity to respond to the consultation on 'Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform'.

ATOC provides a national voice for Britain's passenger train companies. We recognise the value of an efficient and effective framework of economic regulation within the UK rail industry. Regulatory and competition appeals are an important part of this framework.

In our view, the current appeal mechanisms in the rail sector generally work well and we do not see any pressing need to make any significant changes to them. The existing arrangements, which have been in place since passage of the Railways Act 1993, provide a degree of comfort to rail companies that actions that impose costs could, if necessary, be appealed on their merits. The current ability to refer decisions to the Competition Commission who then undertake an investigation is a well understood process.

Specifically responding to Q11 of the consultation, we are therefore not persuaded of the merits of changing the framework on rail.

We appreciate the recognition in paragraph 4.93 that further work is required to determine whether reforming the rail appeals process would bring benefits which outweighed its costs. A switch from appeals on their merits to a judicial review standard of appeal could potentially increase rail costs by making it easier for regulators to impose requirements without fully considering their overall effects across the full contractual matrix.

The consultation raises a number of important questions for the rail industry and we suggest that, given the recognition that further work is needed, if Government is minded to pursue this kind of reform it might be useful to hold a five-way dialogue (potentially under the auspices of the Rail Delivery Group) with BIS, DfT, ORR, TOCs and Network Rail to discuss the unique arrangements that the rail companies work within.

Yours sincerely,

Richard Davies
Head of Policy and Planning

Bar Council (the General Council of the Bar of England and Wales)

Bar Council response to the consultation paper: Streamlining Regulatory and Competition Appeals: Options for Reform

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business Innovation and Skills consultation paper entitled Streamlining regulatory and competition appeals: options for reform.[1]

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics; equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board

Overview

4. HM Government's consultation dated 19 June 2013 entitled: ""Streamlining Regulatory and Competition Appeals"" ("the Consultation") must be read in the light of the Government's own overarching objectives for an appeal regime, which it obligingly sets out at paragraph 1.13. Those objectives are stated to be that an appeal framework:

(i) supports independent, robust, predicable decision-making, minimising uncertainty;
(ii) provides proportionate regulatory accountability – the appeals framework needs to be able to correct mistakes made by a regulator and provide justice to parties, but allow the regulator to set a clear direction over time;
(iii) minimises the end-to-end length and cost of decision-making – partly through making the appeal process itself as streamlined and efficient as possible, but also by encouraging timely decision-making by the regulator or competition authority

[1] Department for Business Innovation and Skills 2013 Streamlining regulatory and competition appeals: options for reform

(iv) ensures access to justice is available to all firms and interested parties – not just to the largest regulated firms with the most resources and experience;
(v) provides consistency, as far as possible, between appeal routes in different sectors – while acknowledging that the specific characteristics of each sector could affect the preferred option.

5. The Law Reform Committee of the Bar Council agrees with the above statement of objectives. Although some of the suggestions made in the Consultation will undoubtedly help to achieve or reinforce those objectives, others – in particular those relating to the suggested change in the standard of review – will not and could in fact lead to a undermining of those very objectives on which the Government places strong reliance.

6. For the reasons set out below, the Bar Council is of the view that the standard of review should not be changed from the present full review on the merits to a strict judicial review standard. Not only would such a change be likely to impact on the rights of interested parties and allow deficient and/or unlawful regulatory decisions to pass untrammelled through the relevant appeal process, it would also appear to be inconsistent with the Government's on-the-record statement in March 2012: ""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.""

7. It is not clear what if anything has changed in the regulatory or appellate landscape since March 2012; there is certainly no explanation given in the present Consultation for the Government's apparent change of position. Nor does there appear to be any appropriate recognition in the Government's consultation of what has been accomplished since the Competition Act 1998 came into force, pursuant to which a system of enforcement and appeals was built virtually from scratch.

8. The Bar Council is also of the view that no ""strong and compelling"" evidence has been produced to demonstrate that the present appeals process has frustrated the authorities' enforcement agenda. In this regard, the Bar Council notes that the Competition Appeal Tribunal (""the CAT"" or ""the Tribunal"") has only overturned infringement decisions on the substance in a relatively few number of cases.[2] The majority of cases in which the CAT has differed from the competition authorities have actually been non-infringement cases, in which the Tribunal has taken a stronger position on enforcement than the relevant regulator.[3] It would also appear that the Government has failed to take into proper account that in the vast majority of competition cases, the key battleground will be the primary facts. If judicial review were to replace the present standard of review except for penalty decisions, the regulator's decision on those facts would effectively be final, unless the applicant could demonstrate that the decision was not supported by any evidence.

9. Another important problem with the Consultation insofar as concerns the proposals for a change in the standard of review is that it appears to proceed on the basis that there is no room for dispute about the meaning and scope of the judicial review standard (still less JR

[2] *Attheraces*; *Genzyme;* the *Construction* cases and the *Tesco dairy* appeal.
[3] See for example *Albion*

plus) and the intrusiveness or otherwise of the scrutiny any such standard requires in a particular case. That such a dispute exists is beyond doubt and if the proposals suggested by the Government were to be adopted, there would inevitably be substantial time-consuming and expensive litigation brought to determine the position. In this regard, the Bar Council recalls the words of Peter Freeman at the 2010 Denning Lecture: ""… [L]imiting the courts' role to 'judicial review' rather than 'appeal on the merits' is not the point, in my respectful view. What matters is the degree of intensity of scrutiny rather than the label attached to the type of review. Paradoxically, some judicial review can be heavier and slower in practice than a full merits appeal, particularly as its main remedy, the remittal of the case back to the authority, can add months if not years to any process.""

10. Accordingly, whilst supporting the Government's wish to streamline the regulatory and competition appellate system and agreeing with certain of the recommendations made, the Bar Council strongly opposes any change to the current full merits review.

11. On 23 August 2013, the Competition Appeal Tribunal published its detailed response to the Consultation. The Bar Council wholeheartedly endorses the said response. In the circumstances and to avoid unnecessary duplication, the Bar Council's response will concentrate on certain key issues such as the standard of review.

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?

12. The Bar Council does not agree that such a presumption should operate. The concern identified by the Government that appears to have led to this suggested presumption is set out at paragraph 4.17 of the Consultation, which provides as follows:

""The principle of proportionality is an important one. While a merits-based appeal is sometimes seen as bringing more certainty to the regulatory environment by allowing affected parties to challenge the full reasoning behind a regulator's decision, where there are many appeals a merits-based standard may also have the opposite effect – of reducing the credibility of the regulator which in itself impacts on certainty. The length of appeals will also impact on the certainty of the regime, particularly if this delays implementation of the regulator's decision, or if it has wider impacts on the timeliness of regulatory decision-making.""

13. The Government's thesis thus appears to be dependent on the number of appeals and their length – if they are few and short, the present full merits review is proportionate; if they are many and long, it is not. That approach is, with respect, open to criticism. A critique of the present full merits review system cannot depend on the number and length of appeals, matters irrelevant to the question as to whether the system per se should be changed. Further, whether one falls the right or wrong side of the lines drawn by the Government will be dependent on the quality, complexity and length of the regulatory decisions which are the subject matter of the appeals in question. The fact that the relevant regulators may produce poor, lengthy decisions leading to a substantial number of lengthy appeals is not an indication that the existing appeal process is flawed; rather it is a reflection of the quality of the decision-making by the relevant regulators.

14. The Bar Council also notes that in the above-mentioned passage, the Government has used the word ""certainty"" in three different contexts. In the first, it admits that a merits-based review brings more certainty to the regulatory environment. The Bar Council respectfully agrees with that admission. In the second, it seeks to suggest that a merits-based review impacts adversely on certainty by supposedly reducing the credibility of the regulator. The Bar Council does not agree with that suggestion but even if it were the case, the fact that a merits-based review can lead to criticism of a regulator's decision does not mean that the standard of review should be changed. Rather it points to the need for the regulator in question to improve its decision-making process. In the third, the Government seeks to link the supposed lengthy proceedings caused by merits-based reviews to a lack of certainty ""of the regime"". As noted above, the Bar Council does not accept that a merits- based review system necessarily leads to more lengthy proceedings. However, even if quod non that were to be the case, again that does not mean that the standard of proof should be changed for the reasons set out above. In short, if a proper appeals process takes time, that is the price to be paid for a robust appeal procedure. If the Government wishes to have ""certainty of the regime"", then it might wish to focus on ensuring that regulators act efficiently, appropriately and correctly.

15. Interestingly enough, in the Chapter focusing on the standard of judicial review, the Consultation fails to refer to a point made earlier at paragraph 3.17 that ""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."" The Bar Council respectfully agrees fully with that statement.

16. There is also the issue as to the compatibility of the Government's suggested presumption with Article 6 of the ECHR. The Government recognises later in the Consultation that the operation of Article 6 necessitates a different standard of review, that of unlimited jurisdiction, for appeals under the Competition Act 1998 as to the level of any penalty imposed by regulatory decision: see paragraph 4.56. That recognition is helpful but does not, in the Bar Council's opinion, go far enough. The case law from both the Competition Appeal Tribunal and the House of Lords demonstrates that the ambit of Article 6 goes beyond penalty decisions.

17. In Napp v. DGFT (2002) Competition Appeal Tribunal 1, the then President found as follows at paragraph 137 of the judgment:

""We also accept that there is force in the argument that the administrative procedure before the Director does not in itself comply with Article 6(1), notably because the Director himself combines the roles of investigator, prosecutor and decision maker. However, as we have already indicated in paragraph 74 of our judgment of 8 August 2011, that in itself involves no breach of Article 6 because the Director's administrative Decision is subject to full judicial control on the merits by this Tribunal …""

18. In Porter v. Magill [2002] 2 AC 357 at 489-490, Lord Hope spoke as follows:

""… At the heart of the argument is the multiplicity of roles which were being performed by the auditor. The respondents say that the procedure which he adopted on receipt of the objections violated their Convention right because he acted as investigator, prosecutor and judge in the investigation which he carried out. …"" (paragraph 89);

""That being the structure of the procedure laid down by the statute, there is inevitably some force in the criticism that, where accusations of wilful misconduct are concerned, the auditor is being required to act not only as an investigator but also as prosecutor and as judge. But this problem has been recognised and dealt with in section 20(3). It provides not only that any person aggrieved by his decision may appeal against the decision to the court but also that the court ""may confirm, vary or quash the decision and give any decision which the auditor could have given."" The solution to the problem which section 20(3) provides is that of a complete rehearing by the Divisional Court."" (paragraph 92);

""In Kingsley v. United Kingdom …, the European Court said in paragraph 51 that, even if an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with article 6(1), there is no breach of the article if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1) …"" (paragraph 93).

19. All the relevant regulators have the powers identified in the above-mentioned authorities. Accordingly, unless the availability of full judicial review on the merits exists in relation to decisions of those regulators, there is a very real risk that the process would be found to be incompatible with Article 6 ECHR. Accordingly, if the Government went ahead with its proposal to limit the standard of review, there is a real possibility that any new legislation embodying that proposal would be liable to challenge.

20. For all the reasons set out above, the Bar Council strongly favours continuing with the present standard of review. Further, as noted by the CAT in its detailed response, a move to a different standard of review might well have the opposite effect to that intended, with the number of remittals to the regulators increasing, thereby impacting on the end-to-end time of the whole process.

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?

21. This question shows the acceptance by the Government that in certain situations, its suggested presumption for a limited standard of review will not operate and that a fuller merits-based review should be adopted. The Bar Council is pleased that the Government accepts that position. However, the Bar Council is concerned that the effect of this is that there will exist different standards of review depending on the type of decision being appealed. This seems neither sensible nor logical. Insofar as differences exist between the different regulatory legislative regimes, it would be more appropriate to seek to amend them so that a common standard of review could be applied rather than adopt a piecemeal approach to standards of review on the supposed basis of historic differences in the various legislative provisions.

22. The Government identifies five separate principles in Box 4.1:

(i) material error of law;
(ii) material error of fact;
(iii) material procedural error;
(iv) material exercise of discretion; and
(v) unreasonable judgments or predictions.

23. Without prejudice to its argument that there should wherever possible be a single standard of review and that standard should be on the basis of a full merits-based review, the Bar Council would be content to endorse the principles set out above as being relevant to any potential appeal. However, the Bar Council does not accept that only these principles are applicable. In a full merits based review, the appellate body may consider whether in its expert determination, the decision under appeal was ""right"". That determination will not necessarily depend on the principles identified above being made out. Accordingly, to the extent that the operation of the said principles would limit a full merits based appeal being conducted, the Bar Council would not agree with their imposition on the appeal process.

24. These concerns could be particularly acute in pricing abuse cases in which the regulators' findings often turn on a large number of minor findings of fact or judgment. Those findings could well be affected by numerous ""small"" errors which could easily be excluded as not being material individually, but which in combination could well be material. Any attempt to exclude the ability of the interested party to rely on such individual errors would be of extreme concern.

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

25. Given that the Bar Council does not accept that there is a valid argument for moving to a judicial review standard, this question does not require an answer. However, as noted above, the Bar Council is of the firm opinion that any change to a judicial review standard (however eventually defined) would impact adversely on the length, cost and effectiveness of the appeals framework.

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?

26. At present, decisions in the communications sector are subject to a full review on the merits. This is unsurprising, given the terms of the EU Electronic Communications Framework Directive (the Directive"") which provides in material part as follows:

""Member States shall ensure that effective mechanisms exist at national level under which any 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 effective appeal mechanism. …"" (Article 4(1))

27. At paragraph 4.29 of the Consultation, the Government states that ""specifying that the appeal body should have due regard to the merits is not necessary in order to comply with the Directive."" The Government does not explain why it considers this to be so - the Bar Council finds this lack of explanation of concern.

28. However, the Government does recognise, at least implicitly, that simply limiting appeals to strict judicial review standards would not suffice and accordingly suggests that the five principles set out above at paragraph 17 should comprise the standard of review. Although as pointed above, those principles could indeed form part of any relevant appeal, their operation would not permit in all circumstances a full merits-based review. Accordingly, the Bar Council does not support such a change.

29. The Government has voiced three concerns about the present system under the Communications Act 2003: first, a significant amount of time and money is spent on appeal; secondly, there could be an increasing overlap between such appeals as presently constituted and market reviews and thirdly, the present system is or may make the regulator unduly risk-averse.

30. As to the first, there is no evidence that moving to a different standard of review would significantly change the time and/money spent on appeal. As to the second, again there is no evidence that changing the standard of review would reduce any perceived overlap. As to the third, the fact that the regulator may or may not be unduly risk-averse is a matter for the regulator and does not necessitate a change in the standard – the simple answer is for the regulator to take better decisions.

31. The Government then seeks to identify the benefits from its preferred approach – i.e. the imposition of the five principles.

32. It contends first that ""(a) tighter focus on permissable grounds of appeal will instil discipline and discourage parties from adducing evidence of limited relevance to the key issues of the case."" (paragraph 4.42) This contention, with respect, lacks conviction. Appeals of this nature will almost exclusively be conducted by experienced solicitors and barristers. Any lack of discipline and irrelevant evidence can be punished in costs, if necessary against the lawyers themselves. The Bar Council notes that no evidence is provided to support any such assertions of lack of discipline or the use of irrelevant evidence.

33. It then suggests that the new standard would focus on where the regulator ""has made a material error, rather than where the parties disagree with the regulator's value judgment."" (paragraph 4.42). Support is sought to be drawn in this regard from the judgment of Lloyd LJ in Telefonica O2 UK Ltd and Others v. OFCOM [2012] EWCA Civ 1002. However, that case does not assist the Government in relation to a change of standard of review. The Court of Appeal made clear that the present standard – i.e. one of a full review on the merits - does not

permit an appeal based on a disagreement with the regulator's value judgment. There is accordingly no need to change the present standard to avoid such perceived problems.

34. The Government then contends, at paragraph 4.43 that ""the benefit of this more focused approach is that it will not encourage appeals which seek to fully reargue the substantive merits of a regulator's decision on the basis of extensive and lengthy evidence and argument. Parties will need to focus on the real issues that could have a material impact on the decision.""

35. Again, this contention does not appear to be made out. As the Court of Appeal made clear in the above mentioned judgment, the question for the appellate tribunal in such appeals is ""whether the regulator was right in its decision on the merits, but the appeal body's consideration of that question is not necessarily confined to the material that was before the regulator."" (paragraph 67). That is the task for the appellate tribunal and accordingly, the parties are indeed entitled to reargue the substantive merits and in doing so rely on ""new"" evidence and argument. As noted above, if that evidence and argument is later found to have been irrelevant or otherwise disproportionate, the tribunal is entitled to penalise the party concerned in costs. As to the second part of the contention – that the parties will need to focus on the real issues – it is to be hoped that that focus exists under the existing system.

Question 5: What would the impact be on the length, cost and effectiveness of the appeals framework if the standard were changed to: (i) judicial review; (ii) focused specified grounds?

36. Given that the Bar Council does not accept that there is a valid argument for moving to a judicial review standard or focused specified grounds, this question does not require an answer. However, as noted above, the Bar Council is of the firm opinion that any change to a judicial review standard (however eventually defined) would impact adversely on the length, cost and effectiveness of the appeals framework.

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?

37. As is clear from what has been set out above, the Bar Council does not agree that there should be a change of the standard of review.

38. Aside from the general problems identified above with the Government's suggestion, the Bar Council notes that the Government concedes that where ""significant and punitive fines can be imposed, and there may be additional follow-on damages, it is important that the decision is scrutinised to a high standard."" – paragraph 4.47.

39. The Bar Council presumes that the reference to ""a high standard"" is one to a full merits-based review. If that is so, then the concession, with which the Bar Council respectfully agrees, actually undermines the Government's suggested change to the standard of review. Follow-on damages actions are not dependent on the infringement decision on which they are

based imposing penalties – the recent MasterCard litigation in the Commercial Court being an obvious example. On that basis, all infringement decisions, whether or not accompanied by penalties, should on the Government's own analysis be capable of being ""scrutinised to a high standard."" i.e. a full merits-based review.

40. The Government attempts to draw support from the fact that there is a differentiated approach taken by the EU's General Court, depending on whether the appeal is against the infringement decision or penalties contained therein. The Bar Council is of the view, for the reasons set out below, that the position of the EU's General Court does not inform the position to be adopted in the UK.

41. First, the EU's General Court's jurisdiction is largely governed by the TFEU, which sets out prescriptive rules as to the jurisdiction of the court and grounds on which challenges to relevant Community acts may be made. By definition, that does not apply to UK tribunals such as the Competition Appeal Tribunal.

42. Secondly, there has been substantial criticism of the light-touch approach imposed on the General Court – see for example the admirable summary of the position by the President of the General Court Judge Jaeger in his 2011 article for the Journal of European Competition Law & Practice.[4]

43. Thirdly, to the extent that the Government appears to suggest that the General Court does not operate a ""high standard"" of review to non-penalty decisions, such suggestion is incorrect. The General Court held as follows in the well-known Tetra Laval case:

""Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. …""[5]

44. It is clear from the above that the EU Courts, including the General Court, should not indulge in light touch review on non-penalty matters.

Question 7: What would the impacts be on the length, cost and effectiveness of the appeals framework if the standard of review were changed to: i) judicial review; ii) focused specified grounds?

45. Given that the Bar Council does not accept that there is a valid argument for moving to a judicial review standard or focused specified grounds, this question does not require an answer. However, as noted above, the Bar Council is of the firm opinion that any change to a

[4] The Standard of Review in Competition Cases involving complex economic assessment: towards the marginalisation of the marginal review? – JOECL&P 2011 Vol 2, No. 4

[5] Case C-12/03P: *Commission v. Tetra Laval* [2005] ECR I-00987 at paragraph 39

judicial review standard (however eventually defined) or focused specified grounds would impact adversely on the length, cost and effectiveness of the appeals framework.

Question 8: For price control decisions in the communications, aviation, energy and postal 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?

46. The Bar Council adopts the position taken by the CAT in its response to this question. The Bar Council notes in passing that the Government appears to accept that in the context of these types of decision, ""there may be a stronger argument for a merits based appeal …"" – see paragraph 4.80.

Question 9: What would the impact be on the length, cost and effectiveness of price controls appeals in these sectors if the standard of review were changed to: i) judicial review; ii) focused specified grounds?

47. Given that the Bar Council does not accept that there is a valid argument for moving to a judicial review standard or focused specified grounds, this question does not require an answer. However, as noted above, the Bar Council is of the firm opinion that any change to a judicial review standard (however eventually defined) or focused specified grounds would impact adversely on the length, cost and effectiveness of the appeals framework.

Question 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?

48. The Bar Council is not is a position to answer this question.

Question 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 or ii) a specified grounds approach?

49. The Bar Council adopts the response by the CAT to this question.

Question 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?

50. The Bar Council adopts the response by the CAT to this question.

Question 13: What would the impact be on the length, cost and effectiveness of other regulatory appeals if the standard were changed to: i) judicial review; ii) consistent specified grounds?

51. Given that the Bar Council does not accept that there is a valid argument for moving to a judicial review standard or focused specified grounds, this question does not require an answer. However, as noted above, the Bar Council is of the firm opinion that any change to a

judicial review standard (however eventually defined) or focused specified grounds would impact adversely on the length, cost and effectiveness of the appeals framework.

52. The questions set out in Chapter 5 of the Consultation relate to appeal bodies and routes of appeal. The CAT has provided extensive answers to those questions and the Bar Council has nothing further to add, save to endorse its position.

53. The questions set out in Chapter 6 of the Consultation relate to a number of procedural matters including confidentiality rings and ""new"" evidence. The CAT has provided extensive answers to those questions and the Bar Council has nothing further to add, save to endorse its position.

54. The questions set out in Chapter 7 deal with the length and cost of cases. The CAT has provided extensive answers to those questions and the Bar Council has nothing further to add, save to endorse its position.

Bar Council[6]
August 2013

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[6] Prepared for the Bar Council by the Law Reform Committee

Berwin Leighton Paisner LLP (BLP)

RESPONSE TO THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS' CONSULTATION ON STREAMLINING REGULATORY AND COMPETITION APPEALS

BERWIN LEIGHTON PAISNER LLP

11 SEPTEMBER 2013

1 INTRODUCTION AND EXECUTIVE SUMMARY

1.1 Berwin Leighton Paisner LLP ("**BLP**") welcomes the opportunity to submit comments on the Department for Business Innovation & Skills' ("**BIS**") consultation *"Streamlining Regulatory and Competition Appeals"* dated 19 June 2013 (the "**Consultation**"). BLP has considerable experience of representing clients in judicial review litigation, and in competition and regulatory appeals.

1.2 Our comments are confined to the issues in the Consultation that we believe are most significant, both to the economy generally and based on our specific sector knowledge. However, where our response relates to particular questions posed in the Consultation, these are referenced accordingly. We have also sought to answer the questions in the order set out in the Consultation where possible.

1.3 We welcome several of the proposals made in the Consultation. Nevertheless we are concerned by a number of significant shortcomings, in particular in relation to the following:

(a) **No clear case for change:** the Consultation fails to demonstrate that there is a problem with the current bases or procedures for regulatory and Competition Act 1998 appeals;

(b) **Failure to examine lost opportunity costs:** the Consultation does not adequately consider the negative impact of decisions that would go unchallenged as a result of the proposed streamlined avenues of appeal;

(c) **Unwarranted reduction in review rights:** the suggested shift in the standard of review, especially for those appeals currently heard on the merits and, in particular, appeals of decisions made under the Competition Act 1998, is unwarranted and contradicts recent policy;

(d) **Asymmetrical cost proposals:** the proposals relating to costs awards are asymmetrical as between regulators and appellants and are likely to deter meritorious appeals by limiting cost recovery from successful appeals; and

(e) **Reduction in procedural robustness:** a presumption that matters should be resolved on the papers wherever possible (for example for costs awards and straightforward matters), and that oral hearings should be kept to an absolute minimum risks undermining parties' rights.

1.4 The Consultation does not appear to focus on the importance of ensuring that initial regulatory decisions are robust, well-reasoned and clear as a means of reducing the number of alleged unmeritorious appeals. Improved processes at the regulatory level would likely have a greater impact on reducing the requirement for and incentive to appeal, which is one of the key aims of the Consultation.

1.5 Our comments are divided into the relevant sections of the Consultation document, namely:

(a) Standard of Review;

(b) Appeal Bodies and Routes of Appeal;

(c) Getting Decisions and Incentives Rights; and

(d) Minimising the Length and Cost of Cases.

1.6 We would be very pleased to provide further information in relation to this response should BIS require.

2 STANDARD OF REVIEW

No clear case for change

2.1 The Consultation appears to proceed from the premise that:

(a) there is a problem (that too many appeals are brought);

(b) this is caused by overly generous or pro-appellant rules; and

(c) therefore, the way to solve the "problem" is to amend the bases of appeal.

2.2 However, there are a number of difficulties with this approach.

2.3 First, the "problem" appears to be primarily in the communications sector only.[1] While there are more appeals within the communications sector, there is a higher proportion of appeals within the aviation sector, and a large number of appeals in each of the energy, rail and water sectors.[2] Moreover, even within the communications sector, only around 15% of Ofcom decisions are appealed.[3] These statistics do not suggest a pressing "problem".

2.4 Second, it is unclear that, even if there *is* an appeal "problem" in the communications sector, this justifies extensive legal and procedural reform of appeals *across* sectors.

2.5 Finally, the Consultation, in many respects, approaches the "problem" from the wrong side. There is no substantive analysis of the role of the initial regulatory decision as a catalyst for appeals. Nor is there any clear suggestion that in order to address a "problem" that manifests itself in appeals against decisions, it is important to ensure that those decisions are robust, well-reasoned and clear.

2.6 We acknowledge that there may be some potential benefits to rationalising routes of appeal and minimising procedural duplication and uncertainty.[4] However, consistency for its own sake should not justify significant reforms of the appeal process across sectors of the economy. In particular, it is not clear that there are

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1 See Consultation, Chapter 3 Summary., where the Consultation states "*there appear to be strong incentives on the parties to appeal decisions*"

2 See Consultation, paragraphs 3.6 and Figure 3.2. The Consultation acknowledges the higher proportion of appeals of Civil Aviation Authority decisions.

3 Ibid.

4 See Consultation paragraph 3.28 and Figure 3.5.

grounds for reduction of the legal basis for appeals across decision types *because* such reform would help to address complexity and/or investor uncertainty.[5]

2.7 Consequently, we do not consider that the Consultation has identified a substantial "problem" that would require the proposed legal and procedural reforms.

Standard of Review Across Different Regulatory Appeals (Question 1)

2.8 In relation to Question 1 of the Consultation, we do not agree with BIS that differences in the standard of review across sectors is driven by incidental factors.[6] We understand that there are genuine policy reasons why different sectors use differing appeal routes.

2.9 In fact, we see no strong case for appeals in all regulated sectors to be dealt with in the same way, given the diverse regulatory regimes that apply and the varying issues that may be the subject of appeals. Harmonisation of appeals across all sectors, without a review of the impact for each sector, is not desirable.

Length, Cost and Effectiveness of Judicial Review (Questions 1 and 3)

2.10 A judicial review is likely to be quicker than a full merits review of a regulatory decision because both the legal grounds and procedural framework for judicial review are limited as compared to substantive reviews. For example, a judicial review in most cases will involve the use of fewer witnesses and provide less scope for introducing expert evidence than a merits review. In particular, judicial review is concerned primarily with the administration and procedure of decision-making, rather than the substance of those decisions.

2.11 However, while the introduction of judicial review as a default means of appeal for certain regulatory decisions may reduce direct *litigation* costs, it is unclear that it would materially reduce *total* costs for both the regulator and the affected party (or parties) when assessed against the total time and cost incurred in retaking any decision that is remitted to the relevant regulator. Any such remittal has two significant practical consequences:

(a) first, the relevant regulator must retake the decision, which requires the allocation of resources and time. The net reduction in cost and time for the

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5 Ibid.

6 See Consultation, paragraph 4.5

regulator in retaking that decision as compared to defending a full merits review may be negligible or negative; and

(b) second, the appellant will likely engage heavily on those aspects of the second decision that it challenged. This may entail the appointment of expert advisers (for example, economists, forensic accountants etc.) to the same level, or in excess of, any such appointments made in the initial decision. Again, the net reduction in time and cost for the appellant as compared to bringing a full merits review before the court may therefore become negligible and/or negative.

2.12 Notwithstanding this practical concern, we do not consider that judicial review would always provide an adequate ground for reviewing regulatory decisions that frequently involve detailed consideration of complex legal and economic factors. While moving away from a merits review may in fact reduce the number of appeals, the Consultation fails to consider a direct correlative impact, namely an increased number of "wrong" decisions that may go unchallenged.

2.13 While it is possible for judicial review to adapt to changing legal practice and requirements,[7] judicial review is not the appropriate forum for detailed consideration of the merits of the decision. Consequently, absent the prospect of a full merits review, regulatory decisions may concentrate on administrative propriety rather than substance.

2.14 In particular, there is a risk that, absent substantive review on appeal, regulatory decisions taken by regulators within the same sector and in relation to similar issues may exhibit "confirmation bias". That is, investigators and decision makers faced with an issue on which they had previously made a decision and which had not been challenged by way of judicial or full merits review, may approach a new case through the prism of their previous decisions without focusing on the particular facts of the case to the degree that they may have when facing a possible full merits challenge.

2.15 Furthermore, a merits review is designed to ensure that the "right" decision has been reached. This is the raison d'être of the appeal system and fundamentally important to ensure access to justice and appellants' rights. It is therefore not appropriate to change the standard of review merely to reduce the time or money

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[7] See Consultation, paragraph 4.19, quoting Lord Diplock's judgment in Council of Civil Service Unions.

spent on appeal, where the appeal is of a significant regulatory decision and demands a full review.

Focused and Specified Grounds of Appeal (Question 2)

2.16 We have a number of concerns in relation to the proposed "focused grounds of appeal".

2.17 First, we believe that the proposed specific grounds of appeal set out in the Consultation risk causing further uncertainty - and therefore disputes - if adopted. In respect of the proposed text set out in Box 4.2 of the Consultation, we envisage disputes arising in particular regarding the materiality threshold imposed in the draft legislation.

2.18 Second, the "focused" grounds outlined in the Consultation are, in many respects, broadly comparable to existing judicial review grounds. As such, it is not clear how the specific grounds of appeal would provide an effective review mechanism if they focus challenges on grounds of procedure rather than substance. This is even recognised in the Consultation itself when BIS states *"in some cases there may either be a legal requirement, or a policy rationale, for a more intensive standard of review than the traditional form of judicial review….which focuses on the process of decision making"*.[8] The specific grounds of review identified in the Consultation are similarly constrained.

2.19 The specified grounds therefore risk "falling between two stools" and neither providing enhanced grounds of appeal nor creating certainty in respect of their scope.

2.20 Consequently, for the reasons outlined in this document, we support strongly retaining the existing grounds of appeal for all regulatory decisions.

Competition Act 1998 Decisions (Questions 6 and 7)

2.21 We do not agree that the grounds of appeal for Competition Act 1998 decisions should be amended. In particular, given the shortcomings of the proposed imposition of judicial review or focused "specified grounds" outlined above, there is no merit to apply those grounds to Competition Act 1998 appeals.

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[8] Consultation, paragraph 4.20

2.22 It is essential to maintain an appeal system that is able to consider the merits of antitrust decisions. Unlike other forms of regulatory appeals, Competition Act 1998 infringement decisions provide clear grounds for follow-on damages actions. Regulatory decisions under the Competition Act 1998 cannot, therefore, be viewed in isolation. The natural correlation of any reduction in the grounds of Competition Act 1998 appeals would be to reduce the number of overturned decisions and strengthen the position of follow-on damages litigants as against the addressees of infringement decisions. Combined with the Government's proposed reform of the private damages regime to make bringing follow-on damages claims more accessible,[9] undertakings found to have infringed competition law would potentially face two disadvantages:

(a) reduced ability to appeal infringement decisions (even with meritorious claims); and

(b) increased liability under follow-on damages claims founded on Competition Act 1998 decisions that may, but for the proposed reforms set out in the Consultation, have been appealed and/or overturned.

2.23 In that regard, we support the Government's recent policy proposal to retain a full merits review for Competition Act 1998 appeals, as set out in its response to the consultation on the competition regime that led to the Enterprise and Regulatory Reform Act (the "**ERRA**"),[10] but which is inconsistent with the Government's approach in the current Consultation.

2.24 The level of scrutiny offered by the current appeal system has proved justified on a number of occasions. Even recently, in both *Dairy Products*[11] and *Tobacco*,[12] a large part of the OFT's decision and the entire decision respectively were overturned on appeal to the Competition Appeal Tribunal (the "**CAT**") on the merits, not just on procedural grounds.

2.25 Indeed, these cases have proved instrumental in helping to enhance the procedures of the OFT, which recently introduced number of changes to the review

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9 See Draft Consumer Rights Bill 2013 (BIS/13/925), June 2013.

10 See, for example, *Growth, Competition and the Competition Regime: Government Response to Consultation,* March 2012: "The Government has no plans to amend appeal rights" (p.9).

11 Case 1188/1/1/11 Tesco Stores Ltd v OFT [2012] CAT 31

12 Cases 1160/1/1/10 Imperial Tobacco Ltd v OFT [2011] CAT 41

and decision processes.[13] The effect of the reforms on the standard of Competition Act 1998 decisions and appeals remains unclear, however, as the OFT has not yet completed any full Competition Act 1998 cases using these new procedures.

2.26 Additionally, the ERRA introduces significant structural and procedural reforms to the UK competition regime. The Competition and Markets Authority ("**CMA**") will take over the OFT's role in Competition Act 1998 cases and is expected to improve further administrative procedures in order to ensure that Competition Act 1998 decisions are as robust as possible. The CMA will have access to a deeper pool of investigators and decision makers, including CMA Panel members. This is likely to increase the quality of cases and decisions and improved decisions will likely reduce both the grounds and incentives for appeals.

2.27 Concurrent regulators will also be required to comply with the minimum decision making requirements of the ERRA (including separation between the investigation team/officers and decision makers) designed to increase internal scrutiny and decision quality. Concurrent regulators will also have greater access to expert support from the CMA and other regulators through secondments and enhanced opportunities for cooperative working. These reforms will help to create greater consistency of decisional process as between concurrent regulators and the primary competition authority and, once implemented, may impact both the grounds and incentives for appeals of Competition Act 1998 decisions.

2.28 Consequently, we believe it is premature to take action to amend rights of appeal before the reforms of investigation and decision making procedures introduced by the OFT, and bolstered by the ERRA, are implemented and tested in practice and, where necessary, tested in the courts.

2.29 Moreover, we agree with BIS that *"the standard of review to which regulatory decisions are subjected, are central to achieving [the] balance between appeal rights and effective regulatory decision-making"*.[14] In particular in the case of appeals of decisions taken under the Competition Act 1998, this balance is not achieved by moving away from a merits based review.

Price Control Decisions in Communications, Aviation, Energy, and Postal Services

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13 See *Review of the OFT's investigation procedures in competition cases – a consultation paper* (OFT1263con2), 28 March 2012; and *Guide to the OFT's investigation procedures in competition cases* (OFT1263), 16 October 2012.

14 Consultation, paragraph 4.4

2.30 In principle, the ability to appeal *aspects* of price control decisions (rather than having to refer the entire decision) would likely be attractive, and would reduce uncertainty and costs, and increase efficiency.

2.31 However, it is crucial that, irrespective of the mechanism of price control reviews (i.e., whether based on appeal of part or inquisitorial reference of whole decision), price control decisions remain subject to full merits review. This is in part because:

(a) as recognised at paragraph 4.73 of the Consultation, these decisions require a substantial and detailed analysis of economic and legal issues. As such, they warrant the expertise of the CMA Panel to review the detailed analysis that stands behind the regulator's initial decision;

(b) regulated businesses cannot determine how much money they will make/recover without a price control, and that business will remain bound by that price control (subject to interim determinations) for between 5 and 8 years. If the regulator errs in its analysis, it can threaten the commercial viability of the business concerned;

(c) it is vital that any regulated business is in a position to finance its functions, and without a full merits review the resultant uncertainty may cause a dip in investor confidence;

(d) the right of appeal with respect to the specific consumer, economic and legal issues entailed in a price control decision would be lost without a review on the merits;

(e) the ERRA reforms establishing the CMA should benefit from continuity with the existing expertise and experience of the Competition Commission (the "**CC**"). Combined with the likely administrative efficiencies of the new CMA, the price control appeal process should benefit from even more effective review under the CMA than the CC;

(f) replacing the CC/CMA review with a judicial appeal to the CAT would risk undermining access to the breadth and depth of expertise of the CC/CMA Panel, economists and other specialists able to ensure that the price control decision taken is correct;

(g) as set out at paragraphs 2.16 to 2.19 above, the "specific grounds of appeal" do not sufficiently permit the full complexities of the issues to be addressed.

3 APPEAL BODIES AND ROUTES OF APPEAL

CAT Governance (Questions 16 and 17)

3.1 We welcome some of the proposals made in the Consultation in respect of amendments to CAT governance.

3.2 With regard to Question 16, we agree that the CAT Chairman should not be limited to a tenure of eight years. Judicial office holders in the CAT acquire a significant amount of sector specific expertise and it is disappointing that this expertise must be lost at the end of an eight year term.

3.3 In respect of Question 17, we believe that there may be circumstances in which it could be appropriate for the CAT to sit with a single judge. However, this would require further consideration and clear guidance would need to be drafted to provide certainty in this area.

Price Control and Licence Modification Decisions (Question 18)

3.4 We agree with BIS that the CC is best placed to continue to hear all appeals on price control and licence modification decisions.

3.5 The conditions of a company's licence will affect that company's ability to finance itself on capital markets. It is vitally therefore important to have a consistent and effective appeal mechanism in respect of licence amendments. The CC – through its well established process, including oral hearings – has to date ensured this effective appeal mechanism. To shift jurisdiction from the CC may have a detrimental impact on the attractiveness of investment in UK utilities.

3.6 Further, as pointed out in the Consultation itself, *"the Competition Commission is well-placed to undertake [the] complex economic, legal and financial analysis required"* in such cases.[15]

3.7 Any concerns about the length of appeals made to the CC in respect of licence modification or price control decisions could also be addressed by more targeted reforms, including revised timetable requirements.

3.8 In addition, there may be merit in providing the CC with an ability to review common themes and issues that arise across different regulated sectors. For example, it may be efficient for the CC to review and set out general "guidelines"

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[15] Consultation, paragraph 5.25

or "position papers" (which may be subject to rebuttal in individual cases) on issues such as:

(a) calculation of the Weighted Average Cost of Capital;

(b) how to determine "financeability" when determining the ability of a regulated company to "finance its functions"; and

(c) calculation of financing costs.

Price Control Decisions in the Communications Sector (Question 19)

3.9 We are generally supportive of the proposal in Question 19 that appeals against price control decisions in the communications sector should be simplified so that such appeals go directly to the CC, rather than via the CAT.

3.10 However, BIS needs to consider carefully how to manage any jurisdictional issues, for example where an appeal relates to both price control and non-price control matters. If an appeal were forced to be split and brought in two parts, the first brought to the CC and the second to the CAT, this may in fact increase complexity and therefore the length and cost of the appeal process, which would not be desirable.

Ex Ante Regulatory Decisions (Question 21)

3.11 In respect of Question 21, we consider that appeals to the CAT would be appropriate in respect of Energy Code modification decisions.

4 GETTING DECISIONS AND INCENTIVES RIGHT

Confidentiality Rings (Question 28)

4.1 BIS explicitly recognises that *"decisions made by competition authorities and economic regulators may go to the heart of how a business is run…They are significant for those directly affected by the decisions, and for the wider economy and public"*.[16] We agree with this assessment.

4.2 It is therefore essential that all possible steps are taken to ensure the efficiency and quality of regulatory decision making. As such, the increased use of confidentiality rings as a means of providing access to confidential documents at the administrative stage of decision making may be justified.

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[16] Consultation, paragraph 4.1

4.3 However, such measures would have to be carefully considered – and appropriate rules devised – in order to ensure that individuals integral to the appeal process are within the confidentiality ring. If only external legal advisers may be part of the confidentiality ring, this could cause considerable difficulty, specifically in relation to:

(a) external legal advisers being able to provide suitable legal advice within the bounds of the confidentiality ring; and

(b) obtaining instructions to act from a client outside of the confidentiality ring.

4.4 We would therefore propose that in-house counsel should be within the confidentiality ring as a general principle. In addition, price control, licence modification, licence breach and Competition Act 1998 decisions typically involve the close analysis of detailed economic, financial and technical information. As such, it is important that those individuals (either external advisers such as economists or accountants, or internal representatives) who need access to the information in order to be able to understand and respond to the regulator's case are also within the confidentiality ring where appropriate.

4.5 We consider that the principle of fair access to information would favour a wider extension of access to confidential information in certain regulatory decisions. We further consider that there is unlikely to be a material increase in risk of unlawful disclosure of confidential information in such circumstances, provided that there are clear undertakings in place that outline the limits of use of the information, coupled with appropriate sanctions for breach of confidentiality.

New Evidence (Question 30)

4.6 BIS states in the Consultation that:

> *"To…avoid excessive incentives to appeal, as well as limiting the material before the appeal body so that the appeal is more manageable for it and the parties, in the Government's view appeal bodies should not admit on appeal evidence that was not considered by the administrative authority prior to its decision unless it can be shown that it is significant and relevant to the aspect of the decision*

which is being appealed and good reasons why the evidence was not produced at the administrative phase are provided." [17]

4.7 However, as explicitly recognised by BIS, some cases will require new evidence to be considered on appeal, and furthermore *"the Government has seen no evidence that parties are purposely holding back evidence until the appeal stage"*.[18] We therefore believe that the current rules for adducing new evidence on appeal are appropriate and fair. In our experience, the current rules generally permit pertinent evidence to be adduced and provide sufficient clarity on admissibility.

4.8 As noted in paragraph 2.24, there have been a number of cases in which the new or restated evidence has proved central to the outcome of an appeal. The existing rules are, we believe, appropriate and help to facilitate the rights of defence.

4.9 Furthermore, the evidence that change is required in this area is founded upon extreme examples of case-law. The *BT v Ofcom* [19] case cited in the Consultation involved the proposed admission of extensive new evidence. As such it is not a typical example of how most cases proceed with respect to adducing new evidence on appeal.

Costs (Questions 32 and 33)

4.10 We do not agree that a regulator, where successful on appeal, should be awarded its costs as the norm but only have costs awarded against it when its conduct can be characterised as unreasonable or there are other exceptional circumstances.

4.11 Regulators must be held to account for wrong decisions (or decisions taken on the wrong bases). The risk of being unable to claim costs is likely to act as a significant disincentive for those subject to a decision from bringing what may in fact be a meritorious claim.

4.12 This disincentive may be particularly acute for parties in low-profit margin industries, or for small or medium sized enterprises. For example, within the water sector, licensed suppliers typically operate a low-margin business model. This is likely to heighten commercial sensitivity to changes in regulatory and legal costs rules. The introduction of a costs model that favours the regulator is likely to disincentivise small competitors from bringing well-founded appeals of regulatory

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17 Consultation, paragraph 6.10

18 Consultation, paragraph 3.23

19 [2011] EWCA Civ 245

decisions that affect them (for example price control, licence modification or bulk supply determinations) if they face a real risk of doubling their legal costs. The impact on incentives is likely to be compounded when considered in the context of new legal bases for appeal (e.g., judicial review) that make appeals more difficult to bring. Any such outcome would not appear to be consistent with the Government's support for increased competition in the retail and wholesale water sector.[20]

4.13 As BIS appreciates, the cost burden of bringing an appeal can be significant. Abiding by the general civil litigation principle that the "loser pays" would ensure that the interests of justice are best served by fairly allocating this burden.

4.14 Similarly, although costs recovery should be generally available for the successful party on appeal, we believe that only the reasonable costs of litigation should be recoverable. A regulator should not be allowed to claim its full costs, including internal legal costs, without detailed investigation.

4.15 Where the costs incurred by a regulator are similar in nature to those that would be incurred by external legal advisers to the other party, then these costs could be assessed and awarded. However, the value attributed to that work would have to be carefully scrutinised.

Scrutinising Grounds of Appeal (Questions 34 and 35)

4.16 We do not agree that it would be appropriate for the CAT to reject appeals which stand little chance of success without first reviewing appropriate evidence and submissions by each of the parties, in a manner similar to a summary judgment application in civil litigation.

4.17 The result of the proposal outlined in this section of the Consultation, when combined with a potential reduction in the standard of review, appears likely disproportionately to affect appellant companies rather than regulators or competition authorities. In particular, appellants would face a more difficult threshold to establish a good, arguable case.

4.18 As the Consultation acknowledges, "*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*". Consequently, appellants may be unable to adduce sufficient evidence to maintain a case "on the papers" alone, as compared

[20] See Water White Paper, 8 December 2011 and the current Water Bill 2013.

with an ability to seek later disclosure of, and therefore be able to adduce at a later stage in the case, more detailed and relevant evidence.

4.19 We would urge BIS to consider carefully how such a proposal would operate in practice.

Competition and Regulatory Decision Making (Questions 26 to 38)

4.20 The changes in process provided in the ERRA are welcome and we anticipate will bring effective improvements to the administrative decision making when the CMA is active.

4.21 Of course, and as mentioned at paragraph 2.25 to 2.27 above, these changes are as yet untested. Therefore, we believe it would be premature to apply the reforms of the ERRA to other aspects of regulatory decision making.

4.22 However, the effect of the ERRA reforms should be kept under close supervision, with a view to determining whether the principles could be usefully applied elsewhere.[21] In particular, we consider that a change in decision maker between investigatory/research based work and providing recommendations and actually taking a decision about whether or not to implement those recommendations could instil increased robustness, even in ex ante decision making.

Non-Infringement Decisions (Question 39)

4.23 We think it is important for non-infringement decisions to remain appealable. Non-infringement decisions are "active" rather than "passive" decisions; they have substantial legal and practical consequences and cannot be categorised as less important than an infringement decision. Indeed, as the Consultation notes,, *"as legal and economic findings they can give certainty as to the lawfulness of the conduct and this can have wider value than just in relation to the particular agreement or activity…concerned"*.[22]

4.24 Furthermore, a non-infringement decision may have a significant detrimental impact on the operations of third parties. Our experience indicates that third parties would be unlikely, after undertaking a cost-benefit analysis, to bring a standalone

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21 See section 46 of the ERRA, which requires a review of the operation of Part 1 of the Competition Act 1998 within 5 years of the transfer of functions from the OFT to the CMA.

22 Consultation, paragraph 6.37

claim to challenge a potentially anticompetitive agreement or conduct given the significant burden involved.

4.25 It is inappropriate to compare as like-for-like bringing an appeal against a non-infringement decision and bringing a standalone claim against potentially anti-competitive behaviour. In fact, pursuing a standalone claim would be particularly burdensome if, in the background, there was an unchallenged (and unchallengeable) non-infringement decision of a competition authority.

4.26 Consequently, we believe it is important that only those non-infringement decisions of sound reasoning and quality be relied upon by other market participants when determining their future behaviour.

5 MINIMISING THE LENGTH AND COST OF CASES

Oral Hearings

5.1 In the Consultation, BIS states that:

> *"The Government's view is that there should be a presumption that matters should be resolved on the papers wherever possible, for example for cost awards and straightforward matters, and that oral hearings should be kept to an absolute minimum to minimise the length and cost of appeals for all parties."*[23]

5.2 We fundamentally disagree with this statement. We also query whether the reduced right to an oral hearing may offend principles of due process.

5.3 Oral hearings are a vital aspect of any parties' right to be heard, and provide a key opportunity for an appellant to present their case. The time and cost associated with preparation for attending such hearings are commensurate with the benefit achieved by the opportunity for parties to advocate and have the opportunity to discuss their concerns directly before the decision maker.

BERWIN LEIGHTON PAISNER LLP

11 SEPTEMBER 2013

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[23] Consultation, paragraph 7.18

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

6th September 2013

Dear Sir / Madam,

Re: Regulatory and competition appeals: options for reform

BGE (UK) Ltd welcomes the opportunity to comment on Department for Business Innovation & Skills consultation paper in relation to Regulatory and competition appeals: options for reform.

Please find detailed below, our observation on the primary matters of interest to us.

Should you wish to discuss this matter further, please do not hesitate to contact me.

Yours sincerely

Brian Murphy
Regulation Manager
(on behalf of BGE(UK))

BGE (UK) Ltd

RESPONSE TO HM GOVERNMENT CONSULTATION STREAMLINING REGULATORY AND COMPETITION APPEALS

General comments

BGE(UK) is regulated by the NIAUR and the Gas and Electricity Markets Authority in the United Kingdom and by the Commission for Energy Regulation in the Republic of Ireland. At a high level reforms which minimise, to an appropriate extent, the differences between the relevant regulatory regimes are welcome. They are consistent with the Third Package objective of ensuring greater co-operation between National Regulatory Authorities.

However, any proposals to create further consistency between the Great Britain and Northern Ireland regimes fall to be considered against a range of other factors. In particular:

(i). Appropriate appeal rights against regulatory decisions provide significant comfort to investors in energy infrastructure such as BGE(UK). These appeal rights are already subject to a range of significant legal and practical restrictions. BGE(UK) does not consider that a case for further limiting the appeal rights of BGE(UK) and other energy network companies is made out in the consultation paper.

(ii) The United Kingdom legislative provisions and institutional background to appeals by BGE(UK) is already subject to significant change, as an example as a result of the EU Third Package and the creation of the new Competition and Markets Authority. The introduction of further reforms at this stage creates further uncertainty and unpredictability around these important appeal rights. It is to be noted that existing proposals for reform in Northern Ireland have not been concluded upon.

The paper canvasses reform to Northern Ireland Energy Regulation. Before any changes are made the implications in a Northern Ireland context need to be fully explored. Energy regulation is devolved in Northern Ireland, and naturally BGE(UK) assumes that any proposals to further alter the Northern Ireland regime for appeal of enforcement decisions, or any other aspects of appeals against NIAUR decisions will be the subject of full consultation by the Northern Ireland Executive/DETI.

Appeal Costs

Q32 asks: *"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?"*

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

BGE(UK) does not agree that any awards of costs against regulators should be limited as proposed. Awards of costs should not start from an asymmetric basis, where even if the energy network company is successful it cannot recover costs except in limited circumstances. Where the energy network company is successful it should be allowed to recover its reasonable costs, for example via the price control or from a regulator. The costs should not automatically fall on the investors.

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

In any appeal it should be clear to all parties at the outset whether their costs will be recoverable and the circumstances in which they will be recoverable.

Where parties are to be entitled to recover costs, this should, (as is usual in litigation), be restricted to reasonable costs. We assume that for both regulators and network operators, internal legal costs could, (depending on the circumstances) constitute reasonable costs. The criteria applicable to assessing reasonableness should be transparent.

We would also note that it is important that mechanisms for recovery of costs are considered in this context: as an example recovery via licence fees or the price control. The basis of such recovery should also be transparent.

Like remarks apply to any award of the tribunal's[1] own costs.

Appeal Routes

The DETI conclusions on the consultation on the revised electricity and gas licence modification arrangements[2] have not yet been published, BGN(UK) note that Direct appeal routes exist for the GB energy sector, however only regulatory references are provided for energy decisions in Northern Ireland.

BGE(UK) notes that there are distinct differences between GB and NI appeal routes and appeal bodies in the energy sector. The NI appeal routes are the Competition Commission and High Court of NI.

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[1] E.g. the CAT, Competition Commission and the CMA.

[2] The consultation on the revised electricity and gas licence modification arrangements - http://www.detini.gov.uk/consultation_on_revised_procedure_for_licence_modifications_and_appeals_process.pdf

It is explained from section 5.33 onwards that, HM Government is considering to move jurisdiction for energy code modification appeals from the Competition Commission to the CAT in GB.

BGE(UK) agrees that there is benefit to having consistency of approach within a sector / across sectors, and throughout GB and NI. However that consistency should not be achieved by further restricting the ability of energy network companies to appeal regulatory decisions.

Brick Court Chambers

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11 September 2013

BIS Consultation on
STREAMLINING REGULATORY AND COMPETITION APPEALS

Brick Court Chambers will not be submitting a substantive response to the consultation. Members have participated in the drafting of other responses (including those of the Bar Council, the Competition Law Association and the Joint Working Party) which accordingly reflect views held by members of Chambers. Each of those responses strongly supports the detailed and impressive response submitted by the Competition Appeal Tribunal, which Chambers would also wish to endorse. The overall view held by members of Chambers is that the Consultation document itself is unpersuasive and regrettably thin and impermissibly selective as regards evidence. Its flaws are accurately highlighted by the CAT response. The Consultation document, considered as a piece of regulatory work, itself provides a good example of the need for full merits review by an expert and independent tribunal, and that has fortunately been provided by the CAT's response.

British Sky Broadcasting Limited (Sky)

STREAMLINING REGULATORY AND COMPETITION APPEALS

BIS CONSULTATION

SKY RESPONSE

This is the response of British Sky Broadcasting Limited ("Sky") to the Government's consultation on "*Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform*" dated 19 June 2013 (the "Consultation").

1. Executive Summary

1.1 Sky is a major contributor to the UK economy. Over the past ten years it has grown substantially. Sky invests substantial amounts each year, employs over 24,000 people in the UK and ROI and provides pay TV, broadband and telephony services to over 11 million customers. Sky's ability to invest and innovate, supporting further growth in future, and to continue to deliver substantial benefits to consumers, should not be hindered by poor regulatory decision making.

1.2 The appeals regime is the only route business has to ensure that regulators are held to account. Appeals enable incorrect decisions to be corrected. But, equally importantly, the prospect of appeals encourages regulators to take good decisions – decisions that are supported by cogent reasoning and evidence – in the first place. This is a key benefit from an effective appeals regime, as regulatory decisions that are wrong can have significant negative consequences for business and consumers, and overall economic growth.

1.3 It is Sky's view that, when considered objectively, the UK appeals regime works well and is not in need of significant reform.

1.4 Stakeholders do not bring frivolous appeals. To succeed, appellants need to meet a high hurdle and provide compelling reasons why the regulator reached the wrong decision. Competition, broadcasting, communications and other appeals heard by the CAT over the past ten years have provided a valuable body of jurisprudence, of benefit both to industry stakeholders and regulators. Rules on the admissibility of evidence in appeals have been tested and are well policed by the CAT. There have been notable improvements in transparency during the consultation phase as a result of appeals. As important issues have been resolved and/or clarified through appeals, parties now bring tighter and more focussed appeals. The Government should bank these improvements and work together with industry and the regulators to make further refinements to the administrative and appeals processes.

1.5 The Government's proposals, which comprise root and branch changes to the UK appeals regime, are a cause for significant concern. Fundamentally altering the appeals regime will likely result in significant uncertainty, an increase in the discretion of the regulators and a greater likelihood of poor decisions.

1.6 The Government has underestimated the cost of the proposed changes and not adequately taken into account the benefits of the current regime. Notably, in assessing the potential costs and benefits of its proposal, the Government has failed to consider the potential impact of wrong decisions on industry, consumers and wider economic growth.

1.7 Instead of reducing the rigour of judicial oversight by lowering the intensity of review, the Government's objectives can better be achieved by improving the end-to-end decision making process through greater transparency and stakeholder engagement, to try to ensure that decisions are right first time. A solid end-to-end process which includes a strong appeals process provides industry with the confidence to invest and thus promotes growth. In contrast, a lighter appeals regime which subjects regulatory decisions to a less intense review will have the opposite effect.

1.8 The Pay TV case[1] is cited in the Consultation to justify the reform proposals. As explained in more detail in this submission, this case in fact demonstrates clearly the value of the existing appeal regime. Ofcom's decision in that case was found by the Competition Appeal Tribunal ("CAT") to be wrong and, if left standing, would have resulted in both a significant miscarriage of justice, and the introduction of unwarranted, unnecessary and costly new regulation. The Pay TV case is also erroneously cited in support of a view that appellants may introduce substantial amounts of "new evidence" in appeals that was not available to the regulator when making its decision. In fact, the key evidence relied upon by the CAT in the Pay TV appeals was that collected by Ofcom during its inquiry and submitted to the Tribunal by Ofcom.

1.9 Although these proposals for reform have been developed under the growth agenda, they risk undermining growth through unintended consequences. The proposals will likely result in increased uncertainty, additional cost and complexity, and ultimately more appeals. This would be damaging both to businesses and consumers. The UK is considered to have a first class appeals regime and the Government should not jeopardise this – nor, importantly, the UK's currently fragile growth.

2. Preliminary remarks and structure of the response

2.1 Aside from the Pay TV case, Sky has been involved in a number of appeals of regulatory decisions, either as an appellant or intervener. Sky provides a list of the CAT cases, price control appeals before the Competition Commission ("CC") and other competition law appeals in which it has been (or remains) involved at **Annex 1**. Given this experience, Sky is well placed to comment on the efficacy of the current appeals regime and the dangers that are likely to arise from the Government's proposals.

2.2 Sky is puzzled by the re-emergence of proposals significantly to alter the appeals regime, this issue having been last reviewed only last year.[2] Sky considers that, when examined objectively, the appeals regime in the UK is highly effective and works well. It plays a significant role providing firms operating in sectors subject to economic regulation with incentives to invest, to the benefit of consumers and economic growth. It is extremely difficult to see what could have changed in the last year to warrant a significant reconsideration of this issue – including proposals for change that go significantly further than those that were previously being considered. Certainly, the Consultation provides no compelling reasons for this. On the contrary the 'case for change' set out in the Consultation is notably thin.

2.3 We have included our responses to previous consultations as annexes to this response, as many of the points made in them are of direct relevance to the issues raised in the current

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1 Cases 1156-1159/8/3/10 British Sky Broadcasting Limited & Ors v Ofcom [2012] CAT 20 (the "Pay TV Judgment").

2 Sky also notes that despite widespread concern raised by industry in response to the previous consultations - DCMS's "Consultation on implementing the revised EU electronic communications framework – appeals" and the Government's September 2010 consultation "Implementing the revised EU Electronic Communications Framework – overall approach and consultation on specific issues" – the Government did not respond to industry concerns.

Consultation. These annexes complement the points made in this response, and should be fully taken into account by Government.

2.4 Sky's response comprises the following sections:

- Significant change is not justified and the proposals risk harming investment and growth (Section 3);
- The benefits of the current regime are not sufficiently taken into account (Section 4);
- The Pay TV case supports the desirability of maintaining the status quo (Section 5);
- The need to strengthen the end-to-end decision making process instead of focussing on appeals (Section 6);
- Changing the standard of review and/or the rules on evidence will lead to a less stable regulatory regime and deter investment (Section 7); and
- The current regime is effective but there is scope to make improvements (Section 8).

2.5 Sky provides at **Annex 2** a response to the Consultation questions by reference to this main response.

3. Significant change is not justified and the proposals risk harming investment and growth

3.1 The Consultation sets out a number of arguments in support of proposals for changing the existing appeals regime.[3] Sky does not consider that these arguments are supported by adequate evidence, analysis or reasoning.

3.2 The Government needs to have adequate regard to the benefits of the current appeals regime, the regulatory certainty it provides, and the costs to businesses and consumers that would arise from changing it. Neither the Consultation nor the impact assessment correctly weighs these costs and benefits. Indeed, the costs associated with a single wrong decision that cannot be adequately appealed have the potential to outweigh the total benefits of the reform proposals set out in the Government's impact assessment.

3.3 Towerhouse Consulting ("Towerhouse") has produced a report which assesses the methodology and arguments included in the impact assessment. This report concludes that the cost of the Government's proposals – that is, the loss of the ability to fix poor decisions directly and indirect benefits that arise from raising the quality of all regulatory decisions, which are the most significant effects of the current appeal system – is currently not quantified in the impact assessment. These costs dwarf the relatively modest benefits that the impact assessment purports to identify, and thus a correctly applied impact assessment is unlikely to support the policy options proposed. Sky agrees with this conclusion.

3.4 Sky also provides at **Annex 3** a table which summarises some of the clarifications made by CAT and CC in relation to appeals under section 192 of the Communications Act 2003, as well as correcting some of the arguments made by the Government in seeking to justify changes to the current appeals regime set out in the Consultation.

3.5 The principal assertions used to justify the proposed changes include:

[3] Section 3 of the Consultation.

(a) variations in the number of appeals across sectors;

(b) length of appeals and the impact on the overall regulatory process;[4]

(c) impact of the standard of review;

(d) incentives to appeal;

(e) inconsistency of appeal routes; and

(f) impact on regulatory decision making.

3.6 We address these propositions in turn below.

(a) Variation between sectors in the number and proportion of decisions appealed

3.7 The Government's contention is that there is significant variation between sectors in the number of appeals brought and/or the proportion of regulators' decisions that are appealed.[5] In particular, the Consultation highlights the CAA and Ofcom as having had a significantly higher proportion of decisions appealed compared to other economic regulators.

3.8 Plainly, as recognised at paragraph 3.7 of the Consultation, there are likely to be many reasons why the number and/or proportion of regulatory decisions vary across sectors. For example, in relation to the number of appeals, there may simply be variation in the number of appealable decisions made by regulators operating in different sectors, while variations in the proportion of appeals could reflect differences in the quality of regulatory decision-making across sectors. Without detailed consideration of the reasons for variation, differences in either the absolute number of appeals across sectors, or the proportion of decisions appealed, per se, cannot reasonably be considered a good reason for proposing reform of appeals processes.

3.9 A more reasonable basis for concern might be that in particular sectors there is (i) an excessive number of appeals and/or (ii) appeals of a high proportion of regulatory decisions that are rejected. In fact, this appears to be a more accurate reflection of the Government's concern. For example, the first point under the heading of "The case for change" slide presented at the stakeholder sessions stated: "*Lots of appeals in some sectors (communications, competition) but not in others (water, rail)*"[6].

3.10 The Government's own analysis shows that neither the number nor the proportion of decisions appealed supports a case for change:

- Figure 3.1 of the Consultation shows that across all sectors there are relatively few appeals each year: nine in 2011 and eight in 2012; and
- Figure 3.2 of the Consultation shows that even in the communications sector less than a fifth of all decisions taken by Ofcom are appealed.

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4 At paragraph 3.9 of the Consultation this is expanded as follows: "*that the process of bringing and hearing appeals takes time and imposes costs on the appeal bodies, regulators, appellants and third party interveners*".

5 Paragraph 3.3 in the Consultation.

6 Plainly, it is inappropriate to describe "competition" as a sector. Given that the competition regime applies to all sectors of the economy, it should not be surprising that there are more appeals stemming from it than in relation to application of competition law and specific regulation in the water and rail sectors.

3.11 In relation to the latter, it is significant that of the recent appeals brought against Ofcom (detailed at **Annex 4**), only in a few instances has it been vindicated entirely. In contrast, appellants have been successful to the full extent of their notice in a number of cases, and partially successful in the majority of cases. The reality is that the vast majority of Ofcom's decisions are not appealed. In the relatively few cases where they are brought in the communications sector they normally address important issues, and Ofcom frequently has been found to have been in error.

(b) Length of appeals and the impact on the overall regulatory process

3.12 The Consultation asserts that the process of bringing and hearing appeals inevitably takes time and imposes costs on the appeal bodies, regulators, appellants and third party interveners.[7] Sky agrees with this assessment, but does not consider that it constitutes a valid argument for changing the existing appeals regime. Naturally, appeals will take time, and involve costs. The relevant questions are whether they take an unduly long amount of time, or involve, in some sense, excessive or unnecessary costs being incurred, relative to the benefits that appeals deliver. There is no evidence to support either of these propositions and, in fact, the available evidence points the other way.

3.13 Sky's experience of the appeals regime is that it is an efficient process. The CAT's case management system, in particular, enables cases to be dealt with swiftly and expediently.

3.14 As the Consultation notes,[8] the duration of appeals in the UK is in keeping with that of other European countries, and indeed much shorter than in some. The UK is not unique in having occasional cases which are lengthy and time consuming. This is unsurprising and indeed necessary, given the complexity of some of the cases heard.

3.15 A desire to minimise the length and cost of appeals, while valid, should not take precedence over basic requirements of justice.

3.16 Sky considers that it is important to bear in mind the fact that it is firms that bear the cost of appeals in the broadcasting and communications sectors, either directly or indirectly (as Ofcom's costs are met by fees paid by firms operating in those sectors). It is Sky's view that bearing such costs is a reasonable price to pay in relation to the benefits that appeals (and the threat of appeals) bring in terms of the right to challenge poor decisions, and their impact on improving the quality of regulatory decision making.

(c) Impact of the standard of review

3.17 The Government states in the Consultation that the standard of review of any appeals regime will affect both companies' propensity to appeal and the length of appeals.[9]

3.18 Sky does not consider that the current standard of review is the determinant for the number or length of appeals (neither of which are in any event particular causes for concern, as discussed above). Rather, both these factors are primarily determined by the nature of the regulatory decision in question.

3.19 Indeed, the only way in which the standard of review could reduce companies' propensity to appeal is if companies believed that the appeal body no longer had the scope to consider legitimate concerns regarding regulatory decisions. Sky does not consider that this is a good rationale for change.

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7 Paragraph 3.9 of the Consultation.

8 Paragraph 3.11 of the Consultation.

9 Paragraph 3.13 of the Consultation.

(d) The incentive to appeal[10]

3.20 While the Government accepts that it is important that changes to the appeals framework preserve firms' incentives and ability to appeal in appropriate cases, it also argues in the Consultation that appeals may be a 'one-way bet'[11], with few downsides even if the appellant does not stand a good chance of winning.

3.21 This proposition is incorrect, and inconsistent with the proposition that appeals involve significant costs. The fact is that mounting an appeal does involve significant costs to firms, both direct costs and in terms of the opportunity cost of internal resources tied up during the appeal process. Any company behaving rationally will consider the potential gains from an appeal, weighted by the probability of winning that appeal (which will be determined significantly by the merits of that appeal), against the costs that will be incurred. In many cases, an appeal simply will not be worthwhile. Accordingly, the decision to appeal is anything but a 'one-way bet.

3.22 In the same vein, the Government suggests in the DCMS Strategy Paper that firms have "*incentives [to] make unmeritorious appeals*"[12]. Whilst such a proposition is trivial, the relevant issue is whether firms do in fact make a significant number of such appeals, having regard both to (a) the likely significant costs of bringing an appeal (including the significant likelihood of being required to pay the other party's costs if an appeal is in fact unmeritorious), and (b) the powers of appeal bodies to strike out plainly unmeritorious appeals at an early stage.

3.23 Sky considers that a proper examination of the actual record of appeals of regulators' decisions that have been brought would show that few if any could reasonably be described, either at the outset or with the benefit of hindsight, as having been without merit. Sky notes that neither the Consultation nor the DCMS Strategy Paper identifies specifically any past cases that are considered by Government to have been unmeritorious.

3.24 Moreover, even if it could be established that some appeals lacked merit from the outset, it is plain that fundamental changes to the appeals regime risks adversely impacting the ability to bring important, meritorious appeals in order to address this purported problem.

(e) Inconsistency in appeal routes

3.25 The Consultation highlights that there are different appeal routes across different sectors and different types of appeal, and expresses concern that this could lead to either a lack of expertise, or a lack of certainty.[13]

3.26 Sky supports the notion that appeals should be heard by bodies that have sufficient expertise and considers that the CAT has the necessary expertise and should remain the

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10 Separately, Sky also notes DCMS's strategy paper "*Connectivity, Content and Consumers – Britain's digital platform for growth*" published on 30 July 2013 (the "DCMS Strategy Paper") and the comments made in relation to the proposed reform of the appeals regime and the reference within that document to this Consultation. Sky is concerned by the oversimplified view of the current appeals regime presented by DCMS, notably the reference to *"companies hav[ing] a strong commercial incentive to appeal if an alternative analysis of facts can result in a more favourable outcome for them*". This proposition fails in particular to recognise the fact that appeal bodies do not overturn regulators' decisions on the basis of "*an alternative analysis of facts*". They will overturn a regulator's decision only where their analysis of facts is wrong. See further Section 5, below.

11 Foreword to the Consultation.

12 Page 45 of the DCMS Strategy Paper – Appeals section.

13 Paragraph 3.28 of the Consultation.

appellate body for communications, broadcasting and competition appeals. Sky also agrees that appeals routes should be transparent and clear to potential appellants. However, the current appeals regime is not deficient in this respect.

3.27 Appeal routes may be inconsistent between sectors, but in the case of the communications sector at least they are well understood. Similarly, established appeal routes do not result in non-expert courts or tribunals hearing cases.

3.28 The Consultation asserts that "*investors across sectors may have less certainty about how the regime operates because of differences in appeal routes*"[14]. This assertion is misconceived. Even though there are such differences, they are well understood and have no impact at all on investment.

3.29 Whilst the reasons for difference in appeals routes may be historical, they are nevertheless established and well understood by industry. Consistency between sectors may be attractive from a conceptual point of view, but in practice it would add little benefit. The risk is that measures taken to introduce more 'consistency' would actually work against the overarching objectives set out in the Consultation.

(f) Impact on regulatory decision-making

3.30 The Consultation puts forward an argument that appeals may be having an adverse impact on regulators' decision-making, in particular by delaying regulators taking or implementing important beneficial decisions, and/or by making them more 'risk averse'. The Consultation notes that Ofcom is spending increasing amounts of time each year addressing appeals, and states, rather cryptically, that "*some have argued that Ofcom has become reluctant to make significant pro-competition decisions as a result of the proliferation of litigation in the sector*"[15].

3.31 In the first instance, Sky is concerned that there is a presumption underlying the analysis throughout the Consultation that regulators always take decisions that are in consumers' interests, or otherwise promote growth and investment, and therefore anything that gets in the way of such decision-making simply delays the realisation of such benefits.[16]

3.32 Such a proposition would ignore many decades of thinking and experience concerning the reality of regulatory intervention. This recognises that regulatory failure is as pervasive and serious an issue as market failure, *i.e.*, that regulators do not always get it right, and that the adverse consequences of regulatory errors can be very significant. For example, in the U.S. it has been estimated that inappropriate telecommunications regulation, which delayed the introduction of voice messaging services, cost consumers over $100 billion in lost consumer surplus.[17]

3.33 We find the proposition that regulators have become, in some sense, 'risk averse' as a result of the potential for their decisions to be appealed to be a strange one. It should not be the duty or objective of regulators to seek to 'take risks' in their decision-making. Nor should the time regulators take in ensuring its decisions are not appealed be viewed as an unnecessary delay, or an unnecessary burden. Rather, it is incumbent on regulators to produce decisions that are not appealed (or are appealed relatively infrequently) because appealing would have little or no prospect of success – that is, because the decisions are

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14 Paragraph 3.30 of the Consultation.

15 Paragraph 3.31 of the Consultation. Sky considers the phrase "*proliferation of litigation in the sector*" grossly to exaggerate the reality of the situation.

16 See for example paragraphs 1.7, 3.18, 3.20, 3.24 and 3.31 of the Consultation and the Appeals Section of the DCMS Strategy Paper.

17 Hausman, J.A., 'Valuing the Effect of Regulation on New Services in Telecommunications'. Brooking Papers on Economic Activity. Microeconomics. 1997.

robust, well-founded, evidence based, free from error and in accordance with the duties and responsibilities placed on regulators by Parliament. Plainly, neither Ofcom nor other regulators have anything to fear from appeals of decisions that are taken in this way. As the CAT indicated when Ofcom sought to argue that an adverse costs judgment against it in the Pay TV case would have a "chilling effect" on its activity:

> "*the ground of appeal upon which Sky succeeded related almost entirely to Ofcom's misinterpretation of the factual evidence (mainly contemporaneous documents)…. These misinterpretations were significant, both in terms of their number and their pivotal relationship with the core competition concerns and the findings upon which Ofcom's regulatory action was founded. …. [If] such a case arose again in the future, Ofcom has no reason to suppose that the grounds for action would be undermined on appeal if its assessment of the facts was sufficiently rigorous in all respects.*"[18]

3.34 Sky also disagrees with the notion that Ofcom has been unable to make 'pro-competition' decisions because of the threat of appeals. The argument that a robust appeals regime is in some way restricting competition is speculative and implausible. It implies that Ofcom is denied the opportunity to engage in intervention aimed at protecting competition by the prospect of such interventions being appealed. It is unclear why it might be thought that Ofcom would be prevented from taking a decision that is well-founded and justified. It is also surprising that such a high degree of credence is given to the suggestion that competition is best served through additional regulatory interventions.

3.35 Sky considers that little weight can be placed on this argument, which seems to amount to a call for regulatory creep.

3.36 A reduction in the degree of rigour required of regulators in reaching their decisions might speed up decision-making, but the quality of decision making would suffer greatly, to the ultimate detriment of consumers, investment and growth, as well as creating potential injustices.

3.37 In relation to the argument that appeals delay decisions being implemented, Sky notes that it is important for the Government to appreciate that it is rarely the case that decisions are stayed while an appeal is heard.

3.38 The Consultation cites two cases as examples of the adverse effect of appeals, or potential appeals, on timely decision-making: (i) Ofcom's spectrum award plans for 2010 MHz and 2.6GHz bands, and (ii) Ofcom's decision in 2009 on Local Loop Unbundling charge controls, the appeal of which was said to have delayed the next price control decision by a year.[19] Sky is not able to comment effectively on the first of these, as it was not involved in that process. In relation to the latter, however, Sky notes that: (a) it is Sky's view that this assertion is spurious: there was sufficient time between the conclusion of the appeal and the beginning of the next price control for that price control to have begun on time. Rather, this is an better example of the issues discussed in Section 6 below, of the efficiency and effectiveness of regulators' own decision making processes; and (b) even though Sky was one of the parties adversely affected by the delayed introduction of the subsequent LLU price control, thereby impacting on Sky's customers, it strongly supports maintenance of the existing appeal regime.

Overall the case for reform is not made

3.39 A well founded case has not been put forward for the changes to the appeal regime that have been proposed. None of the issues which the Government has identified are indicative of the current appeals regime being fundamentally 'broken', and in need of reform. The number of appeals brought is not especially high; appeals are dealt with

[18] Paragraph 57 of the Pay TV Costs Judgment.

[19] Paragraphs 4.27 and 4.28 of the Consultation.

expeditiously; their duration in the UK is in keeping with those in other European countries; there is no evidence to suggest that spurious appeals are brought; nor is it the case that the standard of review is a determining factor in bringing appeals; inconsistencies in appeal routes exist but do not result in notable detrimental effects; and regulatory decision-making is strengthened, rather than hindered, by a strong appeals regime.

3.40 Furthermore, in some cases regulators' errors have been found to have been extremely serious, resulting in strong criticism by the CAT. For example, in Vodafone Limited v Ofcom, the CAT criticised Ofcom for its failure to provide a robust cost benefit analysis as well as criticising its consultation process as follows:

> "*The 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*" and "*the failure of Ofcom to attempt adequately to assess the probability of network failure and to quantify its adverse effects on consumers represents, in the Tribunals' judgment,* a substantial error."[20]

3.41 Similarly in the Pay TV Judgment, the CAT made criticisms of Ofcom, as discussed further in Section 5 below.

3.42 These examples clearly show the importance of ensuring robust judicial oversight and the need to maintain the current appeals regime.

3.43 Sky also notes, and supports, the response of the CAT to the Consultation and the CAT's conclusion that "*overall the Consultation has not presented a coherent case for change and some of its measures, if implemented, could harm the system*".[21]

4. The benefits of the current regime are not sufficiently taken into account

4.1 As outlined in the previous section, the Government has not set out a compelling case for the proposed significant changes to the current appeals regime. Moreover, a proper acknowledgement of the benefits of the existing regime is absent from the 'case for change' section in the Consultation. This is obviously a crucial component in determining whether reform is desirable or necessary.

4.2 Sky has touched upon the benefits that the current regime brings in the response above. It is well-understood by all parties involved. Appeal bodies have built up a body of case-law which provides clarity to potential appellants. It aids regulators, establishing precedent which can be drawn upon in the future. Indeed, the Government recognises that:

> "*appeals play a vital regulatory accountability role by allowing regulators' decisions to be challenged"* and "*appeals can provide an important discipline upon regulators and element* [sic] *of regulatory accountability and transparency.*"[22]

Furthermore, the Government states that "*the right of firms to appeal regulatory and competition decisions is central to ensuring robust decision making and holding regulators to account in the interests of justice*"[23]. Overall, the current regime delivers regulatory certainty as it provides a proper check on decision making.

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20 Vodafone v Ofcom case 1094/3/3/08 [2008] CA 22, paragraphs 95, 108 and 123.

21 Paragraph 4(12) of the CAT's response to the Consultation.

22 Paragraph 3.1 of the Consultation.

23 Paragraph 1.6 of the Consultation.

4.3 Decisions made through the appeals process have been beneficial to industry and, as a consequence, consumers. These benefits are significant and should be taken into account by the Government. Fixing poor decisions directly, and creating indirect benefits by raising the quality of all regulatory decisions, are the most significant effects of the current appeals system, and the loss of those benefits – that is, the cost of the Government's proposals – is currently not adequately taken into account, either in the Consultation, or in the impact assessment.

4.4 The Towerhouse report provides an estimate the quantum of these benefits, which would be lost were the proposals to be implemented. In the communications sector, the loss of consumer benefits resulting from changing the standard of review is estimated to be in a range of a net present value from £50m to £100m or more in relation to each appealed decision that is modified on appeal. This value far exceeds the purported benefits of proposed changes that Government has set out.

4.5 These proposals, which were developed under the growth agenda, are in danger of actually undermining growth through unintended consequences, resulting in additional cost and consequences to business which will likely be passed on to consumers. Appeals play a vital role in mitigating the potential for adverse effects occurring as a result of poor regulatory decisions. Changes which lessen the intensity of review will likely result in poorer decisions and increase uncertainty, costs to business, and the length of the decision making process. Instead, the more fundamental focus should be on encouraging regulators themselves to take high quality, evidence-based decisions.

5. The Pay TV case supports the desirability of maintaining the status quo

5.1 At paragraph 3.19 of the Consultation, the Government recognises that it is important that any changes to the appeals framework preserve firms' incentives and ability to appeal where a regulator's decisions have a material effect on them, and where they believe the regulator's reasoning is flawed, or regulators have insufficient evidence on which to base their decision.

5.2 However, the Consultation then qualifies this statement by stating that "*in some cases there appear to be few downsides to appealing* even *if the appellant does not stand a good chance of winning…the costs of appealing often appear low relative to the benefits to appealing…appeals can routinely involve substantial amounts of new evidence presented at appeal.*"[24] In this context, the Consultation refers to the Pay TV case as an example of an appeal where substantial new evidence is presented that was not available to the regulator when it reached its findings.

5.3 We set out below the relevant factual background to the Pay TV case. It will readily be apparent that:

- the Pay TV case is precisely the sort of case which the Government recognises firms should still have the incentive and ability to pursue. Ofcom's decision in that case had the potential to have a material effect on Sky (and others), and was found by the CAT to be seriously flawed;
- far from supporting the case for change, the Pay TV case demonstrates why it is important, in the interests of justice, to ensure that there is independent judicial oversight – on a full merits basis – of regulatory decisions; and
- the reference to the Pay TV case as an example of a case involving the introduction of significant amounts of 'new evidence' at the appeal stage is not apposite.

[24] Paragraphs 3.20 - 3.22 of the Consultation.

5.4 It will also be apparent from the CAT's Pay TV Judgment and the Pay TV Costs Judgment[25] that the Pay TV case provides support for the proposition that, in relation to promoting robust, effective "end-to-end" decision-making, it is important also to consider the decision-making process itself, rather than focusing on the process of ex post scrutiny of those decisions.[26]

Ofcom's Pay TV Decision

5.5 Ofcom issued its Pay TV decision in March 2010 (the "Pay TV Decision"). In the Pay TV Decision, Ofcom announced the introduction of a new regulatory regime under which Sky was required to offer to wholesale Sky Sports 1, Sky Sports 2, Sky Sports 1 HD2 and Sky Sports 2 HD (the "core premium sports channels" or "CPSCs") to pay TV retailers on other platforms. In the case of the standard definition versions of the channels, this was to be at wholesale charges set by Ofcom. This was denoted the Wholesale Must Offer ("WMO") regime.

5.6 The Pay TV Decision plainly had the potential to have a material effect on Sky. As noted by the CAT:

> "*the regulatory action in question was undeniably commercially intrusive, depriving Sky of any choice as to the person to whom, and the prices at which, it would wholesale its premium sports channels.*"[27]

5.7 This abrogation of Sky's commercial freedom related to products in which Sky had innovated continually, invested billions of pounds, and taken significant commercial risks over many years, to build successful, attractive television channels valued by millions of customers in the UK and ROI.

5.8 The Pay TV Decision was the subject of four appeals, by (i) Sky, (ii) the Premier League, (iii) BT and (iv) Virgin Media. Sky and the Premier League opposed the decision, while BT and Virgin Media argued that it had not gone far enough, arguing for more of Sky's sports channels to be included in the new regime, and for regulated prices to be lower.[28]

Sky's main appeal

5.9 Sky challenged the Pay TV Decision on three principal grounds.[29] These were that:

(i) Ofcom did not have the legal power to introduce the regulation in the way that it proposed (via Section 316 of the Communications Act);

(ii) Ofcom erred in finding that Sky acted on an incentive to withhold supply of the CPSCs from other pay TV retailers; and

(iii) Ofcom erred in assessing the impact and proportionality of the WMO obligation.[30]

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25 Pay TV, Ruling (1) Costs and (2) Disposal of FAPL's appeal [2013] CAT 9, cases no's:1152/8/3/10 (IR) 1156-1159/8/3/10, 1170/8/3/10 and 1179/8/3/11 (the "Pay TV Costs Judgment").

26 See further paragraph 6.29 of the Consultation.

27 Paragraph 57 of the Pay TV Costs Judgment.

28 Sky also challenged two decisions taken by Ofcom under the WMO regime (the 'CAMs' and 'STB' appeals). In essence, these two appeals depended on the outcome of the main appeals, and were given little attention during the main hearing.

29 Sky also challenged the manner in which Ofcom had consulted on the changes to Sky's licences for the CPSCs, which were the means by which the WMO regime was introduced. This was, however, a minor element of Sky's main appeal.

5.10 Sky adopted a focused approach to its appeal, electing not to challenge other important elements of the Pay TV Decision that it considered were also wrong.[31]

The findings of the CAT

5.11 Overall, Sky's appeal was successful. As noted by the CAT in relation to the appeal:

> "*Sky is a clear winner. Although it lost on the two jurisdictional arguments* [i.e. Ground 1]*, its appeal has been allowed and, subject to the stay we granted pending BT's renewed application for permission to appeal, the licence conditions at the heart of Sky's appeal are required to be withdrawn from Sky's licences. So, on the basis of its second ground – mainly relating to the negotiations – Sky achieved everything it could have hoped to achieve in its appeal.*"[32]

5.12 The key basis for the CAT's decision was that it found that Ofcom's conclusions in relation to Sky's dealings with third party pay TV retailers were wrong. The CAT stated:

> "*the ground of appeal upon which Sky succeeded related almost entirely to Ofcom's misinterpretation of the factual evidence (mainly contemporaneous documents) of what had taken place in several sets of negotiations over the course of a number of years. These misinterpretations were significant, both in terms of their number and their pivotal relationship with the core competition concerns and the findings upon which Ofcom's regulatory action was founded.*"[33]

5.13 The CAT's judgment was highly critical of the Pay TV Decision, and Ofcom's interpretation of the evidence that it had collected during its inquiry. The CAT found, for example, that Ofcom:

- misstated the facts (paragraph 229);
- came to findings which did not "*represent a full, fair and accurate reflection*" of negotiations involving Sky (paragraphs 308, 319);
- made findings which gave "*a false picture*" of the actual negotiations that were taking place (paragraph 396);
- came to conclusions which were "*at best of little significance and at worst positively misleading*" (paragraph 397);
- made submissions to the Tribunal which were not accurate (paragraph 457);
- was commercially naïve (paragraph 478);
- took a stance in relation to evidence which, when analysed properly "*far from providing support, shows that a significant number of Ofcom's pivotal findings in the Statement are wrong*" (paragraph 496);
- adopted an approach to certain issues in the Pay TV Statement that was "*clearly unsatisfactory*" (paragraph 765) and "*particularly unsatisfactory*" (paragraph 766); and
- adopted "*pivotal findings of fact in the Statement [which were] inconsistent with the evidence, including the contemporaneous documents*" (paragraph 825).[34]

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30 This ground of appeal was left undetermined by the CAT. The CAT argued that it did not need to determine it, given that the basis for the introduction of the WMO regulation put forward by Ofcom was wrong.

31 For example, Sky did not challenge Ofcom's findings on market definition and market power.

32 Paragraph 55 of the Pay TV Costs Judgment.

33 Paragraph 57 of the Pay TV Costs Judgment.

34 All references in this paragraph are to the Pay TV Judgment.

5.14 In the context of the issue of the CAT's approach to appeals on the merits, it is important to appreciate that the CAT set a high bar for overturning Ofcom's Decision. The CAT stated:

> "*In considering whether the regulator's decision on the specific issue is wrong, the Tribunal should consider the decision carefully, and attach due weight to it, and to the reasons underlying it. This follows not least from the fact that this is an appeal from an administrative decision not a de novo rehearing of the matter, and from the fact that Parliament has chosen to place responsibility for making the decision on Ofcom.*
>
> *When considering how much weight to place upon those matters, the specific language of section 316 to which we have referred, and the duration and intensity of the investigation carried out by Ofcom as a specialist regulator, are clearly important factors, along with the nature of the particular issue and decision, the fullness and clarity of the reasoning and the evidence given on appeal. Whether or not it is helpful to encapsulate the appropriate approach in the proposition that Ofcom enjoys a margin of appreciation on issues which entail the exercise of its judgment, the fact is that the Tribunal should apply appropriate restraint and should not interfere with Ofcom's exercise of a judgment unless satisfied that it was wrong.*"[35]

5.15 The CAT also decided that an order for costs in favour of Sky was appropriate, finding:

> "*In our view to deprive Sky of any costs award in these circumstances would not meet the justice of the case, and would not be justified by any of the factors in question, including the risk of a chilling effect on Ofcom's future regulatory action in accordance with its statutory obligations.*"

5.16 Rather than supporting the Government's case for change, the Pay TV case clearly highlights the need for the Government to maintain the status quo. The Pay TV Decision was found by the CAT to be wrong and if left standing would have resulted in a significant miscarriage of justice.

A substantial amount of 'new evidence' was not adduced at the appeal stage

5.17 As noted above, the Pay TV case is cited in the Consultation as an example of cases in which a substantial volume of new evidence is presented at the appeal stage that was not available to the regulator when it took its decision. Citing the Pay TV Judgment, the Consultation refers to "*over 35,000 pages of submissions and evidence, and 41 witnesses (including 14 experts), of whom 25 gave oral evidence*". This argument, however, is incorrect. The majority of the 35,000 pages of submissions and evidence comprised material collected during Ofcom's inquiry, supplied to the CAT by Ofcom. As the CAT observed in the Pay TV Costs Judgment:

> "*By far the most significant material in relation to the various bilateral negotiations with which we were concerned in examing* [sic] *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.*"[36]

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35 Paragraph 84 of the Pay TV Judgment.

36 Paragraph 60 of the Pay TV Costs Judgment. See also paragraph 172 of the Pay TV Judgment, which states: "*Dr Stephen Unger, Ofcom's Chief Technology Officer since September 2009 (formerly, a Director in Ofcom's Competition Group), considers in his evidence each separate bilateral negotiation (described at paragraph 166 above) in considerable detail, and some six related lever arch files of documents were exhibited to his witness statement.*" The documents referred to were principally those collected by Ofcom during its Pay TV inquiry, along with copies of Ofcom's three consultation documents. See also paragraph 77 of the Pay TV Judgment, which states: "*In regard to the disputes of fact, we have been able to read and consider the same documents as Ofcom.*"

5.18 It is clear that the Pay TV case should not be used as a reference point or justification for the proposed changes to the rules of evidence (see further section 7 below).

6. The need to strengthen the end-to-end decision making process instead of focussing on appeals

6.1 The Consultation describes one of the objectives of the current exercise as being to "*minimise the end-to-end length and cost of decision-making*"[37]. The Consultation indicates that this objective may potentially be realised both by changes to appeals processes, but also "*by encouraging timely decision-making by the regulator or competition authority*"[38]. Despite this, in Sky's view the Consultation fails properly to focus on the administrative pre-appeal decision-making process. For example, Chapter 6 of the Consultation, which is the chapter that deals with regulators' decision making, does not consider at all the length of time taken, and cost to those involved, associated with regulators' inquiries.

6.2 Sky considers that this is a significant weakness in the Consultation. It is typically the case that appeals take a much shorter period of time to resolve than the administrative phase that precedes them. Proper consideration of the "*end-to-end*" decision-making process would show that the real problems do not lie with ex post scrutiny of decisions at the appeal stage, which works effectively and in a timely manner, but at the administrative stage. The focus on appeals is a matter of 'the tail wagging the dog'.

6.3 In making this point, Sky is cognisant of the facts that:

- there is relatively little scope for Government to influence these matters, given the independence of regulatory bodies, which Sky fully supports. We raise this point because we believe that it is relevant context to consideration of the impact of appeals on the decision making process; and

- there are often good reasons why administrative inquiries sometimes take a considerable period of time. In particular, (i) the need to gather evidence and analyse it properly, (ii) the complexity of issues that potentially arise, and (iii) the need, as a matter of both good administration and justice, for regulators and competition authorities to consult with affected firms.

6.4 The only proposal in the Consultation that is likely to impact the problems associated with decision-making at the administrative stage is the proposal to introduce confidentiality rings at this stage of regulatory inquiries. Sky is, in principle, in favour of this proposal, but notes that (a) given the scope of commercially confidential data that is normally disclosed in such rings, and the level of resources associated with operating them, we would be concerned if they were to be used excessively, and (b) the areas in which such rings might make a positive contribution to improving decision-making at the administrative stage are relatively limited. Accordingly, we consider that they are likely to have a small but positive impact on regulatory decision-making.

6.5 In general, Sky considers that the real problems with decision-making at the administrative stage are those discussed at paragraph 6.29 of the Consultation: an absence of sufficient transparency and an ongoing significant risk of confirmation bias. These problems may be compounded by inefficient or overly complex internal decision-making processes.

6.6 Problems of insufficient transparency and confirmation bias are difficult to address because they are as much matters of the culture and outlook of a regulatory institution as a matter of the rules under which such an institution operates, but in principle the

[37] Page 4 of the Consultation.

[38] Paragraph 1.13 of the Consultation.

knowledge that decisions may be subject to rigorous scrutiny by an appeal body is of assistance in promoting a corresponding culture of rigour within decision-making bodies.

7. Changing the standard of review and/or the rules on evidence will lead to a less stable regulatory regime and deter investment

7.1 Section 4 of the Consultation sets out the Government's proposed approach to changing the standard of review in competition cases and certain regulatory appeals (such as appeals under s.192 of the Communications Act 2003). The Government's starting position is that the standard of review should be judicial review unless there are reasons for a more extensive review of the regulator's or authority's decision. This would be a retrograde step. The Government has failed to provide a convincing case for changing the current standard of review.

There is no evidence of a need to change to the standard of review

7.2 The Government has not established a compelling case as to why the standard of review should be changed or how a change to the standard of review would achieve the Government's objectives.[39] Sky notes the response of the CAT to the Consultation and the CAT's conclusion that "*changing the standard of review is unlikely to prove itself a "silver bullet"*".[40]

7.3 The Government recognises in section 4 of the Consultation that "*Rights of appeal* against *… decisions [of competition authorities and economic regulators] are crucial to ensure robust decisions are made in the right way"* and form "*an important part of the accountability framework*"[41]. Sky agrees that a robust appeals regime, which necessarily includes a tribunal and an effective standard of review, is a crucial component of the decision making process. The existence of an appeals process will act as a constraint on a regulator and incentivise them to develop robust, well-reasoned and evidence-based decisions.

7.4 The standard of review should reflect the potential significant impact of competition and regulatory decisions on businesses and consumers. This is, in part, why a "merits" standard was originally adopted for such appeals. The Government has not put forward any case as to what factors have changed that mean the "*intensity of scrutiny is excessive*", as argued in the DCMS Strategy Paper, and should be reduced.[42]

7.5 The Government only recently expressed strong support for maintaining the current standard of review. In March 2012, the Government stated that it "*accepts the* strong *consensus from the [Growth, Competition and the Competition Regime] consultation that it would be wrong to reduce parties' rights and, therefore, that full-merits appeal would be maintained in any strengthened administrative system*".[43] It is surprising and of concern that the Government has materially departed from its position, as set out only last year, without explaining what has changed in the last year. The Government's approach is also

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39 In relation to the Government's objectives as set out in the Consultation, Sky notes and supports the comments in the CAT's response as follows: "*These [objectives] seem to us to be rather high level in nature and to show a degree of confusion and contradiction. Even where the objectives are clear, there is a danger that implementing some of the Government's proposals would achieve the opposite result from what was intended.*" (Part 1, paragraph 3).

40 Introduction, paragraph 4(5) of the CAT's response to the Consultation.

41 Paragraph 4.1 of the Consultation.

42 Appeals Section of the DCMS Strategy Paper.

43 BIS, 'Growth, Competition and the Competition Regime: Government Response to Consultation', March 2012, at paragraph 6.18. The original consultation was entitled 'A Competition Regime for Growth: A consultation on options for reform', March 2011 (the "2011 Consultation").

contrary to its commitment to developing "*stable and predictable regulatory frameworks to facilitate efficient investment and sustainable growth.*"[44]

A change to the standard of review would result in uncertainty

7.6 The Government asserts that uncertainty about what a full merits review constitutes leads to lengthy and costly cases. This is simply wrong: the full merits review standard is now well understood by all stakeholders. Indeed, a change to the standard of review would lead to greater uncertainty and longer appeals whilst the CAT and stakeholders seek to understand what the new standard of review entails and how it differs from the standard of review that it replaces.

7.7 In the Consultation, the Government also argues that an appeals regime based on a merits standard leads to regulatory uncertainty and delays decisions as the standard of appeal could "*reduce the credibility of the regulator, particularly where there is a concern that the appeal body could act as a second regulator*". Sky does not agree that the current appeals regime results in undue "*regulatory uncertainty*". Instead, Sky considers that it is bad decisions that result in this uncertainty whereas having an effective right of appeal, combined with the practice and case-law accumulated over the past ten years, contributes significantly to regulatory certainty.

7.8 There is equally little merit in the assertion that appeal bodies "*act as a second regulator*". The proposition that this is not the case is now a standard part of the jurisprudence of the CAT and the CC (in relation to price control matters). Both the CAT and the CC (in its capacity as a reviewer of price control matters) have stated clearly that they afford regulators a wide margin of discretion and deference, and do not act as a duplicate regulatory body. By way of example, in the Pay TV Judgment, the CAT stated:

> "*we agree with Ofcom that when reviewing grounds of appeal from the exercise of its judgment, the Tribunal is not (to borrow the expression of Jacob LJ) acting as a "fully equipped duplicate regulatory body waiting in the wings". An appeal on the merits is not intended to be a re-run of the administrative process or an opportunity to retake the decision (BT v OFCOM, above).*"[45]

There is no problem of regulators being unduly constrained by over-interventionist appeal bodies.

7.9 Changing the current approach would itself generate significant regulatory uncertainty for business. The Government considers that non-judicial review appeals should focus on "*identifying material errors or unreasonable judgments on the part of the regulator*". It is unclear how this differs from the current "merits" standard already in place, which requires the CAT to identify whether a regulator "*got something materially wrong*"[46]. However, plainly there must be some difference given that the Government is consulting on changing the standard of review.

7.10 As we have argued in previous consultations on this issue, it is inevitable that, if the existing powers of review were amended, the precise implications of the changes would not be fully understood by industry (and, indeed, by regulators) immediately. There will no doubt be an extensive period of uncertainty during which the CAT and Court of Appeal grapple with how the proposed judicial review test differs from the "merits" test that currently exists, with all appeals potentially being stayed if there is a reference to the

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44 Paragraph 7 of 'Principles for Economic Regulation', BIS, April 2011.

45 Paragraph 78 of the Pay TV Judgment.

46 Paragraph 31, Court of Appeal, *T-Mobile (UK) Limited* v *Ofcom (Termination Rate Disputes)* [2008] EWCA Civ 1373.

Court of Justice of the European Union under Article 267 of the Treaty on the functioning of the European Union on the application of the revised test.

7.11 The Government states that the term "merits review" can be unhelpful as it is not always clear at the outset how this standard of review will be applied. By way of sole example, the Government suggests that there is a conflict between the CAT recognising that it should be "*'slow' to overturn a decision which is arrived at by an appropriate methodology*" and its position that regulatory decisions should "*withstand profound and rigorous scrutiny*".

7.12 Contrary to the Government's position, ten years of jurisprudence has clarified the standard of review and Sky considers that it is now well understood and settled. It is clear that the CAT is not a "*second regulator waiting in the wings*"[47] and an "on the merits" standard of review does not provide a carte blanche for stakeholders to appeal decisions that they do not agree with. Under the current appeals regime, appeals will be unsuccessful if they relate to errors of fact or judgement that are not significant enough to have an impact on the regulator's or authority's ultimate decision. In light of this, it is wholly unclear why the Government considers there to be a need to change the standard of review, putting aside ten years of CAT and Court of Appeal jurisprudence.

Reducing the accountability of the regulators and authorities

7.13 The key driver behind the Government's proposal to change the standard of review is not whether an appeal ought to be heard. The Government does not expect fewer cases to be heard as a result in the change of the standard of review. The Government's position appears to be that a change in the standard of appeal would result in appeals focusing on fewer issues and involve less scrutiny of the evidence considered. This is of significant concern to Sky.

7.14 The Government considers that "*in some cases appeals are successful and have acted as a valuable check on the regulator*" (emphasis added).[48] This significantly understates the importance of appeals. In many cases appeals are successful and have acted as a valuable check on the regulator. Reducing the degree of scrutiny of regulators' decisions would distort their incentives to carry out a robust analysis and runs directly against the Government's stated objectives of the reforms.

7.15 The House of Lords Select Committee on the Constitution noted the importance of a full merits review in matters of economic regulation, following a major inquiry in 2003:

> "*Our view is that the power of the regulatory state needs to be matched by effective rights of appeal based on the merits of the case. The only right of appeal open to many regulated bodies is the very restricted one of judicial review. This is normally expensive, time consuming and narrow. Delays leave the regulated in a state of potentially costly uncertainty. For many, therefore, it is not a viable option. We believe that there must be a more accessible and efficient appeals mechanism*".[49]

7.16 It is of great concern that the Government now seeks to curb a fundamental right that acts as a constraint on the significant and wide-ranging powers of economic regulators.

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47 The Court of Appeal in T-Mobile v Ofcom noted that: "*it is inconceivable that Art. 4, in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped second regulatory body waiting in the wings just for appeals*" [2008] EWCA Civ 1373, paragraph 31.

48 Paragraph 4.11 of the Consultation.

49 House of Lords Select Committee on the Constitution, 6th Report of Session 2003-04, 'The Regulatory State: Ensuring its Accountability', Volume I, paragraph 14.

Extension to Competition Act appeals and exercise of Broadcasting Act powers for a competition purpose

7.17 We have noted above that - notwithstanding the widespread concerns expressed by industry in relation to the DCMS's previous consultations – the Government has now proposed changes that are even more extensive than those previously on the agenda. Of particular concern to Sky in this context are the proposals to change the standard of review in relation to two types of appeal which currently attract a full merits review: appeals of infringement decisions under the Competition Act 1998; and appeals of decisions by Ofcom to exercise its Broadcasting Act powers for a competition purpose pursuant to s.316 of the Communications Act 2003 ("Broadcasting Competition appeals"). In both cases the decisions of the relevant authority or regulator have the potential to impose far-reaching changes on the way that a business operates in a market - or to be "*undeniably commercially intrusive*", as the CAT put it in the Pay TV Costs Judgment.

7.18 The proposals to change the standard of review for Competition Act appeals and Broadcasting Competition appeals are not supported by evidence of a problem resulting from the current regime, or any cogent reasoning. In respect of Competition Act appeals the Consultation does at least recognise that "*where significant and punitive fines can be imposed, and there may be additional follow-on damages, it is important that the decision is scrutinised to a high standard*"[50]. (We note that fines can pale in comparison to a company's exposure to damages claims, where complainants can rely on a competition authority's or concurrent regulator's decision without scrutinising the facts of that decision).[51]

7.19 Even this recognition, however, grossly underestimates the impact on companies of both Competition Act infringement decisions and Broadcasting Competition decisions. In both cases, the decisions can result in severe and lasting reputational damage[52] and may compel companies to undertake wide-ranging actions, such as changing their business model, granting a licence to use their intellectual property or refraining from engaging in profit-maximising conduct. In relation to Broadcasting Competition decisions specifically, it is notable that the Pay TV Decision resulted in the imposition of an extremely intrusive obligation on Sky to provide wholesale supply of its content to third parties at regulated prices which were even lower than would normally have pertained under a standard Competition Act approach.

7.20 It would be highly inappropriate for Government to change the standard of review in relation to Competition Act and Broadcasting Competition appeals solely on the grounds that it proposes to change the standard of review in relation to other matters of economic regulation. Any changes to the standard of review in these cases will give rise to a significant risk of injustice, particularly given the far-ranging powers to impose remedies and require far-reaching intrusions into a company's business practices. When the powers to make these decisions were originally enshrined in legislation, Parliament carefully considered in relation to each of these cases what type of appeal was appropriate and in each case concluded - without any significant opposition or debate - that the right approach was for a full merits appeal, because it was so obviously in the interests of

50 Paragraph 4.47 of the Consultation.

51 For example, in 2011 the OFT fined Reckitt Benckiser £10.2 million in relation to an abuse of a dominant position. This figure pales in comparison to the value of the NHS's follow on claim, which is estimated as amounting to £90 million.

52 Even being mentioned in an OFT press release can severely damage a company's reputation. In April 2008, the OFT publicly apologised to Morrisons for issuing a press release stating that Morrisons had received a statement of objections in relation to milk, cheese and butter sales (whereas the statement of objections only related to milk products). The OFT also paid Morrisons £100,000 to settle the defamation action.

justice and good administrative decision-making that such decisions should attract the highest level of judicial scrutiny. No good reasons have been put forward by the Government for the proposed change to the standard of review.

7.21 Sky also notes the CAT's comment in relation to the Pay TV appeals that

> "*it is not clear whether the contemplated reformulation of the standard of review so as to create pixelated grounds of appeal would be sufficient to cover such cases. If not, there would be a clear miscarriage of justice as and when such cases arise in the future.*"[53]

The Government should proceed very carefully to avoid the potential for miscarriages of justice arising in the future through wrong regulatory intervention. It is essential to have a robust appeals regime, for all the reasons we have outlined above. The Government has not presented any evidence of proper consideration of the implications of changing the appeals regime in these cases.

"New evidence" and the length of appeals

7.22 The Government proposes to make changes to control the admission of "new evidence" in appeals in order to make appeals more "*manageable*".[54]

7.23 The proposition that appeal bodies receive substantial amounts of "new evidence" – evidence that could and should have been submitted to a regulator before it took its decision – is unfounded. The majority of evidence submitted to the CAT is not "new" evidence, but instead is evidence relied upon by the regulator in making its decision as well as other evidence submitted by interested parties during the administrative phase.

7.24 When genuinely new evidence is submitted to the CAT, this is normally for good reasons as the appellant seeks to address either novel points that did not arise during the administrative phase or to respond to points made by the regulator once clarity is provided as to the importance of a specific point in the final decision.[55] In these circumstances, the CAT can, and does, already exert control on the admission of evidence and parties can (and do) request that evidence be excluded.

7.25 There is no basis at all for a belief that the current approach to the provision of evidence to appeal bodies results in appeals being difficult to manage. The current rules on the admissibility of evidence at the appeal stage work well and have been endorsed by the Court of Appeal.[56] By contrast, the changes in relation to the admission of evidence proposed in the Consultation would be likely to result in further procedural steps and add complexity to the process.

7.26 The Consultation also addresses the proposition that firms may hold back evidence during the administrative stage of inquiries, in order to deploy in an appeal of a regulator's decision. Sky welcomes the Government's statement that there is no evidence to suggest that firms behave in this way. The proposition is in fact wholly without merit. Even if this were considered by the Government, however, to be a significant potential problem, as noted by Sir Gerald Barling:

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53 Paragraph 19 of the CAT's response to the Consultation.

54 Paragraph 6.13 of the Consultation.

55 '080 Preliminary Issue Case', Judgment of the Court of Appeal (Admissibility of evidence) [2011] EWCA Civ 245, Case No: C3/2010/2254, paragraph 62.

56 Sky notes the comments made by the CAT at paragraphs 41 to 44 of its response to the Consultation which clearly show that the current rules on the admissibility of evidence work well and if anything the Government's proposals could result in further complexity and delay.

"*The implication of the consultation seems to be that the CAT either lacks power to prevent this, or is unwilling to use its existing powers to full effect. Neither proposition is in fact correct. 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 to whatever extent the interests of justice require. The CAT can also "punish" culpably late production of evidence by means of its wide discretion to make costs orders.*"[57]

7.27 In a similar manner the Government has also proposed to work with the CAT to reduce timescales for appeals.[58] Sky considers that the proposed timeframes are rather arbitrary and that there needs to be flexibility to allow the CAT to progress appeals depending on the complexity of individual cases. The CAT already seeks to limit the duration of appeals through effective case management and it is not clear whether the proposals will be workable in practice. Sky notes that the Government has suggested a time period of 6 months in straightforward cases. However, there is no guidance on what a straightforward case is, and in Sky's view it would be difficult to draw such a line in practice. It is in the interest of all parties to ensure that cases are dealt with expeditiously and the CAT already sets tight deadlines to achieve this.

7.28 In the interests of justice, parties should be able to submit all requisite evidence, be afforded a reasonable period to prepare and deliver their cases, and the relevant court or tribunal should take sufficient time to consider the merits of these cases accordingly.

8. The current regime is effective but there is scope to make improvements

8.1 The Government has also set out a number of proposals to amend the appeals process in order to seek to increase their efficiency.[59] Some of the proposals have the potential to improve the appeals process but others risk causing additional complexity and uncertainty. Sky has the following comments:

- Price control appeals being referred directly to the CC: Sky considers that there is merit in parties being able to appeal directly to the CC on price controls and this could certainly reduce the time taken for such appeals. However, issues may arise in cases which involve both charge control and non-charge control issues and in that circumstance it may remain necessary to proceed via the CAT in order to allow for more complex case management.

- No appeal of competition non-infringement decisions (on the basis that these decisions can still be appealed through judicial review): this could be beneficial and allow regulators to provide greater certainty to stakeholders.

- Fast-track procedures: these could be beneficial although the current system does allow for this via effective case management.

- Specialist tribunal: Sky considers that it is imperative to maintain a specialist tribunal. The CAT has the necessary expertise to hear regulatory and competition appeals which often involve complex economic analysis.

- Costs: the Government's proposal to only allow costs in the regulator's favour is unfair. The same rules should apply to all parties to appeals and the CAT is well placed within current rules and case law to reach the appropriate decision in the

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57 'Enforcement of the competition rules – next steps for reform', speech by Sir Gerald Barling at the Westminster Business Forum, 10 September 2013.

58 Paragraph 7.11 of the Consultation.

59 Sections 6 and 7 of the Consultation.

interests of justice. This is supported by the position reached by CAT in the Pay TV Cost Judgment where it stated, in awarding costs to Sky that:

> *"If Sky wished to challenge Ofcom's action it had no alternative but to appeal to the Tribunal, and therefore incur further costs over and above the irrevocable costs of regulatory compliance generally and of participation in the Pay TV investigation itself."*[60]

Given that appeals are the only avenue available to challenge regulatory decisions it is only fair that successful appellants should be able to claim their costs if their appeals are found to be justified.

- Administrative bodies should not be more active in scrutinising grounds of appeal. This has the potential to result in uncertainty and lengthy pre-hearings. It is also noted that parties can, today, apply to strike out frivolous appeals and therefore it is not clear whether this proposal will deliver any substantive benefit.

- Single judge at the CAT: Sky considers that it is essential to maintain panels of three members to hear substantive appeals. There may be circumstances, such as case management hearings where a single member may be appropriate but this should not be set out in prescriptive rules.

8.2 **Annex 4**[61] contains details of all appeals of Ofcom decisions to the CAT. This sets out the outcome of the appeals and notes important points of clarification provided by the CAT judgments. Many of these cases have also resulted in procedural improvements and enabled an evolution of the decision making framework.[62]

8.3 A robust case for change has not been established by the Government. Instead, the Government's proposals risk harming growth and investment which will in turn have a negative impact on consumers. It is clear that the current appeals regime works well and delivers significant consumer benefit by subjecting regulatory decisions to profound and rigorous scrutiny to ensure that wrong decisions are corrected. Rather than seeking to fundamentally change the appeals regime, the Government should instead review the current system to improve the decision making process to try to ensure that the right decisions are made.

Sky **September 2013**

60 Paragraph 57 of the Pay TV Costs Judgment.

61 This is an updated version of the table supplied to BIS at a meeting on 18 January 2013.

62 The charge control appeals have resulted in Ofcom sharing non-confidential versions of relevant charge control models during the consultation phase, as well as clarifying important policy positions on issues of principle (for example in relation to the treatment of pension deficit payments, the Regulatory Asset Value adjustment and issues of materiality). Other cases have provided important clarification on the rules relating to the admission of evidence in appeals as well as providing guidance on the interpretation of the merits standard of review.

ANNEX 1 – APPEALS TO WHICH SKY IS OR WAS A PARTY

	Parties/Case	Sky's Role	Reference	Court/Review body	Decision Dates
1.	**Ethernet Determinations** Sky and TalkTalk v Ofcom	Appellant	1207/3/3/13	CAT	Ongoing
2.	**Pay TV (Appeal of CAT Judgment)** BT v Sky (and others)	Respondent	C3/2013/0443	CoA	Ongoing
	Pay TV (excluding Interim Relief hearing and costs) Sky v Ofcom BT v Ofcom Virgin Media v Ofcom Premier League v Ofcom	Apellant/Intervener	1156 - 1159/8/3/10 [2012] CAT 20 [2013] CAT 2 (appeal request) [2013] CAT 4 (other matters)	CAT	CAT's refusal of permission to appeal – 7 February 2013 CAT decision – 8 August 2012 (Pay TV) (subsequent orders made)
	TUTV decision Sky v Ofcom	Appellant	1170/8/3/10 [2013] CAT 4 (other matters)	CAT	CAT decision – 8 August 2012 (Pay TV) (subsequent orders made)

	Parties/Case	Sky's Role	Reference	Court/Review body	Decision Dates
3.	**Verizon UK and Vodafone v Ofcom**	Potential intervener (application to intervene refused – 20 June 2013)	1210/3/3/13 [2013] CAT 15	CAT	CAT ruling – 27 June 2013
4.	**LLU/WLR Charge Control Review** • Sky and Talktalk v Ofcom • BT v Ofcom	Appellant Intervener	Sky – 1192/3/3/12 BT - 1193/3/3/12 [2013] CAT 8	CAT CC	CAT decision – 29 April 2013 CC final determination – 27 March 2013
5.	**Conditional Access modules** Sky v Ofcom	Appellant	1179/8/3/11 [2013] CAT 4 (other matters)	CAT	CAT decision – 8 August 2012 (Pay TV) (subsequent orders made)
6.	**Wholesale broadband access Charge Control** BT v Ofcom (supported by Sky and Talk Talk)	Intervener	1187/3/3/11	CAT CC	CAT decision – 22 June 2012 CC final determination – 11 June 2012
7.	**Wholesale Broadband Access Statement** Talk Talk v Ofcom	Intervener	1186/3/3/11 [2012] CAT 1	CAT	CAT decision – 10 January 2012
8.	**Ethernet Extension**	Intervener	1172/3/3/10	CAT	CAT decision – 3 May 2011

	Parties/Case	Sky's Role	Reference	Court/Review body	Decision Dates
	BT v Ofcom		[2011] CAT 15		
9.	**LLU and WLR Price Control** Carphone Warehouse v Ofcom	Intervener	LLU – 1111/3/3/09 [2010] CAT 26 WLR – 1149/3/3/09 [2010] CAT 27	CAT CC	CAT disposed of appeal – October 2010 CC final determination – 31 August 2010
10.	**ITV acquisition** • Sky v Virgin Media • Sky v (1) Competition Commission (2) The Secretary of State	Appellant	• [2008] EWCA Civ 612 • 1095/4/8/08 [2008] CAT 25 [2008] CAT 35 [2010] EWCA Civ 2	• CoA • CAT CoA	• CoA decision – 6 June 2008 • CAT decision – 29 September 2008 CAT refusal to appeal – 4 December 2008 CoA decision – 21 January 2010
11.	**Rapture Television v Ofcom**	Intervener	1082/3/3/07 [2008] CAT 6	CAT	CAT decision – 31 March 2008

ANNEX 2

SKY'S RESPONSE TO THE GOVERNMENT'S CONSULTATION QUESTIONS

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. For the reasons set out in Sky's main submission, Sky considers that there should be no change to the standard of review.

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?**

   Sky does not agree with the Government's principles for non-judicial review appeals. Sky considers that the current standard of review should be maintained.

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

   As set out in Sky's main submission, Sky considers that moving to a judicial review standard would create significant uncertainty and lead to longer and possibly more costly appeals. This could include significant delays if there is a referral to the Court of Justice of the European Union (EU) or the European Court of Human Rights to determine whether judicial review (or any alternative standard) is compliant with EU rules. Sky, for the reasons set out in the main submission, also considers that revising the standard of review could have an adverse impact on the quality of decision making, which would also harm growth and investment.

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?**

   No, Sky does not consider that there should be a change to the standard of review.

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 the response to question 3 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?**

   No. For the reasons set out in Sky's main submission, Sky does not consider that there should be a change to the standard of review for decisions under the Competition Act 1998.

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 the response to question 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?

No. For the reasons set out in Sky's main submission, Sky considers that there should be no change to the standard of review.

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 the response to question 3 above.

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?

Sky considers that the changes proposed in the Consultation should not be implemented in England and Wales, and therefore the issue of an extension to Northern Ireland is not relevant.

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?

Sky has not considered the impact of this approach to the rail sector.

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?

Sky has focused its response on those regulatory and competition decisions that can currently be appealed "on the merits" and has not considered other regulatory decisions.

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?

Sky has no further comment.

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

Sky proposes to respond to the Government's consultation on the CAT's Rules once that is published.

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?

Sky does not have any comments on this proposal.

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.

Sky agrees that judicial office holders should not be limited to a term of 8 years.

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

As set out in Sky's main submission, Sky considers that it is essential to maintain panels of three judges to hear substantive appeals. There may be circumstances, such as case management hearings where a single judge may be appropriate but this should not be set out in prescriptive rules.

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

Yes, Sky agrees that the Competition Commission should continue to hear appeals against price control and licence modification decisions.

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?

Yes, Sky considers there is merit in being able to refer price control appeals directly to the Competition Commission. However, as set out in Sky's main submission, issues may arise in cases which involve both charge control and non-charge control issues and in that circumstance it may remain necessary to proceed via the CAT in order to allow for more complex case management.

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

Yes, Sky agrees that the CAT is the most appropriate appeal body to hear appeals against *ex ante* regulatory decisions.

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

Sky does not have any comments on this proposal.

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

Sky agrees that it could be more efficient to have a single appeal body hearing appeals against regulatory enforcement decisions.

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?

Sky considers the CAT to be the most appropriate appeal body to hear appeals against regulatory enforcement decisions.

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?

Sky does not have any comments on this proposal.

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

Sky considers that appeals of Ofcom dispute determinations should continue to be heard before the CAT as these are essentially regulatory disputes and there may be benefit in other dispute resolution appeals also being heard before the CAT.

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?

Sky considers the CAT to be the most appropriate appeal body to hear dispute resolution appeals.

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

Yes, Sky considers that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998.

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

Yes. Confidentiality rings could deliver strengthened decision making and reduce the likelihood of appeals. See further section 6 of Sky's main response.

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?

Please see further section 6 of the body of Sky's main response.

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?

No, for the reasons set out in Sky's main response, Sky considers that the CAT already exerts sufficient control over the admission of new evidence and the application of the current rules is settled.

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, Sky does not consider that there should be any changes to the current approach to new evidence.

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?

No. As set out in Sky's main response, Sky considers this proposal to be unfair. Cost rules should be reciprocal in nature.

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

Sky considers that the current rules and practice around cost awards works well and no changes are necessary.

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?

Sky considers that no change is necessary and it is already open to administrative bodies to challenge appeal grounds at an early stage.

35. 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.

Sky considers that it is already open to the CAT to strike out appeals at an early stage.

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

Yes, Sky considers that introducing changes in decision makers between investigation and final decisions could strengthen regulatory decision making, as would enhanced use of state of play meetings and improved access to decision makers at oral hearings. However, these changes do not provide the same degree of regulatory accountability as an effective appeals mechanism and should not be considered substitutes for a full merits appeal.

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?

Yes, greater and earlier access to the relevant regulator's file and earlier consultation could reduce the likelihood of appeal.

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

No. The regulators already have a wide range of powers to seek information.

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

Sky does not have any comments on this proposal.

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?

No, Sky considers that the CAT manages its case load and hearings effectively.

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

No, Sky is wary of imposing arbitrary statutory time limits in the absence of a clear concern.

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, for the reasons set out in Sky's main submission, Sky considers that the CAT effectively manages evidence and expert witnesses.

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?

Sky considers that the CAT is well placed to use its existing case management powers to fast track cases.

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?

It may be necessary to amend the time limit to allow for increased case management in the event that charge controls are referred directly to the CC.

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?

Sky does not have any comments on this proposal.

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?

Sky does not have any comments on this proposal.

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

Sky considers that case management is generally effective.

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

Sky has no further comments.

Sky **September 2013**

ANNEX 3 – CLARIFICATIONS MADE BY THE CAT AND COMPETITION COMMISSION IN RELATION TO APPEALS UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003 AND SECTIONS 46 AND 47 OF THE COMPETITION ACT 1998 AND CORRECTIONS TO ARGUMENTS MADE BY BIS IN THE CONSULTATION

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
"One Way Bet" "In the communications sector in particular, the Government is concerned that appeals may sometimes be seen as a one-way bet…" - p. 4, "**Foreword from the Minister for Employment Relations and Consumer Affairs**"	"Parliament cannot have intended that an appeal on the merits in a public interest setting should be a guaranteed one way bet, but there are two separate legislative policy aspects to that conclusion. First, that this is not just a matter of the private interests of an appellant. Your concern is that the appeal process gets the right answer in light of the statutory policy objectives in the Communications Act and the Directives. The second is that you have the consideration which we pressed in our submissions and which Ofcom have also indicated that they are concerned about that otherwise you will see a proliferation of appeals – some protective, some adventurous (if it is a guaranteed one way bet) which would result in our submission from an unduly narrow interpretation of the Act." - Hutchison 3G v Ofcom, British Telecommunications Plc v Ofcom, Case Management Conference, [2010] EWCA Civ 391, Case No 1083/3/3/07, 1085/3/3/07, p. 40, lines 5-15	Appeals are not a one way bet. The Government's focus should be on ensuring that the regulator makes the right decision, and the appeals process should facilitate this by providing robust scrutiny of the regulatory decision.
"A Second Regulatory Body" "…a chance to re-open regulatory decisions…" - p. 4, "**Foreword from the Minister for**	"…it is inconceivable that Art. 4, 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 appeals." - T-Mobile v Ofcom, judgment of the Court of Appeal [2008] EWCA Civ 1373, Case No: C1/2008/2257, 2257(A) and 2258 ,	The Tribunal is not expected to be a 'duplicate body' involved in completely retaking the decision taken by Ofcom. The Tribunal plays an adjudicatory and appellate function, not an administrative or

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
Employment Relations and Consumer Affairs" "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." - p.11, para 1.12, "**Streamlining Regulatory and Competition Appeals**" "The Government believes that appeals should focus on identifying material errors or unreasonableness in regulatory decisions, rather than providing for a second body to reach its own regulatory judgement. This preserves regulatory accountability and the rights of parties to challenge decisions, while ensuring the system is efficient and allows regulators to take timely decisions." - p.30, para 4.18, "**Streamlining Regulatory and Competition Appeals**" "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." - p.23, para 3.18, "**Streamlining Regulatory and Competition Appeals**"	page 7, para 31 "We have however borne in mind that Ofcom is a specialist regulator whose judgement should not be readily dismissed." - Carphone Warehouse v Ofcom (LLU), CC Determination, Case No. 1111/3/3/09, p. 1-9, para. 1.32 "[The CC's role]…under section 193 is not to exercise an original or investigative jurisdiction. That is OFCOM's role." - BT and others v Competition Commission [2012] CAT 11, p. 41, §118(2)(ii) "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." - British Telecommunications PLC (Termination Charges: 080 Calls) v Ofcom [2010] CAT 17, Case No. 1151/3/3/10, p. 21, para. 76 "Under Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services [2002] OJ L 108/33, 24.4.2002 ("the Framework Directive"), each Member State must designate a national regulatory authority ("NRA") to carry out the regulatory tasks set out in the CRF…. The United Kingdom's NRA is OFCOM." - Vodafone v Office of Communications [2008] CAT 22, Case No. 1094/3/3/08, p. 7, para. 11	investigatory role. Thus, the Tribunal, in deciding the appeal 'on the merits' is only doing so 'by reference to the grounds of appeal as set out in the notice of appeal'. The Tribunal does not have an independent investigatory role and is not considering the correctness of every part of the Decision, only those parts that are challenged in the Notice of the Appeal. When points are properly raised in the Notice of Appeal, the Tribunal must in an appeal on the merits as a specialist court designed to be able to scrutinise the detail of regulatory decision in a profound and rigorous manner, decide whether Ofcom's decision was the right one. In Vodafone v Ofcom, the CAT recognised that Ofcom is the national regulatory authority, thereby drawing a distinction between itself and Ofcom.

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
	"Although the Tribunal is an expert and specialised body, it is not set up as a second tier regulator of the sector, and it seems to me that, absent new evidence which shows that the factual basis on which Ofcom proceeded was wrong, or an error of law, the Tribunal ought to respect the policy decisions and matters of judgment involved in Ofcom's decisions. To an extent the Tribunal did so, for example as regards respecting Ofcom's policy preference as regards the pricing of 080x calls. Consistently with that, it does not seem to me that it was open to the Tribunal to balance the various potentially conflicting considerations relevant to the regulatory objectives in a different way from that adopted by Ofcom, unless an error could be shown in Ofcom's approach. Nor, to be fair, was it argued before us that this is what the Tribunal had done. The basis for their disagreement with the conclusion reached by Ofcom was that Ofcom's approach had been wrong because of the three misdirections identified, not that Ofcom had considered the right questions on the right material but had weighed up the relevant factors wrongly: see paragraph 231 where the Tribunal said: "Accordingly, we consider that we must ask ourselves … whether the approach in fact adopted by Ofcom was a "wrong" approach". - Termination Charges: 080 Calls, Judgment of the Court of Appeal, [2012] EWCA Civ 1002, Case Nos. C3/2011/3121, 3124, 3315, 3316 and 2012/0692, para. 90	

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
Appeals are a "Gaming Tactic" "There is also a risk that appeals are used as a gaming tactic either to delay specific decisions or more generally to discourage regulators from making more radical or controversial decisions because of fear of appeal." - P.11, para 1.12, "**Streamlining Regulatory and Competition Appeals**" "…there are concerns that the cumulative effect of regulatory appeals can be to make regulators overly risk-averse, and delay important regulatory decisions." p.26, para 3.31, "**Streamlining Regulatory and Competition Appeals**"	"…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…" - Vodafone v Office of Communications [2008] CAT 22, Case No. 1094/3/3/08, p. 21, para. 46 "It is the duty of a reasonable regulator to ensure that the important decision it takes, with potentially wide ranging impact on history, should be sufficiently convincing to withstand industry, public and judicial scrutiny." - Vodafone v Office of Communications [2008] CAT 22, Case No. 1094/3/3/08, p.21, para. 47	The focus of Appeals reform should emphasise the importance of the regulator getting it right the first time and ensure that the right decisions are made. Appellants do not seek to "game the system" but only bring appeals after careful consideration of the likelihood of success and commercial impact.
Admissibility of New Evidence "…, 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." - p.24, para 3.23, "**Streamlining Regulatory and Competition Appeals**" "The Government is minded to set out in statute the scope of the CAT's discretion in Competition Act and Communications Act cases (where the	"Unlike the normal practice in judicial review proceedings, the Act and the Tribunal Rules envisage that the Tribunal may order the production of documents, hear witnesses and appoint experts… and may do so even if the evidence was not available to the Director when he took the decision." - Napp Pharmaceutical Holdings v DGFT [2002] CAT 1, Case No. 1001/1/1/01, p. 28, para. 117 "Napp Pharmaceutical holdings v The Director General of Fair Trading [2002] CAT 1, [2002] Comp A R 13 at [134]. In that case the CAT referred to it as virtually inevitable that, at the judicial stage, certain aspects of the decision were explored in more detail than during the administrative procedure, and that it might be appropriate for the CAT to receive further evidence and hear witnesses."	As established from case law, the rules on evidence are clear and well understood, with the CAT acting as a strong gatekeeper in the application of these rules.

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
focus is on the merits of the decision) along similar lines: permission to adduce new evidence should only be granted if the person wishing to introduce it shows good reason, the evidence could not reasonably be expected to have been placed before the administrative authority, the evidence is likely to have an important effect on the outcome of the appeal and it is in the interests of justice (including any potential prejudice that other parties might suffer) that the evidence be admitted." p.61, para 6.13, "**Streamlining Regulatory and Competition Appeals**"	- 080 Preliminary Issue Case - Judgment of the Court of Appeal (Admissibility of evidence) [2011] EWCA Civ 245, Case No: C3/2010/2254, para. 62 "[The CC] noted that the effect of the exclusion of the material would be to dismiss a ground of appeal which would otherwise succeed. The probative value of the fresh evidence was high since Ofcom did not challenge the substance of the point made on the basis of fresh evidence… …Over all, we concluded that it was in the interests of justice to admit the evidence." - British Telecommunications Plc v Ofcom, BskyB Ltd and TalkTalk Telecom Group Plc v Ofcom, Competition Commission Determination, Case Nos. 1193/3/3/12, 1193/3/3/12, p. 1-21, paras. 1.80 & 1.84 "Where a decision can be challenged by way of a merits appeal, it is incumbent upon an appellant to show – if necessary by way of new evidence – that the original decision was wrong "on the merits". It is not enough to suggest that, were more known, the Tribunal's decision might be different." - TalkTalk Telecom Group plc (Wholesale Broadband Access Charge Control) v Ofcom, CAT Judgment [2012] CAT 1, Case No: 1186/3/3/11, p. 55, para. 134 "The task of the appeal body referred to in Article 4 of the Framework Directive is to consider whether the decision of the national regulatory authority is right on "the merits of the case". In	

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
	order to be able to make that decision the Framework Directive requires that the appeal body "shall have the appropriate expertise available to it". There is nothing in Article 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal. The expression "merits of the case" is not synonymous with the merits of the decision of the national regulatory authority. The omission from Article 4 of words limiting the material which the appeal body may consider is unsurprising. When an appeal body is given responsibility for considering the merits of the case, it is not typically limited to considering the material which was available at the moment when the decision was made." - 080 Preliminary Issue Case - Judgment of the Court of Appeal (Admissibility of evidence) [2011] EWCA Civ 245, Case No: C3/2010/2254, para. 60	

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
Merits Review "The term "merits review" can be unhelpful as it is not always clear at the outset how this standard of review will be applied in any particular case. For example in Vodafone Limited v Office of Communications undertaking a merits review, the CAT recognised that there may be no single "right answer" to a dispute, and would be "slow" to overturn a decision which is arrived at by an appropriate methodology; whereas in other merits review cases the CAT has adopted a more amorphous test, namely that a decision should 'withstand profound and rigorous scrutiny'." - p.29, para 4.9, "**Streamlining Regulatory and Competition Appeals**" "The term 'merits review' can result in different levels of scrutiny, so having more well-defined grounds of appeal for these types of reviews will provide greater clarity and certainty up front." - p.30, para 4.21, "**Streamlining Regulatory and Competition Appeals**"	"However, this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 statement is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts the point made by H3G in their Reply on the SMP and Appropriate Remedy issues that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner. The question for the Tribunal is not whether the decision to impose a price control was within the range of reasonable responses but whether the decision was the right one." - Hutchinson 3g UK Ltd v Office of Communications ("H3G (No 2)") [2008] CAT 11, Case No. 1083/3/3/07, p. 67, para. 164 "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. The Tribunal notes in this regard the position as set out in OFCOM's Guidelines, which, at paragraph 5.30, provide that sensitivity analysis "should help ensure that the Impact Assessment and the final policy decision are more robust"." - Vodafone v Office of Communications [2008] CAT 22, Case No. 1094/3/3/08, p. 21, para. 47 "…the Tribunal should apply appropriate restraint and should not interfere with Ofcom's exercise of a judgment unless satisfied that it was wrong." - British Sky Broadcasting Limited & Ors v Ofcom [2012] CAT 20, Case No. 1156-1159/8/3/10, p. 40, para. 84 (d)	There is now a clear understanding of the scope of a merits review. Case law shows that in certain circumstances, Ofcom is entitled to a particularly broad margin of discretion and the courts appear to be providing greater deference to Ofcom (see for example the recent WBA appeal where the CAT upheld Ofcom's decision despite certain deficiencies in Ofcom's decision). An appeal on the merits will mean that we are not concerned solely with whether the findings are adequately reasoned but also with whether those reasons are correct. The CC has also made it clear that even in an appeal on the merits it may be necessary to consider the quality of Ofcom's reasoning. The standard of review is necessarily a flexible one dependent on the specific nature and context of the allegations being made against Ofcom in a given case. It is appropriate to accord a more generous margin of discretion to a regulator in respect of judgments of about future events, in relation to which there is an inherent element of

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
	"…if, in a future appeal, we considered that the absence or inaccuracy of reasons adopted by a regulator meant that we could not understand the decision that had been reached, we might well conclude that the end result could therefore not be justified on the material before us." - Carphone Warehouse v Ofcom (LLU), CC Determination, Case No. 1111/3/3/09, p. 1-9, para. 1.31 "…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." - TalkTalk Telecom Group plc (Wholesale Broadband Access Charge Control) v Ofcom, CAT Judgment [2012] CAT 1, Case No: 1186/3/3/11, p. 36, para. 79 "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." - TalkTalk Telecom Group plc (Wholesale Broadband Access Charge Control) v Ofcom, CAT Judgment [2012] CAT 1, Case No: 1186/3/3/11, p. 52, para. 124 "…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	uncertainty. Applying a full merits standard means that a decision that would have been struck down on judicial review can be salvaged. In TalkTalk (WBA Charge Control) v Ofcom, it was held that hearing the case on its merits would remedy a fatal procedural defect in the original decision.

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
	reasonable and which might have resulted in a resolution more favourable to its cause." - T-Mobile and others v Ofcom, Core judgment [2008] CAT 12, Case Nos. 1089/3/3/07, 1090/3/3/07, 1091/3/3/07, 1092/3/3/07, p. 37, para. 82 "…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." - Telefonica O2 Ltd v British Telecommunications PLC (Termination Charges: 080 calls), Court of Appeal judgment [2012] EWCA Civ 1002, Case Nos. C3/2011/3121, 3124, 3315, 3316 and 2012/0692, para. 67 "…the Tribunal will, whilst still carrying out an assessment of the merits of the case, give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would also have been reasonable and which might have resulted in a resolution more favourable to its case." - Albion Water Limited v Water Services Regulation Authority [2008] CAT 31, Case No. 1046/2/4/04, p. 25, para. 72	

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
Materiality "Appellants should be able to bring an appeal where a decision may be wrong in law. This is a basic right of appeal and well understood in the UK's legal system. The Government's view is that appeals should consider whether an error of law is material – that is, significant enough to have an impact on the ultimate decision. Therefore, not all errors of law will result in overturning a decision." - p.30, Box 4.1, , "**Streamlining Regulatory and Competition Appeals**" "Appellants should be able to bring an appeal where the regulator may have got facts wrong in reaching a decision. Appellants must demonstrate the error was material to the final outcome. "Material" means an error of fact which is significant enough to have an impact on the ultimate decision, so that it might be different. Therefore, not all errors of fact will result in overturning a decision." - p.31, Box 4.1, , "**Streamlining Regulatory and Competition Appeals**" "Appellants should be able to bring an appeal where there may have been a procedural irregularity. A "procedural irregularity" involves the procedure by which a decision was reached, it concerns matters of natural justice. For example, circumstances where a decision maker appears to be biased or where a consultation process was so	"Where a ground of appeal relates to a claim that Ofcom has made a factual error or an error of calculation, it may be relatively straightforward to determine whether it is well founded. Where, on the other hand, a ground of appeal relates to the broader principles adopted or to an alleged error in the exercise of a discretion, the matter may not be so clear. In a case where there are several 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. On the other hand, if, out of the alternative options, some clearly had more merit than others, it may more easily be said that Ofcom erred if it chose an inferior solution. Which category a particular choice falls within can necessarily only be decided on a case-by-case basis." - Carphone Warehouse v Ofcom (LLU), CC Determination, Case No. 1111/3/3/09, p. 1-9, para. 1.32 "The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate decision is based are wrong, and second, it must show that its proposed alternative price control measure should be adopted by the Commission. If the Commission (or Tribunal in a matter unrelated to price control) concludes that the original decision can be supported on a basis other than that on which Ofcom relied, then the appellant will not have shown that the original decision is wrong and will fail." - Mobile Call Termination, Judgment of the Court of Appeal [2013] EWCA Civ 154, Case No: C3/2012/1523, para. 24	The approach to issues of materiality has already been clarified by case law, examples of which have been provided in this table, particularly with reference to the CC's Determination in British Telecommunications Plc v Ofcom, BskyB Ltd and TalkTalk Telecom Group Plc v Ofcom, which sets out guidance on materiality.

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
inadequate as to be unfair, with the result the regulator was not equipped with the material it should reasonably have obtained had it consulted properly. Appellants must demonstrate that the procedural irregularity was material to the decision, i.e. that it was significant enough to have an impact on the ultimate decision so that it might be different. Therefore, not all procedural irregularities will result in overturning a decision." - p.31, Box 4.1, "**Streamlining Regulatory and Competition Appeals**"	"…we have considered materiality when deciding whether it is proportionate for the error to be corrected. In terms of materiality in remedies we do not specifically look at the value of the error as such but at the balance between the effort and effect (or cost and benefit) of correcting such error." - The Carphone Warehouse Group plc v Office of Communications (Local Loop Unbundling), Competition Commission judgment, Case No. 1111/3/3/09, p. 1-15, para. 1.65 "We consider that there is force in Ofcom's submission that our task is to identify whether Ofcom's decision has been shown to be materially in error. But we have not found it possible to set out a general approach to the assessment of materiality. In practice considerations of materiality are not amenable to a formal analytical scheme. We have considered materiality on a case-by-case basis as part of our analysis of specific criticisms made by CPW of Ofcom's decision making." - The Carphone Warehouse Group plc v Office of Communications (Local Loop Unbundling), Competition Commission judgment Case No. 1111/3/3/09, p 1-14, para. 1.61 "In each case, we took into account the following factors, none of which we viewed individually as necessarily defining a sufficient condition for materiality: (a) the impact of the mistake as a percentage of the relevant charge control; in this context, we noted the CC's determination in Carphone Warehouse (LLU) that where the impact is below 0.1 per cent, the mistake is unlikely to be capable of producing a material effect on the charge control; in those circumstances it fell within an	

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
	acceptable margin of error for a regulator. In our view, this is not, and was not intended to be, a bright-line test for the assessment of materiality. The impact of the mistake as a percentage of the charge control is but one factor in an overall assessment based on all the circumstances of the case; (b) the effort that Ofcom would have had to expend to consider and address fully appellants' criticisms; we noted that this factor may in some instances overlap with the assessment of whether or not it is proportionate for a material error to be corrected; (c) persistency, i.e. whether, if the mistake were not corrected, it would be likely to be repeated or produce effects that persist for longer than the current price control period; (d) whether the mistake relates to a matter of economic or regulatory principle; (e) whether the mistake has a distortive effect in that it works in different directions or impacts to a different extent on different products or services, thus potentially distorting competition between them; (f) the impact of the mistake on any particular companies that are affected if the error is not corrected, and whether this could distort competition between different providers; and (g) any other factors that may be relevant in the particular context of the issue under consideration." - British Telecommunications Plc v Ofcom, BskyB Ltd and TalkTalk Telecom Group Plc v Ofcom, Competition Commission Determination, Case Nos. 1193/3/3/12, 1192/3/3/12, p. 1-17, para. 1.60	

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
<u>Reciprocal Costs</u> "In a number of other regulatory systems (such as in professional disciplinary proceedings) the practice has been to go further so that for example costs are only awarded when the regulator's conduct is in bad faith, unfair or unreasonable. In the Government's view requiring the regulator to behave unfairly or unreasonably for it to bear costs (absent exceptional circumstances) might strike a balance between the interests of appellants and the need to avoid a chilling effect on a regulator exercising public responsibilities in an environment in which many of the players are extremely well resourced." P.61, para 6.23, "**Streamlining Regulatory and Competition Appeals**" "In cases in which regulators are successful there has historically been a tendency for them to claim only their external legal costs. The Government would encourage regulators to claim the full costs, including their in-house legal costs, when successful in an appeal." - p.61, para 6.25, "**Streamlining Regulatory and Competition Appeals**"	"…it is certainly a relevant consideration whether and if so to what extent in any particular case the possibility of a substantial award of costs is likely to have a chilling effect on Ofcom doing what it considers to be appropriate in the exercise of its statutory duties. However, whatever the position may have been in the infancy of the current regulatory regime, we are not persuaded that the risk that a mature and responsible regulator such as Ofcom would be deflected by that consideration is of itself so substantial as to justify accepting as a general principle that an adverse order for costs should not be made against Ofcom in section 192 appeals." - Pay TV, Ruling ((1) Costs and (2) Disposal of FAPL's appeal) [2013] CAT 9, Cases No's: 1152/8/3/10 (IR) 1156-1159/8/3/10 1170/8/3/10 1179/8/3/11, p. 6, para. 15	Any rules on costs should be reciprocal. To award costs only to the regulator would be unfair. Appeals tend to be costly and liable to leave the appellant business commercially and financially vulnerable as it can create a lengthy diversion from their normal business activities. The appellant in a successful appeal can only expect to recover a proportion of its total costs, while an unsuccessful appellant will have to bear not only its own costs but also the possibility of covering the costs of other parties.

BIS Statement	Settled Position in Case Law (where applicable)	Sky Comment
Points of clarification provided through appeals / Regulatory Uncertainty "At the same time, the Government is concerned that some appeals can be lengthy and expensive, increasing regulatory uncertainty." - p. 4, "**Foreword from the Minister for Employment Relations and Consumer Affairs**"	Key principles have been clarified in case law, for example: - Pension Deficit Repair costs in British Telecommunications PLC (Wholesale Broadband Access Charge Control) v Office of Communications CC Determination, Case No. 1187/3/3/11 where BT's argument was rejected and it was clarified that Ofcom's policy of no-introspection and the fact that PDRs are retrospective corrective payments, meant that Ofcom was entitled to disallow future PDR payments. - RAV Adjustments in British Telecommunications PLC v Office of Communications (LLU/WLR Charge Control March 2012) CC Determination, Case No. 1193/3/3/12, where BT's argument that the RAV adjustment would act as a deterrent on investments by existing or new competitors was rejected and it was clarified that though it could theoretically deter investment on the network level, it was unlikely to deter *efficient* investment and that the RAV adjustment was "superior on the grounds of allocative and productive efficiency and promotes competition at the LLU level". - Cumulo Rates in British Telecommunications PLC v Office of Communications (LLU/WLR Charge Control March 2012) CC Determination, Case No. 1193/3/3/12 where the CC rejected the criticisms of Ofcom's approach to cumulo rates, as well as rejecting the alternative approaches proposed by Sky/TalkTalk and affirmed Ofcom's approach of allocating cumulo rates between different products using a method based on PWNRC. .	Important issues have been settled through the appeals process, reducing the likelihood of further appeals and increasing regulatory certainty. We note that as a result of the Charge Control litigation, Ofcom now provides access to cost models.

BT

BT's Response to the Consultation by the Department for Business Innovation & Skills:

"*Streamlining Regulatory and Competition Appeals*"

11 September 2013

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Executive Summary

1. The communications sector in which BT operates is one of the UK's greatest success stories. Generating annual revenues of over £50 billion and enabling growth through increases in productivity across the country, our sector is crucial to the Government's growth agenda as the economy slowly emerges from recession. A strong regulatory environment, which fosters competition and generates substantial benefits for consumers, is a necessary part of that success. The important work conducted by Ofcom (and its predecessor, Oftel) to open up markets to competition and foster new entry is a crucial part of that environment.

2. The UK should, therefore, be justifiably proud of its regulatory regime, including its appeals regime. As a result of competition and new entry, we enjoy the lowest landline telephony and broadband prices amongst the major EU economies. Moreover, in contrast to the position in other sectors, prices for communications services in the UK have fallen substantially in real terms consistently since 1990.

3. However, with very strong regulatory powers such as those enjoyed by Ofcom comes the necessity for sufficient checks and balances: the greater the powers, the greater the need for safeguards to ensure the quality and rigour of decisions made.

4. BT's interest in the Government's consultation "*Streamlining Regulatory and Competition Appeals*" ("the Consultation") results from its position as perhaps the largest single stakeholder in both the competition and regulatory regimes in the communications sector. The Consultation also strikes at the very heart of the interests of citizens and consumers in the sector, many of whom are BT customers.

5. BT welcomes the opportunity to respond to the Consultation and supports the core objectives of streamlining appeals and enabling regulators to take timely and robust decisions. Indeed, many of the proposals now contained in the Consultation are ones that BT has previously put to Government in response to earlier public consultations. As before, BT stands ready to work with regulators, competition authorities and industry more widely in order to ensure that the need for appeals can be minimised and that where appeals

are still needed, the appeals regime is as efficient and cost effective as possible, to the consequent benefit of all stakeholders. In particular, BT considers that Ofcom's processes should be reformed at the administrative level which would assist with the goal of ensuring robust, correct and fair decisions and which would reduce the need for appeals. BT submits that the Competition Appeal Tribunal's ("CAT") and Competition Commission's ("CC") procedures at the appeal stage should be reformed, which would bear fruit in terms of streamlining the appeals process without the risk of generating unintended negative consequences. Examples of potential reforms include mechanisms to assist with greater transparency, stricter case management and a more effective allocation of resources between appeal bodies. BT also sees merit in setting out the position with respect to evidence more clearly. It could benefit all parties to have the developing case law from the appeal bodies effectively codified in policy guidance, without the need for legislative change. BT provides further detail in relation to these constructive proposals in Section 2.

6. However, BT is extremely concerned that certain changes proposed in the Consultation will not achieve its stated objectives and will, instead, severely undermine vital protections against flawed administrative decisions. In particular, BT is strongly opposed to the proposal to remove a regime of appeal on the merits and believes that it would, if adopted, seriously undermine BIS' goals (which we support) of an appeals regime which is efficient, effective, and which helps to achieve better regulatory decisions. Given the magnitude of the decisions that Ofcom can make, affecting billions of pounds of company value, it is right and proper that, if their decisions are wrong, it should be possible that they are overturned. It is insufficient when such sweeping powers are available that they should only be subject to judicial review for being factually or legally incorrect, or procedurally flawed. Such a radical change would result in the opposite outcome, a lower standard in the quality of decisions to the detriment of outcomes for end-users in the sector and, ironically, more litigation and with cases taking longer to reach a final conclusion. In short, implementation of the main recommendations in the proposal will not improve the quality of decision making by regulators, it will make it harder to overturn bad decisions, it will not streamline the regulatory appeals process and it will damage the interests of competition and consumers. Finally, given the

experience overseas, where making similar changes to the standard of review led to higher prices, to the detriment of consumers and business, BIS should exercise the utmost caution before implementing changes to a regime that is working well.

7. BT expands upon these points in its submissions and responses below, but in summary BT submits that:

(a) The main proposals in the Consultation have been developed without considering and taking proper account of the commercial environment, and without proper consideration of whether the fact that there are more appeals in certain sectors compared with others is actually a problem, and why this phenomenon arises (Section 3).

(b) The main reforms proposed will not deliver the laudable objectives BIS has set for this Consultation, but rather they will harm the Government's growth agenda, the interests of consumers and competition in the UK (Section 4).

(c) When properly analysed and understood, the evidence put forward in the Consultation does not support the conclusions reached by BIS. Considered properly and in context, the "problems" identified (such as inordinate delays, uncertainty and costs) are either over-exaggerated or simply do not exist. Furthermore, some of the evidence base relied on involves appeals which were undertaken early in the lifetime of the current appeals regime, before it had "bedded down" (Section 5). In this regard, we also refer BIS to the analysis of the Impact Assessment undertaken by Towerhouse Consulting LLP which reaches the same conclusions and which we adopt as a part of our response.

(d) BT also considers that, if implemented in full, the proposals would have detrimental consequences on important issues such as the standard of review, evidence and regulatory decision making and (if as a result of a successful appeal, the issue had to be remitted for reconsideration) the time taken to finally dispose of the case (Section 6).

8. Instead of potentially seismic and untested changes to the standard of review, BT considers that the important objectives of the Consultation could more proportionately and effectively be met by other less intrusive means.

9. In summary, BT supports the objectives of the proposed reforms but not the means chose. We stand ready to work with regulators, appeal bodies and industry more widely in order to achieve these objectives, which it should be possible to achieve in a timely and effective manner.

Section 1. Introductory Remarks

10. The Government's Consultation strikes at the very heart of the interests of citizens and consumers in the communications sector. BT welcomes the opportunity to respond to the Consultation and supports the core objectives of enabling regulators to take timely and robust decisions and streamlining appeals where these remain necessary. BT considers that a number of the proposed reforms, including mechanisms to assist with greater transparency, stricter case management, allowing those with relevant expertise to continue to serve in the CAT for longer periods, and a more effective allocation of resources between appeal bodies, will enhance the way the appeals regime works and deliver real benefits to all stakeholders.

11. However, as a substantial stakeholder in both the competition and regulatory spaces, BT is deeply concerned that some of the changes proposed in the Consultation, by contrast, will severely undermine vital protections against flawed administrative decisions. In particular, BT considers that the proposal to remove the regime of appeal on the merits would, if adopted, seriously jeopardise the Consultation's goal of an appeals regime which is efficient, effective, and which helps to achieve better regulatory decisions. It would result in the opposite outcome. In short, implementation of the recommendations in the proposal will not improve the quality of decision making by regulators, it will make it harder to overturn bad decisions and it will not streamline the regulatory appeals process – rather, it will lead to more, and longer, appeals.

12. To set this response in context, BT makes the following over-arching introductory remarks.

13. Firstly, Ofcom, the OFT and other sectoral regulators have recourse to far-reaching and potentially draconian powers under the Competition Act 1998 ("the 1998 Act") and Communications Act 2003 ("the 2003 Act"). The following are illustrations of just some of Ofcom's extensive regulatory and competition powers:

    (a) The ability to set the commercial terms (including in relation to the services to be provided and the prices, terms and conditions on which they are offered) for products offered by BT or other communications providers in markets where they are found to have significant market

power (section 45 of the 2003 Act); around £5.5 billion of BT's revenue (of which around £3 billion is to downstream parts of BT) is from wholesale markets which are currently subject to regulatory charge controls. Ofcom regularly imposes price controls that take hundreds of millions of pounds of profit from BT[1], which amount to billions of pounds of equity value of the business; it is right and proper that decisions of such magnitude are subject to appeal on the merits;

(b) The ability to change the terms and/or conditions upon which BT can contract with other CPs (and vice versa), and to require the payment of hundreds of millions of pounds in retrospective payments (section 190 of the 2003 Act);[2] and

(c) The ability to fine non-compliant companies potentially huge sums of money for compliance or competition law breaches (section 96 of the 2003 Act and section 36 of the 1998 Act).

14. BT welcomes the existence of regimes where, when necessary, regulators can intervene decisively, proportionately and effectively in order to ensure markets become, or remain competitive, and that non-compliant behaviour is remedied. We agree with BIS that they play a vital role in ensuring that the interests of consumers are promoted, that competition is protected, and promoted wherever economically viable, and hence that industry can help deliver the Government's growth agenda. However, BT firmly believes that with such strong regulatory powers comes the imperative to have in place a robust system of appeal on the merits.

15. We do not wish to see the current system of judicial scrutiny, which balances well the interests of the different stakeholders, put at risk by the

[1] In BT's 2013 Annual Report we stated (page 39) that we expect the recent charge controls on Ethernet and private circuits to have a net negative year-on-year impact of around £50m-£100m on group revenue and EBITDA in 2013/14 with a further similar impact in 2014/15. BT also noted that "*The charge controls for WLR, LLU and ISDN30 products which became effective in April 2012 had a negative impact of around £120m on group revenue and EBITDA in the year and that we expect a further impact of around £120m in 2013/14*."

[2] By way of illustrative examples, in 2009, Ofcom required BT to pay third parties over £40 million in respect of a dispute relating to partial private circuits (see "*Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and COLT and BT regarding BT's charges for partial private circuits*", 14 October 2009) and in 2013 Ofcom concluded that between April 2006 and March 2011 the prices BT set for certain Ethernet services were too high resulting in an overcharge of £151m over this period.

implementation of these ill thought out proposals from BIS because (to adopt the words of the CAT in its response to this Consultation):

> "*Businesses tend to suffer as much if not more from bad regulatory decisions as from bad appeal processes. Appeals help to put the former right. 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*."

16. Secondly, it is important to note that BT's principled opposition is not as a result of some form of self-serving vested interest. BT operates in markets which, in the last 15 years, have developed faster than most other industry sectors, both in terms of technological change, and the growth of competition, and the appeals regime has supported this development. BT has been "on both sides" of every type of competition and regulatory decision. Consequently, since the inception of the CAT at the beginning of the last decade, BT has both been the instigator of, and materially affected by, a large number of competition and regulatory appeals.

(a) Under **competition law**, third parties have complained about BT's compliance with EU and UK competition law, and BT has been the subject of over 40 separate investigations by Ofcom and the OFT – and has yet never been found to have been in breach. BT has also taken complaints to Ofcom alleging anti-competitive behaviour by others which detrimentally affects BT.

(b) BT is often the subject of ***ex ante* regulatory decisions** made by Ofcom under its "market review" process which define the services that BT must offer to other communications providers and the terms on which they must be offered. BT is, however, also interested and affected by decisions of Ofcom in other market reviews which impose *ex ante* regulation on other communications providers with market power, most notably the mobile operators.

(c) The **dispute resolution** process under which Ofcom is required to act intrudes deeply into the commercial affairs of the disputing parties. Dispute resolution decisions, which can override any agreement that

the parties have reached by formal contract, have a profound impact on the parties and on their ability to compete in any particular market.[3] As with *ex ante* regulation, BT has both brought appeals against Ofcom's dispute resolution decisions and has supported Ofcom when others have challenged its decisions.

17. The outcome of the Consultation is therefore a matter of primary importance to BT and its legitimate commercial interests. BT's position should not, however, be seen as partisan – indeed, given that we are as often seeking to defend an Ofcom decision as to oppose it, we have no incentive to game the outcome of this Consultation by "talking-up" the need to be able to challenge regulatory decisions we consider unfavourable. Rather we are seeking to help BIS deliver the best possible appeals system so that it will be fit for purpose regardless of "which side" BT may be on in any particular appeal. We invite BIS to consider BT's response in this light.

[3] See further Section 3 below.

Section 2. Reforms to the current appeals regime to meet the Government's streamlining objectives

18. As we have already stated, we broadly support BIS's objectives for streamlining competition and regulatory appeals. We see benefit in striving to make the system work as efficiently and effectively as possible to the benefit of all stakeholders. However, BT is strongly opposed to the radical and untested proposals to reduce the standard of review, and contends that the available evidence shows that they will not achieve those objectives. BT's submissions in that regard are set out in the sections below.

19. In this Section, however, we comment on other proposals that we welcome and support which, if implemented properly, will help to achieve the Government's objectives without raising the spectre of unintended negative consequences. We note at the outset that we are pleased to see that some of the proposals reflect suggestions that we and other communications providers have put forward in response to previous consultations in this area.

Getting the right incentives to appeal

20. We welcome the fact that BIS wishes to look at incentives to appeal. However, BT is concerned that the Consultation starts by looking at the issues from the wrong end of the telescope. In essence, it first proposes reform of the standard of review on appeals, then looks at other ways to streamline the process before finally (almost as an afterthought) considering incentives to appeal. We believe that incentives to appeal should have been the starting point for this Consultation. Having the right framework for decision making, that incentivises the right behaviour from both industry participants and the regulator and which encourages the regulator to make the best possible decision, is extremely important.

21. BT considers that a more effective and proportionate way of addressing the perceived problems would be to start by seeking to understand why appeals are (or are not) brought in the first place. This would involve consideration of what the incentives to appeal actually are, why there are more appeals in some industries than others, and what the users of the appeals regime consider is the optimal appeals regime. Armed with this understanding of the marketplace, and the concerns of the relevant industry stakeholders,

options for enhancing the regime through non-statutory changes which could be delivered through stakeholder engagement (including with the relevant appeals bodies) could then be considered. It would only be in the unlikely event that such engagement did not result in a more efficient end-to-end system of decisions and appeals that radical statutory options should be considered. Accordingly, we start by setting out our comments in relation to incentives to appeal, and then consider other proposals to improve the appeals regime. In the next section we explain why there are more appeals in the communications sector than in other sectors.

22. Firstly, as we show later on in this response (see Section 3 below), the volume of appeal cases is merely a symptom of the underlying regulatory regime rather than a problem in its own right. The regulatory regime in communications is highly intrusive, detailed and complex, and particularly as it relates to disputes has grown in scope and complexity with time. BT would recommend that BIS turns its attention to reducing the burden of the regulatory regime, which is the true cause, rather than focusing on the appeals volumes, which are a symptom.

23. Secondly, we have, in response to previous consultations, expressed a willingness to work with Ofcom and other communications providers to review the processes by which key decisions are made in the communications sector. This may include review of such issues as the way in which information is shared between the parties to a dispute (e.g. representations from interested third parties), the degree of information provided by Ofcom in the course of an investigation, and the operation of Ofcom's investigations procedures. We would also be happy to discuss with Ofcom such issues as the timescales for market reviews, which can have a long gestation between the original Call for Inputs and the issuing of a formal consultation document (with the consequence that the timescales for responses becomes compressed) so that the end to end process works to timescales which are optimally efficient for all parties.

24. Thirdly, we suggest that transparency should be a key feature of regulatory decision making, and we recognise that a lack of transparency has in the past been a reason why decisions have been appealed.

25. In relation to transparency of information, we support the principle that parties should have the right amount of information made available to them and that they should have comfort that the regulator has manipulated this in an appropriate manner. The Consultation discusses one proposal in this regard – confidentiality rings. BT's position is that this is but one of a number of possible solutions and is not necessarily the best, or only, one.

26. In relation to transparency of reasons, the degree of transparency and clarity on why a particular decision has been reached is a factor that can sometimes lead to appeals. This may particularly be the case where decisions are heavily redacted. We believe that (whilst recognising the need to retain commercial confidentiality) greater transparency of the reasons for a decision, and the alignment with over-arching regulatory policy would help to reduce the need for appeals.

27. Again, we emphasise that we are willing to engage with BIS and with industry to consider the various options and to develop a range of solutions which are best designed to address the various issues.

<u>Maximising the efficiency and effectiveness of the CAT.</u>

28. First, as we have suggested in response to previous consultations, we believe that there are opportunities to codify, and to bring up to date, the CAT's rules and to consolidate the learning the jurisprudence of the CAT and the CC in guidelines. We remain willing to participate in any consultation on reform of the CAT rules. We believe that the helpful developments in the operation of the regime that the CC and CAT have put forward in case law can be built upon in this codification (and BT covers these points in response to the individual questions in Annex A).

29. Secondly, with the intent of streamlining proceedings before the CAT, the Consultation discusses whether the CAT could be directional as to how cases are run through more proactive case management and the possible use of strike out powers as a way to fast-track straightforward matters. BT gives this qualified support, in that we welcome proactive case management, but we believe that in practice this can only be taken so far, given the uncertainties of how particular cases will proceed. The CAT already has the power to strike out unmeritorious applications, either of its

own motion or following an application from a party, but we note that so far few such applications have been made to it.

30. Thirdly, we also support the proposal that in certain circumstances, a single Chairman (or President) should be able to sit alone. This may help to expedite procedural matters. We do however believe that substantive appeals should be heard by a full panel.

31. Fourthly, we welcome the proposal that members of the CAT should not be subject to a limited term of five years. One of the key benefits of appeals to the CAT is that its members often have a considerable amount of institutional and technical knowledge which is pertinent to the issues that come before it. That helps in the following ways:

    (a) It results in a saving of time and cost if there is no need to "teach again from scratch" (which might be technology or industry learning) at the start of each appeal; and

    (b) It can help to promote consistency of decision making over time.

Efficient Price Control Reviews

32. We agree with BIS that there may be opportunities to refine the way in which price control reviews are, in future, handled by the Competition and Markets Authority ("CMA") as the successor to the CC. We note that there is inconsistency of procedure between regulated sectors and that it may be efficient to seek alignment between the different sectors. The regime is particularly complex in the communications sector, but to some extent this reflects the particular circumstances of the industry. Whilst, for the purpose of the European Regulatory Framework ("ERF"), judicial oversight of the workings of the CMA will be required, we believe that it would be worthwhile having further discussion and consultation on the best way to make referrals to the CMA efficient. In our answer to Question 19 in Annex A we comment further on the issues for our sector.

Delivering efficiency and consistency between appeal bodies

33. We agree with BIS that having a single specialist body to hear appeals, including dispute resolution and enforcement appeals, is a sensible suggestion. It will reduce the risk of satellite litigation (i.e. litigation which is

ancillary – and in addition – to determination of the substantive issue). This can happen, for example, if parties are unclear which body is the right one to appeal to and feel the need to launch appeals in more than one forum in order to ensure their position is protected.

Evidence

34. In Section 6 below, we explain why we are concerned by BIS's proposals in relation to restrictions on evidence. However, we would broadly support the introduction of guidelines by the CAT (short of legislation) that basically codified existing jurisprudence[4] and which emphasised that:

(a) The introduction of fresh evidence is not a matter of right. In the event of a dispute about its admission it is the responsibility of the party who wants to introduce it to show a good reason why the CAT should admit it;

(b) Parties ought to be encouraged to present their case to Ofcom as fully as the circumstances permit and failure to do so should not be accommodated by a second chance in the CAT;

(c) The CAT should consider the potential prejudice (in costs, delay or otherwise) which other parties may suffer if an appellant is permitted to introduce material that it could reasonably have been expected to place before Ofcom; and

(d) 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.

Any such guidelines should, however be capable of evolution as required by particular circumstances in the future. In fact the Court of Appeal emphasised this very point (at paragraph 73) where it recognised that the circumstances "*are infinitely variable*".

35. In conclusion, whilst we are strongly opposed to the proposals for reform of the standard of review and do not believe it will help to streamline regulatory

[4] *BT and Others v Ofcom* [2011] EWCA Civ 245.

and competition appeals, or achieve better outcomes for competition and consumers, we do welcome these other proposals to improve the regime. BT remains willing to work with BIS and with Ofcom to deliver a set of incremental changes that will help ensure the most efficient and effective appeals regime possible.

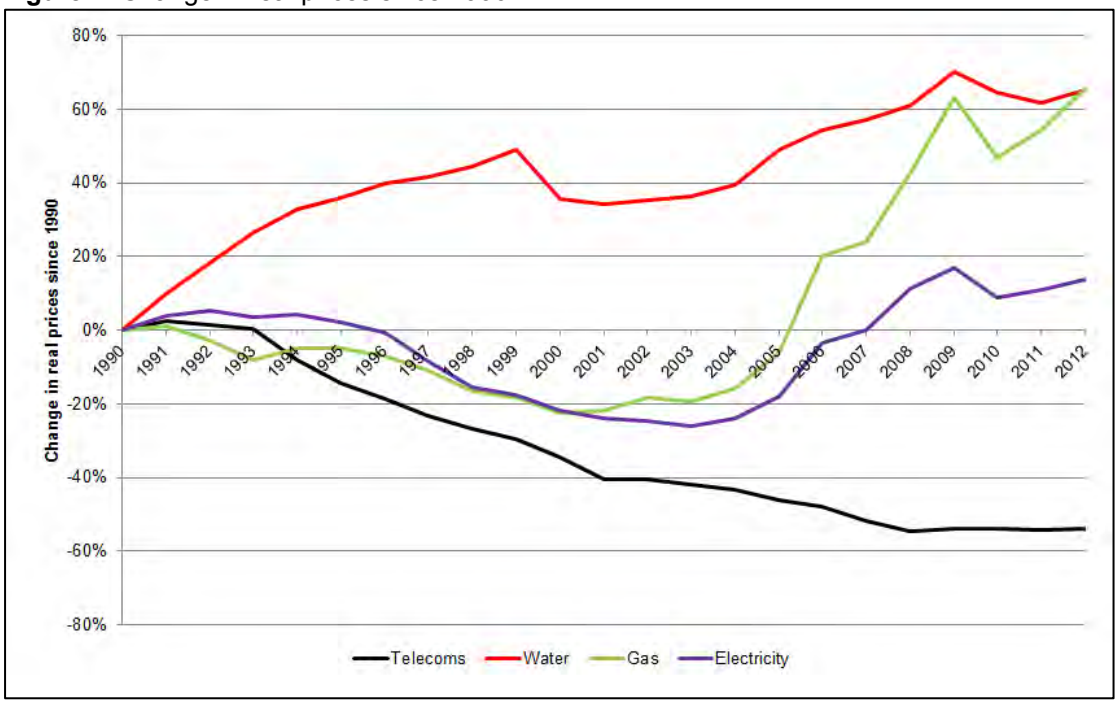
Section 3. The communications industry has a unique commercial and legal framework

36. The Consultation regularly emphasises the fact that there have been more appeals in the communications sector than in other regulated sectors. It presents statistical evidence about the number of appeals and the different types of appeals by sector. It does not, however, assess the crucial questions of why it is that more appeals have been brought in the communication sector. We believe it would be helpful to draw out the differences between communications and other regulated sectors at this stage in order to inform consideration of the question of whether the simple fact that there are more appeals in the communications sector is "a problem" that needs addressing.

The communications industry is more competitive than other regulated industries – and hence generates more appeals

37. The communications industry has evolved significantly in the last three decades, and the range of products supplied is now enormous. These changes have brought tremendous consumer welfare benefits – probably more than in any other regulated sector. Competition exists at many different levels – whether it be for different product sets, in different geographic locations, or at different levels of the value chain. Communications technology and markets are continuing to evolve and the investments being made by communications providers can be measured in the billions of pounds. Figure 1 below shows the benefits of this level of competition, in that prices for telecommunications services in the UK have fallen in real terms consistently since 1990, in contrast to prices in other sectors.

Figure 1: Change in real prices since 1990



38. Communications regulation in the UK is a highly intrusive regime, which operates at extreme levels of detail, across multiple products, geographies and levels of the value chain. It is applied pursuant to the ERF, with great diligence and vigour by Ofcom. In the following paragraphs we identify some of the key features of that regulatory framework and marketplace environment which explain why it should be no surprise that more appeals occur in the communication sector than in other regulated sectors because it is much more heavily regulated.

Extensive ex ante regulation results in more appeals

39. The ERF includes the Recommendation[5] on "*relevant product and service markets within the electronic communications sector susceptible to ex ante regulation*". The Recommendation lists the markets that NRAs such as Ofcom should consider regulating. When Ofcom undertakes market reviews of these markets, it will often find that the "generic" markets described in the Recommendation are actually comprised of several different markets which require regulating differently. The list below sets out the principal communications markets that are currently subject to regulation in the UK.

[5] Recommendation 2007/879/EC.

- **Fixed Access Markets** including:
  - WLR
  - LLU
  - GEA
  - ISDN 2
  - ISDN 30
- **Wholesale Broadband Access Markets** including
  - IPstream
  - Datastream
  - WBC
- **Wholesale Narrowband Market**s (comprising calls and interconnection services) consisting of:
  - Call origination
  - Call termination
  - Single transit
  - Interconnect
- **Business Connectivity Markets**, which cover products such as Ethernet (AISBO) and private circuits (TISBO) consisting of:
  - Retail TI below 2M
  - TISBO up to/including 8M
  - TISBO over 8M and up to /including 45M outside WECLA
  - TISBO over 45M and up to/including 155M outside WECLA
  - TI regional trunk
  - AISBO (up to/including 1G)
  - MISBO (over 1G) outside WECLA

40. No other regulated sector has a similar number of regulated product markets. The application of regulations in so many markets at so many different levels of the value chain results in Ofcom regulating multiple thousands of individual prices in BT's price list: for example, just one product within the Ethernet product range called "Optical Spectrum Access" has 360 individual prices for its components and variants. This sheer number makes it more likely that there will be decisions that parties are dissatisfied with in communications than in other industries.

41. The difference between communications and other sectors is stark. In the water industry, for example, water providers are likely to be interested only in one review which relates to the area in which they provide services. In aviation, the number of airports and the number of price points requiring regulation are very low, and the number of market players is similarly very

low compared to the communications sector. In the energy sector, licence changes have tended to be dealt with by consensus. And in the rail industry, the course of regulation has been the subject of particular political factors, as evidenced by the history of RailTrack and Network Rail

42. The nature of regulation is also quite different in communications to other sectors. BT is highly regulated at a wholesale access level so that other communications providers can compete in the retail market successfully. That gives rise to tensions between competitors within the market being regulated. Airports are regulated not to encourage the entry of new airports, but to support the interests of airlines. This structure results in less competitive tension between the regulated entity and its competitors that can give rise to appeals.

43. The other key factor that distinguishes communications from other regulated sectors is the number of competitors in the marketplace and the importance of each decision to them. There are thousands of communications providers who owe their existence to regulation and the work carried out by Ofcom in order to foster market entry. In communications, it is not just the regulated party that is interested in the outcome of a market review which imposes *ex ante* regulatory obligations. Other communications providers who buy service from the regulated provider are equally interested in, and affected by, the regulator's decision.

44. As markets become increasingly competitive, any party that feels it has been competitively disadvantaged by a decision will consider appealing. This is the natural consequence of Ofcom's effectiveness, as a regulator, in introducing competition far up the differing telecoms value chains and the degree of detail in its regulation, and in some cases the short duration of its decisions (meaning that new decisions have to be made more often). It is not evidence of a "problem" in the appeals regime, but merely reflects the fact that where regulation is so prescriptive and where competition is resulting in keen pricing to consumers, competitors will have more opportunities to ensure that they are not disadvantaged by having to price above the competitive level.

45. What this means in practice is that, if the regulator is perceived to have erred in favour of other communications providers (and imposed overly

harsh regulatory obligations), the regulated party will consider appealing. If, on the other hand, the regulator is perceived to have erred in favour of the regulated company, other communications providers will consider appealing.

46. The importance of the appeals regime to communications providers other than the regulated party can be seen from the table below which identifies the communications providers on whom ex ante price control regulation has been imposed, and the parties who have appealed that decision since the CAT's jurisdiction was established in this respect. It is clear that there have in fact been greater numbers of appeals by non-regulated entities than by the regulated entity.

Charge Control Decision	Appeals by Regulated Entities	Appeals by Non-Regulated Entities
Mobile Call Termination 1	1047/3/3/04 Hutchison 3G (UK) Limited	1085/3/3/07 British Telecommunications PLC
	1083/3/3/07 Hutchison 3G (UK) Limited	
	1084/3/3/07 O2 (UK) Limited	
LLU 1	N/A	1111/3/3/09 The Carphone Warehouse Group Plc
Leased Lines 1	N/A	1112/3/3/09 Cable & Wireless UK
WLR 1	N/A	1149/3/3/09 The Carphone Warehouse Group Plc)
Mobile Call Termination 2	1181/3/3/11 Everything Everywhere Limited	1180/3/3/11 British Telecommunications PLC
	1182/3/3/11 Hutchison 3G (UK) Limited	
	1183/3/3/11 Vodafone Limited	
WBA	1187/3/3/11 British Telecommunications PLC	1186/3/3/11 TalkTalk Telecom Group plc
LLU / WLR 2	1193/3/3/12 British Telecommunications PLC	1192/3/3/12 (1) British Sky Broadcasting Limited (2) TalkTalk Telecom Group PLC
BCMR	N/A	1210/3/3/13 (1) Verizon UK Limited and (2) Vodafone Limited
		1212/3/3/13 Colt Technology Services
Total Appeals	**8**	**9**

47. BT contends that this dynamic market environment contrasts starkly with other industries where the regulated utility provider is often an actual or near monopolist, and the only stakeholders are the regulated provider and final consumers. In those industries, consumers rely on the regulator to set price controls which are fair and appeals are largely taken by the regulated party only. In those circumstances, while an error to the detriment of the regulated entity may be the subject of an appeal, conversely, an error in its favour is unlikely to be appealed.

48. BT's contention is that the presence of competition dependent on regulation at multiple levels in the value chain, and the potential for challenge from either side, acts as an encouragement to more robust decision making by the regulator. It is a check and balance that may not exist in less competitive industries, and is one that brings benefits to consumers. Indeed

such benefits risk being lost if the degree of scrutiny of regulators decisions is reduced along the lines proposed in the Consultation.

49. Given that appeals are a part of the means to an end (i.e. to maximise consumer welfare and competitiveness) and not an end in themselves, we invite BIS to consider whether the real competition and consumer welfare problem is an excessive number of appeals by too many competitors in the communications sector or, perhaps, too few appeals in other sectors.

Ofcom's dispute resolution function is un-paralleled in other industries and results in more appeals

50. The Consultation also draws out that there are more appeals of communications dispute determinations than in other sectors and uses the example of appeals against dispute determinations as implied criticism of the appeals regime overall. There are various points to note here which again explain why there are more communications disputes, both of which again lead to the conclusion that more disputes does not imply a problem exists which needs to be addressed.

51. Firstly, BIS has crucially overlooked the fact that Ofcom is duty bound by the ERF (see Article 20 of the Framework Directive) to resolve disputes between communications providers – and also the fact that, when resolving disputes, Ofcom must have regard to its regulatory objectives. This contrasts with other regulated sectors, where the regulator does not have such a role. The obligation to resolve disputes gives rise to more appeals for the following reasons:

(a) In the course of a commercial dispute, Ofcom has to have regard to its regulatory objectives and, as a result, often introduces new regulatory policy into its decisions. This is a key reason why such decisions are regularly appealed. Recent examples include BT's appeals against the Ofcom's 08x[6], PPC[7] and Ethernet determinations[8]. The introduction of new regulatory policy in determining disputes gives rise to more appeals.

[6] *Cases 1151 and 1169/3/3/10, BT v Ofcom (Termination Charges)*.
[7] *Case 1146/3/3/09, BT v Ofcom (Partial Private Circuits)*.
[8] *Case 1205/3/3/13, BT v Ofcom (Ethernet Determinations).*

(b) Dispute decisions are often worth many tens of millions of pounds, and sometimes over a hundred million pounds, to the parties involved in the dispute. Repeating our submissions about the both the size and competitiveness of the communications markets, and recognising that the decision is determinative of the rights between the parties, it is clear that "getting disputes decisions right" is highly important for them. In this regard, the fact that there can be rigorous scrutiny of the decision does help to ensure that the regulator takes a high quality decision.

52. Case law has further extended Ofcom's obligations to take disputes. The first interpretation of the 2003 Act was that dispute resolution was limited to regulated markets. The 2008 Termination Rate Dispute judgment[9] made it clear that Ofcom's dispute resolution jurisdiction extended into unregulated markets. Disputes in unregulated markets are by their nature more difficult to determine, as there are fewer fixed points against which to judge a decision. These case law developments have resulted in more disputes and more appeals.

53. Current cases risk extending the scope of Ofcom's dispute resolution obligations even further. The 08x appeal[10] being considered in the Supreme Court in early 2014 concerns the scope of disputes. Ofcom is defending a decision by the Court of Appeal that has the implication that all pricing decisions have to be justified by the operator by reference to the interests of end-users. A Supreme Court decision supporting this position would likely result in more disputes and more appeals.

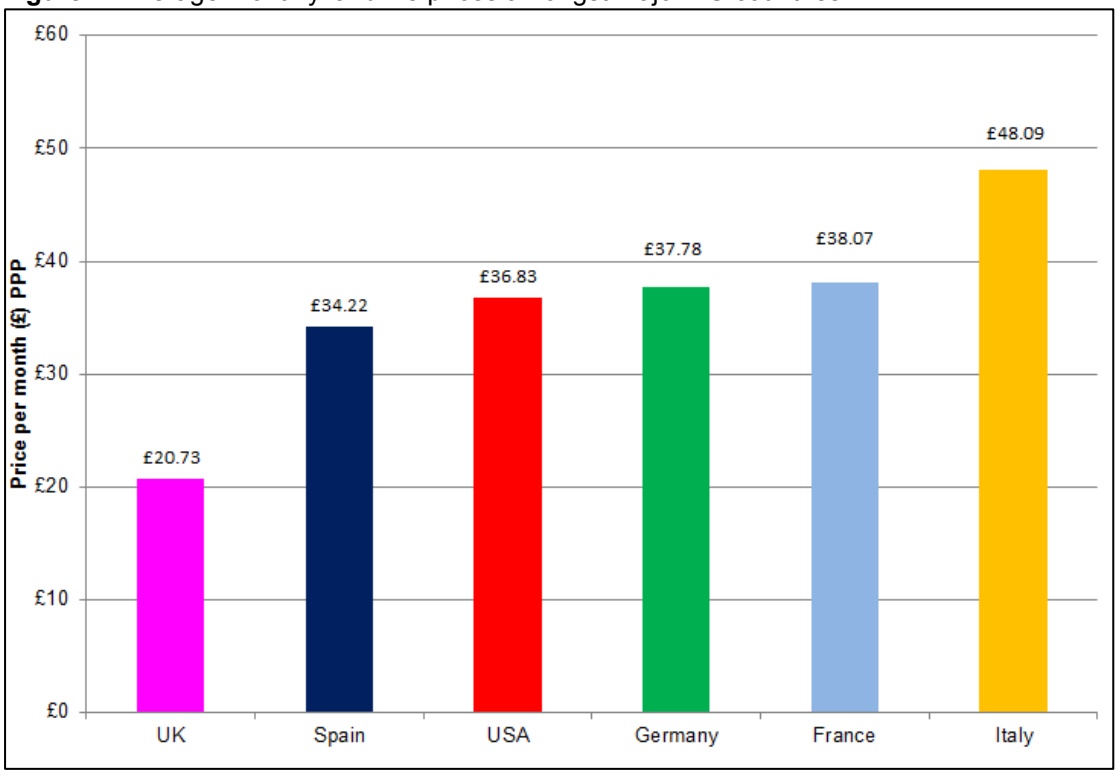
54. None of these reasons for more appeals relates to the operation of the appeals regime per se, but on the underlying obligations of the dispute regime and its operation by Ofcom. Reduction of the standard of scrutiny, so that a decision resolving a dispute which determines the rights of the parties could only be overturned on judicial review grounds, does not address the cause of the problem, only a symptom. It risks inferior decision making in cases that might cost hundreds of millions of pounds, and so risks inequitable outcomes between the parties.

[9] *T-Mobile and Others v Ofcom* [2008] CAT 12.
[10] *BT and Others v Ofcom* [2012] EWCA Civ 1002 (on appeal to the Supreme Court).

The UK communications market is broadly comparable with rest of Europe

55. We note from the evidence in the Consultation and the response from the CAT that there are no suggestions that the UK communications regime is "out of kilter" with the rest of Europe either in terms of the number of disputes or the time they take to resolve. The UK compares very well, for example, with countries such as Germany where, we understand, there can be over 100 appeals a year[11]. This again suggests that there is no UK communications specific problem that needs to be addressed. If anything, the UK should be justifiably proud of its regulatory regime (including in relation to appeals), which, as a result of competition and new entry, has fostered the lowest landline and broadband prices amongst the major EU economies as set out in the diagrams below.

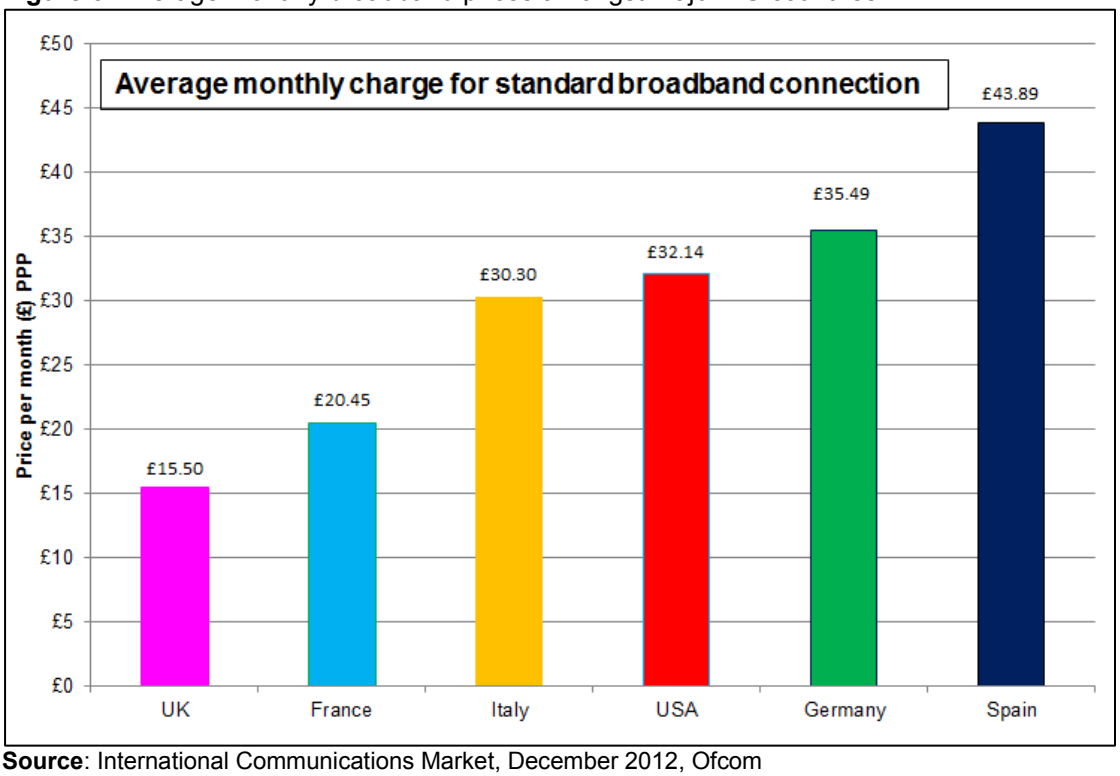
Figure 2: Average monthly landline prices amongst major EU countries



Source: International Communications Market, December 2012, Ofcom
Notes: Weighted average of best-value line rental and call charges from each of the three largest operators by market share in each country; PPP adjusted. Based on a family of two parents and two teenage children who are heavy users of the fixed-line phone.

[11] We note, for example that 2009 Regulatory Scorecard Survey compiled by ECTA showed 122 appeals in the last year in which information was available. See: http://www.ectaportal.com/en/upload/Scorecards/Regulatory%20Scorecard%202009/Annexes.zip

Figure 3: Average monthly broadband prices amongst major EU countries



Source: International Communications Market, December 2012, Ofcom
Notes: Weighted average of best-value broadband prices (excluding telephone line rental) from each of the three largest operators by market share in each country; PPP adjusted.

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Conclusions

57. The fact that there are more appeals in the communications sector than in other sectors is not evidence of a problem in the appeals regime that needs addressing. It is the consequence of the successful development of competitive markets and the highly regulated nature of communications markets. The ability to bring appeals on the merits helps to ensure high quality decision making by Ofcom, and that appeals can ensure outcomes which are equitable between the parties. These benefits to our industry would be put at risk if BIS were to implement its proposals.

Section 4. The current regime promotes the Government's growth agenda, the interests of consumers and competition in the UK

High quality appeals are an important part of delivering the Government's growth agenda

58. As set out in our introductory remarks in Section 1, given the enormous potential impact of regulatory and competition decisions on the outcomes for end users and to the businesses operating in the market, BT has been an active stakeholder in the appeals process both before and since the CAT was established. BT values the CAT as a forum in which highly complex matters can be dealt with efficiently by a multi-disciplinary panel. The detailed and specialist scrutiny which the CAT brings to bear on regulatory and competition decisions is an essential feature of a sound end-to-end process.

59. The merits of the current regime can be highlighted by contrasting experience of the specialist CAT (undertaking a merits based appeal) with BT's recent experience before the Administrative Court in the challenge, by way of judicial review, of the implementation of the Digital Economy Act 2010. The judgment in that case explicitly recognised that although economic evidence was adduced, the constraints of judicial review did not afford the time to assess critically the volume of material submitted. The following extract from the judgment of Kenneth Parker J is telling in that regard:[12]

> *"…In a case of this nature, there are* ***real limits on the process of adjudication****. Although I was confronted with 11 files of evidence, I cannot be entirely confident that all relevant material was before me,* ***nor can the sheer constraints of judicial review proceedings afford the time that would be necessary critically and rigorously to evaluate the volume of material that was submitted. For example, a number of expert economists were deployed on each side, putting forward with equal conviction and vigour their rival cases. Experience in the Restrictive Practices Court, now extinct,***

[12] *R, on the application of British Telecommunications Plc and another v Secretary of State for Business, Innovation & Skills and others (Open Rights Group and another, intervening)* [2011] EWHC 1021 (Admin) paragraphs 213 – 215.

suggests that a thorough exploration and assessment of such evidence could be likely to take many days of detailed cross-examination*."* (emphasis added)

60. A similar point was also made by Lord Justice Mummery in the Court of Appeal in the different context of an appeal against a judgment of the High Court regarding a competition law claim alleging abuse of dominance. In his judgment, Mummery LJ stated:[13]

> "*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*." (emphasis added)

61. It is clearly inappropriate for a body with such huge powers as Ofcom, making decisions of such huge magnitude on a regular basis, not to be subject to proper scrutiny. The CAT, in performing its appeal functions on the merits, clearly is such a "*specialist body equipped with appropriate expertise and flexible powers*" and should be allowed to continue to do so with full merits-based reviews.

62. Moreover, BT believes that an efficient, effective and stable appeals regime which promotes robust, proportionate and well-reasoned administrative decisions is essential to the ability of the UK industry to continue to thrive and invest in the UK economy, which is critical to the Government's growth agenda. The communications sector is currently worth over £50 billion a year to the UK economy as a whole and, between now and 2020, is

[13] *Attheraces Limited v The British Horseracing Board Limited* [2007] EWCA Civ 38, paragraph 7.

projected to grow much faster than the rest of the economy.[14] The decisions taken by Ofcom therefore have enormous potential to impact upon decisions affecting large sums of money, investment and, ultimately, UK jobs. As competition grows, so does the total number of people employed in the sector. By way of examples, the recent recruitment drives launched by numerous businesses within BT following on from substantial investments will lead to the creation of thousands of new jobs across the UK.[15] Furthermore, in its most recent Annual Plan,[16] Ofcom notes the following:

> *"Communications are at the heart of all of our lives and play an important economic and cultural role. While the communications sector enables participation and social cohesion in UK society, it also makes a substantive direct contribution to the economy (in 2011 the UK communications industry revenue stood at £53.3bn), and it indirectly aids UK growth through increased business productivity, improved access to markets and enhanced speed and quality of information flows."*

63. It is when one considers these very high stakes at issue in the Consultation that it becomes clear that the right administrative and appeals framework in relation to regulatory and competition decisions is a matter of critical importance. The current appeals regime, developed through some 10 years of jurisprudence, is valued by investors and businesses precisely because it creates certainty that regulatory decisions can be corrected if they are wrong. It encourages better decisions, helps restrain arbitrary or excessive regulation and makes sure that regulatory intervention, when necessary, is proportionate and targeted. This, in turn, encourages investment and growth. Furthermore, in many cases appeals result in lower prices which are of benefit to consumers. The strength of the telecommunications sector also has a direct bearing on GDP, as shown by Figure 4 below.

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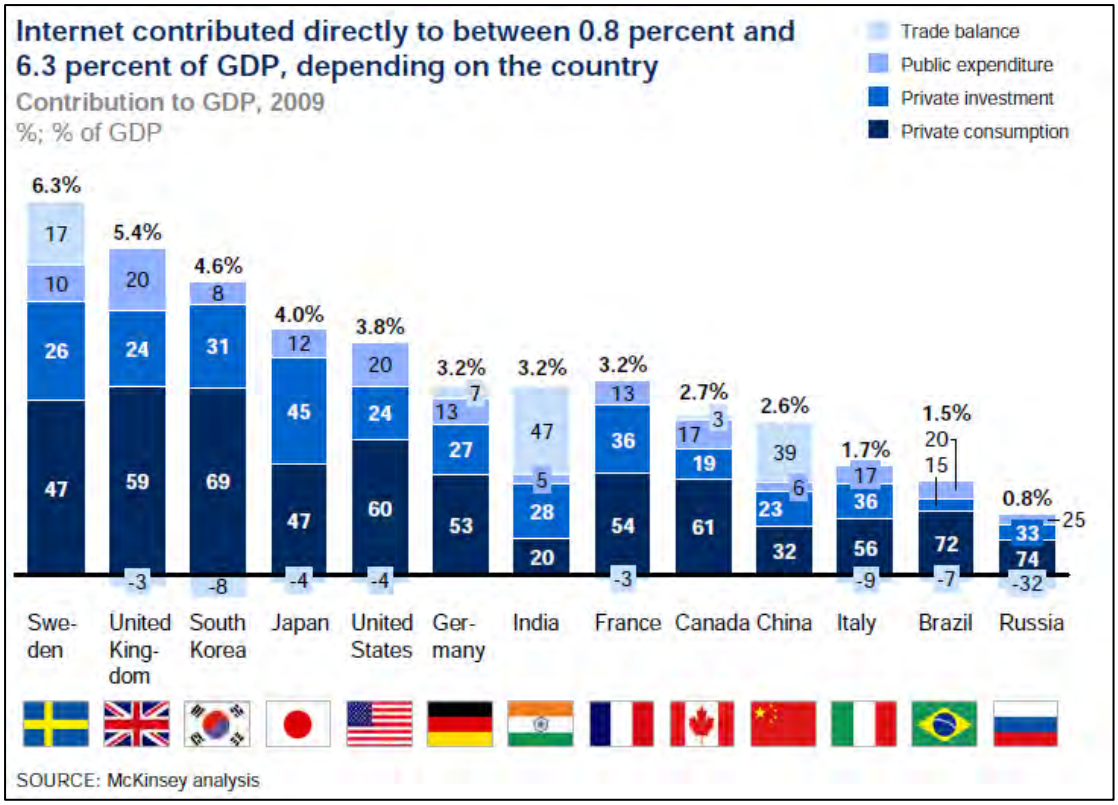
[14] See, for example, the recent report by the CBI, available at http://www.cbi.org.uk/media-centre/press-releases/2012/01/uk-communications-sector-vital-to-rebalancing-the-economy-cbi/

[15] See the following examples: http://www.e4s.co.uk/news/articles/view/1707/job-news-and-information/part-time/BT-Broadband-Could-Add-1000-Worcestershire-Jobs; http://www.yorkshireeveningpost.co.uk/news/business-news/business-headlines/plusnet-jobs-boost-as-firm-set-to-expand-1-5881366 and http://www.webwire.com/ViewPressRel.asp?aId=178573#.UgoclpNwZok

[16] Ofcom Annual Plan 2013/14, dated 28 March 2013, paragraph 2.4.



64. The communications industry is currently, and will be in the coming years, investing huge sums in the UK economy. Fixed line operators are investing billions to bring ever-increasing superfast broadband services to an increasingly large part of the country and the mobile operators are upgrading their networks to bring 4G mobile services to market, whilst at the same time starting to talk about 5G.

65. Radical change to the appeals regime of the type proposed in the Consultation is more likely to put those investments and growth opportunities at risk than it is to encourage them.

<u>The interests of consumers and competitors are protected within the current regime</u>

66. It is a fundamental premise that competition and regulatory law obligations are intended to promote competition and efficiency, and hence to increase consumer welfare. A dynamic, competitive sector is one where multiple players can thrive by offering compelling product propositions to consumers at the keenest prices. It is also necessary to consider longer-term dynamic competition through innovation and the development of new business models. The right to appeal when the regulatory process has gone awry,

and therefore stunted such efficiency, is a crucial part of a dynamic competitive regulatory environment.

67. The Consultation is wholly wrong to characterise regulatory appeals as "one-way bets" (as set out in the Foreword) and, by implication, the reserve of large players. No appellant lodges an appeal without seriously evaluating the risks of an adverse decision, certainly BT does not. Few decisions by Ofcom are entirely one-sided. Making an appeal will almost always put at risk the positive aspects of a decision as well as those aspects that are thought to be flawed. As external evidence of this, witness the fact that most appeals also involve counter-appeals and interventions by other parties. Often, the decision by the higher court is worse for some party or another than the original decision by Ofcom. It is simply untrue to say that an appeal is a one-way bet or that operators or their advisors consider them as such.

68. In the communications sector, as described above, appeals are as often brought by parties other than the regulated entity (on the basis that the regulator has "under-regulated") as they are by the regulated entity (on the basis that the regulator has "over-regulated") and because the right outcome matters to them. Implementing either of BIS's Options 1 or 2[17] will therefore create barriers to entry for new entrants seeking to enter prospectively competitive markets, and make it harder for smaller companies to seek redress where they are the ones suffering as a result of an inadequate regulatory or competition law decision

69. There will also be a loss of material benefits if it becomes harder for third parties to bring such appeals.

70. In the communications sector, there are a number of cases which provide evidence as to how appeals brought by the party other than the regulated entity can be welfare enhancing.

    (a) In its Determination of BT's 2011 mobile termination rates appeal, the CC agreed with BT that lower termination rates (and hence the

[17] See page 34 of the Consultation.

consequent consumer benefits) should be brought in sooner than was originally mandated by Ofcom.[18]

(b) In the appeal of Ofcom's decision of the "Termination Rates Dispute" which followed the 2004 mobile call termination market review, the CAT concluded that Ofcom had been wrong to allow several of the mobile operators to blend the rates for 2G and 3G mobile services. If that decision had not been overturned, 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[19].

71. Turning now to the proposed reforms of competition law, the case studies set out in Annex B and summarised below (save for Albion Water, which we deal with in Section 5 below) show that the ability to seek relief by way of appeal to the CAT is important not only to multinational organisations, but also to smaller companies, new entrants, and trade bodies representing individuals. They demonstrate how appeal "on the merits" has enabled the companies and organisations concerned to seek redress against unsatisfactory decisions of sectoral regulators and the competition authorities. They prove that implementing the proposals in the Consultation will be very likely to jeopardise the ability of others who may tread the same or a similar path to them in future to seek relief and hence risks leaving them as individuals, and SMEs, harmed by bad decisions.

(a) In *Institute of Independent Insurance Brokers*[20], the CAT's predecessor, the Competition Commission Appeals Tribunal, on a merits review, set aside an OFT decision that certain rules in the insurance sector did not infringe the Chapter I prohibition. The restrictions in these rules would have fettered the competitive freedom of intermediaries and GISC members active in the general insurance

[18] See Case 1180/3/3/11 *British Telecommunications PLC v Office of Communications (Mobile Call Termination)*, section 5 of the Determination dated 9 February 2012.
[19] Towershouse Consulting LLP address, in their report, why they consider that this result may well not have been achieved had the CAT been considering the appeal on a Judicial Review based standard of review.
[20] *Institute of Independent Insurance Brokers ('IIIB') / Association of British Travel Agents ('ABTA') v Director General of Fair Trading* [2001] CAT 4.

market (worth £27 billion) and would, in all likelihood, have resulted in a substantial reduction in consumer choice.

(b) In the *Floe Telecom* case[21] the CAT set aside a decision by Ofcom that Vodafone had not committed an abuse of dominance. Further the CAT provided Ofcom with a list of factors that it should consider when re-assessing the case. The CAT also found that Ofcom should take account of views of the industry.

(c) In *JJ Burgess & Sons*[22] the CAT, on a merits review, set aside an erroneous decision by the OFT, elements of which were described by the Consumers' Association as "alarming", and imposed its own decision which gave the appellant the effective redress it had been unable to obtain from the OFT from which consumer benefits would flow. Were a judicial review standard to apply in such a case, the OFT's decision might well have had to have been quashed and retaken, leading to a much longer end-to-end process.

72. BIS should pay particular heed to the potential for unintended consequences which may arise from what appears on its face to be a set of well-intentioned proposals. Denying smaller players the right to seek redress before the CAT risks diluting the competitive dynamics of the market and, consequentially, leading to higher prices and/or lower quality of services for consumers.

<u>The Australian experience</u>

73. BIS refers in the Consultation to the experience in Australia of the introduction of a new regime for gas and electricity regulation which involved a "limited form of merits review". It notes that it resulted in higher prices for users and consumers. Interestingly, this aligns with a recent study of the Australian experience by Professor George Yarrow, the Hon Michael Egan

[21] *Floe Telecom Limited v Office of Communications* [2004] CAT 18.
[22] *JJ Burgess & Sons v OFT* [2005] CAT 25.

and Dr John Tamblyn[23] which revealed the following problems in watering down the standard of review in the electricity and gas regulatory regimes:

(a) it was not possible to conclude that the change had contributed to preferable decisions;

(b) no obvious, major improvements in the way that the regulator had conducted its business were identified;

(c) the appeals process appeared to have become dominated by narrow, formalistic, and sometimes arcane considerations that failed to pay heed to wider economic effects and consequences;

(d) it may contribute to increased regulatory uncertainty in the longer term, by virtue of lack of sufficient robustness to withstand future stresses; and

(e) there have been many more appeals than was originally anticipated.

74. BIS suggests that these downsides will be avoided in the UK by ensuring that the consumer interest is fully reflected. We do not see, however, that simply having a "duty to consider the consumer interest" will suffice if the standard of review is changed as proposed so as to lower the degree of scrutiny of regulatory decisions. We believe that BIS underestimates the size of the risk to the interests of consumers that is suggested by the Australian experience and that, at the very least, it should weigh these risks more heavily in the balance in the Impact Assessment.

Costs asymmetry

75. If the proposals in relation to costs are implemented, so that regulators only face costs orders in the most extreme cases that they lose, this may result in some appellants (in particular smaller SMEs) being put off from appealing decisions that they are aggrieved by. That, of itself, would be acting against the interests of SMEs – introducing a risk for them that does not exist in the present regime. But it might also mean that if regulators consider appeals

[23] "Review of the Limited Merits Review Regime", Report by Professor George Yarrow, The Hon Michael Egan and Dr John Tamblyn, 29 June 2012, available at http://www.rpieurope.org/Publications/2012/Stage_One_Report_to_SCER_29_June.pdf

less likely, and that it is unlikely that it will sound in costs if they lose an appeal, that may also mean that the appeals regime becomes less of an incentivisation to good decision making.

Conclusions

76. BT considers that the Government may not sufficiently appreciate the benefits which the current appeals regime brings to bear in promoting its growth agenda, the interests of consumers and competition in the UK. We therefore oppose the proposals in the Consultation to alter the competition and communications regimes, which are well tried and trusted by industry stakeholders – so as to align them with the as yet untried and untested regime for aviation. Instead of such radical and untested statutory changes to the standard of review, BT considers that the proposals described in Section 2 should adequately address the Government's streamlining objectives without the risk of such adverse consequences.

Section 5. The problems described in the Consultation do not exist in the form described and the evidence relied upon does not support the arguments

77. Paragraphs 12 to 21 of the Impact Assessment provide a useful synopsis of what BIS considers the "problems" to be. In the following paragraphs, we will comment on these and on the evidence provided in support. Crucially, we will demonstrate why BIS's characterisation of these "problems" is incorrect and unsubstantiated.

78. As a preliminary point, BT expresses concern that throughout the Consultation, BIS repeatedly prays in aid only a small number of past cases in support of their contentions. We shall comment on these cases, by reference to the various concerns expressed by BIS to show:

(a) that these were atypical and do not reflect the experience of the parties in the majority of cases; and

(b) that in many cases, the examples given do not support the point that BIS is seeking to make.

BT contends that when this evidence is understood fully and viewed in context, it becomes clear that the examples given do not support the arguments that are advanced in the Consultation.

79. We also refer BIS to the separate paper produced by Towerhouse Consulting LLP which critiques in detail the Impact Assessment associated with this Consultation. This also provides an independent perspective of the problems identified by BIS. It will again be seen that this report concludes that the evidence provided by BIS does not support the arguments advanced in the Consultation. We adopt that report as a part of our response.

<u>Problem 1. Wide variation between sectors in the proportion of significant decisions that are appealed.</u>

80. We have dealt with this "problem" in Section 3 above. We have shown that this does not evidence the existence of a problem in the communications sector.

Problem 2. Appeals take a long time and impose significant costs.

81. We break down this proposition and comment on the different aspects as follows.

(i) Delays generally

82. A key theme of the Consultation is that the current appeals regime is characterised by inappropriate delays. We do not agree.

83. For example, the appeal by Carphone Warehouse in 2009 against Ofcom's LLU charge control decision is cited as an example of delay. However, the Consultation neglects to address the reality:

(a) Crucially, the timetable set out in the Consultation omits the fact that CPW's appeal against Ofcom's LLU decision in July 2009 was inextricably linked to a later appeal brought by CPW against a further decision by Ofcom made in October 2009. It was necessary to deal with both appeals largely according to the same timetable due to the significant degree of overlap between both Ofcom decisions. The CC describes the overlap as follows:

> "*[E]ach of Ofcom's decisions was important context for the other and our conclusions in each appeal would be important context for our decisions in the other*" (WLR Determination, paragraph 1.81)

(b) The conduct of the appeals was marked by a large number of procedural issues, including several applications for permission to amend pleadings. There were also a number of issues related to disclosure of documents which lead to delay, as the CC sets out in its Determination (paragraphs 1.77-1.84):

> "*Over the course of the LLU Appeal, there have been a number of issues concerning disclosure of documents that have impacted upon our process. […]The disclosure of […] documents at a very late stage of the LLU Appeal has meant that an already long process has become even longer. […]These issues have resulted in a large number of submissions being received from the parties months in to the*

LLU Appeal process. This has created an extra level of complexity to the appeal process. […]It is our hope that in the future parties to Communications Act appeals will seek to identify and resolve disclosure issues earlier in the process, ideally prior to any reference being made to the CC."

(c) It is important to note that the CC changed its procedures in response to the CPW appeals. These changes were reflected in revised Guidelines published in April 2011. As described by the CC at paragraph 1.2, the Guidelines were prepared "*following a review of the [CC's] processes after the first five references under the Act*".

(d) Finally, it can be seen that:

(i) Firstly, the parties learned by their experiences in the first LLU / WLR charge control appeals: the appeal brought by TalkTalk (formerly Carphone Warehouse) in 2012 was substantially more focussed than its 2009, thus leading to far materially less delay and complexity.

(ii) Secondly, the CC's changes to its processes have borne fruit (a fact which is not recognised in the Consultation). The hope expressed by the CC that in future disclosure issues be resolved earlier was indeed met by the same parties in the context of the latest appeal against the LLU / WLR charge controls (see Cases 1192 and 1193/3/3/12).

In terms of whether the appeals "*delayed the next price control decision*" (paragraph 4.27), it is important to recall that the LLU and WLR decisions that were the subject of appeal by CPW were both put in place by Ofcom for unusually short periods of time, i.e. from April 2009 to March 2011 for LLU, and October 2009 to March 2011 for WLR. BIS would not have been able to make the same claim of delay had the review imposed price controls for the more usual 3 year period.

84. The Consultation also cites the competition case of Albion Water as an example of delay. In the *Albion Water* cases, Ofwat rejected a complaint of abusive conduct. However the CAT, on conducting a full merits review, ultimately found the conduct complained of to be abusive. These cases,

that concerned a market in which there was only limited competition, achieved a positive outcome for consumers and ultimately an award of damages in favour of Albion Water. Given Ofwat's stance in these appeals it is questionable whether Ofwat would have delivered these benefits had its decision merely been quashed following a judicial review.

85. Moreover, whilst the case was undoubtedly lengthier than other cases, it involved a particularly unusual set of facts. When considered properly in the round, the Albion appeal (while undoubtedly complex) is a paradigm example of the need for a robust right of appeal on the merits against decisions of regulators taken in the field of Competition Law. The following points should be noted in that regard:

(a) The Tribunal not only disagreed with Ofwat's 2004 decision in its 2006 judgment, it was highly critical of much of the reasoning contained in that decision.[24]

(b) The relatively large number of judgments handed down by the Tribunal (on the issues of dominance, margin squeeze and excessive pricing) and the consequent but necessary delay resulting from those judgments, all stem from the inadequacies of Ofwat's original investigation and decision. Through the various judgments issued by the Tribunal, Albion, as a new competitor into the water industry, was able to obtain a measure of justice. This was achieved despite Albion facing formidable foes in the form of inadequate regulatory enforcement and an obstinate incumbent.

(c) It was only following the judgments of the Tribunal, which amounted to infringement decisions for the purposes of section 47A of the 1998 Act, that Albion was able subsequently to obtain recompense in the form of damages of nearly £1.9m.[25]

[24] See *Albion Water Limited v Ofwat* [2006] CAT 23 where the Tribunal made the following remarks: "*These matters, in the Tribunal's view, were not sufficiently investigated in the Decision*" (paragraph 19); "*The Authority's stance of opposition to undertakers offering water efficiency services, and the apparent lack of weight it attached to such services, surprised the Tribunal*" (paragraph 51); "*The Authority's position [regarding Albion's business model]entirely mischaracterised the facts of this case*" (paragraph 52).
[25] *Albion Water Limited v Dwr Cymru Cyfyngedig* [2013] CAT 6.

86. In summary, the actions taken by the Tribunal were necessary in order to protect Albion from regulatory inaction and serious abuse of dominance. This position is rendered all the more stark when one considers that in the course of the appeal Albion was described as being "*on the very edge of viability*" and was faced with substantial inequality in terms of resources.[26] As the commentary above in relation to the Digital Economy Act 2010 shows, it would have been impossible for Albion to obtain similar redress if it had been forced to bring its challenges under a judicial review based appeals regime.

87. Finally, in relation to Albion, the number of judgments, including in relation to subsequent appeals to the Court of Appeal, is also evidence of the likely increased litigation there would be during a "bedding down" period that would be likely to occur if the Government was to seek to amend substantially what is now, thanks in part to these judgments, a well understood legal regime. The likelihood of increased litigation is further addressed in Section 6 below.

(ii) Appeals which delay investment or cause uncertainty for industry.

88. In terms of achieving quicker decisions or greater certainty for industry, the Consultation refers in this regard on multiple occasions to appeals brought in 2008 against Ofcom's spectrum award plans for 2010 MHz and 2.6GHz bands and concludes that the 2012 auction of 4G spectrum could have been undertaken sooner had Ofcom's decision not been the subject of extensive litigation (see paragraphs 3.25 and 4.28). However, the Consultation mischaracterises the factual position:

(a) As set out in Annex E to the Consultation, even allowing for the full process up until refusal of permission to appeal by the Supreme Court, the litigation phase was completed by February 2009. Yet the 4G spectrum auction itself took place in December 2012. Delays, therefore, are a matter of the policy development process not the current regulatory appeals regime before the CAT.

[26] See *Albion v DGWS* [2005] CAT 19, at paragraph 8.

(b) The point is made all the more clearly by the fact that the CAT in its judgment (handed down, it should be recalled, in July 2008, a commendable two weeks after the hearing) said that it did not have jurisdiction in this area. Any explicit or implicit threat of delay was therefore as a result of the prospect of an appeal to the ordinary courts, rather than anything to do with the right to lodge an appeal on the merits to the CAT.

(c) Putting to one side the jurisdictional debate, in essence the litmus test is whether the appeals process delayed the dates on which consumers could start to benefit from 4G mobile services. In truth, any delay had nothing to do with appeals. The reality was that 4G services (at least those provided over 800MHz) were to be provided by means of the spectrum that had previously been used for analogue TV services. It was a four year process to clear this spectrum. Indeed, Ofcom announced in July 2013 that it had finally cleared the path for the release of airwaves for 4G mobile broadband "*five months earlier than originally planned*" as a result of securing "*an accelerated timetable for releasing these Freeview frequencies following discussions with TV broadcasters, Digital UK and the transmission company Arqiva*".[27] So, to put this case forward as an example of consumer disbenefit arising from the CAT appeals regime is unfounded.

89. It is highly instructive in this regard that when they attended the recent CBI meeting on the topic of appeals reform, representatives of BIS were asked if they could provide any other examples of appeals delaying investment, or the growth agenda. The only example they could identify was the BAA appeals – until it was pointed out to them that these had in fact been judicial reviews.

[27] See Ofcom press release entitled "*Path clear for 4G, as airwave clearance is complete*", 29 July 2013, available at http://media.ofcom.org.uk/2013/07/29/path-clear-for-4g-as-airwave-clearance-is-complete/ Note, however, that as that press release shows, there is some other spectrum to be used for 4G services that still needs to be freed up.

(iii) Costs of appeals

90. Paragraph 3.12 of the Consultation sets out the annual costs of the appeals system as being £21.8m (broken down as follows: businesses - £16.9m, regulators - £3.4m, courts and CAT - £1.5m). It is instructive to note that the only one of these constituents complaining about the expense of the regime is the regulator; the industry supports the regime and the CAT also opposes proposals for change. The cost to the regulator of defending its decisions is a small fraction of the costs of running the regulators, and a very small cost relative to the scale of the decisions it makes, which can amount to hundreds of millions of pounds a year.

91. The Consultation's conclusion is that implementing the proposals will lead to appeals which cost less. However, this thesis overlooks the fact that it would only take a single flawed decision to escape scrutiny in order for the cost / benefit analysis to move substantially in favour of a more robust appeals regime. In addition to the numerous examples noted above, in the recent mobile termination rates appeal, it was noted that the adoption of LRIC (as opposed to LRIC+ as set out by Ofcom in its original decision) would save fixed operators £200 million in the final year of the charge control. The GISC appeal described in Section 4 above related to the core activities of a market worth some £27 billion at the time. The sums at stake are therefore clearly orders of magnitude greater than the purported savings to which the Consultation lays claim. The financial case for change is, therefore, not made out.

92. It also appears to us that BIS has not taken into account the cost to the parties that they would incur if the CAT could only remit matters for reconsideration by the regulator or competition authority following a finding that a decision was flawed.[28]

93. The lack of a proper assessment of the costs and benefits of the various proposals is dealt with in the Towerhouse Report and we refer BIS to that accordingly. It identifies that the costs of implementing the proposals will far outweigh the anticipated savings.

[28] See BT's submissions in Section 6 below.

94. We therefore conclude that the Government's case that change to the regime will lead to costs savings to consumers or to industry has not been made out adequately or at all.

(iv) Timescales

95. No evidence has been provided in the Consultation which demonstrates compellingly that cases will be resolved more quickly under a revised standard when compared with proper comparators.

96. The Consultation notes (in Table D4) that the average (end to end) length for all judicial review applications in 2011 was 9.9 months. However, judicial review challenges to infrastructure and planning decisions (which would be more analogous with the complexity of regulatory and competition appeals) took on average between 10.1 to 11.6 months. By way of comparison, the Consultation's own statistics demonstrate that the average length of appeals before the CAT in the past five years under the current standard was just over 9 months (paragraph 3.10). It is important to note that even within those figures, recent data demonstrates that not only have fewer appeals have been lodged before the CAT in recent years (see Figure D1), but that those appeals have been dealt with more quickly than in the past (Figure D3). Moreover, it is important to account for particular cases which in practice amount to "outliers" and which may skew the statistics. For example, the appeal by the Merger Action Group against the takeover by Lloyds of HBOS was resolved in 10 days.[29] However, the fact that the case was resolved so quickly says nothing about the generality of cases, or of the utility of particular targets. It is important to recall that the Merger Action Group appeal raised highly complex issues in what was at the time a highly tense economic and political climate.

97. The Consultation shows at Figure 3.3 the average time taken by each type of appeal and at Figure 3.4 the average length of hearings at the CAT for cases heard between 2008 and 2012. The sample sizes are fairly small in total, meaning that a limited number of exceptional cases can quickly skew the statistics. Again, in our view, that has happened here. We note that the CAT has concluded that when the two exceptionally large cases with

[29] See Case 1107/4/10/08 *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform*.

multiple parties are excluded[30], namely the Pay TV appeals which lasted 37 days and the Tobacco appeals which lasted 29 days, the distinction in hearing duration vanishes, with an average of 2.54 days for merits appeals and 2.38 days for judicial reviews.

98. Again, as set out above, it appears to BT that the timescales that BIS are quoting do not take into account the extra time that it would take for a regulator or competition authority to reconsider a decision which has been found to be flawed if it is simply remitted by the CAT. Whilst decisions that are not flawed might (on BIS's data – which is not accepted) take a little less time to be determined, it seems counterintuitive to be proposing a move to a regime where decisions which are flawed and need correcting take many months longer to be corrected than they do at present. That cannot be in the interests of business or of the consumers of their services.

99. We conclude, therefore, that in relation to timescales, the Government's case for change is not made out.

Problem 3. The standard of review in some sectors gives parties a wide scope to challenge decisions and significant discretion for the appeal body to re-examine elements of the regulatory decision.

100. It is unclear from the Consultation quite what the concern is in this regard. While sections of the Consultation contain oblique statements such as: "…*the Government is also aware of concerns about the appeals regime in some sectors and for some types of decision*" (paragraph 3.2), neither the Consultation nor the Impact Assessment identify who has raised these concerns nor produce any evidence in support of the alleged concerns.

101. We also find it surprising that no mention is given to the outcomes of the previous consultations in this area. BIS is well aware that many key players in the communications industry have had exactly the opposite concern, and that they have previously expressed concerns that limiting the scope to challenge appeals would be a retrograde step for the industry and for the economy. BT, along with other communications providers, have written on a

[30] And with the multiple Construction cases each being properly considered as individual cases.

number of occasions to the Minister responsible at the time for such reforms expressing their legitimate concerns.

102. A key part of the evidence base relied on here is the number of appeals that there have been in the communications sector. However, as noted above, the more the current system "beds in", the fewer the number of appeals that are lodged: indeed, the Consultation notes that:

> "*there have been fewer appeals during 2010, 2011 and 2012 compared with 2008 and 2009*" (see page 84).

While the Consultation states that "*the sample size is too small to determine whether this is a genuine trend*", the period in which there have been fewer appeals (2010-2012) is longer than the previous period for which a higher number of appeals is shown (2008-2009). Again, BT submits that this does not provide a robust statistical basis on which to frame such radical changes. Indeed, recent experience has demonstrated increasing restraint among litigating parties.[31]

103. Another statistic that is used in support of the contention that the standard of review encourages appeals is the analysis of the number of incorrect decisions. Figure D5 demonstrates that while Ofcom's decisions are appealed more often than other regulators' decisions, but the simple fact remains that this table also shows that Ofcom's decisions have had to be corrected more often than any other regulator's.

Problem 4. Features of the appeals processes in some sectors may act to increase firms' incentives to appeal.

104. We believe that there is a degree of overlap with Problem 3 above, in so far as the issue is considered to be the degree of scrutiny given to a regulator's decision by the CAT. However, this problem statement also brings in the concerns identified by BIS in relation to "new evidence" and the suggestions that some appellants believe that there is little "downside risk" to appealing.

105. With regard to the degree of scrutiny given to a regulator's decision by the CAT, in the last few years the CAT and the CC have given a number of

[31] In this regard, see the description above of the changes made following from the CC's 2009 LLU and WLR determinations.

decisions and judgments which help to clarify the scope of appeals. The key principles that can be distilled from these judgments are the following:

(a) An appeal is not a re-hearing of the merits of the case but instead must focus on specific points;[32]

(b) It is not the CAT's function to usurp Ofcom's decision-making role;[33]

(c) It is not sufficient for the CAT to conclude that it would have reached a different decision to that of Ofcom;[34]

(d) The CAT should not interfere with Ofcom's exercise of its judgment "unless satisfied that it was wrong";[35] and

(e) In price control appeals, errors "must [be] capable of producing some material effect upon the actual price control"[36].

106. It is important to understand the significance of these developments. The appeal authorities are already acting to improve the operation of the regime in their case law, in appropriate ways. The government should build on these developments rather than undermine them.

107. Turning now to the concerns about evidence, put shortly the inference is that appellants are "ambushing" regulators, on appeals, with new evidence. However, that is very far from the truth. We see no evidence of this in the Consultation and indeed we note that at paragraph 3.23 BIS state:

> "*The Government has seen no evidence that parties are purposely holding back evidence until the appeal stage*."

108. In this regard, we would also refer BIS to the comments of the President of the CAT who has stated:

> ". . . *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*

[32] *BT v Ofcom (08x – admissibility of evidence)* [2010] CAT 17, paragraphs 76 and 77.
[33] *Ibid*, at paragraph 77.
[34] BSkyB and Others v Ofcom (Pay TV) [2012] CAT 20, paragraph 84.
[35] *Ibid*.
[36] *The Carphone Warehouse Group plc –v- Ofcom (Competition Commission Determination 2010) Case 1111/3/3/09 [Local Loop Unbundling]*, paragraph 1.34 and 1.62 to 1.66; *BT v Ofcom; Sky / TalkTalk v Ofcom (LLU / WLR Charge control, Competition Commission Determination 2013) Cases 1192 and 1193/3/3/12*, paragraphs 1.32-1.33. See also *T-Mobile v Ofcom* [2008] EWCA Civ 1373 at paragraph 31.

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."[37]

109. Nor is the criticism in the Consultation regarding large volumes of evidence found to hold true when analysed properly. The Consultation makes reference in this regard to an appeal by Sky where substantial amounts of evidence were presented (see paragraph 3.22). However, it fails to mention that this appeal was atypical, involving as it did some 13 separate parties and a sector worth many billions of pounds, being subject to regulatory intervention for the promotion of competition for the very first time. Ofcom itself took three years to produce its decision. The Consultation also neglects to acknowledge the fact that, in any event, judicial reviews of complex matters will also involve consideration of large amounts of evidence – as described by BT above in relation to its challenge in the Administrative Courts to the Digital Economy Act 2010.

110. Turning to the question of downside risks, it is not the case that companies such as BT bring appeals without regard to the possibility of success. We do not engage in "speculative" appeals for a number of reasons. Firstly, they are costly and time consuming and we are alive to the risks of costs orders against us if we lose. Secondly, no Ofcom decision is entirely one sided: any appeal risks exacerbating adverse positions as well as dealing with flaws. Thirdly, appeals divert management attention and cause a loss of opportunity. Fourthly, in an industry such as ours, there are issues of personal and corporate reputation and credibility that count against making appeals unless there is clear merit. If we advanced an unmeritorious speculative case, this would be remembered, not least by the appeal bodies

[37] Speech by Sir 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.

themselves. BT and other companies in the sector have to manage their positions with CAT and the CC as well as with Ofcom. Put simply, it would not stand us in good stead for the next time around.

Problem 5. The cumulative effect of regulatory appeals can make regulators overly risk averse and delay important regulator decisions. Appeals can also result in regulators becoming unwilling to devote resources to new decisions until they have clarity on appeals against earlier decisions.

111. BT considers that the problem posited is not supported by the evidence. On the contrary, BT's experience of Ofcom is that the threat of appeal has pushed the quality and depth of the analysis supporting their decisions. For example, Ofcom's most recent market substantial market review and charge control decision, the business connectivity market review and leased lines charge control, were not appealed by BT. This was in large part because they were well-reasoned and well-evidence decisions, even though they cost BT hundreds of millions of pounds a year in profit.

112. On this point, the Consultation prays in aid Ofcom's spectrum award plans for 2010 MHz and 2.6GHz bands.

113. However, as described in greater detail earlier in this Section above, the so-called "delay" had nothing to do with appeals. The reality was that any explicit or implicit threat of delay was therefore solely as a result of the prospect of an appeal to the ordinary courts, rather than anything to do with the right to lodge an appeal on the merits to the CAT. Moreover, 4G services were to be provided by means of the airwaves (i.e. spectrum) that had previously been used for analogue TV services and there was a four year process to clear this spectrum.

114. The Consultation also refers to BT's 2009 appeal against Ofcom's dispute determination regarding Partial Private Circuits as an example of an appeal "*slowing down regulatory decision-making and potentially increasing regulatory uncertainty*" and that "*a number of other dispute cases were held up, pending the final resolution of this case*". (paragraph 4.7). Once more, however, this assertion misstates the position in fact. The issue in that appeal was whether BT was entitled to recover amounts Ofcom had ordered it to pay third party communications providers. The periods in relation to

which the amounts in dispute related were all in the past, i.e. between 2004 and 2008. It is therefore unclear to BT how such historical issues could have "*held up*" the proper and timely resolution of other disputes.

Section 6. The detrimental consequences of implementing the proposed changes on standard of review, evidence and decision making

115. In Sections 2 and 3 above, we described why a high quality appeals regime is important to industry and why moving to a traditional judicial review based standard of review risks undermining the Government's growth agenda. We now describe the benefits of the current regime from a more practical perspective and explain why the changes proposed would be a retrograde step.

Flexibility of current regime

116. The current merits-based standard of review gives the CAT very considerable flexibility about the level of scrutiny it applies to decisions. This flexibility is particularly useful in a regulatory field where there are a wide variety of decisions from different decisions-makers which suit variable standards of review. Infringement decisions under the 1998 Act, for example, are quasi-criminal and may lead to the imposition of large fines. As a consequence, they require a rigorous standard of review. The same is true of enforcement action by Ofcom under the 2003 Act. Appeals against dispute resolution decisions under the 2003 Act are more akin to private law actions and suit a civil appeal standard.

117. The ability of the CAT and the CC to undertake an intense factual review of regulatory decisions also reflects the composition of the two bodies. Although the CAT is a recognisably judicial body that already exercises a limited but important judicial review jurisdiction under the Enterprise Act 2002, the inclusion of lay members with specialist economic or business expertise is clearly appropriate for the current statutory regime rather than a purely supervisory function. That is only more obviously the case for the CC, where the panels appointed for any particular case are not necessarily chaired by a lawyer and whose procedures are inquisitorial rather than adversarial in character. Although both bodies are already sensitive to the need to take due account of the fact that regulators have a wide discretion to determine issues of regulatory policy, they are not in general well suited

either in composition or in procedures to performing the role currently discharged by judges of the Administrative Court.

118. As we will discuss below, the remedial and evidential powers associated with merits-based review give the CAT the flexibility to make decisions for itself on the basis of evidence subjected to detailed scrutiny and cross-examination. In our view, it is appropriate for an expert body such as the CAT to be able to reach its own conclusions where it has identified a material flaw in the initial decision. It is also an important guarantee of due process in the quasi-prosecutorial context of regulatory enforcement action that such cases are subject to judicial control by a body that has developed procedures for making findings of fact on the basis of oral evidence.

119. Moreover, it is a significant virtue of the current regime that the CAT is in a position to act as a standard-setting body that can gives important guidance to the regulators not simply on legal or procedural matters that would be familiar in a judicial review context, but also, where the evidence on the basis of which a decision has been made, on the evidential standards that it expects from regulators.[38] If the adoption of judicial review principles leads to the loss of these significant powers, there are likely to be serious adverse consequences for the quality of the UK regulatory system.

120. Finally, we consider that the limits as well as the flexibility of the current regime are well understood in the light of the case law of the CAT and the Court of Appeal – it is now established that the current regime is a flexible one and that, for example, a greater discretion is recognised in the regulators in the formulation of regulatory policies and priorities than in relation to the findings of fact. We think that it is a material virtue of the current regime that it has been the subject of judicial guidance that would need to be reconsidered if a revised standard were to be introduced.[39]

121. Having identified these benefits of the current regime, we comment now on the inter-relationship between the proposals in relation to the standard of

[38] See, e.g., *North Midland v. OFT*, [2011] CAT 14, paras. 32-34, citing *Argos Limited v Office of Fair Trading* [2003] CAT 16, para. 81, and *Durkan Holdings Limited and others v OFT* [2011] CAT 6, paras. 108-110

[39] One obvious alternative to the present proposals would be for the CAT and CC to issue administrative guidance setting out the standards of review that it will apply in the light of the substantial caselaw that now exists: see Section 2 above.

review and the other appeal process proposals. One of the key problems with the proposals in the Consultation is that they are considered somewhat in isolation. The standard of review is dealt with first, in Chapter 4, whilst the way in which evidence may be adduced is dealt with in Chapter 6. In truth, it is necessary to look at the application of all the proposed changes together, to understand how all the parts of the machine will move and how, overall, appeals would be conducted.

The importance of remedial powers

122. BT contends that the consequences of the change for the CAT's remedial powers in cases where it finds that there has been an error in the regulator's decision-making are at least as important as the proposed shift in the standard of review. We think that issues related to remedies would in turn impact on the nature of the evidence that would in practice be admitted on an appeal.

123. In an application for judicial review, the High Court has the power to make a range of orders, including mandatory orders that can compel a public authority to take a particular course of action. However, as a matter of principle it is generally considered undesirable for the High Court to remake a decision and mandatory orders are rarely made. Instead, a decision will be remitted to the primary decision-maker to reconsider in the light of the guidance of the Court.

124. One of the reasons for the reluctance of the Court to remake a decision itself is that it will usually scrutinise decisions for their validity at the time that they were made, rather than at the time of the judicial review. In particular, the Court will normally refuse to allow a decision-maker to adduce new evidence to justify its original decision or to allow an applicant to challenge a decision on the basis of material that was not available to the decision-maker when the original decision was made. The High Court does not normally admit fresh evidence to be adduced during a hearing and will not make a decision based on new information. It is, therefore, normally the practice that, where a defect in the original decision is identified, the decision is remitted for reconsideration by the initial decision-maker on the basis of up-to-date material and the guidance of the High Court.

125. Currently the CAT can exercise its remedial powers in section 195 of the 2003 Act and Schedule 8 of the 1998 Act to remake a decision on its own terms and based on evidence as it is presented at the time of the appeal. In effect, the CAT is given a broad statutory power to substitute its own judgment for that of the decision-maker based on the evidence available to the CAT itself, not backdated to the position as it appeared at the date of the original decision.[40] The Consultation does not explicitly anticipate reform of the CAT's remedial powers and it leaves intact its ability to hear fresh evidence, albeit on the limited statutory basis set out above. However, the Consultation does suggest that remittal would be the appropriate course of action if judicial review principles were applied.[41]

126. It seems to us that this uncertainty about the remedial powers of the CAT is an important 'fault line' in the current proposals and that it would represent a fundamental and undesirable change in the UK regime if the effect of these changes was to limit the ability of the CAT to 'sort out' cases where it found that the original decision was wrong. This issue was the subject of detailed consideration by Parliament when the 1998 Act was adopted, as recorded by the CAT itself at paragraph 118 of its first major judgment under the (then) new regime, *Napp v. OFT* [2002] CAT 1.

> "*In elucidation of these provisions, we refer 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*

[40] *Albion Water Ltd v Water Services Regulation Authority* [2008] CAT 31; *Vodafone and ors v BT and Ofcom* (2010) EWCA Civ 391.

[41] Under its existing judicial review jurisdiction provided for by sections 120 and 179 of the Enterprise Act 2002, the CAT's remedial powers are limited to quashing the original decision and referral back to the decision-maker with a direction to reconsider and make a new decision in accordance with the ruling of the CAT: see sections 120(5) and 179(5).

> *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.*"

127. We think that the policy underlying this statement was sound and that the uncertainty about how the current proposals would affect the CAT's powers in relation to remedies and remittal sits uneasily with the Government's objective to streamline appeals. It is notorious that major competition and telecoms cases are factually and legally complex and that they can take months or years to determine at the administrative stage. Although the Consultation makes various suggestions to expedite the appeal process, we are doubtful that there is much room for improvement in this respect and consider that the primary source of avoidable delay is the administrative rather than judicial process. If the effect of these proposals were to require the CAT to remit decisions back to the regulators, then it seems to us that the likely effect would be to cause further significant delays in the decision-making process and the potential for additional litigation challenging fresh decisions made after remittal.

128. We also think that, in practice, a material alteration in the CAT's approach to remedies would inevitably lead to arguments from the regulators that it should have a significant effect on its approach to the admission of new evidence. If the default position in the event of an appeal succeeding were a referral back to the regulator for a new determination, then it seems likely

that the CAT would tend increasingly to focus on legal or procedural defects in the original decision rather than the question of whether the substantive decision was correct in the light of the evidence before the Tribunal. If that were the case then that might well lead to demands from the regulators that a significantly less intrusive scrutiny of the evidence was appropriate than is currently undertaken – we note in this respect that, although the Administrative Court can in principle hear witnesses and expert evidence, it rarely does so, reflecting its supervisory rather than fact-finding role.[42]

Increased risk of satellite litigation

129. Finally, a further detrimental consequence of the proposed changes will be the risk that it generates the very outcome it seeks to avoid, i.e. by increasing rather than reducing the amount of litigation overall.

130. Any time a radical change to a legal framework takes place, there is a greatly increased likelihood for more litigation in order to understand what the new framework means in practice. This is particularly true in the current context, where the Consultation proposes to move from what is a well tried and tested formulation to a largely unknown formulation. Moreover, the overarching requirement of EU law brought to bear by Article 4 of the Framework Directive adds yet a further layer of complexity and greatly increases the prospect of sequential appeals beyond the CAT and, if necessary, all the way to the Court of Justice of the EU by way of the preliminary reference mechanism under Article 267 TFEU.

131. The following examples, drawn from a wide variety of areas, provide a flavour of the potential for satellite litigation in the wake of changes to legal frameworks. Further details of the case studies are provided in Annex B.

(a) The issues of limitation periods for bringing claims for damages before the CAT has involved a large amount of litigation in order to decipher the meaning of what appears at first blush to amount to relatively simple language. Litigation surround the meaning of the word "decision" in section 47A of the 1998 Act and rule 31 of the Tribunal

[42] See the consideration above in Section 4 of the judgment of Parker J in the Economy Act 2010 judicial review, *R (BT) v. Secretary of State for Business, Innovation and Skills et al.* [2011] EWHC 1021 (Admin), paras. 213-215: "*the sheer constraints of judicial review proceedings [cannot] afford the time that would be necessary critically and rigorously to evaluate the volume of material that was submitted*".

Rules 2003 has lasted for more than 6 years, and will continue before the Supreme Court at a hearing scheduled for March 2014.[43]

(b) Litigation, also in the sphere of actions for damages, regarding section 58 of the 1998 Act took nearly three years in one single case.[44]

(c) The question of what amounts to an "appealable decision" for the purposes of sections 46 and 47 of the 1998 Act also had a long and tortuous history upon introduction. Over the years, the CAT and the Court of Appeal were required to consider on numerous occasions and over many years various related issues.[45]

132. Clearly, therefore, substantial changes such as those proposed in the Consultation are likely to lead to substantial amounts of satellite litigation resulting in greatly increased delays and costs.

Conclusions

133. The Consultation does not appear to take adequate account of the benefits of the current appeals regime. Nor does it take sufficient account of the potential detrimental consequences of implementing the proposed changes on important issues such as the standard of review, the introduction of evidence and the efficiencies regarding decision making.

134. BT considers that the benefits of the current regime should be retained and would be largely lost if the Government is minded to proceed with changes to the standard of review. Instead, the proposals supported by BT in Section 2 would better achieve the Government's core streamlining objectives while retaining the strengths of the current system.

[43] See, for example, *BCL Old Co Ltd and others v BASF AG and others*, *Emerson Electric Co and others v Morgan Crucible Company plc and others* and *Deutsche Bahn and others v Morgan Crucible and others*.
[44] See *Enron Coal Services Limited ("ECSL") v English Welsh & Scottish Railway ("EWS")*.
[45] See *BetterCare Group Limited v Director General of Fair Trading (admissibility)*, *Freeserve.com PLC v Director General of Telecommunications (admissibility)*.

Annex A
BT's responses to 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?

1. BT does not agree that such a presumption should apply. As set out in detail in our submissions (see Sections 4 and 6), BT considers that appeal on the merits should be retained for appeals against competition law and the majority of regulatory decisions. In particular, BT considers that a high quality appeals regime is important to industry and that moving to a judicial review standard risks undermining the Government's growth agenda.

2. BT makes the following points in support of retaining the current standard of review:

   (a) There are other more proportionate means available to Government which would meet its objectives, without the consequent risk of harm (see Section 2 of BT's response).

   (b) The existing regime works well and it delivers real benefits to consumers, business and the wider UK economy (see Sections 3 and 4 of BT's response).

   (c) The case for change is not proven. The "problems" described in the Consultation do not exist in the form described and the evidence relied upon does not support the arguments (see Section 5 of BT's response).

   (d) Any change needs to weigh up potential benefits (which, BT submits, are largely speculative and un-evidenced) against the real risk of creating substantial additional costs. In particular, BT submits that the proposed changes to the standard of review threaten to lead to poorer quality outcomes for consumers and business and with cases taking longer to reach a final conclusion (see Section 6 of BT's response).

3. BT also considers that the current merits-based standard of review gives the CAT very considerable flexibility about the level of scrutiny it applies to decisions. This flexibility is particularly useful in a regulatory field where there are a wide variety of decisions from different decisions-makers which suit variable standards of review. In addition, the remedial and evidential powers associated with merits-based review give the CAT the flexibility to make decisions for itself on the basis of evidence subjected to detailed scrutiny and cross-examination.

4. As the limits as well as the flexibility of the current regime are now well understood in the light of the case law of the CAT and the Court of Appeal, a clear detrimental consequence of the proposed changes will be the risk that it generates the very outcome it seeks to avoid, i.e. by increasing rather than reducing the amount of litigation.

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?

5. For the reasons set out in its submissions and in response to Q1 above, BT does not agree with the Government's principles for non-judicial review.

6. BT instead considers that the current system which allows for appeal on the merits is now well understood in the light of the case law of the CAT and the Court of Appeal. It allows sufficient flexibility to deal with the wide variety of cases upon which the CAT must decide and, when considered in totality, enables a more efficient and effective resolution of regulatory decisions.

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

7. As set out in detail in Sections 4 and 6 of our submission, BT considers that moving to a judicial review standard would have a number of detrimental consequences, including on the length, cost and effectiveness of the appeals framework.

(a) **Length**: BT considers that the substantial changes such as those proposed in the Consultation are likely to lead to substantial amounts of satellite litigation resulting in greatly increased delays. In addition, BT considers that the remedial and evidential powers associated with merits-based review (in contrast to judicial review) give the CAT the flexibility to make decisions for itself on the basis of evidence subjected to detailed scrutiny and cross-examination. The uncertainty about how the current proposals would affect the CAT's powers in relation to remedies and remittal sits uneasily with the Government's objective to streamline appeals. If the effect of these proposals were to require the CAT to remit decisions back to the regulators, then it seems to us that the likely effect would be to cause further significant delays in the decision-making process and the potential for additional litigation challenging fresh decisions made after remittal.

(b) **Cost**: Clearly, the issues set out above regarding the risk of additional delays will have a direct impact on the costs incurred by the parties. Uncertainty regarding the standard of scrutiny to be applied and the remedial and evidential powers of the CAT will likely lead to increased litigation and, consequently, costs. Moreover, such direct costs do not take account of the substantial costs of flawed administrative decision going uncorrected in any revised judicial framework.

(c) **Effectiveness**: For the reasons set out in our submissions and above, we consider that when considered as a whole it is likely that the proposed changes would generate substantial inefficiencies in regulatory and competition law procedures, resulting in reduced effectiveness overall.

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?

8. For the reasons set out in our submissions and below, we do not agree that for decisions in the communications sector, there should be a change in the standard of review. We consider that the case for change as set out in the Consultation has not, as a general matter, been made out. This is

particularly true in the communications sector which, as described in Section 3 of our submissions, is one of the UK's greatest success stories generating revenues in excess of £50 billion annually and enabling substantial increases in productivity throughout the country. The current regulatory environment, both at the administrative and appeals phases, is a key part of that success.

9. BT is concerned that certain of the changes proposed in the Consultation will not achieve those objectives and will, instead, severely impact on BT's ability to challenge flawed administrative decisions. In particular, BT considers that mandating a legislative change to the current standard of review for appeals would, if adopted, seriously jeopardise BIS' goals, which we support, of an appeals regime which is efficient, effective, and which helps to achieve better regulatory decisions. If anything, it would result in the opposite outcome. In short, implementation of the main recommendations in the proposal will not improve the quality of decision making by regulators, it will make it harder to overturn bad decisions and it will not streamline the regulatory appeals process.

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

10. For the reasons given in BT's submission, and in answer to the previous questions, BT does not believe that the changes contemplated in the Consultation will result in appeals which are finally completed any more quickly. Industry is more concerned by the time taken to finally dispose of a matter than it is with the precise length of a hearing. If changes to the standard resulted in more matters being remitted for reconsideration by Ofcom, it is likely that the time taken, overall, for a matter to be concluded would be longer than at present. This would be a retrograde step.

11. Similarly, for the reasons given above, we do not believe that the length of hearings will be materially affected: indeed, they could become longer rather than shorter if, for example, there were disagreements on whether, in the particular circumstances of that appeal, sufficient regard had been had to

the requirements of Article 4 Framework Directive. It follows that we do not consider that a change will produce cost savings.

12. A change to the standard of review as proposed will not improve the effectiveness of the appeals regime. Indeed, for the reasons given above, it is more likely to result in consumer welfare affecting "errors" being left uncorrected, which would be a retrograde step. More importantly, though, if rigorous, high quality, regulatory decisions is the best way (a) to maximise competitor and consumer welfare and (b) to avoid regulatory appeals, then a reduction in the degree of scrutiny of regulatory decisions will be less of a spur to good decision making than the current regime and hence could increase the number of 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?

13. We do not agree that there should be a change in the standard of review of decisions under the 1998 Act.

14. The proposal to distinguish between decisions in relation to whether or not there has been an infringement of competition law and decisions on the level of penalties is an irrational one. The latter is to some extent a "second order" issue, in that a decision that there has been an infringement is a "condition precedent" to any decision to impose a fine. Any decision on whether or not the relevant party has been guilty of infringing competition law is a *quasi-criminal* decision. The findings of infringement can be made by the OFT or a sectoral regulator, i.e. administrative bodies. An appeal to the CAT is the first time that the matter is considered by an independent judicial body. We doubt that an appeal against a finding of infringement which was undertaken only on conventional judicial review grounds would be compatible with Article 6 ECHR. We conclude, therefore, that the current "on the merits" standard of review, which includes receiving and hearing evidence in order to determine disputed issues of fact, is necessary and

appropriate for decisions in relation to infringement and in relation to the level of penalties.

15. In addition to concluding that, an "on the merits" standard of review is appropriate on natural justice grounds, we also see no reasons, nor any competition or consumer welfare benefits, justifying a move from the current standard of review.

16. As we have already shown in our submission, the Consultation has provided no evidence of dissatisfaction with the current regime under the Competition Act 1998. Our own perspective, and this has been supported both by discussion with members of the CBI's Competition Panel and at the BIS Stakeholder Meeting we attended, is that such a change would represent an inappropriate and unwarranted "about turn" from the position adopted by the Government in response to the Consultation *Growth, Competition and the Competition Regime*. At paragraph 6.18 of that Consultation, the Government concluded as follows: "*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*."

17. In terms of the potential detrimental impact on consumer welfare, we refer to Section 4 of our submission and the case studies set out in Annex B.

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

18. Changing the standard of review will not achieve the aims implicit in this question (i.e. shorter, cheaper, better appeals) – it is more likely to make matters worse and the regime less effective.

19. Given the consequences that can flow as a result of a finding of infringement (in particular follow-on damages claims), any attempt to reduce the degree of scrutiny applied on an appeal against a finding of infringement would be likely to be met by a barrage of satellite litigation (for example to ensure all evidence considered appropriate is introduced and heard, or on whether

sufficient scrutiny had been applied for the decision to be compatible with Article 6 ECHR). The time and costs of such litigation would be very small in comparison with the many millions of pounds typically at stake in terms of fines and damages claims. The current regime is, from all we can see, working well. Given the concerns we have just identified, the likelihood is that if the standard of review is changed as proposed cases are likely to take longer, be more expensive, and potentially could result in more appeals to the Court of Appeal.

20. In terms of reduction in consumer welfare we refer to Section 4 of our submission and the case studies set out in Annex B.

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?

21. BT's prime concern is obviously with the regime for communications. Whilst we can appreciate a desire for consistency between regulated sectors, consistency should come second to fitness for purpose.

22. The communications regime for appealing price control decisions is reasonably well tested, and with experience and learning has come efficiency and expedition. For example, in April 2011, following its experience of the first five price control references under section 193 of the 2003 Act, the CC consulted on its processes and issued its revised guidance. This was helpful, and well received. It appears (from the CMA consultation "*Cost Recovery in telecoms price control references: Guidance on the CMA's approach*") that the intention is that the CMA will retain this guidance (adding a new section 8 to it on recovery of the CMA's costs).

23. In comparison, we believe the aviation, energy and postal service sector regimes are either completely, or very nearly completely, untested, so there is little or no evidence to show whether or not there are any problems with those regimes, and no evidence to suggest that a change of standard of review is necessary.

24. The 2003 Act regime for appeal of price control review decisions requires a party to bring its appeal before the CAT. The relevant price control review questions are then referred by the CAT to the CC. The CC investigates, and in so doing adopts an approach which is largely inquisitorial, and involving bi-partite meetings with the parties, as opposed to adversarial, and makes its determination of the questions referred to it. The CC's decision on the questions before it is reached by reference to the merits of the matter, and not just by adopting judicial review principles to decide whether or not the original decision should be set aside. The CC's decision is then brought back before the CAT and parties aggrieved by it are entitled to challenge it on the basis of judicial review principles.

25. We consider that were the CC (or CMA) to undertake only judicial review scrutiny of the original decision, this would be a significant retrograde step. Where it finds a decision to be flawed, it would only be able to determine that the decision should be set aside and that the matter should be remitted to the regulator. For the reasons given above, this would be detrimental to industry and to consumers because it would increase the overall time taken to dispose of the matter, it would increase the costs and would result in the parties being more "in limbo-land" for a period of time before the matter is ultimately resolved. Moreover, the CC has no experience of applying a judicial review standard.

26. We have already shown that in the communications sector, price control review challenges are more often than not brought by competitors other than the regulated party, on the grounds that, put simply, the regulator has under-regulated, and that the prices they, the new entrant, are being asked to pay are too high. So, a regime which results in more remittals will work counter to their interests because, in such circumstances, it will take longer for the new "correct" lower price to come into force. It follows that changing the standard of review, if it had these consequences, would, in the communications sector at least, work against BIS growth and competition objectives.

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

27. For the reasons given above, we do not consider that changing the standard of review would make the overall regime more effective. If the CC/CMA was only able to reach decisions involving remittal, this would certainly impact detrimentally on its effectiveness.

28. Similarly, for the reasons given above, we see little likelihood that in the communications sector, the regime would become cheaper or quicker. We cannot comment on the other sectors.

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?

29. BT has no comment to make on 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?

30. BT has no comment to make on this question as it has no experience of the rail sector, but as a matter of theory and principle, we consider it likely that the concerns we have expressed above about changes of the standard of review would be equally likely to apply here.

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?

31. For the reasons given above, BT does not consider that judicial review is the right standard for any regulatory appeals. We repeat here the comments we

have made above as to why the current standard of review is preferable for all types of regulatory decision.

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?

32. As per our answer to Question 12, we do not consider that the standard of review should be altered for "other regulatory appeals".

33. We repeat here our concerns above – that changing the standard of review would be likely to diminish the effectiveness of the appeals regime, increase the times taken overall to dispose of matters (i.e. including the time required for a decision to be retaken following remittal) and increase the cost of appeals apply equally here.

34. As above, we consider that any reduction in the degree of scrutiny of regulatory decisions is likely to work against the BIS objectives.

35. Finally, we note that the Consultation provides no evidence of a need for changes to be made.

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?

36. BT considers that there would be merit in working together with stakeholders and the CAT to consider appropriate changes to the Rules. In particular, we consider that there is scope for more proactive use of case management powers (rule 19) and strike out powers (rules 9 and 10) as a way to fast-track straightforward matters. It may also be possible to make amendments to the provisions on case management conferences (rule 20) and oral hearings (rules 21 and 51) to improve the scope to enable more efficient hearings through, for example, stricter timetables and greater reliance on

written pleadings. The deadlines for making applications for permission to appeal (rule 58) and costs (rule 55) could also be re-considered.

37. Moreover, there may be scope for the CAT to make increased use of the provisions in rule 62 which enable procedural acts to be undertaken by the President, a Chairman or the Registrar sitting alone. However, for the reasons set out in its submission, BT considers that the substantive consideration of appeals should still be conducted by a panel in order to for full consideration of the matters.

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?

38. BT does not oppose this proposed change.

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.

39. BT does not oppose this proposed change. Indeed, one of the key benefits of appeals to the CAT is that its members often have a considerable amount of institutional and technical knowledge which is pertinent to the issues that come before it. That helps in the following ways:

- It results in a saving of time and cost if there is no need to "teach again from scratch" (which might be technology or industry learning) at the start of each appeal; and

- It can help to promote consistency of decision making over time.

40. If this change will help to ensure that such institutional knowledge is retained, we would welcome it. However, we would expect that the CAT Chairman would continue to be required to have legal qualifications as this enables the relevant issues on appeals to be considered within the correct legal framework.

41. With regard to holding another judicial office, the same point applies. Provided that the members in question can devote sufficient time so as to

gain and retain their specialist/institutional knowledge, then we see no reason why they should not hold other office.

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

42. One of the great strengths of the CAT is the breadth of experience and knowledge that members appointed to sit on any particular case can bring to it. The use of a multi-disciplinary panel, presided over by a judicial chairman, to hear substantive appeals is welcomed by industry.

43. Whilst we support the proposal that a single Judge should be permitted to sit in certain circumstances[46], for example to deal with procedural matters, or to hear points of law, we would be opposed to any proposal that substantive appeals could be determined without coming before a full panel unless there was unanimous consent to that proposal from all parties involved in the appeal.

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

44. In the communications sector, the general licensing regime has been replaced by a general authorisations regime. Appeals against the imposition of Significant Market Power conditions (or, for example Universal Service or Access conditions) other than price control reviews are heard by the CAT. The process by which price control reviews are referred out to the CC has been discussed in answer to Question 8.

45. To the extent that this question is relevant to the communications sector, BT supports price control review appeals being referred out to the CC/CMA as at present.

[46] We note that that is already the case in certain circumstances; see for example rule 62 of the Tribunal Rules 2003 which allows the President, Chairman and Registrar to exercise the powers of the CAT.

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?

46. Whilst the process in the communications sector is fairly complex, it has shown that it can work, and that the CAT and the CC have played complementary roles. As explained in our response to Question 8, the CC reviewed its process in 2011 and has published its guidance on how it will operate. This is understood by the relevant parties. The Civil Aviation Act 2012 model is untested and so there is no evidence that, in practice, it is superior to the model set out in the Communications Act 2003.

47. On balance, we believe that it is helpful for appeals to originate in the CAT and then be referred, on price control matters, to the CC. Allowing the CAT to have a role at the outset enables case management considerations to be undertaken in a holistic manner. It also allows for any potential disputes regarding whether an appeal properly raises "specified price control matters" for consideration by the CC to be decided early on. The CAT also regularly establishes confidentiality rings at the outset of proceedings and can police compliance with the restrictions placed on the individuals admitted into the confidentiality ring (as well as sanctioning any non-compliance). This is a process which helps with the expeditious and efficient conduct of appeals. Finally, the CAT's judicial experience enables it to deal justly and expeditiously with any interlocutory applications that may arise early on in an appeal, such as in relation to applications for disclosure.

48. By way of example, in March 2013 Ofcom published its final statement at the conclusion of its Business Connectivity Market Review. Ofcom found that BT had Significant Market Power in a number of business markets and consequently imposed regulatory obligations. Two separate appeals were brought by three other communications providers. COLT brought an appeal in relation the particular services that BT was mandated to supply. Vodafone and Verizon appealed the way in which charge controls had been imposed on BT. BT did not appeal itself, but has intervened in support of Ofcom in both appeals. In those appeals, it was helpful for the CAT to be able to have an overview of all of the grounds of appeal and to be able to

case manage the two appeals in a coherent manner. The Vodafone and Verizon appeal has now been referred to the CC, but the COLT appeal will be heard by the CAT. Nevertheless, the two cases are proceeding on parallel and coherently managed tracks, due to the early engagement of the CAT in both sets of appeals.

49. If the CAT played no part at the outset of a Vodafone and Verizon style appeal, it would mean that the two bodies would both be hearing appeals on the same Ofcom final statement, but operating on separate tracks, without either party having reference to the other. In such circumstances, there is clearly a possibility of inefficiency. There might also be inconsistency – for example if the two bodies each took different views on who was permitted to intervene in each appeal.

50. Nevertheless, BT considers that it might be possible to introduce some form of streamlining of the process by which matters are referred to the CC/CMA, if the parties can agree the questions early on at the outset.

51. Finally in this regard, BT has a concern that in future, price control references will be heard by the CMA, an arm of the administration. The appeal is the first time on which the decision of the regulator, an administrative body, comes up for independent judicial scrutiny. It is important that the appellants have the right to have their appeal heard by an independent judicial tribunal. Indeed, the Framework Directive requires that where an appeal body is not judicial in character, its decision shall be subject to review by a court or tribunal. If, as seems most appropriate, the CAT is to undertake this function, it seems logical to us that it should be involved at the outset of the process as well as at the end of it.

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

52. BT agrees. The wide expertise of the CAT and its members, as a specialist tribunal, is very much welcomed by industry. It is therefore far more suitable to hear appeals against ex ante regulatory decisions than, say, the High Court.

53. Conceptually, there is also a high degree of overlap between competition law and regulation. It is therefore logical that the CAT should deal with both.

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

54. The regulation of other sectors is not a matter on BT expresses a particular view. If, however, the intention is to achieve consistency across different industry sectors, then we would be happy to see other sectors adopt a model which is similar to the communications regime, i.e. whereby price control review appeals are referred to the CC/CMA and appeals against the imposition of other regulatory obligations, such as Significant Market Power conditions, are heard by the CAT.

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

55. This question appears to be predominantly about ensuring consistency in Scotland and Northern Ireland. BT refrains from commenting on the most appropriate way to achieve that, save to make two generalised comments (which are without prejudice to our answer to Question 23 below) as follows.

56. Firstly, if different bodies are to be used in Scotland and Northern Ireland, the most important thing will be to ensure that they have an equal degree of competence to the CAT (in practice as well as in theory). That includes ensuring that there is equal expertise in specialist areas such as economics.

57. Secondly, we have expressed concerns elsewhere about the relative importance of having consistent regimes. Whilst it may represent a “clean” solution, it also may fail to recognise local circumstances, either of geography or of industry. We suggest that Government’s prime focus should be on asking whether the proposals to be adopted are the best they can be in that particular location, and recognising the particular circumstances of each industry.

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 body to hear enforcement appeals?

58. For the reasons already given, BT considers that the CAT is an appropriate body to hear such appeals and that it makes sense for the specialist tribunal to hear appeals on all types of competition decisions including enforcement decisions. The CAT also benefits from its role as a UK-wide institution; it can therefore ensure a measure of consistency which would not be possible otherwise.

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 there any other further changes required in Northern Ireland?

59. BT has no specific comment to make on the regime in Northern Ireland. However, BT considers that, in the interests of consistency, the Government may wish to consider whether the CAT should hear such appeals.

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?

60. We respond to Questions 25 and 26 together. In the communications sector, Ofcom's dispute resolution decisions are appealable only to the CAT (with the possibility of a further appeal to the Court of Appeal on points of law) by virtue of sections 195 and 196 of the 2003 Act.

61. We believe that this is a sensible arrangement, and that it is working well. As indicated above, we welcome the fact that when appeals are brought before the CAT, they are heard by a specialist tribunal that understands the industry and the UK and European regulatory framework that applies in such

circumstances. Furthermore, given that dispute resolution appeals are about being granted access and the terms on which access is granted, it follows that there is a need for appeals to be determined expeditiously. If an appeal was to be delayed, it would have a detrimental effect on competition. We believe that the CAT is better equipped than the High Court to hear, and hear quickly, appeals of this type.

62. As we have shown in our response above, the fact that there are more appeals against dispute resolution decisions in the communications sector than in other sectors is a consequence of three key factors.

(a) Firstly, that the UK regulatory regime is intrusive, detailed, and complex.

(b) Secondly, that Ofcom is required, as a result of the European Regulatory Framework, to accept and determine appeals between communications providers in virtually all circumstances means that there are more disputes between providers which are brought up before Ofcom for resolution.

(c) Thirdly, the competitive nature of the industry, with extensive regulation at the wholesale level, and where disputes can be worth tens if not hundreds of millions of pounds to the relevant industry players and can affect their competitiveness, means that "decisions matter" and that incorrect decisions will be challenged by aggrieved competitors.

63. If there is a desire for consistency, (and we question whether the low number of appeals in other sectors means that this should be a priority for BIS) then we would contend that the current communications model is the one that should be adopted and extended to other industries.

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

64. We believe that it would be sensible for the CAT to be able hear such matters. Decisions regarding the way in which an investigation is conducted can have a very important bearing on the final outcome. It therefore makes

sense for the CAT to hear such applications. At present, there is the risk that the High Court deals with issues leading up to the decision, with the CAT then deciding any appeal against the final outcome, as indeed was the case in appeals brought by Crest Nicholson against the OFT's Construction Industry Decision.[47]

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?

65. BT responds to Questions 28 and 29 together. Confidentiality rings play an important role in the appeals process and they are regularly used in appeals before the CAT. As set out in response to Question 19 above, a key benefit of confidentiality rings established by the CAT is that they are capable of being policed, and sanctioned in the event of non-compliance.

66. The position prior to an appeal is, however, very different and we urge the Government to proceed cautiously and not draw undue parallels between the administrative and judicial phases of regulatory proceedings.

67. Overall, BT accepts that having "the right amount of information" and having confidence that it has been manipulated correctly can help to reduce the need for appeals. However, BT considers that an assumption that confidentiality rings are the answer should not be the automatic response.

68. The proposed benefits of a confidentiality ring are described in paragraph 6.6 of the Consultation which states:

> *Regulatory and competition decisions are commonly founded on confidential data which cannot be disclosed directly to all the parties. Without this, parties may not be able fully to understand the case*

[47] See *Crest Nicholson plc v Office of Fair Trading* [2011] CAT 10 and *Crest Nicholson plc v. Office of Fair Trading* [2009] EWHC 1875 (Admin).

against them, or may not until the decision has been made, so an appeal may be more likely. Earlier and improved disclosure to parties of the case through confidentiality rings should lead to better decision-making during the administrative proceedings. This should in turn reduce the need for appeal and would also lighten the administrative burden on competition authorities and regulators, who are often required to undertake costly and time-consuming redaction exercises.

69. It is necessary to deconstruct the above paragraph further, as it could be said to adopts an overly broad brush approach to the wide range of different types of decision at issue, namely enforcement actions (both under competition and regulatory law), disputes and market reviews.

(a) In relation to Competition Act enforcement decisions and, we anticipate, regulatory enforcement decisions, it is the party under investigation which needs to see the case that is put against it. Arrangements already exist for the party under investigation to have access to the file, and so we do not see a need for confidentiality rings in such circumstances.

(b) In relation to disputes, the European Regulatory Framework which applies to telecoms envisages that the dispute resolution process should be a quick and simple process, to be completed within four months. We believe that setting up confidentiality rings in disputes would not be consistent with such a regime and that it would risk jeopardising what is already a very tight timetable (especially so when Ofcom brings to bear matters of policy in reaching its determination). Any ring would need to be set up, the parties would have to agree the individuals in it and then the confidential material would be shared and digested. The Consultation presumes that each of the parties would then be able to comment on the confidential material supplied by the other parties, which is effectively another step in a process which is already highly time constrained, as described above. In this regard, we note that in a recent dispute involving BT, Ofcom was not willing to share with us representations received from an interested third party. Ofcom stated that, in essence, there would be insufficient time to do this and allow us to make representations. Against that backdrop, we would be surprised if Ofcom thought that it could manage to set up

confidentiality rings and deal with the steps identified above within the mandated four month timeframe.

Furthermore, given that the dispute resolution process is concerned with determining the commercial rights of the disputing parties (in other words a form of "arbitration") we are concerned that disclosure of information into confidentiality rings would result in the parties having more access to the information of the other party than they would be entitled to on a commercial arbitration. This has the ability to distort the bargaining powers of the parties.

(c) With regard to market reviews, each of the parties is entitled to submit the evidence it considers appropriate in response to a public regulatory consultation. We suspect that the key concern of the parties here is not so much with the material that has been provided, but with whether the regulator has manipulated it correctly, or whether there it has made mistakes or incorrect assumptions. If that is the case, there may be other ways to address that concern. For example the use of a "trusted third party" to audit or check that the information the regulator has requested is sufficient, and that the regulator has manipulated it correctly, could be a way of providing the parties with confidence in the workings of the regulator, but without sharing information more than is necessary.

70. Moreover, a very practical difficulty regarding the use of confidentiality rings at the dispute stage is that the same parties are likely to seek access to information over the course of numerous processes. The sector in which BT operates is a surprisingly "small world". The same individuals are often involved in many regulatory matters and tend to stay within the industry for a long time. In reality, it is not practical to assume that having analysed confidential information in one case, such information can be entirely forgotten at the end of the case. The unsavoury result would be that over time, and after a number of disputes, enforcement actions and market reviews, individuals would be likely to have obtained a complete picture of the confidential material of a competitor – far more than would normally be the case. Were such an outcome to happen, it would risk severely dampening the competitive dynamics in the marketplace and hence risks outcomes that are to medium and long-term detriment of consumers.

71. The position described above applies even in the event that such rings were to be limited to legal and economic advisers. Again, the same advisers tend to get instructed by the same parties and hence would build a substantial base of knowledge of confidential information over time. However, BT considers that the position would be even further exacerbated were commercial representatives to be allowed into such rings.

72. Instead of allowing intrusive and potentially dangerous access to the legitimate confidential information of a competitor, BT considers that more proportionate solutions to ensure transparency should be explored. For example, as described above, the use of a "trusted third party" to audit or check that the information the regulator has requested is robust and sufficient should provide adequate comfort.

Q30 Do you agree that the factors that 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 line proposed?

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

73. BT responds to Questions 30 and 31 together. We do not agree that the factors that the CAT should take into account in exercising its discretion to admit new evidence should be set out in statute and we see no need to change the current position in relation to price control review appeals. We believe that the CAT has the powers it needs and has shown that it can use them effectively to police matters coming before it so as to ensure that they run expeditiously, effectively and fairly. Moreover, we note that BIS itself recognises that there is "*no evidence that parties are purposely holding back evidence until the appeal stage*" (paragraph 3.23).

74. BT's view is that the position as set out by the Court of Appeal in *British Telecommunications plc v Ofcom* [2011] EWCA Civ 245 strikes a fair and reasonable balance. We have read the response from the CAT to this

Consultation and support and adopt the reasoning that they have set out in answer to these two questions.

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?

75. This question follows the section the Consultation entitled "*New evidence, costs and incentives to game the* system". The inference from this part of the Consultation appears to be that some appellants view appeals as a "*one-way bet*" and (paragraph 6.21 of the Consultation) and that they bring appeals "*where there is no merit in the arguments being brought*" or "*where the object of the appeal is to delay a decision*".

76. As set out in Sections 3 and 4 of its submission, BT does not consider that appeals represent a "one-way bet" and does not believe that there is sufficient evidence to impose an asymmetric costs regime. In particular:

(a) In its submission, BT demonstrated that in the communications sector, appeals are not just brought by the regulated party trying to "squeeze a little more" out of the regulator after it has issued its decision. For example, in price control matters it is more often than not those who purchase the relevant products or services from the regulated party who appeal the decision rather than the regulated party itself;

(b) BIS has produced no evidence whatsoever that parties are bringing arguments which are without merit; and

(c) Bearing in mind that the institution of an appeal does not normally cause a decision to be stayed, appeals are not brought for that reason.

77. Given that in the communications sector, appeals are more often brought by the parties other than the regulated party on the basis that they will suffer prices that are too high, such an asymmetric costs regime risks disincentivising appeals which might bring consumer benefits. It would work

counter to the objectives of the Consultation if, for example, SMEs were discouraged from appealing.

78. Potential immunity from costs orders is also a disincentive to good decision making. Taken together, a lowering of the standard of review, coupled with no costs sanction for arriving at the wrong decision, these factors risk causing a significant reduction in the quality of decision making and hence harm to competition and to consumers.

79. Over the last few years the jurisprudence of the CAT in relation to costs has developed. The CAT has shown that it is alive to issues such as the challenges faced with regulators on issues of regulatory discretion and the complexity of deciding, at the end of a complex case, which party has won or lost.

80. We bear in mind, also, that the Consultation does not identify any reasons why regulators should be afforded such differential treatment or "special protection". We note that public bodies are not given such treatment under normal public law principles and see no reason why a special case should be made here.

81. In conclusion, we consider that no presumption should be made in advance about cost recovery and that it should be left as a matter for the CAT to decide the extent to which costs orders should be made and against whom.

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

82. BT agrees with the premise that parties, when successful, should be free to seek to apply for the reasonable costs incurred in bringing or defending an appeal.

83. With regard to claiming internal as well as external costs, we consider that the question of quantum of costs should be a matter for the CAT and there is currently no bar to regulators seeking such costs, should they wish. We would add, however, that if it is reasonable for regulators to claim internal costs, as a matter of principle it must also be appropriate for other parties to

appeals (who, in the communications arena, have traditionally only claimed external costs) to seek payment of their internal costs.

84. In the event that Ofcom (or other parties) were to seek to claim internal costs, BT considers that the quantum of such costs should be calculated based on the actual cost incurred (i.e. a measure of salary to reflect the hours spent on a particular matter and related costs), rather than by reference to benchmark rates.

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

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

85. BT responds to these two questions together. Again, the inference here appears to be that parties bring unmeritorious appeals. However, no evidence to support such assertions is advanced in the Consultation.

86. Having said that, we believe that in the event that a party brings an unmeritorious appeal, the CAT already has adequate powers to address such cases. Similarly, parties who consider that an appeal raises unmeritorious or unjustified grounds can make a strike out application to the CAT - see rules 9 and 10 of the Tribunal Rules 2003.

87. For the sake of completeness, and further to Question 32 above, BT adds that we think it would be unreasonable for a regulator to be immune from a costs order in circumstances where it applies for an appeal to be struck out and subsequently loses that application.

Q36 Do you consider that the principles proposed for decision-making in anti-trust [cases] should be applied in any way to regulatory decision-making?

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

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

88. BT responds to Questions 36 – 38 together. These questions follow the discussion in the Consultation of proposed improvements to the competition law regime for investigation of infringements of the anti-trust prohibitions. The Consultation asks for views on whether regulators should adopt similar principles.

89. BT considers that as regulatory enforcement and competition law enforcement start to mirror each other more closely (for example, fines of up to 10% of turnover can be imposed for breach of either regime), the more there is a need for both regimes to adopt consistent best practice.

90. In particular, BT considers that there may be merit in considering whether certain best practice recently adopted with respect to anti-trust cases could usefully be applied in the regulatory field. BT has in mind points such as the separation of investigation and decision-making roles and the introduction of a Procedural Adjudicator to resolve procedural disputes that may arise in a timely manner.

91. BT considers that the current investigatory powers employed by Ofcom in its regulatory role (in particular, requests for information under section 135 of the 2003 Act) are sufficient. An additional power to ask questions (presumably of individuals) would not increase the effectiveness of regulation.

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

92. BT considers that non-infringement decisions should continue to be appealable decisions under section 46 of the 1998 Act. Investigations under competition law powers have substantial implications, whether or not they eventually result in a finding of infringement and imposition of a penalty. It is

therefore right and proper that where, on the evidence available to it, an authority has reached a non-infringement decision, that decision should be the subject of judicial scrutiny in the same manner as if an infringement was found. To decide otherwise would leave third party complainants without practical recourse in the event of flawed administrative 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 of 6 months, instead of the existing 9 months?

93. BT welcomes expeditious resolution of matters brought before the CAT. We believe that generally the CAT does work promptly and efficiently: indeed, as the Consultation states at paragraph 7.9, in relation to communications appeals "*Evidence suggests that the UK performs well against most international comparators*".

94. Whilst this proposal may seem worthwhile at first sight, it fails to recognise the very different nature and complexity of the cases that come before the CAT. It would be a real concern for us if the interests of justice were to be run roughshod over just in order to meet a target timescale. It is also unclear what would be considered to be a "straightforward" case and a "non-straightforward" case: virtually all types of appeals can have simple cases and highly complex cases. Sometimes the complications, or the non-straightforward aspects of the case, may only manifest themselves part way through. The proposal that timescales for the case should be set end-to-end at the first case management conference are unlikely to be workable in practice.

95. The example given here, of the Merger Action Group appeal being resolved in 10 days is yet another example of how the Consultation uses statistics highly selectively. The fact that that case was heard so quickly says nothing about the generality of cases, or of the utility of particular targets for disposal of appeals. It is important to recall that the Merger Action Group appeal raised highly complex issues in what was at the time a very tense economic and political climate.

96. In conclusion, whilst we are happy to participate in initiatives, together with the CAT and if necessary with BIS, designed to increase efficiency and expedition, we would not support the introduction of formal targets for the disposal of cases.

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

97. For the reasons given in response to Question 40, we do not support the introduction of formal targets for "all other regulatory appeals". Again, BT stands ready to engage in any initiatives which will help to increase efficiency and expedition.

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?

98. BT responds to Questions 42 and 43 together. At paragraph 7.16 of the Consultation, BIS refers to one wholly exceptional case, the BSkyB appeal, to infer that there is a "problem" that needs resolving in relation to the amount of evidence and the number of witnesses that may be called. This one case is not sufficient evidence to support a case for change to the current rules and was somewhat atypical, involving some 13 separate parties in a sector with many billions of pounds potentially at stake. In any event, the CAT has powers to regulate the way in which matters are heard before it and has shown itself willing to use these to ensure that the same evidence is not rehearsed repeatedly by witnesses of fact, or by expert after expert.

99. In terms of voluntary processes, we believe that the parties already have incentives to keep cases focussed, and to limit evidence as appropriate. We

do not see that the introduction of this sort of procedure would add anything to what already exists.

100. Finally, in this regard, we note that in paragraph 7.18, the Government's view is that "*there should be a presumption that matters should be resolved on the papers wherever possible*". In practice, we have found that uncontested matters and simple costs or permission to appeal applications have been dealt with on the papers. However, the importance of oral submissions in appropriate circumstances should not be underestimated. Whilst we would support applications on the papers where that is sensible, we do not agree that "a presumption" in this regard would strike the right balance. We would prefer that the parties and the CAT should be able to form a view in the particular circumstances of each case as to whether oral argument would assist the process, either in terms of efficiency, or of clarity of argument.

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 [the] Competition Commission has the relevant case management powers?

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

101. BT responds to Questions 44, 45 and 46 together. For the reasons set out in response to Question 40, we do not support the formal introduction of firm timescales. However we would note that the current provisions of the Tribunal's 2004 Rules require the CC to resolve price control appeals within four months, subject to directions from the CAT. Generally, it has been BT's experience that a period of six months is required in order for the CC to deal fully and properly with the complex issues which arise in such appeals.

102. We consider that the CC has shown that it already has sufficient powers under the current regime to deal with price control appeals fairly and expeditiously.

103. BT does not express a view with respect to the proposed changes in the water, rail and aviation sectors.

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?

104. We respond to Questions 47 and 48 together. As set out in our response to Question 14 above, BT considers that there would be merit in working together with stakeholders and the CAT to consider appropriate changes to the Rules. Moreover, BT stands willing to participate in any discussions that may take place to review possible improvement measures.

105. BT also refers to Section 2 of its submissions which set out its proposals for achieving robust decisions more swiftly.

Annex B
Case Studies

A. Case Studies Demonstrating Benefit of Appeal on the Merits to Consumer Welfare (see Section 4)

Case study 1 – *Albion Water v Dwr Cymru [various]*

- Albion Water complained to Ofwat that the water company Dwr Cymru was abusing its dominant position by charging an excessive price, imposing an unlawful margin squeeze and by discriminating against it. In May 2004, Ofwat published a decision rejecting Albion's complaint.

- Albion appealed to the CAT and obtained interim relief by consent order. In an interim judgment of 22 December 2005, the CAT stressed that the primary interest to be protected by the Chapter II prohibition is that of consumers. Having reviewed the case on the merits, in the main judgment, of 6 October 2006, the CAT concluded that Ofwat had made a number of errors in its assessment.

- The CAT stressed the limited nature of competition in the industry and that the vast majority of customers have no effective choice of supplier. It also noted that in multiple cases before it a number of water companies, supported by Ofwat, had resisted various attempts to introduce competition.

- The effect of Ofwat's decision, broadly speaking, was that it would be uneconomic for Albion to supply the particular customer in question and indeed Albion had only survived due to the financial support of that customer and due to interim relief granted by the CAT. The possible elimination of choice for the customer was a "matter of serious concern." Ofwat's stance on certain issues was 'surprising' and seemed contrary to general policy that competition for water supplies to large companies should be encouraged.

- On 18 December 2006, the CAT issued a further judgment on dominance and remedies. Pending reaching a decision itself the

CAT referred back to Ofwat for further investigation the matter of the costs incurred by Dwr Cymru and the question of whether the access price charged by Dwr Cymru was excessive / unfair. The CAT also declared that the access price charged by Dwr Cymru resulted in an illegal margin squeeze.

- On 7 November 2008, the CAT gave further judgment finding that Dwr Cymru had abused its dominant position by quoting an access price which was both excessive and unfair. Dwr Cymru unsuccessfully appealed to the Court of Appeal. On 9 April 2009, the CAT published a judgment on the remedy to be imposed and costs to be awarded.

- Albion subsequently brought a follow on damages action against Dwr Cymru and on 28 March 2013 the CAT awarded it damages in excess of £1.5 million.

Case study 2 – *JJ Burgess & Sons v OFT* [2005] CAT 25

- In January 2002, Burgess complained to the OFT that Austin had abused its dominant position by refusing access to crematoria services at Harwood Park Crematorium ('Harwood Park'). In June 2004, the OFT rejected Burgess's complaint, and found that Austin's refusal to provide access to Harwood Park was unlikely to substantially harm competition and did not infringe the Chapter II prohibition. Burgess appealed to the CAT, which set aside the OFT's decision on the grounds that the OFT's analysis contained errors of fact and law.

- The CAT considered whether it should go on and correctly determine the issues itself rather than referring the case back to the OFT. The CAT noted that its jurisdiction is a merits jurisdiction and is thus wider than judicial review. Having considered factors including that the case concerned medium-sized businesses serving a vulnerable class of consumer and that Burgess had been unable to obtain effective redress from the OFT, it decided to determine the issues itself. The CAT ruled that Austin had abused

its dominant position by refusing access to Harwood Park.

- The CAT criticised the OFT's finding that there would be no abuse, even if Burgess were eliminated, due to the continued existence of one remaining competitor. The Consumers' Association described the OFT's case as "alarming" (see paragraph 286). The CAT observed that the OFT was clearly wrong, because to take any other view on this point would be to tolerate the arbitrary elimination of a competitor, on the whim of a dominant firm.

- The CAT noted the significant consumer detriment that may arise from the abuse particularly for vulnerable customers. As the case concerned a consumer purchase which is relatively expensive for most customers, in respect of which a purchase decision needs to be taken quickly, it is particularly important that effective competition is maintained.

- Burgess subsequently filed a claim for damages for loss of revenues and extra costs incurred by not having access to Harwood Park. The proceedings were stayed following an agreed settlement between the parties.

Case study 3 – *Institute of Independent Insurance Brokers ('IIIB') / Association of British Travel Agents ('ABTA') v Director General of Fair Trading [2001] CAT 4*

- The General Insurance Standards Council ("GISC") was launched in July 2000 as a self-regulatory organisation to establish a harmonised set of standards for motor, household and travel insurance. GISC notified its rules to the OFT for either exemption from the Chapter I prohibition or confirmation that they were non-infringing. The rules included a provision that effectively required independent intermediaries to join the GISC (Rule F42).

- The OFT decided that the rules did not appreciably restrict competition and thus did not infringe the Chapter I prohibition. The IIIB and the ABTA appealed the OFT's decision. The IIIB and its members considered that being compelled to join the GISC threatened to eradicate the possibility for independent brokers to

differentiate themselves in the market from tied agents and direct insurance operations.

- The CAT concluded that Rule F42 had the effect of restricting competition as it limited the freedom of the GISC members to deal with whom they pleased. The freedom to compete implies the freedom to choose how, where and on what terms and with whom to do business. Rule F42 also restricted the choice of insurance intermediaries as to how they did business and was a significant fetter on their competitive freedom. The CAT noted that there was direct evidence that a significant number of intermediaries, namely the 1000 member firms of the IIIB, representing over half of the independent broking practices in the UK, together with the 2,500 members of the ABTA, strongly objected to joining the GISC.

- As the GISC rules affect the vast majority of insurers and intermediaries active in the general insurance market (a market worth some £27 billion) it had an appreciable effect on competition.

- The CAT noted the importance of having a substantial independent broking sector in the field of general insurance, able to shop around and give the client impartial advice, without being tied to one insurer. Further, in relation to travel agents, acceptance of agency status (which the OFT had suggested was an alternative to membership of GISC) was likely result in a substantial reduction in consumer choice.

- The CAT set aside the OFT's decision and found that the rules fell within the Chapter I prohibition.

Case study 4 – *Floe Telecom Limited v Office of Communications [2004] CAT 18*

- On 3 November 2003, the body that is now Ofcom issued a decision that Vodafone had not abused a dominant position by disconnecting Floe Telecom's GSM gateway services. Ofcom found that the services in question were "public GSM gateway services." These services required a licence and as Floe was not itself licensed nor expressly authorised under Vodafone's licence, it

was providing the services illegally. Vodafone's refusal to supply was therefore objectively justified and so there was no breach of a dominant position.

- Floe appealed to the CAT. The CAT concluded that Floe had written authorisation from Vodafone to supply telecommunications services to third parties using public GSM gateways and that Floe could be seen to be authorised to use the GSM gateways in accordance with Vodafone's licence. However, Ofcom raised a new argument that Vodafone's licence was not in fact wide enough to permit it to authorise the use of public GSM gateways. The CAT set aside Ofcom's decision and remitted the matter to Ofcom so that it could reconsider the scope of Vodafone's licences and consider whether Vodafone's actions were objectively justified. On the scope of licence issue Ofcom had not examined Vodafone's views or the views of the industry in general and should take these views into account in its re-examination of the case. In relation to the objective justification issue, the CAT identified a number of issues that Ofcom ought to take into account.

- Ofcom subsequently adopted another non-infringement decision which was upheld by the CAT (albeit that the new decision contained inadequate reasoning in a number of areas). Further appeals by the interveners were made to the Court of Appeal.

B. Case Studies Demonstrating Likelihood of Increased Satellite Litigation (see Section 6)

Issue: Limitation periods in the CAT: what is a decision?
Duration of satellite litigation: 6+ years

BCL Old Co Ltd and others v BASF AG and others

- In April 2008, BCL filed a claim for damages. The defendants asserted that the claim was time-barred, as appeals only against the fine imposed by the Commission (rather than the finding of infringement) would not extend time for filing a claim before the CAT.
- In September 2008, the CAT ruled that the claims had been brought in time: the word 'decision' in this context means the overall decision. In May 2009, the Court of Appeal reversed the CAT's judgment. There is a distinction between the infringement decision and the decision imposing a fine.
- In November 2009, the CAT refused to grant the Claimants permission to bring their actions out of time and that judgment was upheld by both the Court of Appeal and, in October 2012, the Supreme Court.

Emerson Electric Co and others v Morgan Crucible Company plc and others

- In February 2007, Emerson brought a damages action against Morgan Crucible, a successful leniency applicant, who had not appealed the Commission's infringement decision although other parties did. The CAT considered that time had not begun to run, as an appeal by any addressee (and not just by Morgan Crucible) was an appeal against the "decision" stopping the clock.

Deutsche Bahn and others v Morgan Crucible and others

- In December 2010, Deutsche Bahn brought a damages claim against Morgan Crucible. In a change of position from the Emerson case, the CAT ruled that time ran from when the deadline for Morgan Crucible to appeal the Commission's decision had passed

even though appeals by other defendants were still pending.

- In July 2012, the Court of Appeal overturned the CAT's judgment finding that the two year limitation period does not start to run until final determination of all appeals against the infringement decision. Morgan Crucible has obtained permission to appeal to the Supreme Court and the case is due to be heard in March 2014.

Issue: standard of judicial review to be applied by the CAT
Duration of litigation: 2 years

British Sky Broadcasting Group Plc v The Competition Commission

- On 17 November 2006, BSkyB acquired a 17.9% stake in ITV plc. The Secretary of State referred the acquisition to the CC as the acquisition could be expected to operate against the public interest. The Secretary of State accepted the CC's recommendation of partial divestment of Sky's interest.

- Sky (and Virgin) applied for judicial review by the CAT under Section 120 EA. Under that section the CAT is to apply the "same principles as would be applied by a court on an application for judicial review."

- BSkyB's appeal was rejected by the CAT in September 2008. BSkyB was granted permission to appeal by the Court of Appeal and one of the points raised was the intensity of judicial review.

- On 21 January 2010, the Court of Appeal rejected BskyB's submissions that the CAT, as a "hyper competent specialist tribunal" is bound to apply a greater intensity of review than a court would apply in a comparable situation.

- Referring to its previous judgment in the IBA Health case,[48] the Court held that the CAT is to apply the normal principles of judicial review in dealing with a question which is not different from that which would face a court dealing with the same subject matter.

[48] *Office of Fair Trading and Others v IBA Health Limited* [2004] EWCA Civ 142

Whilst the CAT will apply its own specialised knowledge and experience, which enables it to perform its task with a better understanding, the possession of that knowledge and experience does not in any way alter the nature of its task.

Issue: Scope of the 'decision' under section 47A[49] of the Competition Act 1998
Duration of satellite litigation: nearly 3 years

Enron Coal Services Limited ("ECSL") v English Welsh & Scottish Railway ("EWS")

- In November 2006, the ORR found that EWS had abused its dominant position on the market for coal haulage. In November 2008, ECSL brought a damages action under section 47A following which EWS applied to have certain claims rejected on the basis that they were not based on findings of fact in the ORR's decision. The CAT accepted the application in part.
- EWS appealed to the Court of Appeal and on 1 July 2009 its appeal was upheld. The Court of Appeal held that the existence of a finding of infringement is not only a pre-condition to the making of a claim under section 47A, but it also operates to determine and define the limits of that claim and the CAT's jurisdiction in respect of it. It is not open to a Claimant to simply rely on findings of fact which could arguably amount to an infringement. Permission to appeal to the Supreme Court was refused.
- On December 2009, the CAT gave judgment on the remaining claims deciding that ECSL had failed to demonstrate causation. It also rejected an argument that in light of the wording of section 58 of the 1998 Act, it was bound by all findings of fact made by the ORR.
- In January 2011, the Court of Appeal upheld the CAT's judgment on

[49] See also the Court of Appeal's judgment in Emerson Electric Co & Ors v Merson UK Portslade Ltd [2012] EWCA Civ 1559, which found that claims for damages could be brought only against the addressees of the Commission's decision.

causation however it upheld ESCL's claim that the CAT had erred in its interpretation of section 58 of the Competition Act. The Court found that the CAT is bound by all findings of fact made by a competition regulator, unless the CAT directs otherwise. ESCL lost because the Court found that there were no factual findings in the ORR's decision inconsistent with the CAT's rulings. The Court however found that not every statement in a regulator's decision amounts to a finding of fact for these purposes.

- The Supreme Court refused ESCL permission to appeal.

Issue: What amounts to an appealable decision under sections 46 and 47 of the Competition Act 1998 ('CA')
Duration of satellite litigation: numerous judgments on this issue which between them have taken many years.

BetterCare Group Limited v Director General of Fair Trading (admissibility)

- In November 2000, BetterCare complained to the OFT alleging abuse of a dominant position by N&W.[50] In November 2001, the OFT rejected the complaint on the basis that N&W was not an undertaking. Later that month BetterCare launched an appeal claiming that the OFT had made a decision which it was entitled to appeal under section 47 CA. The OFT contended that it had not reached an appealable decision.

- The CAT found that in deciding that N&W was not acting as an undertaking the OFT had necessarily decided that the Chapter II prohibition had not been infringed and this therefore was an appealable decision.

Freeserve.com PLC v Director General of Telecommunications (admissibility)

- In March 2002, Freeserve launched a complaint with Oftel alleging that BT had engaged in various anticompetitive practices. In May 2002, following investigation, Oftel wrote to Freeserve advising it

[50] North & West Belfast Health and Social Services Trust.

that it had closed its preliminary investigation as Freeserve's complaint did not provide evidence of anti-competitive behaviour by BT. In June 2002, Freeserve wrote to Oftel asking for the May decision to be varied or withdrawn under section 47 CA. Oftel wrote to Freeserve informing it that its previous letter did not amount to a decision under section 46 CA.

- In September 2002, Freeserve lodged an appeal. The CAT followed its BetterCare analysis and concluded that Oftel's conclusion that there was no evidence of anti-competitive behaviour amounted to a non-infringement decision.

Civil Aviation Authority (CAA)

Regulatory Policy Group
Group Director's Office

Civil Aviation Authority

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

11 September 2013

Dear Tony,

Re: **CAA consultation response: Streamlining Regulatory and Competition Appeals**

This letter is the Civil Aviation Authority's response to the BIS consultation on Streamlining Regulatory and Competition Appeals.

The CAA notes that BIS has suggested aligning the appeal mechanisms for all regulated sectors more closely with that in place for airport regulation in the Civil Aviation Act 2012 (the CA12 Act), which has only come into force relatively recently. As yet, the CA12 Act's mechanisms have not been tested but the CAA considers that they will provide a fair, proportionate and efficient check on the CAA's regulatory decisions. The CAA has no views on whether these will work in other sectors, but it would be willing to work with BIS to introduce a similar regime for the licensing of air traffic service providers under the Transport Act 2000.

The CAA does not as yet have any experience of litigation under the Civil Aviation Act 2012 so cannot offer any insights drawn from experience. Therefore, we have not commented on any of the questions relating to the impact on length, cost and effectiveness of proposed changes, or on the proposed changes to the CAT's Rules, nor have we made any comments on proposals for other sectors.

Detailed responses to specific questions in the consultation are attached in the annex to this letter.

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Annex: detailed responses to questions.

Chapter 4: Standard of review

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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?

The CAA does not consider that the judicial review standard, as explained provides adequate rights of appeal against the regulator's decision for price control and market power decisions. In particular, judicial review may not allow a challenge rooted in the factual basis of the decision, which could be central to these decisions. The ability to challenge material errors of fact should be a component of the appeals regime for this type of decision.

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 CAA considers that the grounds for appeal set out in the Civil Aviation Act 2012 "the CA12 Act" are comprehensive and would cover the additional principles set out in Box 4.1. In particular, as judgements and predictions involve an element of discretion, unreasonable judgements or predictions would be covered by the existing "unreasonable exercise of a discretion". The appeals policy in the CA12 Act has only recently been developed and debated in Parliament and the CAA is concerned that making changes to it so soon after it has been enacted and before it has been tested, is likely to lead to confusion and possible delays in the appeal process. The CAA considers that the current test in the CA12 Act offers a reasonable balance between the need to avoid a complete rehearing of the whole regulatory decision (which will have been subject to an open and thorough consultation process) while allowing a challenge to any material error by the regulator.

Page 40

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?

There would be the risk of the loss of substantial body of precedent based on the current standard of review and so evidence of likely gains that would outweigh this risk would need to support such a decision in our view. In addition, the fact that substantial penalties fall to be imposed under the CA98 which the CAT has confirmed requires a burden of proof on the regulator that may come close to the criminal one would seems to point away from removing a full merits review on the grounds of ensuring that there can be no risk of undermining Article 6 protections.

Continued (2 of 7 pages)

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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 CAA does not consider that there needs to any change to the standard of review set out in the Civil Aviation Act 2012. We agree with BIS's comments in paragraph 4.73 that price control decisions are central to the operation of the regulated company and that a "specified grounds" based appeal rather than judicial review would provide greater regulatory certainty. Please see comments on Q2.

Page 47

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?

Market power decisions should be subject to a specified grounds appeal as these decisions are central to whether the company is regulated at all, which will have a significant impact on investors' decisions.

Chapter 5: Appeal bodies and routes of appeal

Page 53

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

This is the new structure under the CA12 Act and from the CAA's perspective and its industry perspective it would seen undesirable to move away from this structure before it has even been put to the test. We agree with BIS that the CC is well placed to undertake the complex, legal and financial analysis required.

It is important that price control decisions and licence modifications are appealed to the same body; in many cases, licence modifications are made at the same time as price control changes and may be linked. There is a significant risk that if these were heard by two separate bodies, there would be inconsistency, delay and confusion.

Page 54

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

The CAA operates with a split system whereby some of its ex ante regulatory decision (market power determinations under s.7 of the CAA2012) are appealable to the CAT and appeals on decisions to include or not to include a licence condition or modification are made to the CC. However, as no appeals have yet been brought, we have not comparative experience to offer at this stage. DfT can provide policy background to the original decision to opt for this structure.

Page 55

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

The CAA agrees that a single appeal body may be better able to develop specialist expertise.

The CAA agrees with BIS's views in paragraphs 5.3 and 5.5 regarding the benefits of having a single appeal body hearing enforcement appeals and considers that these benefits outweigh the risks mentioned in paragraph 5.4.

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?

See comments on Q20 and 22.

Page 56

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

The CAA agrees that in some cases it would be better for a specialist tribunal to review cases. This will be particularly valuable where there are complex economic arguments in play which the CAT has considerable experience of appraising.

Chapter 6: Getting decisions and incentives right

Page 60

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

The CAA's experience is that disputes about confidentiality centre on sensitive commercial material which is usually part of the economic evidence matrix. As such, the utility of a confidentiality ring very much depends on its membership. If evidence cannot be tested with stakeholders' experts (whether internal or external) this arrangement does not move matters on much. And there is the continuing tension with the need for regulators to be able to explain their decision making sooner or later. For that reason, our experience is that seeking to engage on agreed forms of disclosure at the point in the process at which disclosure is actually required is a more productive route.

Page 61

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?

The CAA doesn't as yet have any experience of whether this approach will deliver the anticipated benefits so could not suggest whether it would be good for other sectors. This is unlikely to be available until after the first appeals under Schedule 2 are completed during the course of 2014.

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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?

If the appeal is brought by an airport, this is immaterial as CAA costs are met by licence fees paid for by the airport, so the airport will pick up the costs one way or another.

It is more material if the appeal is brought by an airline. Where successful the CAA should be allowed to recover its costs to avoid the pass-through to the airport through licence fees. Where the CAA is unsuccessful, there is a good argument that a company should be able to recover its costs where it has sought and won a review of a wrong decision that has been detrimental to it. However, any costs incurred by the CAA ultimately would be paid for by the airports so if the CAA has to pay the airlines costs as well, this may not be fair and proportionate to the airport, especially if the decision in favour of the airline leads to a less favourable outcome for the airport. The airport may be able to pass the costs back through to the airlines through the regulated airport charges. If this is the case, there seems little point in awarding costs against the CAA in the first place.

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

In relation to an appeal by an airport, this is less important as the CAA's costs will be met by the airport through licence fees in any case. For appeals brought by an airline, the CAA should be allowed to, and be encouraged to claim full costs, to avoid these being passed through to the airport through licence fees.

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.

The CAA agrees this seems sensible to avoid unnecessary costs and to speed up regulatory processes.

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

The CAA agrees that regulators must have clear and transparent processes for carrying out investigations and making enforcement decisions, including engagement with the regulated company and allowing it access to decision makers at relevant stages. However, the CAA agrees with BIS that there does not need to be a statutory requirement for regulators to follow the anti-trust changes. Existing duties to be proportionate, transparent and accountable, coupled with the checks and balances of the appeals process, already require the CAA to carry out enforcement action with full engagement, whilst retaining some flexibility to allow for the different circumstances that arise.

Continued (5 of 7 pages)

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?

Good consultation, with clear explanation of proposals and decisions should lead to fewer appeals as there will be greater understanding of the proposals and it is more likely that key issues will be adequately addressed before the final decision. This does not need additional legislation; the CAA's duties to be transparent and accountable and the risk of appeal and/or judicial review, coupled with the Governments guidelines on consultation, should be sufficient to ensure that the regulator consults effectively.

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

The CAA considers that there are adequate investigatory and information gathering powers in the CA12 Act, although these have not been tested to date.

Chapter 7: Minimising the length and cost of cases

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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?

The CAA sees the benefits of reducing the target time to speed up the regulatory processes, to provide greater regulatory certainty, this should not be at the expense of ensuring the quality of the decision. There may be debates about the interpretation of "straightforward" and "target".

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 comments on Q40

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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?

This may be appropriate if the CAT's own rules do not give sufficient flexibility. The CAA does not have the experience of proceedings before the CAT to be able to give a view on whether there is currently a deficit in this area.

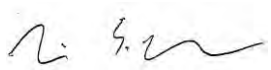
Q43 What are your views on a voluntary fast-track procedure where parties themselves agree to limit the amount of evidence including from witnesses, and potentially capping costs?

The CAA would support a fast-track procedure

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?

The CAA agrees that this is a sensible approach; currently the length of the appeal period can be doubled from 6 to 12 months. This does not seem to encourage an efficient approach. However, whether this is workable depends very much on the complexity of the particular appeal. An appeal of a first licence where a number of contentious licence conditions may be under appeal including price monitoring could suffer from an overly truncated timetable.

Yours sincerely,



Iain Osborne
Group Director, Regulatory Policy

Competition Appeal Tribunal (CAT)

"STREAMLINING REGULATORY AND COMPETITION APPEALS"
(GOVERNMENT CONSULTATION OF 19 JUNE 2013)

RESPONSE OF THE COMPETITION APPEAL TRIBUNAL

INTRODUCTION AND SUMMARY

1. The Competition Appeal Tribunal ("CAT") is central to this review. Not only is it one of the main appeal bodies discussed in the Consultation,[1] but its central role going forward is acknowledged both in the Consultation itself[2] and in the recently published draft Consumer Rights Bill, which is intended to enhance the opportunities for private enforcement of competition law.[3]

2. The CAT appears in the list of those consulted by the Department for Business, Innovation and Skills ("BIS")[4] and has provided BIS with advice and information, some of which is reflected in the Consultation. However, the CAT made it clear that it might feel obliged to provide a detailed response to the Consultation, as it has concerns about some aspects of the document.

3. Our comments are subject to certain constraints. The CAT is a specialist tribunal, and part of the court system. Although it is sponsored by BIS, its President and Chairmen are judges appointed by the Lord Chancellor. The CAT is at the same time closely involved in and necessarily detached from the regulatory and competition systems. As a court, the CAT expresses no view on questions of policy, which are matters for Ministers, or the relevant economic regulators. It is, however, well placed to comment on its experience of handling appeals from various authorities, and based on this experience and specialised knowledge, to comment on the practical merits and demerits of the BIS proposals as well as on the information and data on which BIS seeks to rely.

4. Subject to these important qualifications, we set out our views in this Response. Broadly, we welcome some aspects of the Consultation, we disagree with other aspects and we have some serious underlying concerns. In particular:

   (1) We recognise that some rationalisation of the various arrangements for appeals from sectoral regulators could be useful and we welcome a number of the proposals, including the introduction of legislation to enable the heads of the three judiciaries of the United Kingdom to nominate specific judges of the High Court (and equivalent in Scotland and

[1] "Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform", 19 June 2013.

[2] Consultation, Chapter 5 and in particular paras 5.7-5.16.

[3] Draft Consumer Rights Bill (June 2013).

[4] Consultation, Annex K.

Northern Ireland) to sit as CAT Chairmen, and to remove the current 8 year limit on eligibility to sit as Chairmen.

(2) We believe that a possible basis for rationalisation of regulatory appeals would be to allocate complex price control appeals directly to the Competition Commission ("CC") / Competition Markets Authority ("CMA"), whilst reserving other matters (including any further judicial review of a CC/CMA price determination) to the CAT. However, any rationalisation would need careful design as: (1) the CC's procedures hitherto have been very different from those of the CAT; (2) how the CMA will handle regulatory cases has still to be settled; and (3) the potential for interaction between price control and non-price control issues needs to be appreciated.[5]

(3) We agree that some improvements could be made to the specific regime for appeals under the Communications Act 2003 (particularly by routing price control matters directly to the CC/CMA as above), but believe that other difficulties with the regime have been over-stated and/or misunderstood.

(4) We agree that in the specific context of regulatory appeals a specialist tribunal (ie the CAT) has significant advantages over the general court system in terms of speed, focus and expertise, and that further improvements to processes can always be made.

(5) We note the Government's views on the "standard of review" in regulatory appeals generally (which permeate much of the Consultation) but it is questionable whether changing (or reformulating) the standard of review will bring the benefits sought. In particular, there seems to be a degree of misunderstanding and misinformation about how "merits" appeals work in Communications Act 2003 cases and what would be the likely effects of changing them. Changing the standard of review is unlikely to prove itself a "silver bullet", as the Government appears to believe it to be.

(6) No case at all is made out in the Consultation for altering or reformulating the standard of review in competition appeals under the Competition Act 1998, whether from decisions of the Office of Fair Trading ("OFT") / CMA or from regulators with concurrent powers. 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.

[5] See Part I, para 36 and Part II, para 67 below.

(7) We agree that appeals should be conducted as quickly as is reasonably possible, consistently with the requirements of justice, and should not be concerned with immaterial matters. However, we do not share the Government's apparent view that current CAT rules and procedures encourage unmeritorious appeals or involve the excessive deployment of so-called "new" evidence. We do not believe that placing specific restrictions upon the admission of such "new" evidence, or upon CAT timetables or other procedures is either necessary or sensible. Similarly we believe that the introduction of a costs rule whereby a successful appellant would not normally benefit from an order for costs in the absence of unreasonable conduct on the part of the regulator/authority, whereas a successful regulator/authority would normally benefit from such an order, would be asymmetrical, unfair and at odds with the well-established approach in similar public law cases.

(8) We are concerned that the Government's stated objectives are too high-level in nature and are in some cases contradictory. Where they are clear, we fear that implementation of some proposals (for example changing the standard of review or over-prescribing the procedures of the CAT) may achieve the opposite result from what is intended, namely delay and increased cost.

(9) We are concerned that some of the evidence relied on in the Consultation to support often radical conclusions and proposals is insufficient, selective and/or misleading. Statistics on relative times for different appeal processes and superficial comparisons between processes of very different natures are particularly suspect in this regard. Overall, the figures quoted in the Consultation show a low number of appeals involving only a small percentage of decisions taken, with the CAT dealing with most cases with commendable dispatch. We are also concerned at the use of selected quotations from judges in cases which, on closer examination, were decided in the opposite sense from that implied[6] and the general use of assertions unsupported by evidence as a basis for proposals for change. We would strongly encourage the Government to test its assertions and proposals against hard evidence, rather than to rely on special pleading and anecdote.

(10) We are concerned that the Consultation takes too little account of the findings in other recent reviews covering some of the same ground, in particular on the institutional reform of the competition system, the encouragement of private competition actions and the implementation of the revised EU communications framework, which confirm the value of a specialist tribunal and set out the appropriate standard of review in regulatory and competition appeals.

[6] See, in particular, Part II, para 42 below.

(11) We are concerned that the degree of control that BIS appears to envisage exercising over the detailed conduct of the CAT's activities and procedures is too prescriptive and risks infringing the principle of judicial independence, as well as adversely affecting the just and expeditious disposal of appeals.

(12) In short, we fear that whilst there are some very positive aspects to these proposals, overall the Consultation has not presented a coherent case for change and some of its measures, if implemented, could harm the system.

5. In **Part I** of this Response, we set out some comments of principle on the main matters raised in the Consultation. These comments follow the order in which they are set out in the Consultation. In **Part II**, we respond to the specific questions in Chapter 8 and provide more detailed comments. Certain comments in relation to the Consultation annexes are included at the end of Part II.

PART I: COMMENTS ON MATTERS OF PRINCIPLE RAISED IN THE CONSULTATION

1. Our comments on matters of principle focus on:

    - the case for change and the Government's stated objectives;
    - the standard of review in Communications Act 2003 cases and in competition appeals;
    - appeal bodies and routes of appeal;
    - unmeritorious appeals and so called "new evidence";
    - the appeal process and "streamlining"; and
    - access to justice and judicial independence.

    Our general concern with the evidence and data described in the Consultation, and the use made of them, is mainly discussed in **Part II** of this Response.

THE CASE FOR CHANGE AND THE GOVERNMENT'S OBJECTIVES

2. The Government's case for change is set out in Chapter 3 of the Consultation.[7] Essentially this is that (1) regulatory appeals have evolved differently across different sectors; (2) in the communications sector there seem to be strong incentives for parties to appeal, either because the standard of review is too intensive or because parties face no "downside", even if they lose; and (3) in other sectors there are many fewer appeals, despite the possibility for such appeals existing. The Government suggests it would be better to move to a system where appeals were more focused on "material" errors, appeal bodies' expertise was applied consistently across the sectors, appeals were more accessible to all, incentives were properly aligned and processes were as efficient and cheap as possible.

3. In assessing whether this case for change is made out it is useful to look at the Government's stated objectives in conducting this exercise, which are set out in the Executive Summary.[8] These seem to us to be rather high-level in nature and to show a degree of confusion and contradiction. Even where the objectives are clear, there is a danger that implementing some of the Government's proposals would achieve the opposite result from what was intended.

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[7] Consultation, page 18.

[8] Consultation, page 5.

4. The **first objective** set by the Government for the appeal system is to "support independent, robust, predictable decision making, minimising uncertainty".

5. We assume that this refers to decision making by regulators rather than by appeal courts themselves, but it is important to note that it omits the requirement that decisions should be soundly based on the evidence. It is perfectly possible for decisions to be robust but wrong: indeed the two often go together. It is trite to say that the underlying purpose of an appeal system is to encourage good decision making; however, this involves not only upholding regulatory decisions when they are sound, but also by correcting decisions when they are wrong or badly made and it is that necessary process of correction that gives rise to the issues of weight and degree of review that the Consultation seeks to address. So while this objective may sound superficially attractive, it begs the essential question of what makes an effective appeal system.

6. The **second objective** is to "provide proportionate regulatory accountability" – correcting errors, providing justice to parties but allowing regulators to "set a clear direction over time". Again, this objective is fair so far as it goes, but it hides some contradictions. If, for example, a regulator's "direction over time" were profoundly mistaken, based perhaps on an idiosyncratic economic theory, an effective appeal system would have to cope with this too, if necessary by correction. There is an important debate to be had on what is the correct delineation of the discretion to be allowed to regulators, in terms of policy or judgment, but unfortunately this objective is expressed in too general terms to assist in that debate. At present, however, it is important to stress that the existing system *does* allow regulators to set a clear direction.[9]

7. The **third objective** is to "minimise the end-to-end length and cost of decision making, through streamlining appeals and encouraging quicker decision making by regulators". It is quite right to worry about the overall length of a regulatory case, but the Consultation itself focuses largely on the appeal process before the CAT. The proposals to improve evidence handling and decision making by regulators and for them to interrogate individuals,[10] although no doubt useful in themselves, are much less significant than the changes proposed for appeals. Here it is assumed that by limiting the admission of "new" evidence on appeal and by reducing the duration and intensity of judicial scrutiny, quicker and cheaper regulatory decisions will result. It is very doubtful that this will occur; some of the proposed changes will, if anything, increase the likelihood of litigation, and reducing the level of scrutiny will tend to lower the incentives for regulators to make sound decisions.

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[9] See, further, Part II, paras 11-14 below.

[10] Consultation, para 6.29*ff*.

8. 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.[11] 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,[12] 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.

9. The **fifth objective** is to "provide consistency...between appeal routes in different sectors" (whilst acknowledging the different sectoral characteristics). We agree that there are significant, and anomalous, differences between the appeal regimes in different sectors, and we welcome the general objective of bringing about some rationalisation. However, we are not optimistic that the Consultation provides a sufficient basis for doing this. This is at least in part because the Consultation concentrates on the communications sector and treats other regulated sectors comparatively cursorily.

10. Generally, we sense from the tone of the Consultation and from the accompanying press release[13] that the Government's real objective is rather more mundane, namely to lighten the appeal burden for business and for regulators. Worthy though this objective may sound, it is not easily achievable as the interests of these two "stakeholder" groups can differ sharply.[14] Businesses tend to suffer as much if not more from bad regulatory decisions as from bad appeal processes. Appeals help to put the former right. 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. The Consultation appears to have assumed, wrongly, that any issues to be corrected lie entirely within the appeal system, and has (despite paying lip service to the need for it) paid less attention to how regulatory decisions are made in the first place.

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[11] The recent draft Consumer Rights Bill is perhaps more relevant to this topic.

[12] Consultation, para 6.22.

[13] "A new streamlined system will mean that businesses see their appeals sorted out quicker (sic) and that they and regulators spend less time and legal resources on disputes".

[14] The Impact Assessment accompanying the Consultation highlights that the costs of the present appeal system fall most heavily on appellants and interveners (a total of £16.9 million compared with £4.93 million incurred by regulators and appeal bodies – see page 4). Yet paragraph 14 of the Impact Assessment reveals that the only evidence gathered by BIS as part of its preliminary analysis is "from regulators and appeals [sic] bodies".

THE STANDARD OF REVIEW

11. Discussion about the significance of the standard of review in appeals appears in Chapter 4 of the Consultation.[15] In seeking to make a case for change, the Government claims that it is this that determines the length and complexity of cases; that in the communications sector (where the standard of review is "full merits") cases are long, complex and wide-ranging; and that the standard of review differs across different sectors. The Government notes that introducing a more limited standard of review for energy sector appeals in Australia led to more appeals and higher prices, but believes this was because the consumer interest was in some way neglected rather than because of the change to the standard of review itself. The Government claims it can avoid that risk in the UK context.[16]

12. It is clear that the Government believes it is the prevalence of the "full merits" standard of review that contributes in large part to the length and complexity of appeals, and that lowering it offers some kind of "silver bullet" solution.[17] The Consultation explains this in terms of a "full merits" standard allowing consideration of all aspects of the decision under appeal, including whether it is "right", with the court able to substitute its own view, contrasted with a more limited "judicial review" standard where the review is limited to matters of legality, fairness and rationality, with quashing and remittal as the remedies.[18] The Government's view appears to be 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 judgment".[19] As a solution to this problem, the Government proposes the general adoption of a judicial review standard, in the interests of economy of process, but where a case can be made for a more intensive standard of review, this should be on specific or what might be termed "pixelated" grounds only.[20] The Consultation looks at how this might operate in Communications Act 2003 cases, in competition appeals and in certain other cases. The comments below refer to Communications Act 2003 appeals and other cases; we deal with competition appeals in the next section.

13. There are several grounds for questioning this proposed solution. First, it is not clear that length and complexity of appeals are as closely linked to the standard of review as the Government

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[15] Consultation, page 27.

[16] See Consultation, para 4.14.

[17] "The standard of review will have a significant impact on the scope of the appeal body to re-examine a decision, the length and cost of an appeal" (Consultation, para 3.13) and "The standard of review...will have a material impact on the level of scrutiny applied, and the length and cost of an appeal" (Consultation, para 4.6).

[18] Consultation, paras 2.15-2.20.

[19] Consultation, para 4.18.

[20] Consultation, Part 4, in particular paras 4.16-4.21.

appears to think. Second, the merits appeals conducted by the CAT have emphatically *not* been in the nature of complete re-trials with a "second body reaching its own regulatory judgment".[21] Third, on occasions the CAT's examination of a regulator's findings and assessments in the context of a merits appeal has revealed serious errors which might have gone uncorrected on a more restricted review. Finally, changing the standard of review is bound to lead to uncertainty, delay and further litigation for a period (which may in fact last for quite a long time, as the implications of legislative changes are worked out in the courts).

14. On the first ground, 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.[22]

15. Not only is the difference in intensity and length between the two standards over-stated, but applying a full merits standard may enable a decision that would be struck down on judicial review to be salvaged.[23] This was, of course, precisely the reason why Article 4 of the Directive on a common regulatory framework for electronic communications networks and services (the "Framework Directive") requires a consideration of the merits of the case on appeal and it is somewhat ironic that the Government now contemplates a reversal of this.[24]

16. Finally, the Consultation does not contain any convincing example where the use of an intensive standard of review has led to undue delay and complexity. In the example quoted of *British Telecommunications Plc v OFCOM* (*Partial Private Circuits)*,[25] the delays arose from other factors, including the hearing and disposal of two "gateway" preliminary issues, the availability of the parties, and an appeal to the Court of Appeal.

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[21] See further Part II, paras 11-14 below.

[22] See the commentary on the statistical basis for the Government's claim to the contrary in Part II, para 4(2) below; paradoxically, in "full merits" appeals under the Communications Act 2003, the CAT technically speaking remits the decision to OFCOM, but with directions on what needs to be done, and OFCOM is normally able to take a fresh decision very quickly. The cost / benefit analysis within the Impact Assessment in connection with "Option 2" assumes that consumers will "benefit from faster appeals as they will be able to receive the benefits of regulation sooner". However, there is no acknowledgement of the additional costs likely to be incurred upon the quashing of a regulatory decision on judicial review grounds.

[23] See eg *TalkTalk Telecom Group v OFCOM* [2012] CAT 1 at [136(g)], where it was held that hearing the case on its merits could cure an otherwise fatal procedural defect in the original decision. See further Part II, paras 7 to 9 below.

[24] See the Report by CERRE "Enforcement and Judicial Review of National Regulatory Authorities" (Brussels 21 April 2011) cited in the Consultation in a different context, page 125. See also Part II, para 7 below.

[25] See Consultation, para 4.7 and the fuller discussion of this point in Part II, para 4(3) below.

17. As to the second ground, under its current practice the CAT does not conduct a *de novo* re-trial of the regulator's decision but limits itself to establishing whether the grounds of appeal reveal material errors by the regulator.[26] For example, as the CAT itself has said:

> "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".[27]

18. Nor are the Government's concerns about regulatory uncertainty and damage to the credibility of regulators justified. The Consultation refers to this arising from "a concern that the appeal body could act as a second regulator „waiting in the wings'".[28] This appears to be a reference to words used by Lord Justice Jacob[29] in describing what *ought not* to happen, rather than what *does* happen (see further Part II, paragraphs 14 and 42 below). There is no evidence whatsoever in the Consultation of the CAT seeking to act in this way and this particular concern has no basis in reality.

19. On the third ground, it is the case that on some (relatively rare) occasions, an appeal in which the merits of a decision have been challenged reveals serious errors of fact in the assessment by the regulator concerned. This is expressly acknowledged in the Consultation[30] and the most recent example is the CAT's decision in the *Pay TV* case.[31] It is not clear whether the contemplated reformulation of the standard of review so as to create pixelated grounds of appeal would be sufficient to cover such cases. If not, there would be a clear miscarriage of justice as and when such cases arise in the future.

20. On the fourth ground, the Consultation seems sanguine as to the extent of disruption and delay that would inevitably follow from legislating to change the standard or grounds of review in a regime set by EU law. However, moving away from a full merits standard to something more restrictive is at least likely to generate additional and/or lengthier litigation as parties seek to establish the boundaries of the new regime,[32] including whether it complies with Article 4 of the

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[26] Although the Consultation refers to the need to impose a requirement of materiality, the CAT would not overturn a regulator's decision because of something that was not "material" (see Part II, para 35 below).

[27] *British Telecommunications Plc v OFCOM* [2010] CAT 17. Other examples are given in Part II, para 14 below.

[28] Consultation, paras 3.18 and 5.4 (footnote 31).

[29] *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] EWCA Civ 1373 at [31].

[30] See Consultation, para 3.1 "several recent appeals have demonstrated that regulators have made clear factual errors" and the cases mentioned in Part II, footnote 110 below.

[31] Cases 1156-1159/8/3/10 *British Sky Broadcasting Limited & Ors v OFCOM* [2012] CAT 20. This case is cited in the Consultation at para 7.16 (albeit wrongly cited as the satellite "Conditional Access Modules" appeal) as an example of a case involving large amounts of evidence and witnesses.

[32] See, for example, H Davies QC, *Competition Litigation: Practical Thoughts in Developing Times* [2011] Comp Law 274, where the author observes, in relation to the current appeals regime: "Recent experience at the

Framework Directive. The latter issue may ultimately have to be tested through a reference to the CJEU under Article 267 TFEU, with the risk that other appeals would be brought to a standstill during the reference period (which can take a number of years to complete). It is indeed quite foreseeable that there may need to be more than one reference to the CJEU on different questions relating to the application of the new standard. The Government states that long term benefits would outweigh the short term uncertainty.[33] Such a view sits rather unhappily in a set of proposals designed to promote economy and speed of process, and does not take due account of the disruption that could be caused to the development of fast moving important markets and the chilling effect on innovation, to the detriment of the national economic interest.

21. Finally, there is no mention in the Consultation of the almost universally unfavourable reaction to the two earlier extensive consultations on changing the standard of review in communications appeals.[34]

22. Subject to the requirements of Article 4, it is of course ultimately a matter for Government, subject to the wishes of Parliament, to decide what standard of review is to be applied by the CAT in Communications Act 2003 appeals. We considered it appropriate to point out that the assumptions underlying the Government's apparent wish to move to a general judicial review model, or to pixelated grounds of review in certain cases, may be unsafe. Our concerns apply with even greater force to competition appeals, to which we now turn.

COMPETITION APPEALS

23. The Consultation contemplates a weakening of the present "full merits" appeal standard for appeals against *ex post* infringement decisions by competition authorities (including regulators with concurrent competition powers).[35] Although three competition decisions are described in Annex E to the Consultation,[36] the main part of the Consultation does not discuss the

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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."

[33] Consultation, para 4.66. See also the Impact Assessment accompanying the Consultation, which states that the transitional costs of understanding the new regime are "unlikely to be significant" (page 6) and that there will only be a "short-term" increase in the number of appeals if the standard of review is changed and firms "test" the new jurisdiction (pages 5 and 7). At page 18, it is stated that the transition costs (for Option 2) 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".

[34] DCMS's consultation, "Implementing the revised EU Electronic Communications Framework – Appeals", is referred to at paras 3.31 and 4.26 of the Consultation, but not the responses to it.

[35] Consultation, paras 4.46-4.66.

[36] *G F Tomlinson, National Grid* and *Albion Water*. We discuss the contents of Annex E and its curiously selected examples in the more detailed comments at Part II, para 104(4).

competition enforcement system in any detail. In particular, it is entirely silent as to whether the enforcement of competition law has been affected adversely or otherwise by the current standard of review or by the way in which appeals have been conducted. The press release accompanying the Consultation refers to the *Albion Water* case as if it were a typical case, and fails to explain (or even to refer to) the special circumstances of that example of serial, but in the result entirely justified, litigation.[37]

24. Appeals against *ex post* competition decisions appear to have fallen within the Consultation because regulators exercise competition powers concurrently with the competition authorities, and have to choose whether in any given case they should exercise their competition or their regulatory powers. The choice of power may indeed affect the situation on appeal. But the distinction between competition appeals and regulatory appeals (acknowledged in paragraph 4.46*ff* of the Consultation) is fundamental for several reasons, and it cannot be assumed that it is appropriate (as proposed by paragraph 4.58 of the Consultation) simply to transpose principles and draft legislation contemplated in connection with communications appeals.

25. First, and perhaps most obvious, is the fact that a finding of infringement of a competition law prohibition is a very serious matter with potentially drastic consequences for the undertaking concerned, and its executives. Such a finding is generally seen as quasi-criminal in nature.[38] As such it has serious adverse reputational as well as financial implications. Basic 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.

26. Second, the relevance of the European Convention on Human Rights ("ECHR") is recognised in the Consultation.[39] No-one questions that competition appeals should comply with Article 6 ECHR, in recognition not only of the substantial penalties but also of the other adverse consequences that a finding of infringement may have for a company. Restricting the grounds on which a company can appeal against such a finding when made by an administrative body acting as investigator, prosecutor and judge, risks violating the fundamental requirements of Article 6. For example, in the case of *Menarini*,[40] the European Court of Human Rights highlighted the importance, in the context of a review compatible with Article 6, of full judicial

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[37] *Albion Water* was, for several reasons, a wholly exceptional case. See Part II, para 104(4)(v) below.

[38] See *A. Menarini Diagnostics S.R.L. v Italy*, no. 43509/08, 27 September 2011 (ECHR); *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2001] CAT 3 at [69]; *Aberdeen Journals Limited v Director General of Fair Trading* [2002] CAT 4 at [176].

[39] Consultation, paras 4.48 et seq.

[40] Cited at fn 38 above, paras 63-64.

control over all elements of the administrative authority's decision, including matters as to which the authority enjoys a discretion.[41]

27. Furthermore, restricting the grounds of appeal would directly conflict with the Government's statement 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".[42]

28. The Consultation refers to this statement,[43] but does not explain why the Government is having second thoughts so soon. This is unfortunate given that stakeholders may have been willing to embrace aspects of the institutional reform proposals (for example, retention of the administrative decision system, as opposed to moving to a prosecutorial one) in the reasonable expectation that a full merits appeal system would be retained.

29. The Government seeks to draw an analogy with reviews by the General Court of the EU of infringement decisions made by the European Commission, implying that this supports a lowering of the current standard of review. But in doing so it fails to take account of the way in which the EU courts are developing their own appeal procedures to comply with the fundamental requirement of compliance with the ECHR, in the light of widespread and growing concern about the more limited scope which has at times been attributed to the review carried out by the General Court in that context (cf. *KME* and *Chalkor*).[44] Thus, at a time when pressure for more intense judicial scrutiny within the EU competition regime is increasing, the Government appears to be contemplating the restriction of such scrutiny in the UK system.

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[41] See also the views expressed by Marc Jaeger, President of the General Court of the European Union, in relation to the standard of review (at EU level) of cases involving complex economic assessments and the particular requirements of human rights in this context: M Jaeger, "*The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of Marginal Review?*", Journal of European Competition Law & Practice, 2011, Vol 2(4).

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

[43] Consultation, para 4.52.

[44] Case C-272/09 P, *KME Germany & Ors v Commission* [2012] 4 CMLR 275; Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*. This jurisprudence is quoted at para 4.51 of the Consultation but the implications are not examined. See also Merola & Derenne (eds), The *Role of the Court of Justice of the EU in Competition Law Cases*, GCLC Annual Conference Series, Bruylant (2012); I Forrester, "*A Bush in Need of Pruning: the Luxuriant Growth of "Light Judicial Review*", European Competition Law Annual 2009; *The Evaluation of Evidence and its Judicial Review in Competition Cases*, Hart Publishing, Oxford and Portland Oregon (2011), 407-452; W Wils, "*The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*", (2004) 27 (2) World Competition: Law and Economics Review, 201, 224. See also Jaeger, cited at fn 41 above.

30. The contemplated changes also appear to create anomalies and inconsistencies in relation to the private enforcement of competition law. Here, a finding of infringement by a competition authority is binding for the purposes of a follow-on action for damages whether in the High Court or the CAT (Competition Act 1998, sections 47A and 58A).[45] Such damages might well exceed the administrative penalty. If the full merits appeal standard were discarded or restricted, as is now being mooted, a company defending such an action would only have been able to challenge the (binding) finding of infringement on those restricted grounds. By contrast, in a stand-alone private action there would be a full consideration of the merits of the case by an independent and impartial judicial body (and subsequent possibility of appeal to the Court of Appeal).[46]

31. Finally, there is an acknowledgment in the Consultation that a full merits appeal should perhaps remain possible as to the amount of any penalty. This again derives from a similar distinction in EU law.[47] However, the distinction is difficult to justify. The question has been discussed in the EU context whether it is appropriate to separate the amount of the penalty from the underlying decision finding an infringement on which the penalty is based.[48] In any event, the point remains that the effects of an infringement decision itself are sufficiently serious to suggest that the availability of a full merits review by an independent and impartial court is essential in the interests of justice, where the decision has been made by an administrative body acting as investigator, prosecutor and judge. This appears to have been recognised by BIS itself as recently as 2012.

APPEAL BODIES AND ROUTES OF APPEAL

32. The Government's proposals for which appeal body should hear which appeal are contained in Chapter 5.[49] The Government accepts the need for specialist appeal bodies alongside the High Court and its equivalents, but believes appeals are not necessarily being heard by the most appropriate body. A number of potential rationalisation measures are identified, including sending Communications Act 2003 price control cases directly to the CC/CMA rather than routing them through the CAT as at present.

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[45] The same is true of findings of fact by the OFT: section 58 of the Competition Act 1998.

[46] Such stand alone claims can now be brought in the High Court, and will also be available in the CAT if and when the draft Consumer Rights Bill published on 12 June 2013 becomes law.

[47] Consultation, para 4.50. Article 31, Regulation (EC) 1/2003.

[48] See, for example, Gerard D, "Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?", European Law Review Vol. 36, No.4, August 2011, pp.457-479; Norlander K and Harrison P, "Are Rights Finally Becoming Fundamental?", CPI Antitrust Chronicle, February 2012(1).

[49] Consultation, page 48.

33. As regards the need for a specialist appeal body, we note the Government's statement that it "has decided to retain a specialised CAT"[50] so do not discuss this point further, save to note that the Government recently endorsed the CAT's specialised expertise and capacity in relation to private enforcement.[51] We believe that a specialist appeal tribunal, in the context of regulatory and competition appeals, offers significant advantages over alternative bodies, in terms of flexibility, speed and focus, and the Consultation confirms this view.[52] In particular, we welcome the proposal to direct judicial reviews of disputed decisions arising *in the course of* Competition Act 1998 investigations to the CAT rather than the Administrative Court, as at present.[53]

34. As to the choice between the CC/CMA and the CAT, this requires careful consideration. The CC has specific adjudicatory functions, and legal challenges can be brought in respect of such decisions, both interim[54] and final. These challenges are currently brought either to the High Court or, in the case of merger and market investigation decisions, to the CAT. Up to now the CC has operated these functions in a very different way from the CAT. In merger and market investigations, the CC undertakes a detailed inquisitorial examination of the issues, gathering whatever evidence it feels it needs.[55] It does not generally hold *inter partes* hearings and its proceedings are not generally open to the public. On the other hand the CAT hears appeals and reviews by way of an adversarial procedure, and on the basis of the evidence and arguments advanced by the parties; it does not normally seek additional evidence. It certainly does not carry out its own investigations. Its proceedings are generally in public. The CAT's decisions are controlled by the Court of Appeal. Precisely how the CMA will handle regulatory appeals, assuming these continue to come to it, is not yet settled. It seems likely that it will in general follow current methods used by the CC.

35. These points suggest that the CAT and the CC/CMA should not be viewed as simple substitutes for one another, and that the CMA's processes would probably be suitable for the handling of complex price control assessments and other similar matters requiring very detailed expert investigation and assessment. By the same token, the Consultation recognises that Energy Code

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[50] Consultation, para 5.9.

[51] Government's 2013 response to Consultation: "*Private Actions in Competition Law"* (January 2013), para 4.6.

[52] Consultation, paras 5.3-5.6

[53] Consultation, para 5.44. See further Part II, paras 79-80 below.

[54] See, for example, case 1116/4/8/09, *Sports Direct International PLC v Competition Commission*.

[55] Although see, by contrast, the CAT's observations in relation to the CC's role, and investigative powers, when determining price control matters: *British Telecommunications Plc & Ors v OFCOM (Mobile Call Termination)* [2012] CAT 11 at [118(2)(iii)].

Modification appeals, presently heard by the CC sitting in effect as a tribunal, should be moved to the CAT.[56]

36. Therefore, there may be a case for re-routing price control aspects of communications appeals *directly* to the CMA rather than, as at present, sending these first to the CAT for onward reference. As a corollary, appeals that currently are directed to the CC, but which involve essentially the adjudication between two disputed positions, could sensibly be allocated to the CAT. However, it needs to be borne in mind that even in Communications Act 2003 appeals, for example, there is occasionally fierce disagreement as to whether an issue is or is not a price control matter, or as to the terms of the particular questions to be referred to the CC for determination. A modified regime would need to make clear who would decide such a dispute.

37. As regards achieving greater consistency across sectors, some rationalisation might well be appropriate. However, any proposals for change in this regard will no doubt take account of why the appeal systems in different regulated sectors have evolved as they have, and why outside the communications sector, "appeals" have been relatively few in number. This is at least in part because other sectors (water, energy, rail, aviation etc) have not had an appeal system as such, but instead have been subject to a system of regulatory reference to the CC, which is comprehensive in scope and concept. Regulators and regulated companies alike have been unwilling to have price control assessments in their market considered afresh by another expert body that may come to quite different conclusions. References to the CC may have been threatened, but in general they have been avoided as the incentive on both sides to "settle" is stronger than the incentive to dispute. The exception hitherto has been aviation, where a reference to the CC has until recently been compulsory.

UNMERITORIOUS APPEALS AND "NEW" EVIDENCE

38. The Consultation appears to subscribe to a belief that the CAT's current procedures encourage too many appeals without sufficient merit, and allow the admission, to the regulator's disadvantage, of too much "new" evidence (ie material that was not, but ought properly to have been, put to the regulator at the regulatory decision-making stage).[57] In each case the implication is that the CAT either lacks power to prevent this, or is unwilling to use its existing powers to full effect.

39. The Consultation makes a number of suggestions for improving regulatory decisions themselves, for example by improving internal procedures, making it easier for confidential information to be provided and considered, and requiring individuals to provide evidence at the

[56] Consultation, para 5.33.

[57] Consultation, Chapter 6 (page 58*ff*), "Getting Decisions and Incentives Right".

investigation stage. As already mentioned, the Government also proposes to limit regulators' potential exposure to a costs order in respect of a successful appellant's costs of appealing.[58]

40. In relation to unmeritorious appeals, the Government proposes, first, that regulators should be more active in challenging inadequate grounds of appeal, and, secondly, that the CAT should be required to review appeals at an early stage and reject those that stand no chance of success.[59] The CAT's current rules and procedures already provide ample scope for appeals (and indeed defences) to be struck out at an early stage if they are devoid of merit.[60] It is true that there have been very few such "strike out" applications, but this is because generally speaking few if any obviously hopeless appeals are actually commenced. 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. The fact that regulators' decisions are in most cases upheld[61] does not mean that appeals are brought without merit. There would be no harm in encouraging regulators to consider carefully whether a strike-out application might usefully be made at an early stage in any case where they have good reason to consider the appeal hopeless. However, great caution should be exercised before changing the CAT's rules so that such applications become universal or common, as this would be very likely to increase the number of contested hearings, lengthen appeals and increase costs for all parties.

41. A more serious cause for concern is the Consultation's reference to possibly restricting the introduction on appeal of so called "new evidence".[62] Of course, what is being referred to as new evidence is in general 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 this is not comparable to the situation as between a first instance court and a court of appeal.[63] In regulatory and competition appeals, the CAT is the court of first instance. By "new evidence" is therefore meant material which, for one reason or another, was not available to the regulator before it made the decision which is being appealed.

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[58] Consultation, paras 6.18-6.25. We mentioned this in discussing the Government's "Access to Justice" objective (Part I, para 8 above). See Part II, paras 87-92 below for more detailed discussion of the proposals on costs.

[59] Consultation, paras 6.26-6.28.

[60] Rules 9 and 10 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) ("the 2003 Rules").

[61] See Part II, para 24 below.

[62] There are various references to this concern in the Consultation but the main articulation is set out at paras 6.9-6.17.

[63] As was the situation in the leading case of *Ladd v Marshall* [1954] 1 WLR 1489. In *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245 at [69]-[70], Toulson LJ specifically noted the "significant differences" between a civil trial and administrative proceedings before OFCOM.

42. The Consultation appears to imply that, under the present system, such material is routinely admitted by the CAT on appeal, and that this not only prolongs proceedings, but places the regulator at a disadvantage.[64] The Consultation does not suggest that material which could have been adduced at the administrative stage is being deliberately withheld in order to be deployed for the first time on appeal.[65] The CAT has never encountered such a practice and there are good reasons to believe that it does not occur. 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.[66] The CAT can also "punish" such late production of evidence by means of its wide discretion to make costs orders.[67] Moreover, the regulator is not entirely powerless in the face of any "new" evidence. It is always open to the regulator to apply for a stay or withdrawal of proceedings in order to reconsider its decision afresh in the light of that evidence and taking this course might result in a considerable saving of time, effort and cost.

43. The practice of the CAT in relation to the admission of evidence that has not previously been considered at the administrative stage was explicitly endorsed by the Court of Appeal,[68] which went on (in the same case) to reject a call from OFCOM to lay down a more precise test.[69]

44. If restrictions of the kind proposed in the Consultation are introduced in relation to the admission of evidence by the CAT, the result will not be a reduction in the number of appeals or a shortening of their overall length. On the contrary, there are likely to be additional and longer appeals both in the CAT and in the Court of Appeal as the parties dispute the admission or exclusion of material by reference to the proposed statutory criteria.[70] This would be most undesirable. If a party, whether appellant or defendant, wishes to put new evidence before the

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[64] See for example the discussion at paras 6.9-6.17 of the Consultation. Apart from quoting Lord Justice Toulson's statement, in a case in which he approved of the way the CAT had handled the evidence before it, there is no reference to any instance in which the CAT has admitted evidence not available to the regulator in a way that has prolonged an appeal or otherwise harmed the process. See, for more detail, Part II, paras 83-86 below.

[65] The Consultation accepts that there is no evidence of this kind of gaming the system (see eg para 3.23).

[66] See, in particular, rules 19(2)(e) and 22 of the 2003 Rules.

[67] See rule 55 of the 2003 Rules.

[68] *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245.

[69] Ibid, per Toulson LJ at [72]-[74], for example at [72]: "…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. There are several reasons why I consider that it would be inappropriate, and is unnecessary, for this court to do so."

[70] Thus, the assumption in the Impact Assessment (in the cost / benefit analysis for "Option 3"), that "streamlining measures" will reduce costs to regulators, regulated firms and the courts / tribunals by 25% may not be sound.

CAT which is *relevant* to the main matter which the CAT has to decide, it should be left to the CAT's judicial discretion whether to admit or exclude the material in question. Any fault on the part of a party who seeks to adduce evidence "late" may be reflected in the costs order which the CAT makes.

THE APPEAL PROCESS AND STREAMLINING

45. The Government's views on shortening the length and complexity of regulatory appeals are set out in Chapter 7,[71] although there is discussion in other parts, particularly Chapters 3 and 5. The Government's position appears to be that in general appeals take too long, and the overall length of cases can be reduced by a combination of stricter deadlines and shorter time limits in the CAT (including "fast track" procedures in "simple" cases) and more power for it to exclude or limit expert and other evidence. The Government proposes to "work with" the CAT to shorten its target time-scales.

46. The expeditious resolution of all cases is very important, and it is right to encourage courts (and regulators) to act as quickly as possible. However, although the CAT is not at all complacent about its performance, and welcomes any proposal which would improve it, the Consultation produces scant evidence to support the case that appeals take "too long". It points to the favourable showing of the CAT compared to other EU jurisdictions,[72] to the extreme swiftness with which most merger appeals have proceeded and the CAT's commitment to the "just, expeditious and economical conduct" of its proceedings.[73] Moreover, some of the "solutions" proposed (eg early timetabling of procedural steps in proceedings) are already well-established features of the CAT's case management for every case that comes before it. It is true that in relation to appeals under the Communications Act 2003 the statutory mechanism for reference of price control matters to the CC by the CAT together with other factors such as the need to try preliminary issues, interlocutory appeals and the inter-dependence of cases, can on occasions add to the overall time taken.[74] In this regard, as we have said earlier, there is some merit in the proposal that the price control element of such appeals should be appealed directly to the CC/CMA. The CAT could still hear any application for judicial review of their decision, as at present.

47. In relation to speed generally, it needs to be borne in mind that the interests of justice require that, wherever possible, the parties be allowed a reasonable time in which to discharge the

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[71] Consultation, page 67.

[72] Consultation, para 7.19.

[73] See rule 19(1) of the 2003 Rules.

[74] The *British Telecommunications Plc v OFCOM* (*Partial Private Circuits)* case, incorrectly cited in the Consultation as an example of undue length in para 4.7, is discussed at Part I, para 16, and at Part II, para 4(3).

procedural steps required of them and to prepare their respective cases. In this connection the Tribunal frequently receives requests for extensions of the normal time limits. Such requests come at least as often from regulators as from other parties, and may be fully justified in the circumstances of the case.[75] Subject to an over-arching principle that cases should be dealt with expeditiously and fairly, it should be left to the court or tribunal to manage its casework in its own way. It is not clear in what respect BIS proposes, or is able, to "work with" the CAT to reduce its target timescales.[76]

48. The Consultation proposes that the CAT should be given greater powers to limit the amount of evidence produced and the number of expert witnesses.[77] The implication is that either the CAT's present powers are insufficient or that it does not exercise them sufficiently. There is, however, no real evidence to suggest that either concern is justified.[78] In general, as we have already explained, the exclusion or limitation of evidence must be handled with great care to avoid both possible miscarriages of justice and the generation of satellite litigation. The CAT's existing powers are ample to enable it to restrict or exclude expert and other evidence where and to the extent it considers this appropriate.

49. The Consultation also proposes the use of "fast track" procedures, modelled on those proposed for private actions.[79] By its proactive case management practices the CAT already in effect operates "fast track" procedures whenever and to the extent that these are necessary and practicable. For example, the normal time limits for procedural steps are abridged, and/or certain steps omitted altogether, in many merger and price control cases and in applications for interim relief (where time is frequently of the essence). Given that each case coming before the CAT has its own specific circumstances and requirements, we doubt very much that the institution of a formal "fast track" would add anything of value to the CAT's existing case management powers and practices, which are extremely flexible, thereby enabling the CAT to deal with the particular requirements of each case.

50. The Consultation makes a number of proposals to assist the CAT in its work. These include a statutory mechanism to enable salaried judges from Scotland and Northern Ireland, in addition to those from England & Wales, to be deployed as Chairmen, and removal of the anomalous limitations of tenure of the CAT's Chairmen.[80] We welcome these proposals and are grateful to

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[75] Counsel tend to refer in such circumstances to the needs of justice taking precedence over the need for speed.

[76] Consultation, para 7.11.

[77] Consultation, para 7.17.

[78] See the existing provisions of the 2003 Rules, in particular rules 19(e) to (g), 19(l) and 22.

[79] Consultation, para 7.17.

[80] Consultation, paras 5.12-5.15.

BIS for supporting our requests in this regard. Another proposal is to enable a Chairman to sit on a case alone where appropriate, for example where it is mainly concerned with points of law.[81] We welcome this proposal too. However, we are strongly of the view that the operation of this power should not be mandatory in any particular category of case, but should always be discretionary: the use of multi-disciplinary panels is one of the CAT's strengths, and it is difficult to define in advance each and every type of case where it would be appropriate for a Chairman to sit alone. This should be determined on a case-by-case basis in the light of all the circumstances.[82]

JUDICIAL INDEPENDENCE

51. Reform that is intended to alleviate administrative pressures by constraining judicial processes and decision-making risks infringing the vitally important principle of judicial independence that applies, under the separation of powers, to all courts and tribunals. Controls on the admission of evidence, on other case-management issues, and on the time needed to give proper judicial consideration to each case are inherently matters for the court in question, subject to review by a superior court. Imposing overly prescriptive requirements in this area will also risk a conflict with the CAT's fundamental duty to ensure that all parties have access to justice and a fair hearing and may have unintended prejudicial consequences, particularly for SMEs.

52. We are concerned that in a number of important respects the Consultation contemplates or proposes measures which, as well as failing in their expressed objectives of reducing the number, length and cost of appeals, threaten to encroach on the ability of judges to exercise independent judgment when case-managing and hearing appeals against decisions that may be of very great importance both for the undertakings concerned and for the economy in general.

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[81] Consultation, para 5.16.

[82] In relation to fast-track SME private actions it appears to be suggested that a Chairman should be obliged to sit alone (see the proposed new subsection 14(1A) to the Enterprise Act 2002, found at Schedule 7, Part 2 of draft Consumer Rights Bill). We hope that this proposal will be changed to make this discretionary. See also in this connection Part II, para 65 below.

PART II: DETAILED COMMENTS AND ANSWERS TO THE 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?**

1. It is difficult to identify any clear principled or evidential basis for such a sweeping presumption. See the CAT's comments at Part I, paragraphs 11 to 22 above. Whatever may finally be decided in respect of appeals against *ex ante* regulatory decisions, challenges to findings of infringement of the competition prohibitions should unquestionably remain appeals "on the merits" as at present. There is no justification for any change in this regard, and an abundance of reasons justifying the *status quo*. We comment further as follows.

2. **Q1** of the Consultation presupposes:

   (1) That appeals on a "judicial review" standard will be quicker and shorter than appeals on an "on the merits" standard;

   (2) That an "on the merits" review is somehow inappropriate in the case of appeals from the decisions of regulators made under the Competition Act 1998 and the Communications Act 2003; and

   (3) That the present regime gives parties "strong incentives" to appeal decisions.

3. However, leaving aside other objections these assertions do not appear to be supported by the evidence put forward in the Consultation, nor are they borne out by the CAT's experience. For the reasons set out below, the CAT's view is that the evidence and experience does not support any "presumption" that a judicial review standard should pertain.

There is no proper basis for the asserting that appeals on a "judicial review" standard will be quicker and shorter than appeals on an "on the merits" standard

4. The Consultation cites no instance where the application of a merits standard by the CAT has caused unnecessary delay and complexity, stating merely that cases "heard on judicial review grounds appear to be resolved more quickly than full merits appeals".[83] Further, the data in the Consultation regarding the average time taken by type of appeal (Figure 3.3) and the average length of appeal hearings (Figure 3.4) has been unsoundly compiled and cannot be relied upon. In particular:

(1) Figure 3.3 identifies seven different "types" of appeal,[84] and purports to compare them on a "like for like" basis. But these "types" of appeal cannot be compared in this way. They are not "like for like". By way of example:

(i) Reviews of mergers (Type (5) "Mergers and markets JR") are usually conducted on a procedurally expedited basis. An application for review must be made within four weeks (the norm being two months),[85] and the time for service of a defence is also limited to four weeks (the norm being six weeks).[86] This expedition in pleadings is carried through in the speed with which hearings are fixed, and the CAT's general reluctance to grant extensions of time. This is not a consequence of the standard of review, as such, but rather a consequence of the need to resolve these important cases quickly.

(ii) This expedition – and the fact that it has nothing to do with the standard of review – can be seen when comparing Type (5) "Merger and markets JR" with Type (6) "Other JRs". The former – according to the Consultation – take four months, whereas the latter take eleven months. Yet the standard of review is the same.

(iii) Price control appeals (Type (7) "Price control") all involve a reference, by the CAT, to the CC under section 193(1) of the Communications Act 2003 usually following the close of pleadings (ie once the defence and any statements of intervention have been filed) before the CAT. The CC's review takes a minimum of four months,[87] but this time period is often extended on the CC's application to five or six months. Type (7) "Price control" appeals – which are done "on the merits"[88] – take ten months end-to-end, but about half of this time[89] will be taken up with proceedings before the CC. If the matter reverts to the CAT, which (if

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[83] Para 3.15, and see paras 3.13-3.18 generally.

[84] Namely: (1) "Dispute resolution"; (2) "Ex ante regulation"; (3) "Ex post competition"; (4) "Licence modification"; (5) "Mergers and markets JR"; (6) "Other JR"; and (7) "Price control".

[85] As regards the rule in merger cases, see Rule 26 of the 2003 Rules. The general rule, providing for two months, is stated in Rule 8(2).

[86] As regards the rule in merger cases, see Rule 28(3) of the 2003 Rules. The general rule, providing for six weeks, is stated in Rule 14(1).

[87] See Rule 5 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004/2068) ("the 2004 Rules").

[88] The process is a complex one, laid down in section 193 of the Communications Act 2003. It actually involves a review "on the merits" by the CC, with the possibility of a further judicial review by the CAT of the CC's "on the merits" determination (see para 58 of the CAT's judgment in the *Mobile Call Termination* appeals [2012] CAT 11, upheld on appeal by the Court of Appeal). If the CC's determination is not liable to be set aside on a judicial review, it stands as the CAT's "on the merits" resolution of the appeal. This process – which is essentially statutory – appears cumbersome, but can be made to work quickly.

there is a challenge) considers whether the determination falls to be set aside on judicial review grounds,[90] proceedings are generally heard with considerable expedition, as there is usually a great urgency to correct any possible error in a price control whilst it is still ongoing (given the impossibility of retrospective adjustment). Thus, price control appeals are another example of expedited judicial review proceedings before the CAT. A further point to note about price control appeals (and potentially relevant to options for reform – see further paragraph 68 below) is that "pleadings" before the CAT in price control appeals (ie the documents filed and served in the CAT prior to a reference being made to the CC) are not, in reality, pleadings prepared for the benefit of the CAT. Rather, these pleadings set out the parties' key submissions in connection with the *CC*'s determination of the price control matters, which are then supplemented through the parties' core submissions as part of that process. In our view, there is some scope for acceleration and streamlining of this process.

(2) 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)*[91] and *Everything Everywhere Limited v OFCOM (Stour Marine)*[92] 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 <u>not</u> heard together, distorts the statistics. Each of these merits appeals had a separate hearing, lasting between

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[89] As stated, a minimum of four months, which period is often extended.

[90] This is not always the case, as the parties may accept the CC's determination of the price control matters.

[91] Case 1113/3/3/09.

[92] Case 1167/3/3/10.

0.5 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.

(3) As a judicial body, the CAT does not act by reference to end-to-end "targets", but rather seeks to do justice in the individual case, and has regard to the need to "secure the just, expeditious and economical conduct of the proceedings" (Rule 19(1) of the 2003 Rules). The Consultation – and in particular Figures 3.3 and 3.4 – does not mention or appear to take account of these cardinal principles. Thus:

(i) Usually, the CAT will be able to accommodate a hearing extremely quickly, and would be able to fix hearings according to timetables that the parties before it could not meet or could only meet with great difficulty and expense. The time it takes to get to a hearing tends to be informed by the pace at which the parties can reasonably proceed. Often – and this is quite understandable, given that their resources are not unlimited – it is the regulator who asks for more time.[93] Of course, it is true (as the Consultation notes, referring to the *Merger Action Group* application for review in paragraph 3.10) that in cases of extreme urgency, cases

[93] See, for example, the request made on behalf of the CC regarding the filing of its defence, and timetabling of a hearing, in case 1216/4/8/13 (transcript of case management conference on 24 June 2013, pages 25-30).

can be brought on very quickly. But the cost of doing so (with bigger than usual teams of lawyers working longer than usual hours) is immense, and would prejudice those with more limited financial resources, such as regulators and SMEs.

(ii) The Consultation assumes – wrongly – that all appeals proceed on a linear basis from the filing of an appeal, to a single judgment at the end of the case. That is simplistic. Cases can frequently involve the hearing and determination of preliminary issues, interlocutory appeals to the Court of Appeal, stays to the proceedings (in particular where the outcome of another appeal process is awaited or the parties are attempting to reach a settlement), or amendment to pleadings (usually in light of disclosure of confidential information to the parties which was not available during the investigation). Each of these factors can have a considerable effect on the end-to-end length of proceedings. A good example is the recent case of *British Telecommunications plc v OFCOM (08 numbers)*,[94] where the end-to-end length of hearing before the CAT was protracted by an (unsuccessful) interlocutory appeal brought by OFCOM, and by the lodging of two further, related, appeals by BT and Everything Everywhere, which all the parties agreed should be heard together with BT's first appeal.[95] The timetable was as follows:

16 April 2010	Summary of appeal published on the CAT's website.
22-23 June 2010	Hearing of OFCOM's deemed application to exclude evidence.
8 July 2010	CAT's judgment on admissibility of evidence handed down, refusing OFCOM's application.
5 August 2010	OFCOM requests permission to appeal CAT's judgment.
9 September 2010	CAT refuses OFCOM's application for permission to appeal.
11 October 2010	Two further, related appeals filed by BT and Everything Everywhere.
29 October 2010	The Court of Appeal gives OFCOM permission to appeal.
10 March 2011	Judgment of the Court of Appeal, dismissing OFCOM's appeal.

[94] http://www.catribunal.org.uk/237-6086/1151-3-3-10-British-Telecommunications-PLC-Termination-Charges-080-calls.html

[95] Cases 1168/3/3/10 and 1169/3/3/10.

4-20 April 2011	Hearing of the substantive dispute in the CAT.[96]
1 August 2011	Main CAT judgment handed down in respect of all three appeals.

(iii) The examples drawn upon in the Consultation fail to take such interlocutory matters, which are commonplace, into account. For example, paragraph 4.7 of the Consultation refers to the case of *British Telecommunications plc v OFCOM (Partial Private Circuits)*[97] in the following terms:

> "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 judgment was appealed to the Court of Appeal which gave its judgment in July 2012. A number of other dispute cases were held up, pending the final resolution of this case."[98]

We would make the following observations in relation to this description:

(a) This case involved the determination of two important preliminary issues.[99] Allowing certain issues to be decided as preliminary issues (ahead of a full substantive hearing) has the potential to save parties time and money (and shorten the length of the appeal process), to the extent that success on a preliminary issue has the potential to dispose of the entire proceedings. However, the hearing of preliminary issues can, as here, lead to an extension to the overall end-to-end length of the case, as this involved a two day hearing and the delivery of a judgment running to some 37 pages.

(b) The timetable of the hearing – as is clear from the CAT's website[100] – was as follows:

30 December 2009	Summary of appeal published on the CAT's website.
25-26 May 2010	Hearing of two preliminary issues.

[96] The main hearing had, in fact, been fixed several months before April 2011, but that hearing date had to be vacated because of OFCOM's decision to appeal the CAT's interlocutory decision on evidence, and the time it took for the Court of Appeal to determine the appeal.

[97] Case 1146/3/3/09.

[98] Omitting original footnotes.

[99] See the CAT's judgment of 11 June 2010 on the preliminary issues, [2010] CAT 15.

[100] http://www.catribunal.org.uk/237-5136/1146-3-3-09-British-Telecommunications-PLC.html

11 June 2010	Judgment on the preliminary issues handed down.
20-28 October 2010	Main hearing.
22 March 2011	Judgment in the main hearing handed down.
27 June 2012	Court of Appeal handed down judgment on issues arising out of the preliminary issues judgment and main judgment.

A major factor that contributed to the end-to-end length of these proceedings was the availability of the parties. The CAT had indicated to the parties (at the first case management conference in these proceedings) that it was minded to list the main hearing in June 2010. However, following representations from the parties (including OFCOM), principally connected with the availability of counsel, a hearing was ultimately listed in October 2010.[101]

(c) Decisions taken by the CAT at first instance on a "judicial review" standard are just as liable to generate preliminary issues which need to be resolved in advance of the main hearing, and just as liable to be appealed as decisions taken "on the merits". The period between 22 March 2011 and 27 June 2012, when matters were pending before the Court of Appeal, is therefore altogether irrelevant for purposes of the issues being considered in the Consultation, as is any delay attributable to the need to resolve the preliminary issues in the CAT.

(4) It is clear from the length of the CAT's judgments that cases heard on a judicial review standard can still involve issues of considerable complexity. For example, the CAT's recent judgment in the *Mobile Call Termination* cases,[102] which concerned applications by Vodafone and Everything Everywhere for review of the CC's determination of the price control matters arising in their appeals (in which context the CAT applies a judicial review standard), ran to 139 pages in length (the CAT's judgment was delivered in under a month from the conclusion of the hearing in that case). By contrast, the CAT's recent judgment in two separate appeals by BT heard on the merits ran to just 23 pages.[103]

[101] See the transcript of the case management conference on 11 February 2010, pages 15 to 17.

[102] [2012] CAT 11.

[103] [2011] CAT 15.

5. Additionally, the Consultation does not appear to pay sufficient or proper regard to the ability of an "on the merits" hearing to cure regulatory error without the need for a new decision by the regulator.

6. 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, therefore, delay coupled with the risk that another reviewable error might be made when re-taking the decision, leading to further proceedings.

7. By contrast, an "on the merits" review can sometimes – this may not be possible in all cases – enable the court (here: the CAT) to substitute for a flawed decision a new decision on the merits, avoiding the kind of delay inherent in successful judicial reviews. In *TalkTalk Telecom Group plc v OFCOM* [2012] CAT 1, the CAT was persuaded by OFCOM that although the decision by OFCOM was procedurally flawed (and so liable to be set aside on a judicial review), the re-hearing on the merits that had occurred cured the procedural flaw (see [136(g)]).[104] Indeed, the CERRE report relied upon by BIS in the Consultation explains that this is the very reason for which a merits review was contemplated under Article 4 of the Framework Directive:

> "…Article 4 of the Framework Directive… originally aimed at avoiding that NRA decisions be quashed on the sole basis of procedural failures while they were valid on their merits."[105]

8. Although the Consultation mentions this ability to cure defects in the decision under appeal by an "on the merits" appeal (see paragraph 3.17), it fails to take into account the very considerable savings in time and cost that can result. Another aspect of this, acknowledged in the Consultation, is that a merits appeal avoids the danger of regulators seeking to "JR proof" their decisions by concentrating on procedural and editorial considerations at the expense of the quality or correctness of the decision.

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[104] It must be stressed that this is not always possible. In the *Tobacco* litigation (*Imperial Tobacco Group plc & Ors v OFT* [2011] CAT 41), which did not concern a procedural irregularity, but did involve the regulator (the OFT) conceding that its initial substantive decision was unsustainable and inviting the CAT to substitute its own decision, the CAT did not consider it appropriate – despite the application of the OFT – to do this in the circumstances of that case.

[105] Page 125.

9. Further, the availability of a merits appeal will also allow a regulatory decision to stand, notwithstanding an error in reasoning, if the CAT concludes that the regulator's decision could be supported on another basis. This was made clear by the Court of Appeal in the recent *Mobile Call Termination* proceedings:[106]

> "The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate decision is based are wrong, and second, it must show that its proposed alternative price control measure should be adopted by the Commission. If the Commission (or Tribunal in a matter unrelated to price control) concludes that the original decision can be supported on a basis other than that on which OFCOM relied, then the appellant will not have shown that the original decision is wrong and will fail."

By contrast, were a judicial review standard to apply in such a case, the regulator's decision might well have to be quashed and retaken, leading to a much longer end-to-end process for all concerned.

Is "on the merits" review somehow inappropriate in the CAT cases in which it is currently applicable?

10. As already discussed, the CAT would have particularly serious concerns about any change which might have the effect of restricting the current level of judicial oversight of *ex post* infringement decisions under the Competition Act 1998.[107] However, before such changes are made in respect of *any* appeals which are currently "on the merits", there should be good reason for so acting. Here, the appropriateness of an "on the merits" review is considered (as **Q1** invites) generally, with reference to some of the statements made in the Consultation.

11. The Consultation proceeds generally on the basis that appeals on a "judicial review" standard are less intrusive than "on the merits" appeals, and that "on the merits" appeals cause the review body to "act as a second regulator „waiting in the wings'" (paragraph 3.18; also paragraph 1.12). These are presented as reasons sufficient to justify a move away from "on the merits" review.

12. Essentially, what is being suggested is that when the CAT hears an appeal "on the merits", it is inclined to substitute its view on policy questions for that of the regulator, and thus acts as a "second regulator „waiting in the wings'", to quote from the Consultation.

13. The Consultation therefore proceeds on the assumption that appeal bodies, such as the CAT, routinely engage with matters of regulatory judgment, and seek to look at such matters afresh on

[106] [2013] EWCA Civ 154 at [25].

[107] See Part I, paras 11-22 ("on the merits" generally) and Part I, paras 23-31 (competition cases). The different considerations are also addressed in answer to **Q4** (communications cases) and **Q6** (competition cases).

appeal.[108] However, no examples are put forward in the Consultation of the CAT (or any other court) behaving in such a manner, whether under a judicial review or "merits" standard, nor would such an approach be consistent with the very clear line of authority on this issue in both the CAT and the Court of Appeal, including the very case quoted (yet unattributed[109]) in the Consultation, namely the Court of Appeal's 2008 judgment in *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] EWCA Civ 1373, in which it was held, at [31]:

> "…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 appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had 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."

14. 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. The following decisions of the CAT – all cases involving an "on the merits" review – demonstrate this:

(1) *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] CAT 12 (i.e. the CAT proceedings that led to the Court of Appeal judgment cited at Part II, paragraph 13 above) at [82]:

> "It is…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."

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[108] The Consultation refers in various places to the desirability of moving to a standard of review which allows "for the proper exercise of independent judgement" (para 1.8), and points to 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" (para 1.12). In the summary at Chapter 3, the Consultation states that "the standard of review [in the communications sector]… allows the appeal body significant scope to review regulators' judgements". At para 4.18, the Consultation also states that: "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 judgment."

[109] This is not the only example of an unattributed quote within the Consultation. For example, para 2.7 of the Consultation quotes (without reference) from the Tribunal's judgment in *BAA Limited v Competition Commission* [2012] CAT 3 at [20(6)]. Although this may seem a relatively minor point to raise in our Response, in our view it is somewhat misleading to quote (without attribution) from clear authority, and present such authority as a statement of a perceived current risk.

(2) *Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31 at [72]:

> "…whilst carrying out an assessment of the merits of the case, [the CAT can] give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would have been reasonable and which might have resulted in a resolution more favourable to its case…"

(3) *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."

(4) *Telefónica UK Limited v OFCOM* [2012] CAT 28 at [45]:

> "…the weight to be attached to different considerations in forming a value judgment is a matter for OFCOM, as the NRA charged with the duty of resolving disputes, and in the absence of any misdirection by OFCOM the court will normally respect its determination, whether or not the court would itself have balanced the considerations in the same way and reached the same conclusion."

(5) *British Sky Broadcasting Limited & Ors v OFCOM* [2012] CAT 20 at [84]:

> "…the Tribunal should apply appropriate restraint and should not interfere with OFCOM's exercise of a judgment unless satisfied that it was wrong."

15. Further, the Consultation arguably overstates the difference between the CAT's approach "on the merits" and the *Wednesbury* unreasonableness of judicial review. The point has already been made (Part I, paragraph 14) that the intensity of both the "on the merits" and the "judicial review" standards can vary from case to case.

16. When it comes to points of law there is no real difference between "on the merits" appeals and the "judicial review" standard. If the regulator has made a *material* error of law, then that will be corrected, whatever the standard of review on appeal. ("Immaterial" errors of law, by definition, are immaterial, and so cannot affect the decision and will be disregarded by the reviewing court. That is true, whatever the standard of review.)

17. As far as questions of fact are concerned, even on a "judicial review" standard the court is entitled to consider whether a material factual finding is adequately supported by the evidence, and will certainly examine with some intensity questions of "jurisdictional fact", ie factual questions that go to the decision-maker's jurisdiction in respect of the decision in question. "On the merits" appeals are likely to be more intense when it comes to disputes of fact, but here too the court will not be concerned with immaterial errors.

18. Although to some extent a question of policy, the ability – in the context of fact-heavy and critically important decisions – properly to review material findings of fact where they are disputed is surely desirable. Where a regulator has made a material error in such a finding, is it appropriate that the decision should nevertheless stand on a false basis of fact?

19. On the face of it, the Consultation does not appear to recognise the importance to individual entities of many of the decisions in the spheres in question (see further Part I, paras 25 to 31 above, and the answers to **Q4** and **Q6** below). A finding of unlawful anti-competitive behaviour carries with it not only sanction in the form of very large fines, but also the stigma of *quasi*-criminal conduct and the potential for follow-on litigation in the form of civil actions for damages. Nor should the importance of some regulatory decisions under the Communications Act 2003 be underestimated. For example, cost and price controls can constrain a firm's freedom to price for years on end (controls typically run for three or four years) and a regulated firm can be required to provide access on regulated terms to certain key facilities or services.

20. Given that these decisions really matter, and are essentially decisions based on fact (for example, whether there has been a cartel, whether significant market power exists or has been abused, all involve factual questions), the sort of approach advocated by the Consultation where, in effect, the regulator has the last word, fails to respect the legitimate interests of regulated entities.[110] Further (as the CERRE report recognises) substantial appeals are "probably unavoidable in view of the legal, technical and economic complexity of the subject matters of these appeals".[111]

21. The positive features of an "on the merits" appeal are further discussed in the responses to **Q4** (communications cases) and **Q6** (competition cases) below.

The suggestion that the present regime gives parties "strong incentives" to appeal decisions

22. See the CAT's comments on matters of principle at Part I, paragraph 10 above. The Consultation suggests (see, in particular, the "Summary" at page 18) that "there appear to be strong incentives on parties to appeal decisions", which (it is suggested) "may" be due to:

    (1) "the standard of review, which allows the appeal body to review regulators' judgements";

[110] There are a number of cases where regulators have made material factual findings which were erroneous . See, for example, *North Midland Construction Plc v OFT* [2011] CAT 14, at [28]-[31]; *Imperial Tobacco Group Plc & Ors v OFT* [2011] CAT 41, at [46]-[47], and [61]; *Tesco Stores Limited & Ors v OFT* [2012] CAT 31, at [219]-[220], [324]-[325], [355], [396]-[397], and [430]; *British Sky Broadcasting Limited & Ors v OFCOM* [2012] CAT 20, at [27]-[38], [227]-[229], [310]-[311], and [831]-[832].

[111] Page 108 of the CERRE report.

(2) "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".

23. In the CAT's view, neither of these matters supports a finding of a strong incentive to appeal. Given the clear line of authority on the matter (see Part II, paragraph 14 above), appellants cannot expect that a regulator's judgment will be the subject of "second-guessing". Further, the view expressed that there is a "limited downside to appealing" disregards a number of very obvious matters considered further at paragraphs 25 to 27 below. The main reason, why regulators' decisions are appealed is because they are often of considerable economic, commercial and reputational significance to the parties affected by them, and this important point is not acknowledged in the "Summary" on page 18 of the Consultation. In a recent appeal, BT highlighted that the amount at stake in connection with just one of its grounds of appeal was £200 million per year,[112] and such sums are commonplace in CAT proceedings. The second bullet in paragraph 3.6 of the Consultation does acknowledge that – as regards appeals against OFCOM decisions – "as might be expected more appeals have been brought against the most significant decisions OFCOM has taken". However, the Consultation does not appear to accept that this is the main reason why regulatory decisions are appealed.

24. Even according to the Consultation, the number of appeals as a proportion of the number of decisions taken does not appear to be unreasonable or (given the significance of the decisions) particularly high. Paragraph 3.6 of the Consultation notes that "[a]s might be expected, the number of decisions appealed is a relatively small proportion of the absolute number of decisions". According to Figure 3.2, of the 160 decisions taken by OFCOM in the period 2008 to 2012, only about 12% were appealed. The Consultation does not explain why decisions taken by the UK's primary competition authorities, the OFT and CC, are not included within these figures.

25. The suggestion that an appealing party has "nothing to lose" by appealing is not correct. In fact there are a number of downsides to bringing an appeal. First, there must be reasonable grounds – a hopeless appeal will not survive, as the CAT has a broad jurisdiction to strike out such a case at an early stage.[113] Secondly there are financial and commercial risks, including the diversion (sometimes intensively and for long periods) of personnel from their normal business activities. The cost of this alone can be very substantial.

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[112] See the transcript of the case management conference on 31 May 2012 in cases 1192/3/3/12 and 1193/3/3/12, at page 21.

[113] As explained earlier, very few hopeless appeals have ever been brought in the CAT. There are reputational as well as commercial disadvantages for undertakings and their legal representatives in mounting a case which has no merit.

26. Leaving aside such indirect costs, the direct costs of mounting an appeal in respect of a regulator's decision are considerable and – even if the appeal is wholly successful – the appellant can only expect to recover a proportion of its total costs. If the appeal is unsuccessful, then not only will the appellant bear its own costs, but there will be an exposure to pay the costs of the other party or parties (which will not be insubstantial). Moreover, because the CAT has an extremely broad discretion in relation to costs, it is possible (amongst many other things) to make "issues-based" costs orders. Thus, even where an appealing party has achieved a successful outcome, if it has advanced multiple arguments, some of which have succeeded, and some of which have failed, its costs recovery may be limited to reflect this (see, for example, the CAT's ruling on costs in *National Grid PLC v GEMA* [2009] CAT 24 at [12]-[13]). There are thus powerful incentives on appellants to avoid taking bad points.[114]

27. Any incentive that a party may have to delay the effect of a decision by bringing an appeal (as suggested at paragraph 3.24 of the Consultation) is also likely to be mitigated by the possible exposure to a liability in interest payments (see, for example, *Quarmby Construction Company Limited v OFT* [2011] CAT 11 at [214]).

OFCOM's award of spectrum in the 2.6 GHz band

28. There are repeated references in the Consultation (and the accompanying Impact Assessment) to the delay to OFCOM's award of spectrum in the 2.6 GHz band: see, for example, paragraphs 3.25, 4.10, 4.28 and Annex E of the Consultation; pages 11-12 of the Impact Assessment).

29. For example, it is stated that:

> "…in many cases regulators must wait for an appeal to concluded before it can take action on other matters that may be related or unrelated to the case… Such delays can also lead to consumer benefits being deferred as was the case in the 2.6 GHz 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."

30. It is thus implied 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.

[114] The Consultation refers at para 3.21 to the CAT's costs awards in communications cases. As some cases brought under the Communications Act 2003 are withdrawn, or the question of costs is settled directly between the parties, it may be more appropriate to refer to the number of costs rulings, rather than the number of cases. On this basis, the CAT has made orders awarding costs in just under half of its costs rulings. It should also be noted that OFCOM, where it has succeeded in defending an appeal, has tended only to seek the costs of external counsel, rather than its full costs.

31. 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.

32. Indeed, these appeals serve to demonstrate a rather different point, namely that it can be anticipated that any ambiguity regarding the scope of an appeal body's jurisdiction or its procedural rules (for example, as regards the standard of review that pertains, or the test for the admissibility of evidence) will be extensively tested by the parties in litigation.

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?

33. See the comments on matters of principle at Part I, paragraphs 13 to 22 above. In paragraph 4.19 of the Consultation, it is noted that "[j]udicial review is…a flexible standard as it is not defined in statute but is based on case law". This is equally true of the "on the merits" standard. It is a flexible, but clear, test. The criticism of the term "merits review" contained in paragraph 4.9 of the Consultation is unfounded. There is no inconsistency between subjecting the decision of a regulator to "profound and rigorous scrutiny", whilst accepting that certain questions (typically questions of regulatory judgment, policy and discretion) have multiple "right" answers, and it is for the regulator and not the court to choose *which* right answer should pertain in any given case.

34. The "on the merits" test has been considered in a number of cases and its particular application to competition and communications cases is understood. A number of cases showing the respect accorded to a regulator's discretion and policy decisions have already been cited (see Part II, paragraph 14 above). The nature of the "on the merits" standard was considered in *British Telecommunications plc v OFCOM (Admissibility of evidence)*,[115] which made the following points:

    (1) There are two aspects to the standard. First, a requirement that the CAT decide the appeal "on the merits" (this has already been considered in connection with **Q1** above). And, secondly, that the CAT decide the appeal "by reference to the grounds of appeal set out in the notice appeal". Both aspects are important.

    (2) This second requirement makes it clear that the CAT's review is confined to those issues that the appellant raises in its notice of appeal, and does not amount to a rehearing (as, for example, is the case on an appeal to the Crown Court under section 79(3) of the Senior

[115] [2010] CAT 17 at [66] to [78].

Courts Act 1981). If a point is not specifically challenged by an appellant in its notice of appeal, the regulator's decision stands in that respect. The issues before the CAT will thus be much narrower than those before the regulator. As the CAT stated at [76]:

> "By section 192(6) of the 2003 Act and rule 8(4)(b) of the [2003 Rules], the notice of appeal must set out specifically where it is contended OFCOM went wrong, identifying errors of fact, errors of law and/or the wrong exercise of discretion… 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."

35. Given the Government's stated commitment to "stable and predictable frameworks",[116] and the likelihood that any statutory change is likely to give rise to legal uncertainty and legal challenge, it is not clear what would be achieved (or improved) by a change in the standard or grounds of review in the form proposed (Box 4.2), particularly in light of the following considerations:

(1) A statutory provision enabling the CAT to allow an appeal where the decision is based on a "material error of fact" (proposed section 195(2A)(a)) or a "material error of law" (proposed section 195(2A)(b)) is arguably simply restating in different form the existing law. The term "material" is not used in the existing rules – rightly, because no rational tribunal would allow an appeal based on an immaterial point, and no party would (for that reason) seek to run an immaterial point. There is also clear authority from the Court of Appeal that the CAT is required to identify whether the regulator "got something materially wrong."[117] However, the very fact of the grounds of appeal being reformulated will give cause for argument that some change of meaning and effect must have been intended. One can anticipate much additional argument being engendered before the CAT, and no doubt the Court of Appeal, as to what "material" actually means, and whether the CAT did or did not have jurisdiction to decide the appeal because the error was in fact "immaterial". This is inherent in the Consultation's acknowledgment that not all such errors (of fact, law or procedure) "will result in overturning a decision".

(2) Proposed sections 195(2A)(d) and (e) deal with discretion, judgments and predictions – all cases where there are potentially numerous "right" answers, which would therefore be decided in accordance with the case-law described in Part II, paragraph 14 above. It is highly likely that parties will (according to their interest) dispute whether a given issue is, on the one hand, a question of fact/law or, on the other hand, a question of

[116] Consultation, page 7.

[117] *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] EWCA Civ 1373 at [31].

discretion/judgment/prediction, because the CAT's ability to intervene is different in these cases. This is just the sort of satellite litigation that slows regulatory appeals down.

(3) Proposed section 195(2A)(c) states that an appeal can be allowed "because of a material procedural irregularity". It is not known whether the drafting intention here is to preclude an "on the merits" appeal from curing a procedural defect in the decision (as occurred in *TalkTalk*: see Part II, paragraph 7 above), but that could be the effect. Naturally, the question of whether the decision in *TalkTalk* should be overruled by statute is not one for the CAT (indeed, the decision in *TalkTalk* is itself presently before the Court of Appeal): but it would appear to be a retrograde step with the unintended consequence of leading to more decisions being overturned on appeal and a lengthier remedial process overall.

(4) Interestingly, the proposed section actually expands upon the existing standard of review for communications appeals in one regard: it appears to remove the requirement (discussed at Part II, paragraph 34 above) that the CAT should decide the appeal in accordance with the grounds of appeal.

36. In short, the adoption, by amendment to the relevant legislation, of principles set out in Box 4.1 may well not bring about any material change in the standard of review that currently pertains in the CAT, but will almost certainly stimulate a potentially long and disruptive period of satellite litigation.

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

37. For the reasons given in Part II, paragraphs 4 to 9 above, the evidence advanced in the Consultation suggesting that a shift to a "judicial review" standard would impact the end-to-end length of appeals and the length of hearings does not appear to be sound. It is very doubtful that the change would make any significant difference to the length and cost of appeals. As has been highlighted above, considerable care must be taken when seeking to draw conclusions from raw statistics in relation to case and hearing length.[118]

[118] We would also urge caution when seeking to draw direct comparisons with appeals in other EU Member States, or as between the CAT and other judicial bodies acting in different areas of law. In particular, the nature of the cases at issue in the relevant appeals must be taken into account. For example, it is immediately apparent from a review of the High Court cases included at Annex E of the Consultation (and Annex B of the Impact Assessment) that the cases concerned are quite unlike the multi-party, complex and technical cases coming before the CAT. A number of these included failed permission applications and small single-issue cases (and many of these took a period of several months merely to get to a permission hearing). The only case which directly relates to a competition investigation (*Crest Nicholson*) took 14 months to conclude. By contrast, the CAT decided 25 separate merits appeals (raising issues of liability and penalty) over a broadly similar period in connection with the same OFT investigation.

38. Indeed, until any new regime has "bedded down", with its limits and parameters tested in litigation, it is most likely that any change would (for the best part of a decade) result in increased litigation and therefore longer and costlier regulatory appeals.

39. As to effectiveness, for the reasons given in Part II, paragraphs 4 to 9 above, and in answer to **Q4** and **Q6** below, it is suggested that a move to a "judicial review" standard is unlikely to enhance, and may impair, the effectiveness of regulatory appeals.

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?**

40. This answer to **Q4** does not repeat the answers given to **Q1 to Q3**, which pertain, and we refer also to the comments on matters of principle at Part I, paragraphs 12 to 22 above. 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.

41. 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. As is well known, Article 4(1) of the Framework Directive provides:

> "(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 available 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 appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.
>
> (2) 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."

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.

(2) OFCOM's dispute resolution process. OFCOM takes many types of decision and makes many types of determination. One of these is resolving disputes between communications providers pursuant to sections 185 to 190 of the Communications Act 2003. In such cases, OFCOM acts as a resolver of private disputes between communication providers, albeit that OFCOM retains the right to apply its regulatory policies in the resolution of such disputes. A court, were it resolving a private dispute at first instance, would apply an "on the merits" approach. The question arises whether it is appropriate for an appeal from an administrative regulator to be more circumscribed. It is worth noting that – to the extent that such disputes do not involve a "policy question" – any appeal can currently be resolved without OFCOM's participation. As the Court of Appeal observed in the postscript to its judgment in *British Telecommunications plc v OFCOM plc* [2011] EWCA Civ 245 (at [87]), although in dispute resolution cases OFCOM is named as a respondent as a matter of form, it "should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal".

(3) Is the judicial review standard appropriate in respect of price control decisions? As was described in Part II, paragraph 19 above, price (or cost) control decisions are extremely important and generally highly contentious decisions that are regularly taken by OFCOM. They are highly contentious, because they involve imposing *ex ante* limits on what would otherwise be the normal freedom of communications providers to price their services. Therefore they can only be imposed where stringent conditions have been satisfied (in particular, a finding that "significant market power" exists in the market in question). These decisions are very fact sensitive. A question may therefore arise whether a move away from an "on the merits" standard of review is appropriate. In addition – as has been noted in Part II, paragraph 7 above – in certain cases an "on the merits" review permits the "curing" of a procedurally defective decision and – where a decision is substantively wrong – an ability to cure the defect without having to embark upon a completely fresh consultation process.

42. Paragraph 4.42 of the Consultation (which precedes this **Q4**) refers to the Court of Appeal's judgment in the *08 numbers* litigation (also discussed at Part II, paragraph 4(3) above).

However, as we pointed out to BIS in correspondence some time ago,[119] the Consultation misunderstands and in doing so, misrepresents, what the Court of Appeal was actually saying. The Consultation states as follows: "BT had argued that OFCOM had made a wrong value judgement. The Court of Appeal found that the CAT did not have the jurisdiction to overturn OFCOM's decision for this reason." This was not the basis on which the Court of Appeal allowed OFCOM's appeal, and the Court of Appeal did not find that the CAT had wrongly interfered with a value judgement made by OFCOM. The relevant passage from Lloyd LJ's judgment should be read as a whole:[120]

> "…Although the Tribunal is an expert and specialised body, it is not set up as a second tier regulator of the sector, and it seems to me that, absent new evidence which shows that the factual basis on which OFCOM proceeded was wrong, or an error of law, the Tribunal ought to respect the policy decisions and matters of judgment involved in OFCOM's decisions. To an extent the Tribunal did so, for example as regards respecting OFCOM's policy preference as regards the pricing of 080x calls. Consistently with that, it does not seem to me that it was open to the Tribunal to balance the various potentially conflicting considerations relevant to the regulatory objectives in a different way from that adopted by OFCOM, unless an error could be shown in OFCOM's approach. **Nor, to be fair, was it argued before us that this is what the Tribunal had done. The basis for their disagreement with the conclusion reached by OFCOM was that OFCOM's approach had been wrong because of the three misdirections identified, not that OFCOM had considered the right questions on the right material but had weighed up the relevant factors wrongly**: see paragraph 231 where the Tribunal said: "Accordingly, we consider that we must ask ourselves … whether the approach in fact adopted by OFCOM was a "wrong" approach"." (Emphasis added)

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

43. For the reasons given in answer to **Q1**, **Q2** and **Q4**, it is questionable whether the changes envisaged by the Consultation for communications appeals would result in a more effective regime. The reverse may be true.

44. In terms of time and cost implications, the answer to **Q3** is repeated.

45. Many communications appeals are currently concluded by the CAT in very short periods. For example, the case of *Vodafone Limited v OFCOM (Mobile Call Termination)*,[121] a price control appeal where parties brought judicial review challenges to the CC's determination of the price control matters, was heard with considerable expedition. The CAT imposed a very tight timetable to dispose of the appeals, for example listing a CMC the day after the CC's determination. This was necessary given that, by the time the price control matters were determined by the CC, nearly a quarter of the period covered by the price control had elapsed.

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[119] Letter from the Registrar of the CAT to Chris Jenkins of BIS dated 10 February 2013.

[120] [2012] EWCA Civ 1002, at [90].

[121] Cases 1180-1183/3/3/11.

The CAT's judgment of 137 pages was handed down within one month of the main hearing in the proceedings, and traversed detailed questions of law and economics.

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?**

46. We refer to the answers given to **Q1 to Q3**, which pertain, and also to our comments on matters of principle at Part I, paragraphs 23 to 31 above. For the reasons there set out we consider that there is no justification for changing or reformulating the standard of review in respect of the decisions referred to in **Q6**. As noted at Part I, paragraph 23, the Consultation does not put forward any evidence why a merits appeal in relation to findings of competition law infringement is inappropriate, nor is the Government's significant change of position (from its March 2012 response to the consultation titled *Growth, Competition and the Competition Regime*) explained. Further, it is unlikely – for the reasons given in answer to those questions – that the envisaged changes will achieve the ends anticipated in the Consultation. Rather, increased cost and increased litigation are to be anticipated. Given the quasi-criminal nature of a finding of infringement of the competition prohibitions, it is possible that a challenge would be brought to the compatibility of a revised standard of review with the requirements of Article 6 ECHR. Further, the Competition Act 1998 regime is a very well-established one, and its limits and operation have been tested in court and are clear to all the stakeholders.[122] It would be unfortunate were the benefits of this accumulated learning and practice to be lost.

47. Although this is inevitably a subjective opinion, on which the Government will no doubt reach its own view, no appetite to change the present system is detectable, and it is a system that appears to be working well, albeit against a backdrop of a low overall number of competition law enforcement decisions (and, hence, appeals) Given the emphasis placed in the Consultation on the importance of "stable and predictable regulatory frameworks" (see, eg, page 7 of the Consultation), it is unclear what would be achieved by a modification to the standard of review in this area.

48. Although in general terms the standard of review of administrative decisions is a matter of policy, a reduction in the current standard of review in respect of infringement decisions under the Competition Act 1998 would give rise to a number of serious concerns (see Part I, paragraphs 25 to 31). More specifically:

[122] See the remarks of Helen Davies QC in the article cited at fn 32 above.

(1) A "judicial review" standard is inappropriate where findings of quasi-criminal conduct are being made. A finding of anti-competitive behaviour carries with it – in addition to the potential for extremely large fines – the stigma of having been found guilty of *quasi*-criminal conduct. Such a finding by an administrative body (whether that be the OFT, as it presently is, or one of the sectoral regulators, like OFCOM) should, as a matter of basic justice, be capable of challenge "on the merits" before an impartial judicial body. Such a "merits" challenge should be capable of including disputed questions of fact.

(2) It is appropriate that a finding of unlawful anti-competitive conduct is capable of challenge "on the merits" because it is incapable of challenge in "follow-on" damages claims. Even in cases where no fine is imposed by the competition authority, a finding of unlawful anti-competitive behaviour carries with it an exposure to damages pursuant to a "follow-on" claim (presently provided for in section 47A of the Competition Act 1998).[123] In these actions, the finding of anti-competitive behaviour cannot be challenged by the defendant, and must be accepted by the court, whose only function it is to assess what damages have flowed from the anti-competitive behaviour (as a matter of causation and quantum). In such circumstances, it would be unfair if a party subject to such a finding by an administrative body was unable to challenge this finding "on the merits".

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

49. For the reasons given in answer to **Q1**, **Q2** and **Q6**, it is questionable whether the changes envisaged by the Consultation for competition appeals would result in a more effective regime. The reverse may well be true, particularly when the interests of justice are taken into account.

50. In terms of time and cost implications, the answer to **Q3** is repeated.

[123] Examples of cases where no fine was imposed, but a company was exposed to a follow-on action for damages include case 1166/5/7/10 *Albion Water Limited v Dŵr Cymru Cyfyngedig* and case 1178/5/7/11 *2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited*. In such cases, a firm is also potentially exposed to an award of exemplary damages (again, see *2 Travel*).

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?**

51. Two, preliminary, points can be made:

    (1) First, these are not cases where the CAT is the primary appeal body. The primary reviewing body is generally the CC, carrying out such a review "on the merits" (although the statutory formulation varies from case to case). In the case of communications appeals under the Communications Act 2003, appeals are directly to the CAT, which considers whether "price control" questions arise out of the appeal. These are then referred, by the CAT, to the CC (see, principally, section 193 of the Communications Act 2003), which (in effect – the statutory scheme is complex) decides the matter "on the merits", subject to a "judicial review" by the CAT if the CC decision is challenged. In the case of postal services appeals, OFCOM sends any appeal raising price control matters directly to the CC (see paragraph 59 of the Postal Services Act 2011).

    (2) Secondly, the position of the CC within the pantheon of competition regulators is undergoing profound change pursuant to the Enterprise and Regulatory Reform Act 2013: the functions of the CC and the functions of the OFT are being taken over by the CMA. The implications of this, in terms of how regulatory appeals will be handled, are in the process of being worked out.[124] However, any structure in which the decisions of one administrative body are reviewed by another administrative body will still require supervision by the court.

52. Significantly, both the Communications Act 2003 regime and the Civil Aviation Act 2012 regime contain "on the merits" reviews (in the case of the latter regime, on specific grounds only). The Communications Act 2003 regime has been working for a number of years now, and although the statutory scheme might fairly be described as "complex", recent decisions of the CAT and the Court of Appeal have clarified the procedure considerably: see *British Telecommunications plc v OFCOM (Mobile Call Termination)* [2012] CAT 11 and [2013] EWCA Civ 154; and [2012] CAT 30, dealing with costs). The procedure seems to be working well. As indicated in relation to **Q5**, cases coming before the CAT relating to price controls in the communications sector have generally received speedy determination. The regime under the Civil Aviation Act 2012 is too recent to have been tested.

[124] The first "tranche" of CMA guidance documents having been issued for consultation on 15 July 2013.

53. Against this background of considerable legislative and institutional change, it may be premature to consider further changes to the standard of review, particularly in an area of profound economic significance to regulated entities.

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

54. For the reasons given in answer to **Q1**, **Q2** and **Q8**, it is questionable whether the changes envisaged by the Consultation for price control appeals would result in a more effective regime. The reverse may well be true.

55. In terms of time and cost implications, the answer to **Q3** is repeated.

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?**

56. The CAT has nothing to add to its answers to **Q1 to Q9**.

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?**

57. The CAT has nothing to add to its answers to **Q1 to Q9**.

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?**

58. The question pre-supposes agreement with the proposition advanced in **Q1**. Please see the answer to **Q1** 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?**

59. Please refer to the answers to **Q1** and **Q2**. It is questionable whether changes of the kind envisaged would result in a more effective regime. The Consultation contains no evidence to suggest that the regime would be any more effective.

60. In terms of time and cost implications, the answer to **Q3** is repeated.

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

61. Please see our comments at Part I, paragraphs 45 to 52 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?

62. Yes. See Part I, paragraph 50 above.

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.

63. Yes. The eight year term is difficult to defend in the case of either full-time or fee-paid judicial office holders. Subject to the retirement age applicable to their office, it ought to be possible for appropriately experienced full-time judges to be deployed as CAT Chairmen without further temporal limitation.

64. As regards CAT Chairmen who do not hold full-time judicial office, the eight year limit is equally inappropriate and damaging to the system, and should be abolished. The opportunity should be taken to move to a system of rolling, renewable appointments of, say, five years, of the kind generally applicable throughout the justice system in respect of fee-paid (ie part-time) judges. The current eight year non-renewable limit is unique to CAT judges, as far as we are aware. There is no justification for treating them differently from all other judges. The limit results in the loss to the CAT and its users of a great deal of extremely specialised knowledge and experience. It is wasteful of judicial resources. There is no downside to its repeal. Diversity considerations are fully respected in the appointment process when each CAT Chairman (whether full-time or part-time) is recruited by the Judicial Appointments Commission.

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

65. The CAT is already entitled to sit with the President or a Chairman alone in order to deal with certain matters, notably, interim relief and case management issues.[125] Subject to the points we make at Part I, paragraph 50 above, we support the extension of this power to certain other cases, such as, for example, where the issues in the case are wholly or mainly questions of law

[125] See in particular, rule 62 of the 2003 Rules.

or procedure. However, given the invaluable benefit of the CAT's multidisciplinary constitution, we would not support the imposition of a mandatory approach which required the CAT to sit with a Chairman alone in any particular category of case. The CAT should be granted sufficient flexibility to decide, on a case-by-case basis in the light of the particular circumstances, whether the use of this power is appropriate.

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

66. The CAT makes no comment on this question.

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?

67. Please see our earlier comments, in particular at Part I, paragraphs 34 to 36 above. There may be a case for re-routing the price control aspects of communications appeals directly to the CC/CMA, and there is no reason why the Communications Act 2003 regime could not be altered so as to follow the lines of the Civil Aviation Act 2012 model. However, the latter model is an untested one. Moreover, although the Communications Act 2003 system is undoubtedly complex, its operation over ten years has been clarified by the parties' practice and the case-law that has evolved. The regime works reasonably well. In particular, the fact that all appeals – whether "price control" or "non-price control" are initially referred to the CAT has a number of advantages:

(1) The CAT, as a judicial body, can identify and resolve any contested issues at the outset of an appeal, for example whether, as a matter of law, a given appeal raises price control issues, whether particular interventions by third parties should be permitted (and if so, on what terms), and whether disclosure is necessary in order for an appellant to advance its case.

(2) If an appeal raises both price control and non-price control issues, the CAT can consider whether one set of issues should be heard ahead of the other, or whether parallel hearings (in front of both the CAT and the CC) are appropriate, and identify an appropriate procedural timetable.

(3) The CAT can put in place a confidentiality ring, before proceedings in front of the CC begin.

68. There are also viable means of improving the existing regime for communications price control appeals, short of the institutional reshuffle contemplated in the Consultation. For example, the existing bifurcated regime could be maintained, with the CAT retaining overall responsibility for the disposal of the appeal, but with the reference questions formulated by the parties at the outset of proceedings and sent immediately to the CMA for its determination. At present, the specified price control matters are not agreed, or referred to the CC, until the close of pleadings before the CAT. The appeal process could be considerably shortened if no such pleadings were filed with the CAT, and the parties moved directly, following the reference of the questions, to making submissions to the CC / CMA. However, retaining the role of the CAT in the process would potentially allow contested issues (such as the specific terms of the reference questions, or permission to intervene) to be resolved without delay to the CC / CMA's process.

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

69. The CAT was established as a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy, and is therefore well equipped to hear and decide cases involving competition law and related economic regulatory issues.[126]

70. *Ex ante* regulatory decisions often involve very similar (and sometimes identical) issues to *ex post* competition cases. For instance, the question (under, e.g. section 87 of the Communications Act 2003) of whether a "dominant provider" has "significant market power" in an "identified services market") involves consideration of just the sorts of issue that arise when considering whether the Chapter II prohibition in the Competition Act 1998 has been infringed (notably, market definition and dominance). Further, the CAT has developed significant experience and expertise in the context of its existing jurisdiction over *ex ante* regulatory decisions under the Communications Act 2003.

71. Therefore, it would make sense for the CAT to hear a wider range of appeals or reviews in respect of *ex ante* regulatory decisions in other sectors too.

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

72. There is a case for such appeals to be heard by the CAT, as in undertaking such appeals the CC is, in effect, being required to sit as a tribunal. This though is a question of policy for others.

[126] The CAT's existing jurisdiction in this area is, in large measure, confined to communications and a limited number of aviation, energy and postal services matters. The statement at paragraph 5.33 of the Consultation that most appeals from *ex ante* decisions (other than price control and licence modification decisions) "are already heard by the CAT" is therefore probably expressed too broadly.

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

73. Paragraph 5.37 of the Consultation correctly recognises the desirability of consistency within a sector as well as consistency across sectors. The best way of achieving this would be to put in place a parallel competence on the part of the High Court (or Court of Session/High Court of Northern Ireland) on the one hand and the CAT on the other, with an ability to transfer cases between these courts and the CAT as appropriate.

74. This would achieve a higher degree of consistency across sectors than is presently the case, whilst making use (or continuing to make use) of the expertise of all relevant judicial bodies.

75. A rigid „one size fits all' approach carries a risk of ineffectiveness as it cannot be assumed that regulatory enforcement decisions are *always* "more straightforward legal decisions which require less substantial economic analysis or value judgement" (paragraph 5.35 of the Consultation). Such decisions can raise very complex issues. For instance, the question of whether a regulated entity has complied with a particular SMP condition, for example a condition requiring that prices be oriented to cost, may well involve detailed issues of economics and accountancy.

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 body to hear enforcement appeals?

76. A more flexible approach, such as that suggested by the answer to **Q22,** may be preferable to the rigid choice posed by **Q23**.

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 there any other further changes required in Northern Ireland?

77. The answers to **Q22** and **Q23** are repeated.

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?

78. We comment on **Q25** and **Q26** together. Under the Communications Act 2003, OFCOM's dispute resolution decisions are appealable only to the CAT (with the possibility of a further appeal to the Court of Appeal on points of law). This represents a sensible model which should

be retained in communications cases. The same model would also work well if extended to other sectors. There are two reasons for this:

(1) First, OFCOM is obliged to determine disputes under the dispute resolution regime extremely quickly. Other than in exceptional circumstances, OFCOM must resolve the dispute within four months (section 188(5) of the Communications Act 2003). It follows from this that any appeal from such a decision also needs to be quickly determined: the CAT has the proven capacity to do this, having speedily heard and resolved many such appeals over the ten years or so since the Communications Act 2003 was enacted. It is far from clear, and has certainly not been demonstrated, that the High Court (and equivalent courts in Scotland and Northern Ireland) would be in a position to achieve the same timescales.

(2) Secondly, resolving appeals from dispute resolution decisions requires an understanding of the wider regulatory regime. For example, in the field of communications, a dispute resolution determination by OFCOM can engage the question of the particular regulatory duties and powers exercised by OFCOM, or indeed questions of whether an operator has complied with a particular licence condition. Given the potential complexity of such issues, as well as their close relationship with the underlying regulatory regime, it makes sense for a single body with particular regulatory expertise – the CAT – to hear these appeals. Although it is correct (as noted at paragraph 5.40 of the Consultation) that the High Court has significant expertise in hearing commercial disputes, the particular nature of regulatory disputes means that such expertise may not be of such direct relevance or bearing.

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

79. This extension of the CAT's competence (whilst, it is assumed, retaining the parallel competences of other courts) would assist the efficient and expeditious disposition of competition appeals, and allow appellants to develop a familiarity with the procedures of a single appeal body. Were such a policy to be determined upon, it could be implemented without difficulty.

80. The existing position, where "process" issues and "substantive" issues are heard by separate bodies (due to only specific categories of appealable decision being identified in section 46 of the Competition Act 1998), can cause appellants and other parties undue cost and delay, and is

inconsistent with the CAT's jurisdiction under other legislation.[127] For example, one of the parties that appealed the OFT's *Construction* decision was required to lodge appeals in two different fora, the first in the High Court in connection with the procedural fairness of the OFT's "fast track" leniency offer,[128] and a substantive appeal in the CAT against the penalty ultimately imposed by the OFT.[129]

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?

81. We comment on **Q28** and **Q29** together. The CAT has a well-established regime for the creation and implementation of confidentiality rings, which are a regular feature in the cases that come before it. Whether the use of confidentiality rings can helpfully be extended to the administrative stage is not a matter for the CAT.[130] Were confidentiality rings so to be extended, then the CAT sees no difficulty in its supervising them, were that considered appropriate.

82. It is unclear whether the availability of confidentiality rings at the administrative phase would have an impact on the overall number of appeals that are brought. However, the availability of confidentiality rings at that earlier stage could increase the speed of appeals, as it would then be less likely that parties would seek permission to amend their pleadings before the CAT in light of information disclosed into a confidentiality ring at the appeal phase (which can delay proceedings). Their advisers would already have been made aware of such information at an earlier juncture.

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[127] The CAT's jurisdiction under section 120 of the Enterprise Act 2002, for example, extends to a "decision…in connection with a reference or possible reference", and has been held to extend to procedural decisions taken by the CC in connection with a reference: *Sports Direct International PLC v Competition Commission* [2009] CAT 32.

[128] See [2009] EWHC 1875 (Admin).

[129] See [2011] CAT 10.

[130] The potential use of confidentiality rings during the administrative phase of a regulator's investigation was highlighted during a recent meeting of the CAT's user group, to which users reacted favourably. See the minutes of the meeting of 8 November 2012, available on the CAT's website:

http://www.catribunal.org.uk/files/1.UserGroup_minutes_08Nov2012.pdf

Q30 **Do you agree that the factors that 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 line proposed?**

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

83. **Q30** and **Q31** are dealt with together. A number of remarks have already been made on these questions in Part 1, paragraphs 41 to 44 and 48 above. However, by way of direct response, the CAT would note that the present regime, which allows the CAT to control the evidence before it (including through the exclusion of certain evidence where appropriate) is well-established, has been reviewed and approved by the Court of Appeal, and is understood by parties to CAT proceedings.[131] The case for change is not made out in the Consultation, and the proposed change is unnecessary and undesirable.

84. By way of expansion, the following additional points need to be made:

(1) The manner in which appeals to the CAT are made was described in Part II, paragraph 34 above. An appellant must state – and state with precision – its grounds of appeal. It is not possible to appeal a decision "generally": such an appeal would be struck out as improper. It follows that, from the very beginning of an appeal process, the grounds of appeal will be identified and will not (save in exceptional circumstances) change.

(2) Unless the regulator has reached a decision on grounds that were not canvassed in consultation with interested parties (which has occurred: see, for example, *CTS Eventim AG v Competition Commission* [2010] CAT 7), it is very likely that at least the substance of the grounds of appeal will have been articulated before the regulator, but not accepted by it. (Any suggestion that parties are purposely holding back evidence until the appeal stage would be entirely without foundation, and no such suggestion is made – see paragraph 3.23 of the Consultation.)

(3) 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-

[131] The CAT has also provided guidance in its judgments regarding the manner in which competition authorities and regulators gather and marshal evidence during investigations, with a view to possible appeals: see, for example, *Tesco Stores Ltd & Ors v OFT* [2012] CAT 31 at [115]-[131].

productive. The reference (at paragraphs 3.22 and 7.16 of the Consultation) to the substantial evidence advanced in the *Pay TV* appeals[132] 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.

(4) It is assumed that the reference to "new" evidence in **Q30** is intended to refer to evidence supporting points that were *not* made before the regulator. This can happen, but actually happens extremely rarely. The rules were considered in *British Telecommunications plc v OFCOM* [2010] CAT 17 (before the CAT) and [2011] EWCA Civ 245 (before the Court of Appeal). The Court of Appeal made clear (see [57]*ff*) that the CAT retained a broad discretion to admit new evidence, not least because – although these are nominally "appeals" – they are actually the *first time* very important regulatory decisions are the subject of *judicial* scrutiny.

(5) In its own judgment in that case, the CAT specifically addressed OFCOM's concerns regarding a broad discretion to admit evidence (at [81]), which it considered were unfounded (at [82] to [86]). As noted, this decision was affirmed on appeal. It is worth bearing in mind the circumstances that gave rise to the application to admit new evidence in the case. Essentially, in a series of communications to BT – the party seeking to admit new evidence – OFCOM misstated the ambit of its own investigation (see [103] to [108]), with the result that BT was unaware until a very late stage of precisely what evidence it needed to adduce.

85. A closed list of instances where "new" evidence can or cannot be adduced will give rise to disputes as whether particular evidence does, or does not, fall within the list, and (inevitably) cannot make provision for the unanticipated case. This will almost certainly lead to additional and longer hearings and to further appeals to the Court of Appeal from the CAT's exclusion or admission of evidence by reference to the proposed statutory criteria. The regime under the Civil Aviation Act 2012 is recently introduced and is untested: before adopting it as a model, the practical operation of this regime ought to be considered.

86. Further, the existing procedural rules are perfectly adequate to enable the CAT to control (and where appropriate limit) the evidence before it, and the CAT does already take such steps. For example:

[132] The *Conditional Access Modules* case (1179/8/3/11) was, in fact, a satellite appeal to four main appeals brought against OFCOM's *Pay TV* statement (cases 1156-1159/8/3/10), although the evidence in those cases was heard together.

(1) In case 1185/6/8/11 *BAA Limited v Competition Commission*, the CAT refused BAA permission to adduce expert evidence in relation to the costs of divesting Stansted airport, concluding that this evidence was not necessary to understand the submissions being made by BAA and that evidence of this type was not appropriate in the context of the proceedings in question. As the CAT noted at [80] of its judgment ([2012] CAT 3):

> "…In our view, attempts to introduce detailed technical expert evidence in reviews under section 179 of the Act should be strongly discouraged and disallowed other than in very clear cases. Otherwise, there is an obvious danger that costs will be wastefully multiplied with no significant benefit for the speedy and efficient dispute resolution procedure which is supposed to be provided for by a section 179 review, as with judicial review generally…"

(2) In the current appeals from OFCOM's recent *Ethernets* determination[133] (merits appeals under section 192 of the Communications Act 2003 in relation to an OFCOM dispute resolution determination), the CAT refused the appellants permission to advance an expert report in relation to types and rates of interest, on the basis that this was an issue with which courts were already familiar, and the point could in any event be addressed by another expert witness.[134]

(3) In the recent *Mobile Call Termination* appeals,[135] the CAT (upheld by the Court of Appeal[136]) expressed scepticism about whether, in the context of a price control determination, new evidence would be admitted late in circumstances where a party had had the opportunity to tender such evidence at an earlier juncture. The CAT described such a party as the "author of its own misfortune".

Q32 <u>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?</u>

87. We refer to earlier comments in the Introduction and Summary, at paragraph 4(7), and also in Part I, paragraph 8 above. We now expand on these points here. Costs orders during and at the end of litigation represent an important, just and effective way of ensuring that appeals are responsibly conducted. They also reinforce the just disposal of appeals by allocating some of the costs of mounting or defending them so as fairly to reflect the outcome, where that is appropriate. Litigation – including appeals before the CAT – comes in all shapes and sizes, and

[133] Cases 1205-1207/3/3/13.

[134] See the transcript of the case management conference on 18 March 2013 at page 14*ff*.

[135] *British Telecommunications Plc v OFCOM (Mobile Call Termination)* [2012] CAT 11, at [224]-[228].

it is important for the CAT to able to be flexible in the costs orders it can impose, rather than strait-jacketed. The present regime is characterised by a wide discretion in the CAT, which has been developed in the case-law and acknowledged by the Court of Appeal.[137] It is an approach that should be retained.

88. It is not appropriate, in this answer to **Q32**, to set out in detail the sorts of orders the CAT typically makes. In very general terms, the CAT's starting point is that the "loser pays" and this principle tends to be applied whether the loser is a regulator or a privately funded party. This, however, is only the starting point, and may be adjusted by reference to an open list of relevant considerations. For example:

(1) The CAT may take an "issues" based approach, and allow the winner on certain issues to recover costs (even though the overall appeal was lost) or preclude the winner from recovering costs on certain issues.

(2) The CAT may consider the size of the litigation team instructed by the winner, and prevent the winner recovering a portion of its costs where the team is unnecessarily large or an unreasonable number of hours have been claimed.

(3) The CAT may take into account the way in which issues have been contested, and penalise in costs a party that has put the other parties to unnecessary trouble and expense.

(4) The CAT can already take into account, as a relevant factor to an award of costs, the position and duties of a regulator, together with the extent of any risk that an order for costs might have a chilling effect on their activities. As it noted in its ruling on costs in the *Pay TV* appeals:[138]

> "…it is certainly a relevant consideration whether and if so to what extent in any particular case the possibility of a substantial award of costs is likely to have a chilling effect on OFCOM doing what it considers to be appropriate in the exercise of its statutory duties. However, whatever the position may have been in the infancy of the current regulatory regime, we are not persuaded that the risk that a mature and responsible regulator such as OFCOM would be deflected by that consideration is of itself so substantial as to justify accepting as a general principle that an adverse order for costs should not be made against OFCOM in section 192 appeals."

89. In short, a nuanced, case-by-case, approach is called for. Such an approach should not – in general terms – be "asymmetric" in favouring regulators over the regulated, save perhaps in

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[136] [2013] EWCA Civ 154, at [60]-[62].

[137] *Quarmby Construction Company Limited v OFT* [2012] EWCA Civ 1552.

[138] *British Sky Broadcasting Limited & Ors v OFCOM* [2013] CAT 9, at [15].

very specific, probably unique, cases of dispute resolution appeals.[139] These cases, however, are capable of being (and are in fact) dealt with under the CAT's general discretion, without the need for a legislative change to the CAT's rules.

90. As the Impact Assessment accompanying the Consultation makes clear, the costs of appeals falls most heavily on appellants,[140] 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".[141]

91. The Consultation does not identify any convincing reasons why one side in a dispute (but not the other side) should be afforded special protection in terms of its liability for the opposing party's costs, should the opponent be successful. Such asymmetry would be unfair and at odds with the well-established approach under the CPR in High Court challenges to administrative decisions.[142] There would also be a risk that insulating regulators from potential liability for an appellant's costs of challenging an incorrect or unlawful administrative decision would endanger the quality of such decisions and of the decision-making process.

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[139] *Ibid*, at [30], where the CAT noted that dispute resolution decisions have been described by OFCOM as involving the performance of a "unique quasi-judicial" function, and that the "special nature of such decisions might be said to affect the appropriate starting point for the award of costs on an appeal therefrom."

[140] See fn 14 above.

[141] See Consultation para 4.14.

[142] See CPR Part 44.2(2)(a), and the CAT's ruling on costs in *Tesco PLC v Competition Commission* [2009] CAT 26 at [32].

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

92. A properly effective costs regime implies that each party seeks to claim its reasonable costs. In the case of regulators, there appears to be no good reason why internal costs cannot be claimed: see *British Telecommunications plc v OFCOM (Mobile Call Termination)* [2012] CAT 30 at [39].

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

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

93. **Q34** and **Q35** are dealt with together. Please see our comments at Part I, paragraphs 38 to 40 above. Clearly, where a ground of appeal is capable of being dealt with summarily and without a substantive hearing that course should be followed – whether on the application of the regulator or by the CAT of its own motion. The CAT's rules of procedure already make provision for this,[143] such that no amendment is necessary. In practice both sides in regulatory appeals are almost invariably represented by highly experienced specialist advisers, who are likely to have been intimately involved in the underlying dispute for a considerable period before the matter reaches the CAT. Where an appeal (or indeed a defence) stands no realistic prospect of success, it is to be anticipated that an application would be made by one of the parties, seeking a "strike out" at an early stage. Little would be gained by imposing a specific obligation on the CAT to conduct an early detailed review of the merits of each appeal (and defence) when lodged, as the CAT's familiarity with the issues at that stage is obviously less than that of the parties and their advisers. On the other hand, where one side (invariably the appellant) is not legally represented, or does not appear to be represented by advisers who are experienced in the relevant area of law, the CAT is likely to consider it appropriate to conduct a more detailed review of the merits at an early stage.

94. However, **Q34** and **Q35** imply that there are many grounds of appeal (or many appeals) that can be characterised as so weak as to justify this course: there is no evidence to justify that implication, and in the CAT's experience it is not well-founded.

[143] Rule 10 of the 2003 Rules.

Q36 **Do you consider that the principles proposed for decision-making in anti-trust [cases] should be applied in any way to regulatory decision-making?**

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

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

95. **Q36**, **Q37** and **Q38** are principally directed at the regulators, and the CAT makes no comments.

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

96. Now that the distinction between non-infringement decisions and decisions not to proceed with an investigation for other reasons, for example in the light of other priorities of the enforcement authority, has been clarified by the CAT's case law, there is no particular problem in this area. However, in the light of the Government's intention to enlarge the CAT's jurisdiction in private enforcement so as to include "stand alone" actions for infringement of the competition prohibitions, it could be argued that there is less utility in a complainant's ability to appeal against a non-infringement decision.

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

Q41 **Do you agree with the proposal to introduce target times 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 [the] Competition Commission has the relevant case management powers?**

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

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

97. Please see our comments at Part I, paragraphs 45 to 52 above. The CAT is conscious that appeals must be handled as quickly as the requirements of justice permit. The statistics measuring the length of time that appeals take before the CAT demonstrate a high degree of success in this regard.

98. The imposition of additional time limits or "target times" is unlikely to be helpful. Cases take as long as they do for reasons that (in general) have little to do with the CAT, and more to do with the needs of the parties appearing before the CAT. This is not in any way a criticism, but reflects the fact that, in the run-up to a trial, the vast majority of the preparatory work (in terms of preparation of pleadings, evidence, and written and oral submissions/cross-examination) is done by the parties, and the time-frame in which this work must be done cannot be unduly constrained, if a fair trial is not to be compromised.

99. In contrast to many other courts, the CAT has the great advantage of extremely flexible, efficient and cost-effective panels consisting of chairman and ordinary members. The panel of chairmen comprises a number of part-time judicial office holders as well as a number of High Court judges of the Chancery Division. When there are fewer appeals to the CAT, the part-time chairmen do their other work (most are experienced QCs at the Bar) and the Chancery judges are engaged in their day to day work of the Chancery Division. In busy times, the Registrar of the CAT can call on all these personnel to assist. It is extremely rare for the CAT to be unable to accommodate hearings at whatever pace the parties wish, and the CAT is usually able to proceed at a pace quicker than the parties would wish or can reasonably achieve. In practice the CAT case-manages, hears and finally determines each and every case as expeditiously as is consistent with the demands of justice and the competing requirements of other cases which may be more urgent.

100. In these circumstances, the imposition of additional "targets" is certainly unnecessary, and probably unhelpful. In particular, a distinction between "straightforward" and "not straightforward" cases seems designed to create argument, rather than speedy resolution. Further, although the CAT may be able, following the conclusion of the main hearing in a particular case, to provide an indication to the parties of the likely period in which it will deliver its decision, the suggestion (at paragraph 7.14 of the Consultation) that the CAT indicate the date of its decision at the first case management conference is wholly unworkable. Usually, by the time of the case management conference, the CAT has only received a single document, namely the notice of appeal, and will have no proper way of anticipating (particularly without sight of the respondent's defence) the likely length and complexity of the proceedings, or the

length of time likely to be required to prepare a judgment that fairly and fully addresses the arguments in the case. As far as monitoring data is concerned (paragraph 7.13 of the Consultation), the CAT already makes a vast amount of information in relation to its proceedings available on its website, and in its annual review and accounts for each year.[144] This latter document provides detailed case statistics for all CAT proceedings during the period under review.

101. As to the CAT's powers to regulate its own procedure – including as regards factual and expert witnesses and the volume of evidence – the CAT has entirely adequate and appropriate powers[145] and regularly exercises them. Please also refer to the comments at Part II, paragraph 86 above.

102. Paragraph 7.18 of the Consultation suggests that there should be a presumption that matters be resolved "on the papers" (ie without an oral hearing) wherever possible, and that oral hearings be kept to an absolute minimum to minimise the length and costs of appeals for all parties. This is consistent with the CAT's existing practice – the CAT already routinely decides issues on the papers, including the question of costs and permission to appeal. However, this is again an area where retaining flexibility is key: reducing a disputed issue so that it can be dealt with on the papers without a hearing takes the parties time and may increase costs for them in a particular case. (For example, deciding issues of costs and permission to appeal is undoubtedly slower and more expensive than having a short hearing on these points immediately following the handing down of judgment.) As far as the length of oral hearings is concerned, the CAT's existing practice is already to ensure that oral argument is limited to that which is strictly necessary and conducted as efficiently as possible. In this regard, the CAT's Guide to Proceedings provides as follows:

> "The structure of the main oral hearings of the Tribunal will be planned in advance, in consultation with the parties, with a view to avoiding lengthy oral argument. Since the written arguments of the parties will have already been fully set out, and since the main issues will have been identified prior to the main oral hearing, this hearing will normally be conducted within short defined time limits, in accordance with established practice in the [General Court]."[146]

[144] http://www.catribunal.org.uk/248/Publications.html

[145] See, for example, rules 19 to 22 of the 2003 Rules.

[146] Para 3.4.

However, the importance and usefulness of oral argument in appeals should not be underestimated. As Laws LJ noted in the case of *Sengupta v Holmes* [2002] EWCA Civ 1104, at [37]:

> "…oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it."

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

103. The CAT has nothing further to add in response to this question.

Comments on the Consultation Annexes

104. The CAT makes the following observations in relation to the Annexes to the Consultation:

(1) **Annex B**: the list of current functions of the CAT set out in this Annex is not comprehensive, and draws only on the high level summary set out on the CAT's own website. By way of example, the areas of jurisdiction conferred on the CAT by the Energy Act 2010, Postal Services Act 2011 and Civil Aviation Act 2012 are not mentioned.

(2) **Annex D, Table D2 (average length of CAT cases)**: the comments at Part II, paragraph 4(2) above are repeated in relation to the presentation of statistics in the Consultation generally. In particular the figures in this table D2 are not recognised, as they appear to include appeals outside the CAT's jurisdiction. For example, the CAT has no jurisdiction in respect of licence modification decisions.[147] Further, it is not clear what is included within "other JR", given that the only cases in the period in respect of which the CAT has exercised a judicial review jurisdiction are cases connected with merger and market investigation references (under sections 120 and 179, Enterprise Act 2002) or specified price control matters (under section 193(7), Communications Act 2003). Yet each of these categories appears to be referenced elsewhere. It is also not clear which cases are referred to within the category of "ex ante regulation".

(3) **Annex D, Table D3 (Communications appeals)**: the list of communications appeals, and the accompanying figure showing the length of different stages of appeals, is

[147] Para 66 of the Impact Assessment accompanying the Consultation is therefore wrong in its statement that "the CAT hears all licence modification appeals in the communications sectors."

incomplete and inaccurate. Further, no attempt is made to represent the impact of interlocutory appeals (as in case 1151/3/3/10), preliminary issues hearings (as in case 1146/3/3/09) or the time taken up, in several of these cases, with the CC's determination of the specified price control matters arising in the appeal.

(4) **Annex E (Case studies)**: this section of the Consultation is cursory, difficult to understand in places, and contains several inaccuracies. No explanation is provided for the selection of the five cases at pages 93 to 96, which – insofar as many of them have particular exceptional characteristics – do not provide a good sample of typical cases before the CAT. They do not tell the reader anything useful about either competition or communications appeals. Nor is there any analysis of these particular cases in the main body of the Consultation. In particular:

(i) **Case 1117/1/1/09** (*G F Tomlinson Building Limited & Or v OFT*) – this case is exceptional insofar as it was managed together with 24 other appeals against the same OFT composite decision. Although, as noted, each appeal was heard separately, given the common issues between the appeals, the CAT delivered about ten substantive judgments, many of which dealt with more than a single case at the same time (see [2011] CAT 7, which disposed of six appeals in a single judgment of 83 pages). Consequently, although an overall length of appeal is stated as 1 year, 4 months and 6 days, it should be recalled that the CAT disposed of all 25 separate appeals within this broad timeframe. Contrary to what is stated in the Consultation:

(a) G F Tomlinson's appeal was not heard, as stated, over 2, 5 and 6 July 2010, but was heard in half a day on 6 July 2010.

(b) Limited evidence was advanced by the appellant in this case, as it challenged only the penalty imposed by the OFT, and that evidence was directed specifically at the impact of the penalty on the appellant. No oral evidence was heard.

(ii) **Case 1099/1/2/08** (*National Grid PLC v GEMA*) – it should first be noted that the stated length of appeal (2 years, 3 months) includes not only the appeal before the CAT, but the subsequent appeals to the Court of Appeal and Supreme Court. As noted, the CAT's own judgment was handed down within a period of just over one year from the registration of the appeal. This was a detailed and complex appeal (the notice of appeal ran to over 300 pages), involving evidence from 13 witnesses of fact and 5 expert witnesses and, in its ruling on costs, the CAT

penalised National Grid for the "lack of clarity" in its case, and for pursuing points which were unmeritorious.[148] However, the CAT noted (at paragraph 33 of its judgment)[149] the particular importance of the case, which related not only to past abusive conduct, but to an ongoing 14 year glidepath which was likely to have an important impact on the development of competition in the relevant market. The CAT was ultimately able to dispose of the appeal in a judgment of 86 pages, which was handed down a little over three months from the hearing.

(iii) **Case 1102/3/3/08** (*T-Mobile (UK) Limited v OFCOM*) – see our comments at Part II, paragraphs 28 to 32 above.

(iv) **Case 1111/3/3/09** (*The Carphone Warehouse Group Plc v OFCOM*) – the summary of this case wrongly suggests that the CAT delivered two judgments, one concerning non-price control matters, and another concerning the price control matters. This is not accurate: the CAT did not make **any** judgment on the substance of the appeal. Rather, the non-price control matters were subject to a settlement between the parties (pursuant to rule 57 of the 2003 Rules). As far as the price control matters were concerned, none of the parties brought a judicial review challenge to the CC's determination, such that the CAT allowed the appeal in accordance with that determination. Accordingly, the case spent just 5.57 months before the CAT (during which the parties filed their pleadings), with 9.13 months being accounted for by the CC's determination of the specified price control matters.

(v) **Cases 1046/2/4/04 and 1166/5/7/10** (*Albion Water Limited & Or v WSRA*; *Albion Water Limited v Dŵr Cymru Cyfyngedig*) – the circumstances of these cases are truly exceptional, not least because of the detailed issues of law and economics involved, but due to the fact that the CAT upheld Albion Water's challenge to two successive non-infringement decisions of OFWAT, such that the CAT was required to reach its own decision (in exercise of its powers under paragraph 2(d) and (e) of Schedule 8 to the Competition Act 1998) on the question of infringement on both occasions. Further, a large part of the process was accounted for by the period taken by OFWAT to reach a new decision on the question of whether the first access price was excessive. Despite the title of "Case study 5", no mention is made of the second case, namely the subsequent successful damages action brought by Albion Water.

[148] [2009] CAT 24 at [12]-[13].

(5) **Annex F (International Appeals Process)**: It is not clear what cases are referred to in the two columns titled "Competition Appeals [sic] Tribunal – Energy (1)" and "BIS – Competition Appeals Tribunal – Energy (3)", as the CAT is not aware (other than the *National Grid* case referred to at Part II, paragraph 104(4)(ii) above) of any regulatory decisions appealed to the CAT in the energy sector (and *National Grid* is better described as an *ex post* competition enforcement case).

(6) **Annex H (Details of Hearing Body and Standard of Review by Sector)**: this table appears to be incomplete and inaccurate in places. For example, the column titled "enforcement action for breach of the transmission constraint licence condition" does not accurately reflect the CAT's jurisdiction under the Electricity Act 1989 (as amended by the Energy Act 2010). Further the description of the "standards of appeal" in relation to Competition Act 1998 investigations by Ofgem is incomplete. Other than in respect of Ofgem, there is no mention of the other regulators' concurrent powers.

[149] [2009] CAT 14.

CBI (Confederation of British Industries)

CBI RESPONSE TO BIS CONSULTATION ON REFORM OF REGULATORY AND COMPETITION APPEALS

1. The CBI welcomes this opportunity to respond to the BIS consultation on proposals to reform of regulatory and competition appeals. To inform this response we have consulted with members from across all industrial sectors. There is widespread concern across CBI membership about these proposals and the potential impact they would have on the well-established regulatory and competition systems and a wider impact on the UK as a place to invest and do business.

2. In summary this response argues that:
   - **An effective regulatory and competition system – with a robust challenge mechanism – helps to support functioning markets**
   - **The existing appeals system functions well and must not be undermined**
   - **The Government's proposals risk introducing investment uncertainty and increasing costs for business**
   - **Instead, the focus should be on improving end-to-end decision making**

An effective regulatory and competition system helps to support functioning markets

3. Regulation and competition law provides an essential framework for business operations. By setting the parameters within which a business functions, the standards and behaviours for how markets work are partly established. Within these regimes regulators should be able to intervene where necessary, either to ensure non-compliant behaviour is rectified or to maintain competition.

4. Business supports the right of regulators to exercise the strong regulatory powers at their disposal. These powers have an important role to play in ensuring that markets remain fair and not subject to unfair practices. However, these must be held in check by a robust challenge mechanism and judicial oversight. Without this, there is a real risk that economically sub-optimal decisions will go unchallenged and damage growth.

5. A stable and effective appeals system provides certainty and supports long-term decision making from businesses, thereby directly impacting on investment in the UK. It helps to maintain business confidence in the regulatory and competition regime which is a major consideration for investment decisions for CBI members. Regulators' decisions have a huge impact on both the business affected, and the wider economy, due to the scale of investment involved in these regulated sectors and the market shaping decisions which are being taken by regulators.

6. The accountability provided by the appeals mechanism is crucial to the UK's regulatory and competition frameworks being seen as fair. Accountability increases the scrutiny of decisions and in doing so, helps

to improve the quality of decision-making by highlighting where and how sub-optimal decisions have been made. Where mistakes are identified they can then be rectified, and any learnings for the regulatory and competition bodies will serve to further improve the overall quality of their work.

The existing appeals system functions well and must not be undermined

7. The stated aim of these proposals is to support growth and it is right to have economic considerations as a primary purpose. However, businesses do not believe that these proposals would be beneficial for economic growth. In fact, by altering an existing, well-established system there would be significant negative consequences for business.

8. CBI members, from across a range of industry sectors, do not feel the current regulatory and competition system requires the fundamental reform proposed. There has been concern expressed from across CBI membership that BIS has not provided a robust evidence case for these proposals, weakening the motivation for these reforms.

9. Businesses also have concerns over the assertion – put forward in the consultation document – that they are pursuing 'unmeritorious appeals'. Businesses do not appeal decisions lightly. Taking forward an appeal is a costly process – both directly and in terms of personnel resource – and a company will have weighed the costs and benefits carefully before deciding to act. One member reported that the average external cost of an appeal is between £100,000-£150,000 with complex cases rising as high as £500,000. This is before the cost of the internal allocation of resource is factored in.

10. Businesses also dispute the suggestion in the consultation that appeals are unnecessarily delaying business activity and investment over the long-term. It is not the *speed* of the decision which is of most concern to businesses but the *quality* of the final decision itself. There is no evidence that placing time limits on the process will serve to improve the decision making – rather, by prioritising speed, there is a risk that the quality of decision could suffer.

The Government's proposals risk introducing investment uncertainty and increasing costs for business

11. Taking the package of proposals as a whole, businesses do not believe that the government should be pursuing a 'one-size-fits-all' approach to appeals. There is a diverse range of sectors covered by these regimes, with vastly different regulatory and competition environments, relevant case law as well as the differing investment cycles, product life cycles and business models. Given this sectoral variation and the development of appropriate appeal routes with each industry, businesses do not feel it is appropriate to pursue consistency for consistency's sake, as there is no evidence that such an approach would yield the alleged benefits. The existing appeal routes are well-established and businesses would not support any re-routing of decisions.

12. It is clear from our consultation with business that any reforms to the current appeals framework would create considerable instability. The existing system and appeals bodies are well understood by business and supported by a settled body of case law. Rather than streamline and speed up the appeal process, these reforms would open up new areas of litigation as any new standards or frameworks were tested. In some sectors – aviation – for example, there has been recent regulatory change which business has now adapted to. Overturning this would be unsettling for businesses accustomed, often quite recently, to existing regimes. Moreover, such a period of uncertainty – likely to be several years – would deter investment and lessen the attractiveness of the UK for business.

13. There is significant, widespread concern that these reforms would lessen business' ability to hold regulators to account. Regulator transparency, along with robust, evidence-based decisions are important parts of the decision-making process. Any change to the standard of review, either to judicial review or any other proposed, is strongly opposed by business. The complexity of these decisions, and the value of investment they underpin, are so significant that a judicial review standard does not offer adequate protection for businesses operating within these regulatory and competition regimes. In particular because the issues on which appeals are made will often be industry specific, and have considerable consequences for that industry, a full merits based approach is most appropriate and should remain. Indeed, in the Government Response to Consultation on Growth, Competition and the Competition Regime, March 2012, the Government stated that it "*intends that (a) full-merits appeal would be maintained in any strengthened system"*.

14. The proposal to restrict the use of evidence fails to take into account the powers within the existing system. The intention of BIS' proposals are not clear given that the Competition Appeals Tribunal (CAT) can already exert control on the admission of evidence and parties can request that evidence be excluded. Furthermore the CAT themselves, in their response to this consultation, dismiss the suggestion that the current system leads to the unmeritorious deployment of new evidence. [1] Preventing businesses from using additional evidence, either because it was unavailable or it was not relevant at an earlier stage, would serve to weaken the appeals system as a method of recourse.

15. Business believes these proposals would weaken the accountability mechanisms of the appeals process. The result would be that economically sub-optimal decisions go unchallenged, with a direct impact on the affected businesses of the individual decisions and a wider, negative impact on the UK's business environment, as investor confidence deteriorated and the UK became a less attractive place to invest. For example, given the value of the regulatory settlements for energy network price controls (which relate to billions of pounds of total expenditure), 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.

Instead, the focus should be on improving end-to-end decision making

16. Within the competition and regulatory arena there is currently substantial change taking place. The CBI has welcomed the decision to reform the competition regime by combining the Office of Fair Trading and the Competition Commission to create the new Competition and Markets Authority (CMA). An efficient and fast-reacting organisation capable of delivering consistent outcomes while taking a proportionate approach to ensure that interventions are commensurate with the scale of the problem will lead to higher quality decision making.

17. These changes to the competition regime acknowledge the importance of a system that focusses on ensuring the right decisions are made initially. By undertaking such a wide ranging alteration of the existing competition system, the Government is able to look at each step of the decision process rather than focussing on one specific element out of context.

18. Rather than focus only on the appeals process, the government should instead continue to examine in detail what is leading to decisions being taken to appeal in the first place. Specifically, details on how

[1] *'However, we do not share the Government's apparent view that current CAT rules and procedures encourage unmeritorious appeals or involve the excessive deployment of so-called "new" evidence. We do not believe that placing specific restrictions upon the admission of such "new" evidence, or upon CAT timetables or other procedures is either necessary or sensible.'* CAT, Government consultation of 19 June 2013: Response of the Competition Appeal Tribunal http://www.catribunal.org/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html

the CMA will function both broadly and on a day-to-day basis need to be finalised and regulators' decision-making capability and the analysis which underpins judgements should be assessed. This will improve end-to-end decision making and support growth.

CBI
September 2013

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11 September 2013

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Dear Tony

Centrica response to BIS consultation on Streamlining Regulatory and Competition Appeals

This non – confidential response is submitted on behalf of the Centrica group of companies (excluding Centrica Storage) and may be placed on the BIS website.

Executive Summary

- Centrica is extremely concerned about the proposals to (limit or) change the standard of review for regulatory and competition infringement decisions.

- We do not believe the case is made for any such change in the energy sector; a sector which has only relatively recently seen a change to its licence modification and appeals regime following the introduction of the EU 3rd Package. Nor do we see a case for change for competition decisions, where the issue was considered only last year.

- BIS' key concerns as set out in its consultation relate to the telecommunications sector (from which the examples set out in the consultation are drawn). If this is the case, that sector alone should be the focus of the review.

- Indeed, as BIS' consultation notes, only four Ofgem decisions have been appealed in the past four years. It therefore seems illogical to include the energy sector within this review.

- Merit based reviews – if used responsibly by appellants – are a positive, not detrimental, characteristic of regulatory frameworks (given the impact this has on quality of regulatory decision making.

- BIS has also failed to address the impact that its proposals with have on (urgently required) inward investment and investor confidence in the energy sector.

General comments on the consultation

It is, of course, preferable for regulated companies and regulators alike (and all those potentially impacted) for decisions taken by the regulatory authority to be right in the first place. In our view, the fact of, and basis upon which, an appeal can be brought play a significant role today in helping to ensure that. So, proposals to make the scope of any such challenge more limited than today, runs the substantial risk of reducing the incentive for regulators to get the decision right first time. This increases regulatory risk and will deter critically need investment and indeed, new entry to the market.

We are sceptical of suggestions that the proposals will make decision-making quicker or reduce the burden for companies for two reasons. First, there will be increased litigation on how any new formulation of appeal rights is to be interpreted and second, any appeal which is akin to judicial review

will presumably mean that the issue will be passed back to the original decision maker again rather than allowing for the flexibility for the review body to address the issue, thus increasing the potential costs and length of the overall process.

Following the economic downturn, the investment climate remains fragile. As noted above, BIS' proposals lead to uncertainty and will therefore have the effect of adding considerable regulatory risk to inward investment. It must be borne in mind that all the energy companies operating in the UK have the opportunity to invest in other markets overseas and boards are likely to look more favourably at those regimes which exhibit lower regulatory risk. BIS' proposals are therefore published at a time when the UK badly needs new investment to ensure security of supply and to meet its environmental objectives.

Finally, we do not agree with the proposal to move to review on judicial review grounds where merits based appeals exist today, we also note that the Government is considering changes to judicial review which would potentially impact this consultation. This current consultation should, at the very least, refer to that other work and outline how those proposals could impact the questions posed in this consultation.

We do not propose responding to the specific questions that BIS is asking in its consultation and, instead, set out our comments on the proposals in the rest of this response.

Regulatory Appeals

We are not convinced of the need to streamline the various regulatory appeals mechanisms across the different and separate industry sectors. Whilst we recognise there may be benefit for the institutions which handle the regulatory appeals, that is not, in our view, sufficient to consider a review of appeal rights, for the reasons we describe in this section.

Each regime has developed within its own sector, based on the market characteristics specific to that sector and the applicable European and domestic legislative and regulatory regime (with the checks and balances placed on the regulator and the incentives placed on the regulated companies). It is too narrow an approach without considering how those checks, balances and incentives interact in reaching regulatory decisions. Furthermore, few companies operate across a number of regulated sectors so there is little, if any, benefit to companies arising from streamlining processes and procedures across the sectors. In fact, the consultation paper focuses on regulatory appeals in the telecommunications sector, almost exclusively, with only passing reference to other sectors. So, if that is where the concern lies, then that is where BIS should focus its efforts.

Also, if streamlining appeals is the objective, that does not necessarily require a change to the basis upon which those appeals can be brought as it is possible to have a streamlined, merits based appeal system. It appears to us that many of the issues raised in the consultation (specifically in relation to telecommunications) do not necessarily relate solely to the basis of the appeal and, even if they did, it does not lead to a conclusion that changes to systems outside the telecommunications sector are necessary.

In relation to energy, regardless of any proposal to streamline, we do not believe that the case to make any change to the existing appeals process has been made. The basis upon which appeals on licence modification decisions can be brought was considered as recently as three years ago in the context of implementing the Third Energy Package when DECC consulted on the changes to the collective licence modification (CLM) process. We did not, at the time, support removal of the CLM process, but did submit that, should DECC go ahead and remove it, appeals must be merits based. DECC concluded [1] that a merits based appeal right continued to be necessary in the light of the proposed removal of the CLM process and, even introduced an extra ground for appeal. So, following that review and consultation process which involved a comprehensive view of the energy regime, licence modification appeals can be brought where there is an error of law or fact or where the amendment will not achieve the intended effect. It is also worth noting that these Third Package

[1] DECC Implementation of EU Third Internal Energy Package Government Response URN10D/953 paragraphs 2.24-2.26

changes have only recently entered into force and have not been given chance to either bed in or be properly tested.

The proposal to move to limited grounds for appeal removes the significant protection afforded to energy companies by the existing grounds. By introducing a materiality criterion and removing entirely the ground that the amendment does not achieve its intended effect, BIS's proposals would introduce unacceptable risk into the sector through reducing the incentive on Ofgem to get the decision right. We recognise that the question of whether an error is material is a relevant factor for the review body in any event, but this change would appear to change the bar and to be designed to do so. We also foresee additional litigation with greater costs and time spent by parties in establishing the boundaries here. In this respect, we disagree with the conclusions drawn in this regard within the consultation. Indeed, in our view, the more intense and wide the appeal, the more incentive on the regulator to make the right decision.

There is no evidence of the energy appeal rights (whether licence modifications or otherwise) being misused through the bringing of frivolous or vexatious appeals – in fact, as the current consultation itself notes, there has been only four energy appeals energy appeals and no suggestion that those which have been brought were without merit or took a long time to conclude.

So, we object strongly to proposals to change the standard of review for energy as we do not believe the case is made for energy and those rights were reviewed relatively recently in any event.

Competition Appeals

We are extremely concerned about the inclusion of competition appeals in this consultation and, in particular, the suggestion that the basis upon which appeals of competition infringement decisions can be made should be changed. It is unclear why appeals of competition infringement decisions have been included in this consultation, given they are arguably very different to the regulatory decisions considered in the rest of the consultation.

Additionally and more importantly, there were no suggestions that changes should be made to the basis upon which appeals can be brought to competition infringement decisions when the Government undertook its significant review of the competition landscape concluding only last year. In fact, at that time, the Government proposed continuation of the administrative system on the basis it would be backed by a full merits appeal. This is a significant (and surprise) reversal of policy direction for Government and in our opinion, the case has not been made. It is unacceptable that this should be reconsidered so soon after that conclusion and before the full impact of the not insignificant changes to the enforcement of competition law and the institutional structure have been felt (or, indeed, even implemented).

A finding of an infringement of competition rules is an ex post decision (as is a regulatory decision finding an infringement of the licence rules) – and thus very different in nature from ex ante regulatory decisions taken following a consultation process. These infringement decisions can result in very serious reputational and financial consequences for the company involved and, in the case of competition decisions, its executives can also face fines and potential criminal liability. And the initial infringement decision will have been reached through an administrative, rather than prosecutorial, process. Given that, it is entirely reasonable and, indeed, in line with human rights legislation, that an appeal to that decision is merits based.

Additionally, an infringement decision is likely to be increasingly important as the basis of follow on actions for damages claims given Government's proposals to increase the likelihood of damages claims from private individuals (although we note those changes are not yet finalised). It is entirely inappropriate for companies to have this substantial exposure in circumstances where it cannot appeal the administrative decision on the merits. This would introduce an imbalance into the process as between follow on and stand alone private actions which are at least heard before a court.

It is our view that appeals of competition infringement decisions should continue to be on the basis of a full merits review.

Given the level of concern we have with BIS' proposals, we would welcome the opportunity to meet with BIS officials to discuss further.

Yours sincerely

Tim Dewhurst
Director, Regulatory Affairs
British Gas

Cleary Gottlieb Steen & Hamilton LLP

CLEARY GOTTLIEB STEEN & HAMILTON LLP

LONDON

30 August 2013

Streamlining Regulatory and Competition Appeals

Response of Cleary Gottlieb Steen and Hamilton LLP to BIS Consultation on Options for Reform

This paper sets out Cleary Gottlieb Steen & Hamilton LLP's response to the Department for Business, Innovation & Skills' consultation on Streamlining Regulatory and Competition Appeals, published on 19 June 2013 (the "Consultation").

We broadly support the Government's attempts to rationalise the various routes by which decisions may be appealed across the competition and regulatory sectors and to eliminate some of the historical idiosyncrasies that have emerged as the institutional framework has evolved over time. However, certain of the options for reform give rise to concerns; in particular, the proposal to reduce the level of judicial scrutiny applied to competition enforcement decisions and/or to limit the grounds of appeal that may be advanced against such decisions. These concerns are heightened when considered in light of the reforms to the UK competition regime embodied in the Enterprise and Regulatory Reform Act 2013.

We have grouped our responses to particular questions under the following headings: standard of review in competition appeals (Section I; addressing questions 1-3, 6, and 7); appeal bodies (Section II; addressing questions 15-17, and 27); communications price control appeals (Section III; addressing questions 18 and 19); admission of new evidence on appeal (Section IV; addressing questions 30 and 42); and costs (Section V; addressing question 32).

I. STANDARD OF REVIEW IN COMPETITION APPEALS

QUESTIONS 1- 3, 6, AND 7

In Chapter 3 of the Consultation, the Government sets out the case for reforming the appeals framework across the full spectrum of regulatory and competition decisions. Its objectives include ensuring that the appeal process is more closely focused on identifying material errors and improving accessibility, efficiency, and cost effectiveness. The Government is concerned that, currently, the incentives to appeal decisions are imbalanced: first, appellants face a limited downside to appealing - even an unsuccessful appeal may be profitable if it suspends the implementation of an adverse decision; second, the standard of review, which allows the appeal body considerable scope to review regulators' decisions, may encourage speculative appeals.

The Government therefore proposes – for competition and regulatory appeals – moving to either: (1) a judicial review standard of review; or (2) focused "*specified grounds*" of appeal. We are concerned that, particularly for decisions finding that competition law has been infringed, either proposal would weaken the present standard of review, which currently

allows for an appeal "*on the merits*",[1] and thereby have significant and far-reaching negative effects. We focus on the approach to appeals against competition law infringement decisions below.

1. Competition Law Decisions Require An Appeal On The Merits

In our view, the nature of competition law decisions requires that a full appeal "*on the merits*" is available:

- **Competition law decisions engage fundamental rights.** Decisions determining that competition law has been infringed, which often lead to significant financial penalties, engage Article 6(1) of the European Convention on Human Rights ("ECHR") and Article 47 of the Charter of Fundamental Rights of the European Union.[2] Consequently, competition decisions require effective judicial scrutiny. In areas giving rise to complex economic assessments, judicial scrutiny of a competition regulator's decision must include establishing not only whether "*the evidence relied upon is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*."[3]

- **Judicial review is insufficient to protect these fundamental rights.** It is far from clear that a judicial review standard (or the introduction of focused grounds of appeal) for competition decisions – which necessarily involve complex economic analysis – would be Article 6(1) ECHR compliant. In *R v. Director General of Telecommunications, ex p Cellcom* [1999] ECC 314, which concerned the judicial review standard in a case concerning a regulatory decision by the predecessor to Ofcom, it was stated that:

  > "Where the Act has conferred the decision-making function on the Director, it is for him, and him alone, to consider the economic arguments, weigh the compelling considerations and arrive at a judgment… If (as I have said) the court should be very slow to impugn decisions of fact made by an expert and experienced decision-maker, it must surely be even slower to impugn his educated prophecies and predictions for the future".

  Such a limited form of review would be insufficient to protect parties' fundamental rights. An appeal is the first occasion on which independent judicial scrutiny is to applied to competition decisions, and the court must be empowered

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1 Currently s.46(1) and (2) of the Competition Act 1998 ("CA 1998) provide that any party to an agreement in respect of which the OFT has made a decision, or any person in respect of whose conduct the OFT has made a decision, may appeal to the CAT "*against, or with respect to, the decision*". Schedule 8 provides for two different types of review depending on the type of decision under appeal. In most cases, by paragraph 3(1) of the Schedule, the CAT "*must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal*" (emphasis added).

2 Consultation, para. 4.48 *et seq* and the cases there cited. *See also* ECtHR, *A. Menarini Diagnostics S.R.L. v. Italy*, September 27, 2011; Case T-1/89 *Rhone-Poulenc SA v. Commission* [1991] ECR II-867; and Case C-199/92 P *Huls AG v. Commission* [1999] ECR 4287, paras 149-150.

3 Case C-386/10 P *Chalkor v Commission* [2011] ECR I-0000, para. 54. *See also* Case C-272/09 P *KME & Others v Commission* [2011] ECR I-0000 and Case C-389/10 P *KME & Others v Commission* [2011] ECR I-0000.

to make a full factual and legal assessment of the merits of such decisions. Any more limited form of review risks being in conflict with requirements of Article 6(1) ECHR and the jurisprudence of the European Court of Justice.

- **A flexible judicial review which assesses the merits is not feasible.** The suggestion that judges review decisions on judicial review grounds, with a discretion to consider the merits only so far as necessary to be Article 6(1) ECHR compliant, does not seem to be a workable proposal.[4] First, we do not think it is prudent to take as the starting point the judicial review standard, which for the reasons set out above does not satisfy the requirements of Article 6(1) ECHR as regards competition infringement decisions, and then try to 'fix' that erroneous standard of review. Second, the suggestion that judges should undertake a judicial review, but simultaneously "*flex*" the standard in order to consider "*the facts and law of the case where it is required*"[5] would be confusing for judges, parties, and parties' legal representatives. For example: how, when, and in what context would factual and legal arguments be permitted, in what should ostensibly be an exercise to determine the legality, rationality, or procedural fairness of a decision?[6] Third, the proposal would move beyond the outer limits of judicial review: the case-law on this issue makes clear that judicial review cannot be a review of the merits of a decision.[7] On a practical level, if factual and legal arguments are permitted at a judge's discretion, then the parties will inevitably make those arguments. Time and expense will not be saved, and legal uncertainty will only increase.

- **Findings of competition law infringements have serious consequences.** Unlike many other regulatory decisions, findings of competition law infringements entail not only the adverse findings and substantial financial penalties of the decisions themselves, but also reputational damage for the businesses and individuals concerned. Additionally, findings of infringement can involve an uplift in penalty in the event of any recidivism by the company. Further, a finding can be used as the basis for a claim for follow-on damages. Follow-on claims of this sort are likely to become more prevalent and burdensome following both the Government's[8] and EU Commission's[9] recent

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4 Consultation, paras 4.53-4.57.

5 Consultation, para. 4.54.

6 *CCSU v. Minister for the Civil Service* [1985] AC 374, 410D per Lord Diplock: "*one can conveniently classify under the three heads the grounds upon which the administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.*"

7 *See, e.g., R(SB) v Governors of Denbigh High School* [2007] 1 AC 100, para. 30, per Lord Bingham.

8 *See* s.82 and Schedule 7 of the Draft Consumer Rights Bill of June 2013.

9 *See* the European Commission's package of measures designed to facilitate private damages for actions published on June 11, 2013: (i) Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404; and (ii) Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3, 11.6.2013.

proposals to make it easier for consumers to bring private actions (for example, the proposed introduction in the U.K. of an opt-out class action system for claimants). Allowing competition infringement decisions to stand without a full merits review could result in unwarranted follow-on damage claims; which risk dampening energetic competition. In these circumstances, it is essential that competition law decisions are subject to robust and effective scrutiny, not only as to their legality, rationality, and procedural propriety, but also their substantive correctness.[10]

- **Incentives in competition law appeals are different.** The Government argues that imbalanced incentives exist for many regulatory appeals (in particular in the communications sector) and that this encourages speculative appeals. But this does not apply to competition law decisions: (1) there is no incentive for parties to appeal in order to delay a decision or make a regulatory action more difficult (an appeal under s.46 of the Competition Act 1998 generally does not suspend the effect of the decision to which the appeal relates);[11] (2) appeals will not involve substantial amounts of new evidence, and there is nothing to suggest that in practice parties purposefully hold back evidence until the appeal stage;[12] and (3) significant downsides exist if an appeal is unsuccessful (*e.g.*, adverse costs orders and further loss of reputation). In our view, the fact that an appeal of a competition law decision generally does not suspend the decision's effect, combined with the risk of an adverse costs order if the appeal is unsuccessful, is sufficient to disincentivize speculative appeals.

In short, the particular nature of competition law decisions - and the very serious consequences that can flow from such decisions - require that a full appeal on the merits be available.

2. An Administrative System Requires An Appeal On The Merits

The foregoing considerations apply *a fortiori* to the administrative system that exists in the U.K. for the investigation and sanction of competition infringements. Because the first independent judicial scrutiny that is applied to decisions finding competition law infringements is on appeal, it is imperative that there exists, at this point in proceedings, the possibility for a review on the merits. The case-law of the European Court of Human Rights is clear that, on an appeal from a decision of an administrative body (and in particular an administrative body which can adopt competition law infringement decisions, which can involve penal sanctions and therefore criminal charges[13]), in order to safeguard a party's Article 6(1) ECHR rights, the affected party must be able to "*bring [the] decision affecting him before a judicial body that has full jurisdiction, including the power to quash in all*

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10 *See, e.g., R (Fraser) v. National Institute for Health and Clinical Excellence* [2009] EWHC 452 (Admin) at para. 47 per Simon J for a summary of the principles that are applied on an irrationality challenge to a regulator's decision. In short, the Courts in judicial review cases have treated the decisions of expert regulators with significant latitude. This is insufficient to protect against the severe consequences that could flow from a regulator's incorrect competition decision.

11 s.46(4) of the Competition Act 1998. *Cf.* Consultation, para. 3.24.

12 This is recognized by the Government. *See* Consultation, paras 3.24-3.25.

13 ECtHR, *A. Menarini Diagnostics S.R.L. v. Italy*, September 27, 2011, para. 31.

respects, on questions of fact and law, the challenged decision".[14] This requires that a full appeal on the merits be available from a regulator's administrative decisions.

The proposal to weaken the standard of review in competition appeals stands in stark contrast to the Government's position when defending the decision to replace the two-tier competition regulatory regime with a single Competition and Markets Authority, where the Government pointed to the existence of full merits review of competition decisions as a safeguard against the abolition of the independent second-phase administrative body. In March 2012, the Government's position was that it "*would be wrong to reduce parties' rights and therefore intends that full-merits appeal would be maintained in any strengthened administrative system*".[15] We agreed with that approach then and, following the enactment of those reforms, continue to do so. As we noted in our response to the Government's consultation on "*A competition regime for growth*" (submitted June 13, 2011):

> "Under the current model parties who are subject to an infringement decision have the right to have that decision reconsidered by the CAT. There is then the possibility of appeal to the Court of Appeal (see, for example, Replica Football Shirts and Toys). The right of appeal to the CAT has served a primary purpose of ensuring parties are not wrongly found to have infringed the law. It has also served a secondary purpose of improving the quality of first-instance decision making, requiring the OFT to produce strong and compelling evidence of an infringement. We are concerned that removing the right of appeal not only limits parties' rights of defence in an area that can have significant consequences for businesses and individuals, but also removes an important discipline on the first-instance decision maker. In particular, it is to be expected that matters of economic assessment are unlikely to be seen by the Administrative Court as sufficient grounds when considering applications for judicial review. And yet such assessment is fundamental to many competition law decisions. Without the potential for crucial elements of a first instance decision to be challenged, there is no check on that decision.
>
> Similarly, as has been shown by the recent CAT judgments in the OFT's Construction and CRF cases, there is potential for excessive fines to be imposed unlawfully at first instance. It is therefore critical that there remain a meaningful way of challenging the amount of any fine imposed.
>
> A further disadvantage of a judicial review model (as opposed to an appeal on the merits) is that where a decision is successfully challenged, that decision would, in most cases, have to be remitted to the OFT/CMA, requiring further investigation and the possibility of a new first instance decision. This entails further costs and delay for all parties involved (including the authority). By contrast, under an appeal model the court is able to substitute its own decision directly."

We see no reason, and cannot identify any change within the intervening period, that would justify the Government reversing its position on this important question.

We further note that the Government recognized, when reforming the economic regulation of airports through the introduction of the Civil Aviation Act 2012, the importance of a merits-based appeals mechanism. The March 2009 consultation document stated:[16]

> "We believe that the lack of an appropriate merits-based appeals mechanism in the existing regulatory system is one of its most fundamental shortcomings (emphasis added). The absence of

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14 ECtHR, *A. Menarini Diagnostics S.R.L. v. Italy*, September 27, 2011, para. 33; and ECtHR, *Janosevic v Sweden*, May 21, 2003, para. 81.

15 Department for Business, Innovation & Skills, "Growth, Competition and the Competition Regime", *Government Response to Consultation*, March 2012, §6.18.

16 "Reforming the framework for the economic regulation of UK airports", Department for Transport, March 2009, p. 94.

> any ability for stakeholders to challenge the merits of final regulatory decisions fails to hold the regulator to account and contributes to making the current system unnecessarily adversarial. For these reasons we propose the withdrawal of the Competition Commission's current automatic advisory role within the price control system and its replacement with more transparent and robust appeal mechanisms. This would enhance the flexibility of the system by taking out the unnecessary and lengthy process of automatic referral of price controls to the Competition Commission and would enhance regulatory accountability as the regulator's decisions would be more open to challenge."

Similarly, the December 2009 decision document stated:[17]

> "This chapter explains how the Government proposes the regulator should be held to account for its decision making and the regulator's general performance in a new regulatory regime. The most important mechanism for ensuring regulatory accountability is appropriate provision for affected stakeholders to challenge the Civil Aviation Authority's (CAA) decisions to an independent body and the lack of an appropriate merits-based appeals mechanism in the existing regulatory system is one of its most fundamental shortcomings. (emphasis added)"

None of the responses to the airports consultation argued for "*judicial review alone being sufficient*" for CAA appeals. Given the Government appears to be using the airports consultation as a model for various elements of the competition regime, it is our view that the foregoing considerations apply equally (or to an even greater extent) to competition law decisions.

3. The Government Overstates The Difficulties Of A Full-Merits Review

We consider that the Government has overstated the length and difficulties of a full-merits review. An appeal before the Competition Appeal Tribunal ("CAT") on the merits is not a rehearing of the entire matter. While the CAT will determine an appeal on the merits, considering not only whether the decision under challenge is properly reasoned, but whether it is the right decision,[18] it will not substitute its own view for a tenable view of the regulator properly made on a factual foundation.[19] The CAT's approach on a merits appeal is sensitive to the circumstances and requires parties to focus on the relevant grounds of appeal.

The evidence put forward in the Consultation to suggest that a merits appeal negatively impacts the length of appeals is, in our view, ambiguous. As recognized by the Government, the shorter hearing length and resolution time for judicial review hearings, as opposed to merits appeals, in the CAT is most likely because the majority of judicial review cases heard in the CAT are merger inquiries. These tend to be resolved quickly because parties have strong incentives to resolve such cases as quickly as possible.

Moreover, the availability of a merits appeal increases regulatory certainty. First, the possibility of more detailed scrutiny of facts and legal arguments underpinning a decision through a full merits review ought to make it less likely that errors will occur in regulatory decision making in the first place. It acts as an important discipline on the first-instance decision-maker. Second, a merits review ensures that regulators do not overly focus on the

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17 "Reforming the Framework for the Economic Regulation of Airports", Decision Document, Department for Transport, December 2009, p. 80.

18 *See Hutchinson 3G v. Orange* [2008] CAT 11, para. 164.

19 *See T-Mobile (UK) Ltd & Others v. Ofcom* [2008] CAT 12, para. 82.

procedural aspects of a decision (in order to make them "JR-proof"), but concentrate equally on getting the substance right.

Finally, on an appeal on the merits, the court is able to substitute its own decision directly for the regulator's. This may save time and expense. On the other hand, on a judicial review, if a decision is successfully challenged, that decision would, in most cases, have to be remitted back to the regulator. This would require further investigation and the possibility of a new first instance decision.

4. Focused Grounds Of Appeal Are Not Helpful

We are not convinced that the suggestion to introduce focused grounds of appeal is helpful.[20] We are concerned that, first, the focused grounds will lead to less effective judicial scrutiny because of reduced flexibility; and, second, they will not bring about any significant savings in time or expense:

- **Reduced flexibility diminishes effective judicial scrutiny.** The Government suggests that having more well-defined grounds "*will provide greater clarity and certainty up front*".[21] The suggested focused grounds of appeal could, however, detrimentally reduce flexibility. An appeal on the merits is able to consider all aspects of an appealed decision, if necessary. This flexibility is important for effective judicial scrutiny, which is necessary for the reasons outlined above. We note that the Government endorses enhanced judicial flexibility in its judicial review proposals, and yet also suggests implementing rigid and specified grounds of appeal.

- **No significant saving of time or expense.** The availability of a full merits appeal does not imply that there is a full re-hearing of the first-instance decision. CAT judges are familiar, on an appeal on the merits, with focussing on the material elements of a decision under appeal, and identifying the relevant grounds of appeal for a challenge to that decision. The focused grounds of appeal could simply result in parties creatively presenting an appeal on the merits within the specified grounds. Accordingly, we are not convinced that there would be any significant saving of time or expense by introducing focused grounds of appeal. We note that the Government has presented no evidence to suggest that the focused grounds will increase efficiency.

II. APPEAL BODIES

QUESTIONS 15-17, AND 27

We welcome, in principle, the proposal to concentrate competition and regulatory appeals in the specialist CAT. This is consistent with the Government's reforms to private actions, which aim to make the CAT the major venue for competition actions in the UK. The advantages of the CAT lie, in particular, in its flexible case management powers, specialist knowledge, and expert lay members. The proposed change to enable existing judicial office

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20 *See* Consultation, Box 4.1 for the "focused" grounds of appeal.

21 Consultation, para. 4.21.

holders to sit in the CAT free of any restriction in terms of the length of their tenure is to be encouraged as a means of retaining such knowledge and experience.

However, we would emphasise that these various steps to concentrate competition actions – both private and appellate – in the CAT, risk leading to logjam and delay unless the CAT's current size and resources are appropriately expanded. It is striking that the CAT staff currently comprise only one full time judge, a registrar, and a staff of about a dozen, as well as six fee-paid chairmen and 15 so-called "ordinary members" (with the possibility to call on Chancery Division judges for additional judicial assistance).[22] As the evidence set out as part of the Consultation makes clear, the CAT already has a wide range of responsibilities across the full spectrum of competition, regulatory and enforcement decisions, licence modifications and dispute resolution. This burden may well be significantly increased not only by any modification of appeal routes implemented as a consequence of the current Consultation but also by the Government's reform to private actions for damages. There is a real risk that without the CAT being adequately resourced, the proposal may, by rationalising appeal routes, not be able to fulfil one of its key stated objectives, namely "…*making the appeal process itself as streamlined and efficient as possible*".[23]

In this regard, we are concerned that the proposal to allow the CAT to sit with a single judge in cases concerned only with points of law and/or more straightforward cases might be treated as negating (or diminishing) the need to increase the overall size of the CAT to reflect its expanded remit. Besides the fact that it may not always be obvious at the outset what constitutes a "straightforward case", ordinary members can make an important contribution even in such "straightforward" cases; a contribution that may even enhance the speed and efficiency with which such a case can be decided. The absence of ordinary members, most notably economists and members drawn from particular sectors and industries, may deprive a judge of the insight, experience, and additional analytical perspective vital in considering many issues of competition law. It is therefore unclear whether, as the proposal posits, the use of a single judge will result in significant savings, or indeed any savings at all. If frequently deployed, the use of single judges has the potential to shift user's perceptions of the CAT; indeed, the CAT could come to be seen as no more specialised than the ordinary courts, by comparison with its current reputation for economic and industrial expertise. At the very least, the issue of whether to sit with a single judge should be left in the discretion of the CAT on a case-by-case basis.

The Consultation further explores adding to the CAT's responsibilities the jurisdiction to hear judicial reviews under the Competition Act 1998. Drawing on the example of the *Cityhook* litigation, it is suggested that having the Administrative Court hear a judicial review relating to a case in which an appeal before the CAT would also be required risks unnecessary duplication.[24] We think that such concerns may be overstated; parallel hearings

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22 Gerald Barling, "Competition litigation: what the next few years may hold", *The David Vaughan CBE, QC/Clifford Chance Annual Lecture on Anti-Trust Litigation*, 19 June 2013.

23 Consultation, pp. 5, 12.

24 This is more fully explained at paragraph 221 of the CAT's decision in *Cityhook v Office of Fair Trading*, [2007] CAT 18: *"A party may challenge the authority's legal characterization of the alleged infringement. If the decision in question is an appealable one, then the Tribunal would have jurisdiction to decide that issue on the merits. If there is no appealable decision, then the Administrative Court, in exercising its judicial review jurisdiction, may need to consider the same legal*

of this kind appear to have occurred only rarely and it may well be that the issues raised in a judicial review are ones that the Administrative Court, with its specific expertise, is best placed to resolve, notwithstanding that this may require some duplication regarding matters also being raised before the CAT. At the very least, if it is decided that the hearing of judicial review applications may be undertaken in the CAT, such applications should be heard by those Chancery Division Judges who sit in the Administrative Court.[25]

III. COMMUNICATIONS PRICE CONTROL APPEALS

QUESTIONS 18 AND 19

The Government is also consulting on a proposal to allow communications price control appeals to be brought directly to the Competition Commission rather than being routed through the CAT. It is said that this would simplify the current process, whereby appeals against Ofcom price control decisions must be brought first to the CAT and any price control issues then referred to the Competition Commission to be resolved, instead of being made directly to the Competition Commission by the appellant.

As a general matter, we agree that the Competition Commission (and, subsequently, the CMA) should continue to hear appeals on communications price control and licence modification decisions. However, we see some practical difficulties in the proposal that price control appeals are brought directly to the Competition Commission and any other matters taken directly to the CAT. This is because it is not always straightforward to distinguish (at least at the outset) price control elements of an appeal suitable for determination by the Competition Commission from other elements more suitable for determination by the CAT.

A practical illustration of this was the *Mobile Call Termination* case, in which Hutchison 3G ("H3G")[26] and British Telecommunications ("BT")[27] challenged Ofcom's mobile call termination price control decisions for the four-year period from 1 April 2007. H3G brought three grounds of appeal, against: (1) the findings of significant market power in the decisions; (2) Ofcom's decision to impose a price control in the form imposed by the decisions; and (3) the level of the price control fixed in the decisions. The CAT acknowledged its obligation "*to identify whether an appeal raises any 'specified price control matters' as defined*" and to refer such matters to the Competition Commission for its determination, leaving matters raised by the appeal which were not price control matters to be decided by the CAT. It considered that the first two grounds of appeal were not price control matters and fell to be determined by the CAT, while the third ground was a specified price control matter that had to be determined by the Competition Commission.[28]

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issue, namely, whether the relevant competition authority made an error of law or took into account an irrelevant legal consideration or failed to provide reasons that are adequate or intelligible."

25 This was the suggestion favoured by the Court of Appeal in *T-Mobile v Office of Communications* [2008] EWCA Civ 173 [2009] 1WLR 1565, para. 52.

26 Case No 1083/3/3/07 *Hutchison 3G (UK) Limited v. Office of Communications (Mobile Call Termination).*

27 Case No 1085/3/3/07 *British Telecommunications PLC v. Office of Communications (Mobile Call Termination).*

28 [2008] CAT 11, paras 33ff.

It was accepted that BT's appeal raised only price control matters that were for determination by the Competition Commission.[29] However, this did not preclude the CAT having to rule on a related matter, namely what the CAT's powers would be to dispose of the appeal in the event that the Competition Commission ruled that the price control set by Ofcom was erroneous but a portion of the price control period had already elapsed. Specifically, the questions before the CAT were whether (1) an erroneous price control could be corrected as regards the elapsed period of the price control; and/or (2) the price control in the un-elapsed period could be further modified to take account of any inability to correct the price control for the elapsed period. This question of the CAT's powers on disposal was not itself a specified price control matter for determination by the Competition Commission and the CAT's resolution of this question occurred in parallel to the Competition Commission's determination of the price control elements of the appeals.

This question was re-examined by the CAT in the *Local Loop Unbundling* case.[30] In that case, The Carphone Warehouse Group challenged Ofcom's Local Loop Unbundling Decision setting out price controls for two services provided by Openreach, a division of BT providing a number of wholesale telecommunications services. Again, the CAT was faced with the situation where a price control might be deemed by the Competition Commission to have been in error after part of the price control period had elapsed, leaving the question of whether the erroneous price control in the elapsed period could be amended and/or whether the price control in the un-elapsed period could be further modified to take account of the inability to correct the price control for the elapsed period. With the CAT's approach in the *Mobile Call Termination* case the subject of a pending appeal to the Court of Appeal, the CAT was uncertain whether even to include an additional question for the Competition Commission in the price control reference concerning how the price control might be adjusted to take account of the fact that part of the price control period had elapsed (assuming that the Court of Appeal ruled that such a power would be available to the CAT on disposal). One of the concerns noted by the CAT was that it "*might decide that it has the power to make such a future adjustment, but might also decide that the question of whether that adjustment should be made, and what adjustment should be made, is a remedy question and not a price control matter for the Competition Commission*".[31] In the end, the CAT decided to refer the additional question, without prejudice to its determination of whether, as a matter of law, it was a price control matter for the Competition Commission at all.

These examples illustrate that it may be difficult to delineate what is a price control matter suitable for determination by the Competition Commission – and therefore should be appealed to them directly – and what is a non-price-control matter that should be taken directly to the CAT. We do not think that appellants are necessarily best placed to make this assessment when challenging a communications price control decision. Rather, the possibility for the CAT to determine what is a price control matter suitable for determination by the Competition Commission and refer it to them, and for the CAT to retain jurisdiction over the remainder of an appeal, is a useful and practicable system for resolving such uncertainty.

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29 [2009] CAT 1, para. 3.

30 Case No 1111/3/3/09 *The Carphone Warehouse Group Plc v Office of Communications (Local Loop Unbundling).*

31 Transcript of Case Management Conference of 27 November 2009, p. 35.

Moreover, it is unclear how the Government's proposal would work in practice. Would a price control appeal brought directly to the Competition Commission in turn be amenable to appeal to the CAT? If so, would the CAT be obliged to await the Competition Commission decision and the bringing of any appeal before it determines any non-price control matters relating to the same determination? Would the appeal to the CAT against the Competition Commission be on judicial review grounds only? Assuming that there would be a right to appeal a Competition Commission price control determination on judicial review grounds to the CAT, the position would be substantively the same as the system already in place today. The difference in the Government's proposal would therefore boil down to only the requirement that appellants, rather than the CAT, determine what is and is not a price control matter. This is a question we consider is better left in the hands of the specialist tribunal.

IV. ADMISSION OF EVIDENCE ON APPEAL

QUESTIONS 30, 42, AND 43

The Government is considering limiting the circumstances in which a party may admit "new" evidence on appeal (*i.e.*, evidence that was not considered by the administrative authority prior to its decision). The Government prays in aid Toulson LJ's statement in *BT v Ofcom* that "*[n]o party has an unfettered right to adduce fresh evidence on an appeal*".[32] The Government proposes to set out in statute the scope of the CAT's discretion in Competition Act and Communications Act cases, namely that: "*permission to adduce new evidence should only be granted if the person wishing to introduce it shows good reason, the evidence could not reasonably be expected to have been placed before the administrative authority, the evidence is likely to have an important effect on the outcome of the appeal and it is in the interests of justice (including any potential prejudice that other parties might suffer) that the evidence be admitted*".[33]

We note that the Government's proposal is not entirely in line with Toulson LJ's judgment on the question, in which he stated: "*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.*" We do not believe that it is necessary to go beyond Toulson LJ's formulation and, contrary to his invocation, lay down in statute more specific factors that the CAT should be required to balance. As the Government itself notes, an appeal is the first opportunity a party has to put evidence before an impartial tribunal (in that sense, the CAT is the court of first instance) and the Government should be slow to fetter the CAT's existing discretion to manage the admission of evidence in the interests of justice in a particular case. Further, we echo the Government's concerns that in creating statutory limitations to the CAT's discretion it may increase the number of costly appeals of decisions on the admission of evidence.

We see merit in the CAT retaining its wide discretion and case management powers so as to control the type and volume of evidence it hears, be it expert evidence, or otherwise.

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32 [2011] EWCA Civ 245, para. 71.

33 Consultation, para. 6.13.

Accordingly, although we believe that the CAT should be encouraged to expedite appropriate cases so far as possible, and actively manage cases with the parties' assistance, we do not perceive a need for Government to implement a formal fast-track procedure.

V. COSTS

QUESTION 32

The Government is consulting on whether to make express legislative provision that where a regulator is unsuccessful on appeal, 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. We do not support such a reform. Parties to Competition Act investigations already incur substantial costs, both in terms of actual expenditure and disruption to their business. We see no reason to disturb the usual "loser pays" costs rule in a case where a party has successfully challenged a decision and is seeking to recover not even the costs associated with the impugned administrative process but merely their costs of the successful appeal. Just as the Government is concerned to ensure that parties do not have the incentive to bring unwarranted appeals, so the Government should ensure that the regulator is incentivised to reach robust, correct decisions.

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CLEARY GOTTLIEB STEEN & HAMILTON LLP

Chancery Division

RESPONSE OF THE JUDGES OF THE CHANCERY DIVISION TO THE CONSULTATION

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

ISSUED BY THE DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS

1. The Chancery Division is the division of the High Court to which competition actions are assigned, save that such actions relating to certain specified areas may be assigned to the Commercial Court.[1] In practice, the majority of such actions are now brought in the Chancery Division and not the Commercial Court. Further, any proceedings commenced in the County Court raising an issue as to the application of competition law must be transferred to the Chancery Division of the High Court.[2] Every Chancery judge, on his or her appointment as a High Court Judge, is also separately appointed a chairman of the Competition Appeal Tribunal (CAT). Many of the current Chancery judges have accordingly sat in the CAT.

2. The Chancery Judges agree with the overall proposal to strengthen the role of the CAT as the primary appellate body for regulatory and competition appeals.

3. In this response, we address those questions raised by the consultation which affect the judiciary both directly, as judges presiding over such appeals either at first instance or at the appellate level, and indirectly as judges with an interest in maintaining the integrity and high standards of judicial processes more generally. We do not comment on more general issues of policy. We therefore discuss below particularly those issues which in our view

    - affect the clarity and practicality of the statutory test which a presiding judge will be required to apply in a particular case;

    - increase or diminish the challenges of actively managing cases which often involve multiple parties and complex issues of law, economics and fact;

[1] Practice Direction : Competition Law - Claims Relating to the Application of Articles [101] and [102] of the [TFEU] and Chapters 1 and II of Part 1 of the Competition Ac t 1998, paras 2.1-2.4.
[2] CPR rule 30.8

- encourage the development of a cadre of judges with experience of managing and deciding regulatory and competition law appeals both for the benefit of the CAT and for the benefit of handling those competition law claims which will continue to be brought in the High Court or which go on further appeal to the Court of Appeal and beyond.

The standard of review: Questions 1 - 13

4. Consideration of the appropriate standard of review against decisions taken under the Competition Act 1998, the Communications Act 2003 and other sectoral regulation needs to focus first on whether any proposed test satisfies the United Kingdom's obligations under European Union law and under the European Convention on Human Rights (ECHR).

Concerns as to the legality of the proposed test

5. On this point, we share the concerns expressed about the compatibility of a judicial review test in appeals against Competition Act decisions with Article 6 ECHR. In the light of the recent jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights, there is a significant risk that a move away from a full merits appeal in such cases will be the subject of a successful challenge.

6. Question 6 in Chapter 8 of the Consultation suggests that the standard of review might be changed only for appeals from infringement decisions which did not impose a fine. This appears to us unsatisfactory. Limiting the application of the judicial review standard of review to cases where no fine has been imposed in fact may not guarantee compatibility with the ECHR since the *Engel* criteria which determine whether a charge is criminal or civil may depend on the nature of the potential penalty attached to the infringement rather than on the penalty actually imposed in a particular case.

7. Secondly, few appeals are lodged by infringing companies against decisions where a fine has not been imposed, since the undertaking concerned has less financial incentive to devote the resources to litigating the matter further. Where

such an appeal is brought it is likely to be because the undertaking is seriously concerned about the reputational damage arising from the finding of infringement or the possible value of follow-on damages claims or the effect that the finding will have on the way the company carries on its business. We question whether an undertaking in that position should be limited to judicial review grounds for appealing against the decision. The decision by the regulator not to impose a fine may also be based on the application of the small agreements immunity in section 39 of the Competition Act. It appears inconsistent with the Government's objective of encouraging access for small firms for such firms to face a higher threshold for an appeal than applies to larger firms.

8. Thirdly, we have concerns about the practicality of drawing a distinction between cases where penalties have and have not been imposed, given the power of the CAT to impose penalties in paragraph 3(2)(d) of Schedule 8 to the Competition Act. Where a complainant appeals to the CAT against a non-infringement decision (where necessarily no fine will have been imposed) and seeks, as part of its relief, the imposition of a fine if the appeal is successful, the CAT has the power itself to make any decision which the regulator could have made and thus may itself impose a penalty. It would be problematic if such an appeal were determined only on a judicial review standard and a penalty were imposed without a full examination of the merits.

9. So far as the standard of review in the Communications Act 2003 is concerned, the standard of review required is that set out in Article 4 of the EU Framework Directive, namely that the appeal body must be able to ensure that the merits of the case are duly taken into account. The kinds of decisions where the appeal route is to the CAT, pursuant to section 192 of the Communications Act, appear to be those where the issues are likely to need the kind of scrutiny that a specialist tribunal, operating with lay members who include eminent economists and business people, can bring to bear. Again, we would be concerned that a move away from the balance apparently struck in the Communications Act would be an inadequate implementation of Article 4 of the Framework Directive.

Concerns as to the practicability of the test setting the standard of review

10. An important issue as regards the practicability of the test to be applied is the scope for the statutory wording to generate additional legal issues or satellite litigation increasing the length and complexity of appeals. At present the CAT's jurisdiction is divided between those instances where it applies an 'on the merits' jurisdiction and those where it applies the same principles of judicial review as are applied in the administrative court. Those two alternative tests are well recognised as a matter of English law and their parameters are reasonably well established in case law generated by the Competition Act and the Communications Act and by analogous provisions in much other legislation.

11. We would be concerned that the introduction of a hybrid test combining elements of both standards or an entirely different test, relating to 'focused specific grounds', would create significant uncertainty while bringing little practical benefit. Given the amounts of money at stake for the parties in these cases, any such uncertainty is likely to generate substantial litigation until the meaning of the new test, and how it differs from the current test, was finally determined. That would lead to delay in the resolution of cases, and increased costs for both the public authorities and private parties involved.

12. Question 2 in Chapter 8 refers to the proposals in Box 4.1 of the Consultation document. Those proposals, and Chapter 4 more generally, refer in several places to the need to focus appeals on errors which were material to the regulator's decision. We would be concerned by the introduction of an element of 'materiality of error' into the statutory test to be applied either under the Competition Act or the Communications Act. Aside from the uncertainty inherent in any such wording, it is difficult to see what would be the appropriate benchmark of materiality. A number of options could be relevant under the Communications Act: for example, the absolute size of the financial adjustment which would be made if the error were corrected; the size of any such adjustment as a proportion of the undertaking's business; whether the size of the adjustment is to be assessed looking only at the effect on the appellants or also at the effect on other telecoms companies affected by the decision; the likelihood of the error identified being repeated in future decision-making if it is not corrected.

13. Again, given the sums at stake for the parties to these appeals, such issues are unlikely to be resolved without protracted litigation. This is likely to increase the difficulty for the judge of managing these cases. This is particularly of concern in Communications Act appeals where the price control under challenge continues in effect during the course of the appeal and the CAT currently lacks powers under section 192 of the Act to adjust past payments to take account of over or underpayment at the end of the appeal process.

Procedural issues: admission of new evidence and judge sitting alone

14. Question 30 in Chapter 8 of the Consultation Document raises the question of the CAT's ability to admit new evidence in Competition Act and Communications Act cases.

15. We consider that any formalisation of the discretion to admit new evidence by including a test in the statute is not conducive to proper case management or to a fair resolution of the case. We note that the Court of Appeal recently stated that it was undesirable to attempt to lay down a precise test for when the interests of justice are best served by the admission of new evidence: see *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245 at paragraph 72.

16. In Communications Act cases, the appeal decision determines what the price is likely to be for the future. Competition Act cases often also determine the lawfulness of continuing conduct. Since this may have a significant effect on the interests of the public or consumers, it seems important in such cases that the judge is able to base his or her decision on the most accurate and up to date information available, even if this was not presented to the regulator at the investigation stage. It would be unfortunate if the judge were precluded from taking such information into account.

17. Question 17 raises the question whether the CAT should be permitted to sit with a single judge rather than with panel members. We consider that this would be a useful element of flexibility in the CAT's procedures in terms of ensuring that case management decisions can be dealt with promptly and in terms of making

most efficient use of judicial resources. The issue as to which cases, or applications, are best heard by a single judge and which by a panel should in our view be left to the discretion either of the panel chairman or of the President of the CAT. Any specified dividing line between interlocutory matters and substantive hearings is likely to be inappropriate in some cases. There are instances where, for example, an application to amend a Notice of Appeal or to strike out part of a claim raises issues of fact or economics on which the panel members' contribution would be valuable and, conversely, there are substantive hearings which involve a pure question of law where a chairman sitting alone could dispose of the matter.

18. Further, the forthcoming expansion of the jurisdiction of the CAT to encompass stand-alone original actions brought by private parties will enable the CAT to grant interim injunctions. Indeed, that is seen as one of the advantages of the fast track procedure to be introduced.[3] In such cases, it is important that a chairman should be able, where appropriate, to determine an interim application sitting alone, since it will often not be practicable to convene a panel involving two part-time members at very short notice.

Cadre of judges with relevant expertise

19. Question 15 asks whether the relevant Chief Justice should be able to deploy High Court judges or their equivalents in Scotland and Northern Ireland to sit as Chairmen of the CAT.

20. This question raises a number of important issues bearing on the efficiency and expertise with which cases are determined and the most effective deployment of limited judicial resources.

21. We strongly support the proposal to enable the appointment of judges from Scotland and Northern Ireland as chairmen of the CAT. We also strongly support the removal of the current 8-year bar on any sitting judge continuing as a chairman. We further fully support the ability to select as a chairman of the CAT

[3] See the BIS paper, *Private Actions in Competition Law: A consultation on options for reform – government response* (January 2013), paras 4.8-4.9 and 4.23.

any High Court judge who has particular expertise in competition law, irrespective of the Division to which that judge has been assigned.

22. We agree with the proposal in paragraph 28 of the Response of the Queen's Bench Division to the consultation.

23. We emphasise the importance of the expertise within the Chancery Division. As we explained at the outset of this Response, most competition claims and defences in the High Court are heard in the Chancery Division. The other side of the coin to the deployment of High Court judges in the CAT is the deployment of such judges to hear competition claims in the High Court. This dual function has enabled a significant cadre of judges in the Chancery Division to develop expertise in competition law. This means that there is a wider pool of judicial expertise in competition law than would otherwise be the case, allowing flexibility to meet listing commitments. It would be a seriously retrograde step and administratively highly undesirable to limit those able to hear competition claims to those who have had a significant competition practice before being appointed to the High Court Bench. It would also seriously limit those in the Court of Appeal with experience in competition law.

24. Even after the CAT's jurisdiction is expanded to cover stand alone damages claims, there are still likely to be competition law issues arising in proceedings in the High Court. Not only may some parties choose to litigate pure competition law claims in the High Court but competition issues can arise as one among a number of different claims in High Court proceedings. This latter point particularly applies to intellectual property disputes where an allegation of competition law infringement may be pleaded alongside other defences to a patent or trade mark infringement suit.

25. It is unclear whether the Consultation seeks proposals about arrangements for the deployment of particular judges for particular cases in the CAT. Briefly, it seems sensible that, for administrative and management convenience, the release of High Court judges to the CAT should be overseen by a single Head of Division liaising with other Heads of Division, each taking advice on current commitments from

their respective listing officers. We suggest that the obvious choice for that function is the Chancellor, as the head of the Chancery Division, who already oversees the despatch of most competition cases in the High Court, the training and standards of the greatest number of High Court judges hearing those cases and their deployment as chairmen of the CAT.

9 September 2013

City of London Law Society - Competition Law Committee

"STREAMLINING REGULATORY AND COMPETITION APPEALS"

RESPONSE OF THE COMPETITION LAW COMMITTEE OF THE CITY OF LONDON LAW SOCIETY ("CLLS")

1. INTRODUCTION

1.1 This paper is submitted by the CLLS in response to the Department of Business, Innovation and Skills (**"BIS"**) Consultation Paper entitled "Streamlining Regulatory and Competition Appeals", published on 19 June 2013 (the **"Consultation Paper"**).

1.2 The CLLS represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues.

1.3 The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

1.4 The CLLS Competition Law Committee (the **"Committee"**) has prepared this submission. The Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

1.5 The authors of this response are:

Robert Bell, Bryan Cave LLP (Chairman, Competition Law Committee)

Nigel Parr, Ashurst LLP, Chair of Consultation Response Working Party

Michael Grenfell, Norton Rose Fulbright LLP

Becket McGrath, Edwards Wildman Palmer UK LLP

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1.6 We are grateful for the contributions of colleagues on the Committee.

2. EXECUTIVE SUMMARY

2.1 The Committee welcomes the opportunity to provide its views on the Government's proposals as set out in the Consultation Paper. Although the Committee agrees with some of the proposals made in the Consultation Paper (including the eligibility of judges to hear appeals and certain improvements to the administrative decision-making of the OFT and sectoral regulators), the Committee has very serious reservations about many of the other proposals, in particular the proposal to move away from a "full merits" standard of review for certain appeals to either a "flexible judicial review standard" or defined statutory grounds of appeal.

2.2 In this connection, we do not believe that the case for change has been made out. Moreover, we believe that the current "full merits" standard of review is entirely consistent with the Government's objectives as set in page 5 of the Consultation Paper. In contrast, we believe that the proposals set out in the Consultation Paper will not be good for business or the wider economy, as they will undermine business confidence in the system (which is critical to economic growth), and will result in:

(a) the appeals framework becoming lengthier, costlier and less predictable;

(b) the quality of the regulators' decisions potentially deteriorating (as a result of less effective judicial oversight);

(c) interested parties facing a greater risk of being subject to erroneous decisions which cannot be remedied on appeal. In this regard, the repercussions of such decisions can be very severe, including, in the context of antitrust decisions, very significant financial penalties, director disqualification orders, exposure to substantial damages actions, long term damage to brands and reputation, potential exposure to criminal sanctions, exposure to an uplift in fines imposed in respect of any subsequent competition law infringements due to characterisation as a "recidivist", and potential increased interest from competition enforcement authorities in other jurisdictions. In addition, in the context of regulatory decisions, businesses' commercial freedom can be significantly limited and property rights can be interfered with; and

(d) a chilling of the incentives for businesses to innovate and invest (as a result of greater uncertainty), which will have adverse effects on the wider economy.

2.3 It is unclear to us what the factors are which have prompted this review (which is not, contrary to the claim made in the Consultation Paper, a comprehensive review of the end-to-end process, but instead focuses on the role of the Competition Appeal Tribunal (**"CAT"**)). As far as we are aware, there has been no call from either the legal profession or the business community to change the current "full merits" standard of review. In our experience, the CAT does an excellent job in dealing with appeals efficiently and effectively under the current system, and we do not consider that there is any sound evidential basis for the proposed changes. Indeed, we consider the CAT to be a "world class" institution.

2.4 In particular, we are concerned that rather than seeking to improve the appeals framework, the suggested removal of the right to a "full merits" appeal would make regulators' decisions more difficult to appeal, irrespective of whether that decision is soundly based on the evidence. In this regard, the Committee believes that it is extraordinary that the Government is seeking to limit judicial oversight of "radical and controversial" decisions.[1] It is precisely such "radical and controversial" decisions that must be subject to the utmost judicial scrutiny in order to ensure that such decisions are soundly based and that businesses are not unfairly or incorrectly sanctioned.

2.5 Finally, we note that in considering whether to adopt the proposal the Government has undertaken an Impact Assessment which has calculated that the benefits arising from the implementation of all of the proposals would be, at the upper limit, only £8.03 million per annum. These are very small benefits which would be dwarfed by the costs of adapting to a new regime and the additional litigation that is likely to arise as a result, as well as the very

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1 Consultation, paragraph 1.12.

serious negative consequences of a single incorrect decision being upheld (see paragraph 2.2(c) above, and paragraphs 3.21 (d) and (e) below). The Consultation Paper completely fails to measure the claimed benefits against such negative consequences.

3. STANDARD OF REVIEW (CHAPTER 4)

Introductory comments

3.1 Before responding to the individual questions on standard of review, we set out some general observations on the Government's proposals for changing the standard of review in relation to certain appeals. In particular, we focus on the nexus between the standard of review and the Government's stated objectives for the regulatory and competition appeals framework[2] and, accordingly, the Government's case for change. As explained below, it is clear from a systematic consideration of these objectives that the current "full merits" standard of review is entirely consistent with the Government's objectives. Further, in many instances, it appears to the Committee that the reform proposals (i.e. a move to judicial review or statutory defined grounds of appeal) are in fact inconsistent with the Government's objectives. As a result, we do not consider that there is any case for changing the current "full merits" standard of review.

3.2 Indeed, it strikes us that the Consultation Paper may be premised on a number of misunderstandings. First, one of the key reasons for change put forward by the Government is that businesses have strong incentives to appeal either because the standard of review is too intense or because they face no downside. The Consultation Paper does not provide adequate evidence or reasoning to substantiate this claim; in particular it fails to explain how a change in the standard of review would actually reduce parties' incentives to appeal. Where a decision has profound negative affects on a business, that business will have an incentive to appeal irrespective of the standard of review. Further, it is clear from the Consultation Paper that the Government does not appreciate how businesses determine whether or not to appeal a relevant decision. Notwithstanding an incentive to appeal, in the experience of the Committee, clients rarely perceive there to be no downside to appealing. In reality, clients weigh the following factors against the "upside of winning": the direct legal and expert costs that will be incurred, exposure to costs in the event of losing, the internal management time and cost that will be incurred, the commercial consequences of focussing on litigation rather than other commercial priorities, and reputational issues. In our experience, it is rarely a simple decision to appeal; the Consultation Paper fails to appreciate this.

3.3 Secondly, the Consultation Paper does not appear to appreciate how the CAT conducts "full merits" reviews. Contrary to the suggestions in the Consultation Paper, the CAT does not, when undertaking full merits reviews, act as a second stage regulator conducting a *de novo* re-trial.[3] Rather, the CAT's review is limited to the specific grounds set out in the Notice of Appeal and the CAT does not reconsider parts of the decision that have not been specifically appealed by the parties. For example, in the *Pay TV* appeals, Ofcom's findings in the Pay TV Statement on market definition and market power were not challenged by Sky and were not ruled upon by the CAT. Further, the scope of the CAT's review has been subject to extensive consideration both before the CAT and the Court of Appeal and is now largely settled with an acceptance that the CAT only interferes in a regulator's decision where it is clearly wrong.

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2 Consultation, page 5.

3 This is identified as a potential concern with the current system, see Consultation, paragraph 3.18.

By way of example, the CAT has recently observed that "*the Tribunal should apply appropriate restraint and should not interfere with OFCOM's exercise of a judgment unless satisfied that it was wrong.*"[4]

The nexus between the standard of review and the Government's stated objectives

Objective 1: Support independent, robust, predictable decision-making, minimising uncertainty

3.4 We agree that independent, robust and predictable decision-making is important for both businesses and consumers. It facilitates the consistent and correct application of competition/regulatory law, which:

(a) enables businesses and consumers to assess more accurately whether conduct complies with the relevant legal requirements (which is essential where, as has been the case for the EU and UK competition prohibitions since 2004, parties must "self-assess" their compliance with competition law, rather than being able to seek approval from a competition authority);

(b) enables businesses to make commercial decisions more confidently against a backdrop of a predictable legal/regulatory environment; and

(c) ensures that parties will only be penalised for conduct which is determined by an independent court as a matter of fact and law to be unlawful and deserving of sanction.[5] In this connection, the potential sanctions/measures resulting from competition and regulatory decisions can be severe and intrusive, for example:

(i) in an antitrust context: significant financial penalties, director disqualification orders, exposure to damages actions and exposure to an uplift in fines imposed in respect of any subsequent competition law infringements due to characterisation as a "recidivist"; and

(ii) in an ex ante regulatory context (for example, use of Ofcom's powers under section 316 of the Communications Act 2003): businesses' commercial freedom can be significantly limited and property rights can be interfered with (see Ofcom's Pay TV Statement which required Sky to supply certain TV channels (intellectual property) at mandated prices to qualifying retailers[6]).

3.5 We wish to emphasise in this regard that one of the biggest risks to competition (and in turn economic growth) is unfounded government intervention, which can significantly distort competition, particularly if businesses are being (incorrectly) told that they cannot take

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4 *Pay TV* Appeals, Cases 1156/8/3/10 etc., *British Sky Broadcasting Limited and others v Office of Communications and others* [2012] CAT 20, judgment of 8 August 2012, paragraph 84.

5 Indeed, in relation to cases involving an infringement of Article 102 TFEU/Chapter 2 of the Competition Act 1998, the conduct in question may be lawful and in the consumer interest in the absence of a finding of dominance (e.g. very low pricing). Accordingly, an incorrect decision to prohibit such conduct will actually reduce competition and result in consumer detriment (for example, if a supplier is incorrectly found to be engaging in predatory pricing it will be forced to increase its prices to customers).

6 Ofcom Pay TV Statement, 31 March 2010.

certain actions, which in fact might otherwise be pro-competitive and lead to consumer benefits.[7]

3.6 An increased risk of incorrect and/or unpredictable decisions and unjustified sanctions and measures (i.e. unfounded government intervention) would create considerable difficulties for businesses in the UK and introduce inefficiencies in the wider economy. It would undermine business confidence, delay commercial decisions, reduce innovation and may result in lower investments (especially where many businesses, in particular communications companies, are part of multinational firms which could divert investment funds to other jurisdictions rather than risking unwarranted and/or incorrect regulatory/competition law intervention). The Government should be very cautious in making any changes to the law which may have such a chilling effect on businesses and investment more generally.

3.7 In order to ensure the correct and consistent application of competition/regulatory laws, it is essential that both the decision-making process and the substantive analysis undertaken within that process are independent, robust and predictable. Judicial review only serves to ensure that the decision making *process* is not unfair or irrational; it does not address the substantive analysis which has been undertaken during that process or the "correctness" of the decision (other than in the extreme case of the decision-maker acting irrationally). The only way to ensure that the substantive analysis is independent, robust and predictable and, most importantly, supported by the evidence, is to have an appeals framework which involves a review of the substantive analysis of the case, including a full review of the evidence relied upon. This can only be achieved by way of a "full merits" appeal.

3.8 Further, a full merits appeal framework incentivises regulators to conduct, at the administrative phase, a thorough substantive analysis and to engage fully with the facts/evidence of the case. By contrast, if, as is proposed, a decision-maker's substantive analysis were subject to a narrower review (such as judicial review or defined statutory grounds of review), there is a real risk that the quality of its decisions would be impaired as it would not have the same incentive to pursue such a robust factual and evidential process. (Rather, regulators may instead focus on their decision-making processes in an attempt to avoid successful applications for judicial review). This is because a regulator will be able to draw comfort from the fact that the appeal body will not be able to scrutinise the regulator's substantive analysis in any detail (including the facts/evidence of the case). That is bound to weaken the quality of decision-making and to undermine business confidence in the system.

3.9 In this regard, we also wish to emphasise that there was a general consensus at the time of the formation of the new Competition and Markets Authority (**"CMA"**) that rights of appeal and the appeals framework would remain the same if a more powerful, unified and centralised authority were created. To implement the proposals set out in the Consultation Paper would fundamentally upset the consensus on which the wider UK competition regime reforms are built.

3.10 Finally, we would observe that that the Government has very recently considered the appropriate standard of review in competition law cases and concluded that, in deciding not to move to a prosecutorial decision-making process, "*it would be wrong to reduce parties' rights and* [the Government], *therefore, intends that full-merits appeal would be maintained*

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[7] For example, see footnote 5 above.

in any strengthened administrative system."[8] The Consultation Paper does not explain what has changed since March 2012 in order to warrant such a fundamental change of approach.

Objective 2: Provide proportionate regulatory accountability – the appeals framework needs to be able to correct mistakes made by a regulator and provide justice to parties, but allow the regulator to set a clear direction over time

3.11 We agree that proportionate regulatory accountability is important and that the appeals framework needs to be able both to correct mistakes and to provide justice to parties.

3.12 In this regard, a full merits review is integral to ensuring that mistakes are corrected and justice is provided to parties. To illustrate the importance of this in practice, we refer to the recent successful appeals against the OFT's decision in the *Tobacco* case. The OFT's original infringement decision in that case found serious infringements of the competition prohibitions and imposed very substantial fines on the UK businesses involved, including a fine of £112 million on Imperial Tobacco alone. As a result of the OFT's decision, the parties were exposed to the risk of follow-on damages actions, significant long term damage to brands and reputation, and an uplift for recidivism, should they be found to have infringed competition law again in the future. Directors could also have been subject to director disqualification orders. All appealing businesses were subsequently exonerated by the CAT, which overturned the OFT's decision in its entirety.[9]

3.13 In this case, the OFT's mistakes during the administrative phase were corrected by the CAT only as a result of the CAT being able to undertake a full merits review, which enabled it to engage in detail with the evidence, through considering evidence that was already before the OFT during the administrative phase (but not shared with the parties) as well as through the cross-examination of witnesses, concluding that:

> "*If the OFT had tested the* [leniency witness's] *evidence more stringently… it might have become clear sooner that* [the leniency witness's] *evidence… did not appear to be consistent with the OFT's findings in the Decision.*"[10]

3.14 The *Tobacco* appeal therefore illustrates why a full merits appeal is necessary to ensure that justice is provided to parties. There can be no guarantee that a judicial review or similar process would have established the fundamental errors in the OFT's approach. We note, for example, that it is very uncommon in a judicial review for there to be cross-examination of witnesses yet it was to a large extent the cross examination in the *Tobacco* case which established the flaws in the OFT's decision. We also refer in this connection, in the communications sector, to the *Pay TV* litigation.[11]

3.15 Lastly, a full merits standard of review does not undermine a regulator's ability to set a clear direction over time. Insofar as that direction is consistent with the laws that a regulator is charged with implementing and/or enforcing, the standard of review cannot affect the regulator's ability to set a clear direction. Where that direction is inconsistent with the laws

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8 Government's 2012 Response to Consultation *Growth, Competition and the Competition Regime*, page 54.

9 Cases 1160/1/1/10 etc., *Imperial Tobacco and others v OFT* [2011] CAT 41, judgment of 12 December 2011.

10 Paragraph 85 of the judgment cited at footnote 8 above.

11 Cases 1156/8/3/10 etc., *British Sky Broadcasting Limited and others v Office of Communications and others* [2012] CAT 20, judgment of 8 August 2012.

or is unsupported by the evidence in a particular case, there must be an appeal mechanism by which such errors can be corrected.

Objective 3: Minimise end-to-end length and cost of decision making – partly through making the appeal process itself as streamlined and efficient as possible, but also by encouraging timely decision making by the regulator or competition authority

3.16 The Government's desire for change is premised on its view that the duration of the appeals process is currently too long. The evidence does not support this.

3.17 First, the case studies quoted in the Consultation Paper do not represent a complete picture of case length; rather the Consultation Paper appears to place too much weight on "outlier" cases such as *Albion Water*, *Tobacco* and *Pay TV*. In any event, compared with the OFT's almost 7-year investigation,[12] the CAT's review in the *Tobacco* case, which took only 18 months,[13] was highly efficient.

3.18 Secondly, in relation to some of the case studies referred to in the Consultation Paper, when the cases are considered in context they do not in fact support the Government's view. For example, when referring to the *G R Tomlinson* appeal (part of the *Construction* appeals), insufficient weight is placed on the fact that this appeal was part of 25 separate admissible appeals which were subject to uniform case management (with one case management conference for all the appeals) and heard concurrently. The fact that 24 of those appeals[14] (which were heard by reference to a full merits standard) were heard and resolved in less than 18 months demonstrates the efficiency of the CAT's appeal process.

3.19 Thirdly, currently appeals to the CAT do not take significantly longer (or indeed any longer at all) than equivalent appeals in other EU member states. Annex F of the Consultation Paper illustrates that telecoms and energy sector appeals are only quicker on average than they are in the UK in three of the 10 courts considered (Cour d'appel de Paris – Telecom; Cour d'appel de Paris – Energy; and Verwaltungsgericht Köln – all cases). In contrast, appeals to Cour d'appel de Bruxelles – Telecoms, Conseil d'Etat - Telecom (France) and College van Beroep – Telcoms (Netherlands) took more than twice as long (and in some cases three times longer) as appeals to the CAT.

3.20 Fourthly, it is not clear whether the average time estimates put forward in the Consultation Paper take into account factors outside of the control of the CAT and unrelated to the standard of review, such as interlocutory matters and stays granted at the request of the parties.

3.21 Fifthly, it cannot be assumed that the appeals decided by reference to another standard, such as judicial review (flexed to take into account EU law and European Human Rights obligations) or defined statutory grounds, would result in quicker end-to-end decision making. This is for a number of reasons, including:

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12 The OFT first requested information and documents under section 26 of the Competition Act 1998 in relation to the alleged infringements on 15 August 2003. The OFT's infringement decision was dated 16 April 2010.

13 The appeal notice was dated 15 June 2010. The CAT's judgment was dated 12 December 2011.

14 The 25th appeal (*Interclass Holdings Ltd & Anor v Office of Fair Trading* [2012] EWCA Civ 1056) took longer to ultimately resolve due to an appeal to the Court of Appeal which was determined in July 2012. However, the CAT's judgment in that appeal was delivered within the same timeframe as the 24 other cases.

(a) the observation in the Consultation Paper that the judicial reviews conducted by the CAT are significantly faster than full merits reviews is overly simplistic and does not take into account the way in which these appeals are conducted. Cases subject to a judicial review standard may be quicker than a full merits review for reasons unrelated to the actual standard of review, such as other procedural rules which result in judicial review cases being conducted on an expedited/compressed timetable basis. By way of example, in relation to the judicial review of Competition Commission merger control decisions, applications must be made within four weeks and the defence must be served within a further four weeks (in other competition cases the CAT Rules allow respondents six weeks to file a defence and the OFT often requests, and is granted, long extensions within which to file its defence);

(b) judicial review cases can be very lengthy; see for example the review launched by British Sky Broadcasting of the OFT and CAT's decision in relation to its acquisition of a stake in ITV plc, which took 23 months, and the review of the Competition Commission's BAA's market investigation decision, which took 10 months;

(c) appeals before the EU's General Court and Court of Justice, although conducted on more limited grounds than a full merits review, generally take significantly longer than appeals before the CAT. In this regard, in the experience of CLLS members, it is not unusual for comparable appeals to take 4 to 5 years to be heard and determined (which is widely agreed to be unsatisfactory);[15]

(d) in a move to a judicial review-based system, considerable energy, time and expense would be spent (by the courts, the authorities and the parties) on addressing whether the grounds for appeal properly meet the legal criteria for judicial review – that is our experience with the way judicial review cases generally are conducted in this country, and it is an unproductive and wasteful use of resources which is unnecessary in the present system of "full merits" appeal; and

(e) the Consultation Paper acknowledges that even if a judicial review standard is adopted, there will be a period of time required to "bed" in the new law, not least because judges will have to apply the judicial review standard flexibly in order to take into account EU law and European Convention on Human Rights obligations. The time required for this to take place should not underestimated. The development of case law will, by its very nature, be piecemeal and it can be expected that many cases will raise different issues, each of which will need to be resolved and each of which may be elevated through the UK appeal system and potentially referred to the ECJ.

3.22 Sixthly, the Consultation Paper does not appear to take into account that appeals heard by reference to a judicial review standard can lead to the matter being remitted to the administrative body for reconsideration. In contrast, where an appeal is heard by reference to a full merits standard of review, because the CAT can remedy errors itself, the end-to-end duration of the decision-making process can be very substantially reduced by the CAT reaching its own substantive decisions and thereby avoiding a remittal back to the administrative body for reconsideration.

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15 By way of general observation, there is considerable debate within the EU (and within the EU courts as they develop their legal precedent on this issue) on the efficacy of the current EU appeals framework including whether the limited review is actually compatible with Article 6 on the European Convention on Human Rights. This has resulted in calls for more intense judicial scrutiny at the EU level. Against this background, the government should be very wary of using the EU approach as a benchmark.

3.23 Seventhly, the Consultation Paper erroneously places too much weight on achieving fast end-to-end decision making. The success of the appeals framework should not be measured by reference to speed to the exclusion of other important factors. The key objective of the appeals framework should be ensuring correct and consistent decisions which are supported by the evidence. For completeness, good decisions and quick decisions are *not* mutually exclusive (as demonstrated by the *Construction* appeals), although it does require efficient case management by the relevant appeal body, to achieve this. In the Committee's view, the CAT has achieved this balance admirably.

Objective 4: Ensure access to justice is available to all firms and affected parties – not just to the largest regulated firms with the most resources and experience

3.24 The presumption that the current "full merits" standard of review denies access to justice to all but the largest regulated firms with the most resources and experience is not supported by any evidence presented in the Consultation Paper. In the Committee's view, this assumption is manifestly flawed and lacking in foundation. In fact, experience, as well as decided cases, suggest that smaller firms are able to access justice notwithstanding the existence of a "full merits" standard of review. The *Construction* appeals are a useful example of small businesses able to take advantage of full merits appeals.

3.25 Further, and in any event, it is difficult to see how lowering the standard of review (i.e. making it more difficult for interested parties to seek justice) will increase access to justice for smaller parties with fewer resources and less experience. On the contrary, lowering the standard of review weakens the incentives on the authority to reach a properly reasoned and robust decision. That can only be to the detriment of smaller parties who find themselves under investigation by the authorities (or interested parties in relation to such investigations), just as it would be for larger businesses.

Objective 5: Provide consistency, as far as possible, between appeal routes in different sectors – while acknowledging that the specific characteristics of each sector may require tailored approaches

3.26 There is merit in having a consistent regulatory framework across sectors, but as acknowledged in the Consultation Paper, the specific characteristics of each sector need to be taken into account.

3.27 In this regard, we note that the Consultation Paper appears to focus on the communications sector with scant analysis of other regulated sectors (i.e. it is not a comprehensive review, despite claims to the contrary). The Committee is of the view that if the Government is determined to make the various regulated sectors more consistent, it is necessary to undertake a more thorough analysis of the specific aspects and outcomes of each regulated sector, to enable the reasons for any divergence to be assessed beforehand.

3.28 In any event, it is not inconsistent to retain a full merits review in relation to certain appeals and to have a different standard in relation to other types of appeals. Rather than a formulaic check-box comparison, the focus should be on ascertaining the circumstances in which a full merits review is necessary and then ensuring that regulatory and competition decisions demonstrating those same features are treated equivalently. For example, where two independent reviews of a case have been undertaken and as part of each review the facts and evidence of a case are considered, it may be acceptable to have the final decision appealed by reference to a judicial review standard (as is the case in relation to market investigation

decisions and merger control decisions by the Competition Commission (soon to be the CMA).

3.29 In contrast, where a single body has undertaken the administrative review and its substantive assessment of the facts and evidence of the case has not been independently reviewed, a full merits review remains essential (for example in relation to Competition Act 1998 enforcement decisions and ex ante regulatory decisions).

3.30 We also note in this regard that it is not yet clear how the decision-making process may be affected by the move to a new more powerful, unified competition authority (the CMA) and whether a review on a "flexible judicial review basis" will be sufficient, even in the areas where appeals are currently heard on a judicial review rather than full merits basis (i.e. mergers and market investigation decisions). We consider that much will depend on the continued independence and significant involvement in decision-making of the Panel Members.

3.31 Finally, there is another element of consistency that the abolition of "full merits" review in competition cases would jeopardise. At present, and under the new competition law regime that will take effect under the Enterprise and Regulatory Reform Act 2013, decisions under the competition prohibitions may be taken not only by the main competition authority (the OFT now, the CMA from next year) but also by several sector regulators (Ofwat, Ofcom, Ofgem, ORR, CAA, etc.) which have powers to apply the competition prohibitions in their sectors. Rulings by the CAT on the *merits* of competition law questions – as are available in "full merits" appeals but would not be available if the CAT is confined to a judicial review standard – help to set a body of legal precedent that the competition authority and all the sector regulators must apply, allowing for the more consistent application of competition law by these decision-making authorities in the UK, and, hence, greater predictability and commercial certainty for UK businesses.

Alternative ways to meet the Government's objectives

3.32 To the extent which, notwithstanding the above, the Government considers that there is nevertheless a case for change, it is incumbent upon the Government to consider whether less intrusive and more proportionate changes could be made, rather than changing the standard of review (which is a disproportionate and ultimately irrelevant measure). In this regard, there are a number of procedural improvements which could be made, and in some cases are already being made, that would address the Government's concerns, for example:

(a) one of the reasons for the number of appeals and the complexity of those appeals is the quality of the administrative decision-making. Improvements to administrative decision-making processes, such as those recently implemented at the OFT and to be implemented under the Enterprise and Regulatory Reform Act 2013, should result in decisions which will be easier for the OFT/CMA to defend. As suggested in the Consultation Paper, such decision-making processes could be applied to the sectorial regulators; and

(b) the CAT's processes could be considered in more detail (as suggested in the Consultation Paper). For example, under Rule 14 of the CAT Rules 2003, for most proceedings the respondent (i.e. the regulator) has six weeks from the date on which it received the notice of appeal to file its defence. In our experience, the regulator is often granted lengthy extensions to this time period which causes delays to the appeal

process. It is suggested that in the majority of cases 6 weeks is perfectly adequate for a regulator to file a defence when it has often been working on the case for several years. If more time is required, the regulator should be required to point to exceptional circumstances which justify an extension, as is required for an extension to the appeal period.

Response to specific questions asked in the Consultation Paper

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?

3.33 No, we do not agree. This answer should be read in conjunction with the introductory comments set out above in paragraphs 3.1-3.32.

3.34 The case for any such presumption has not been made out. The existing use of full merits appeals should be retained because:

(a) full merits appeals are essential to ensuring that correct and consistent substantive decisions are reached, especially where decisions have not previously been independently reviewed by two bodies. In the interests of justice, the core objective should be ensuring correct and consistent substantive decisions and not simply fast decisions (although these are not mutually exclusive as demonstrated by cases such as the *Construction* appeals referred to above);

(b) full merits appeals incentivise regulators to ensure that their substantive analysis is robust and that they fully engage with the facts of the specific case; and

(c) there is insufficient evidence to suggest that a move to a judicial review type system would result in faster and more efficient decision making; in contrast the change will, at the very least, lead to short term confusion and medium-to-long-term satellite litigation. This would prevail until the scope of the new grounds for review become settled through appeals to the Court of Appeal and potentially references to the European Court of Justice (particularly in light of EU law and European Convention on Human Rights obligations).

3.35 The Consultation Paper does not seek to limit the review of the amount of any penalty in a competition law context to a judicial review standard; rather, under the proposals, this would remain subject to a full merits appeal. This proposal is analogous to the current EU competition law position. It is not clear why the amount of any penalty and the substantive decision should be subject to different standards of review. If the imposition of a financial penalty is sufficiently serious as to be subject to a full merits review, it necessarily follows that the substantive finding underpinning that penalty must also be subject to a full merits review. Indeed, it seems to the Committee that in determining whether a particular penalty is appropriate it is likely to be necessary to review the underlying facts of the infringement.

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?

3.36 No, we do not agree. There are compelling reasons for retaining the existing full merits review and, further, the case for change has not been made out.

3.37 A move to statutory grounds of appeal would be contrary to the Government's stated objectives (Consultation Paper, page 5), for example:

(a) statutory grounds of appeal would lead to less robust and less predictable decision-making, ultimately increasing the likelihood of incorrect and inconsistent decisions. This is because there will be insufficient scrutiny before the CAT of the facts and evidence of the case; and

(b) statutory grounds of appeal would inevitably generate a large wave of satellite appeals (which the Consultation Paper underestimates). These appeals would be required in order to determine what the grounds actually mean (for example, whether the issues raised are "material"), how they interact with each other, and how they are to be applied. Even though the standard would be more limited than the existing full merits standard, interested parties would still have the same incentives to appeal (as competition and regulatory appeals can have significant ramifications for businesses). Accordingly, it would be incorrect to assume that statutory grounds of appeal would minimise the length of end-to-end decision making.

3.38 We also consider that it would be artificial to introduce statutory grounds of appeal in this context, when no case for change has been made out. There is no evidence to suggest that the appeals process would be any more efficient if the statutory grounds of appeal proposed in the Consultation Paper were introduced. Moreover, to do so would create confusion and undue formalism. No decision would be overturned by the CAT under the current system on the basis of an error of fact or law that was not "material". The CAT should be concerned with substance rather than form, and in our experience its judgments delivered under the current system demonstrate that it already achieves this.

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

3.39 A move to a judicial review standard is likely to result in a longer (and therefore costlier) appeals framework, particularly in view of: (i) the time and energy that would be diverted to arguing whether an appeal met the legal criteria for the judicial review standard; (ii) the scope for remittals to the original decision maker; and (iii) the scope for further applications for review. In this regard, there is insufficient evidence to support the view that a move to a judicial review standard would result in faster and more efficient decision making.

3.40 In fact, a judicial review standard would, at the very least, lead to short term confusion and medium- to-long-term satellite litigation. This would prevail until the scope of judicial review in regulatory and competition law contexts is settled (especially in light of EU law and European Convention on Human Rights obligations).

3.41 The appeals framework would also be less effective as it would be less able to identify and correct substantively wrong decisions.

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?

3.42 No, we do not agree. The Committee considers that the existing full merits standard, where applied, is appropriate. This is because:

(a) the full merits standard of review is necessary in order to ensure correct and consistent decision-making;

(b) given that Ofcom (as a single regulatory body) undertakes a one-stage administrative review and its substantive assessment of the facts and evidence is not separately and independently reviewed, it is even more necessary to have a separate appeal body reviewing the evidence in detail and engaging with the case on the merits;

(c) the full merits standard is clearly consistent with EU law, in particular Article 4 of the Framework Directive. Any move away from this standard will inevitably result in satellite litigation (and potential referral to the EU Court of Justice);

(d) evidence suggests that Ofcom has not been unduly hamstrung in making regulatory decisions or taking regulatory action. Indeed, only a minority of Ofcom decisions are appealed under the current system (as acknowledged in Annex D to the Consultation Paper). Further, Ofcom is in fact only completely overturned in a small proportion of those cases (less than 10 per cent of appeals).[16] Lastly, in circumstances where Ofcom was recently overturned in the Pay TV Appeals, Ofcom has opened a new investigation into Sky's conduct (albeit in relation to different aspects);[17] and

(e) the full merits standard of review is not delaying the implementation of Ofcom decisions. In this regard, pending determination of appeals to the CAT, Ofcom decisions can be (and are) implemented (subject to arrangements protecting the financial position of the relevant parties). This occurred in relation to Ofcom's *Pay TV Statement* where the wholesale must-offer obligation imposed by Ofcom in the Pay TV Statement was implemented whilst the Pay TV appeals were being heard before the CAT and subsequently before the Court of Appeal. Further, it is inaccurate to imply that the CAT's review was responsible for the delay to Ofcom's award of 2.6 GHz band spectrum. The delays in that case were the result of a number of complex factors; in contrast the CAT's review was conducted expeditiously (with the main hearing being held and the judgment delivered within one month and six weeks respectively of the appeals being lodged).

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?

3.43 In our view, a move to a narrower appeal procedure may well result in a longer (and therefore costlier) appeals framework, as explained in paragraphs 3.39 and 3.40 above). There is insufficient evidence to support the view that a move to narrower standard of review would result in faster and more efficient decision making. In fact, any change in the standard is likely to lead to confusion and satellite litigation, as explained above.

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16 Consultation Paper, page 88. We also note that, based on the statistics presented in Annex D of the Consultation Paper, Ofcom is least successful in relation to "Other JR" appeals, with 40 per cent of such appeals resulting in Ofcom's decision being overturned. In comparison, only 17 per cent of appeals against Ofcom's ex-ante regulatory and ex-post competition decisions (which are determined by reference to a "full merits" review) have resulted in Ofcom's decision being completely overturned (Consultation Paper, page 89).

17 See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01106/. Ofcom opened this case on 14 June 2013.

3.44 We also believe that such a change would render the appeals framework less effective as it would be less able to identify and correct substantively wrong and/or inconsistent decisions.

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?

3.45 No, we do not agree. There are compelling reasons for retaining the existing full merits review (please refer to our introductory comments at paragraphs 3.1-3.32 above and the responses to questions 1, 2 and 3 above).

3.46 In this connection, we would add that it would be wholly inappropriate to subject decisions of a quasi-criminal nature to a judicial review standard, not least given the severe repercussions of any such decisions (including very substantial fines, significant long-term damage to brands and reputation, director disqualification orders, exposure to damages actions, exposure to an uplift in fines imposed in respect of any subsequent competition law infringements due to characterisation as a "recidivist", and the potential for increased interest from competition authorities in other jurisdictions).

Q.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?

3.47 A move to either a judicial review standard or a focused specified grounds standard would in our view likely result in lengthier and costlier appeals and a less effective appeals framework. Please refer to our introductory comments at paragraphs 3.1-3.32 and the responses to questions 1, 2 and 3 above.

Q.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?

3.48 Given the significant institutional and legislative changes that have recently taken place and are currently taking place, the Committee is of the view that it would be more appropriate for these changes to "bed in" before considering whether any further changes need to be made.

Q.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?

3.49 Given the recent changes in relation to price control decisions, it is difficult to comment on the extent to which a change to the standard of review would affect the length, cost and effectiveness of price control appeals. In any event, it strikes us that there is a real risk that a more limited standard of review would lead to longer, costlier and less effective appeals for the same reasons as those set out in response to questions 1 and 2 above.

Q.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?

3.50 No comment.

Q.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?

3.51 No comment.

Q.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?

3.52 We consider that there are compelling reasons for maintaining a full merits review by the CAT where it currently exists. We refer to our introductory comments on the standard of review in paragraphs 3.1-3.32 above.

Q.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?

3.53 We consider that changing the standard of review could lead to longer, costlier and less effective regulatory appeals and end-to-end decision-making in general. We refer to our introductory comments on the standard of review, in particular at paragraphs 3.16-3.25, and our responses to questions 3 and 5 above.

4. APPEAL BODIES AND ROUTES OF APPEAL (CHAPTER 5)

Introductory comments

4.1 As a preliminary observation, the CLLS welcomes and agrees with the Government decision to retain a specialised CAT. In our experience, the CAT has been a great success and offers a number of significant benefits, including specialised expertise, flexibility and speed. As explained further below, we agree that there are potential advantages to having licence condition modification decisions and price control decisions reviewed directly by the CC/CMA without the need for referral by the CAT. However, in all other cases, we consider that the CAT is best placed to hear appeals of both competition and other regulatory decisions.

Response to specific questions asked in the Consultation Paper

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

4.2 In general, in our experience, the existing CAT's Rules already enable to the CAT to meet the objectives set out the paragraph 5.9. We note that the CAT's Rules specifically provide the CAT with the flexibility to make any such directions "*it thinks fit to secure the just, expeditious and economical conduct of the proceedings.*"[18]

4.3 The CAT has shown itself to be willing and able to use its existing broad case management powers to ensure that appeals are conducted efficiently and expeditiously, as is well illustrated by the *Construction* appeals. However, we do have concerns about the CAT's

[18] CAT Rules, 19(1).

willingness to grant extensions in relation to the filing of defences in enforcement appeals. The overall timetable could be compressed if the CAT's Rules were applied more strictly, in particular, Rule 14 which requires the filing of the Defence within six weeks of receiving a copy of the Notice of Appeal. We would suggest that extensions should only be granted in exceptional circumstances and not as a matter of course. Further, we would suggest that the possibility of moving directly to skeleton arguments, rather than to replies and rejoinders, should be considered in more cases.

Q.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?

4.4 We welcome the proposal to enable the relevant Chief Justice to deploy appropriate judges to sit as a chairman of the CAT if they are High Court Judges of England and Wales or of an equivalent in Northern Ireland or Scotland. We agree that removing unnecessary bureaucratic barriers would be helpful.

4.5 We would suggest that consideration should also be given to having a specific, shorter list of judges from the Queen's Bench, Commercial and Chancery divisions (and their equivalents in Northern Ireland and Scotland) with specific expertise in competition law and regulatory matters. Where the CAT is hearing appeals by reference to a judicial review standard (for example in relation to existing market investigation and merger control appeals of CC/CMA decisions and judicial reviews of disputed decisions arising during the course of Competition Act investigations (see response to question 27 below)), we would also suggest that a similar approach be taken so that judges who have expertise in competition and judicial review cases should be considered as potential CAT chairmen.

Q.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.

4.6 We agree that these judicial officers should not be limited to a term of 8 years. We also consider that the 8 year term limit should not apply to CAT Chairmen who do not hold another judicial office. The current limit is unique to CAT judges and we do not believe there is any justification for treating them differently from other judges. Further, the current 8 year limit inevitably rules out a significant number of knowledgeable and experienced judges.

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

4.7 We note that the CAT Rules already permit the President or the Chairman to sit alone in relation to interim relief and case management issues (see CAT Rule 62). However, we welcome the proposal to expand the ability of the CAT to sit with a single judge in appropriate cases, for example, in cases dealing with discrete points of law. We do believe, however, that certain safeguards should be introduced, specifically, that the President should decide which cases should be heard by a single judge on a case by case basis (rather than this being mandatory for certain types of cases) and following consultation with the relevant parties.

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

4.8 Yes. We believe that the CC has extensive relevant experience in undertaking the type of detailed analysis required in appeals against price control and licence modification decisions, in particular in relation to accounting and profitability analysis. It will however be important to maintain and preserve this experience following the creation of the CMA.

Q.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?

4.9 Yes. We agree that it would be more efficient for such appeals to be simplified so that they go directly to the Competition Commission (subject to the possibility of judicial review by the CAT). Given that the Civil Aviation Act 2012 model is new and has not been sufficiently tested, we are not in a position to recommend it as an appropriate model to follow.

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

4.10 Yes (with the exception of price control and licence modification decisions as discussed in response to question 17 above). As previously noted, the CAT has significant cross-disciplinary expertise in a wide range of relevant fields, including law, economics and business, and is therefore well-placed to hear and determine such appeals.

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

4.11 Yes, we agree that such appeals should be heard by the CAT rather than the Competition Commission, because they are adversarial in nature.

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

Q.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?

4.12 We comment on questions 22 and 23 together.

4.13 We agree that there are advantages in having a single appeal body hearing appeals against enforcement decisions as to whether a firm has breached its licence or other statutory or regulatory requirements.

4.14 We note that these appeals can raise complex economic and regulatory issues. Accordingly, we think that there are significant advantages in the CAT, a specialised tribunal with extensive relevant expertise, hearing such appeals.

Q.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?

4.15 No comment.

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

Q.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?

4.16 We comment on questions 25 and 26 together.

4.17 We agree that there are advantages in having a single appeal body hearing dispute resolutions appeals both in the communications sector and in other regulated sectors.

4.18 We note that these appeals can raise complex economic and regulatory issues. Accordingly, we think there are significant advantages in the CAT, a specialised tribunal with extensive relevant expertise, hearing such appeals.

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

4.19 Yes, we agree that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998 (whilst retaining the parallel competences of the High Court and its equivalents in Scotland and Northern Ireland, and allowing for the transfer of cases where appropriate).

4.20 In our experience, the current position can lead to undue delays and related costs as illustrated, for example, by the *City Hook* litigation referred to in paragraph 5.42 of the Consultation Paper and more recently in the context of the *Construction* litigation (specifically the successful judicial review by Crest Nicholson PLC[19]).

4.21 Further, as discussed in response question 15 above, consideration should be given to whether judges from the Queen's Bench division (and their equivalents in Northern Ireland and Scotland) who have extensive expertise in competition judicial review cases should sit as CAT chairmen in such cases.

5. GETTING DECISIONS AND INCENTIVES RIGHT (CHAPTER 6)

<u>Response to specific questions asked in the Consultation Paper</u>

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

Q.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?

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19 [2011] CAT 10 and [2009] EWHC 1875 (Admin).

5.1 We comment on questions 28 and 29 together.

5.2 The use of confidentiality rings is already sometimes considered by the UK competition authorities and regulators at the administrative stage as an alternative to a time-consuming redaction process, in order to streamline the access to the file process. However, we agree in principle that increasing the use of confidentiality rings at this stage, and in particular giving the competition authorities and regulators the power to *impose* confidentiality rings (rather than simply requesting the parties voluntarily to consent to their use), could provide a helpful tool in striking the necessary balance between granting access to the file to ensure relevant information is made available to the party/ies under investigation in preparing their defence (thereby also reducing the likelihood of a subsequent appeal) and the desirability of protecting confidential business secrets.

5.3 As recognised in the Consultation Paper, confidential data is often crucial to both regulatory and competition decisions, and we agree that making such information available at the administrative stage is likely to assist parties in fully understanding the case against them, and responding to those allegations. We also agree that this, in turn, should hopefully lead to better decision-making and reduce the likelihood of appeals.

5.4 Disclosing confidential information via a confidentiality ring at the administrative stage might also help reduce delays at the appeal stage (if an appeal is nonetheless brought), as parties would be less likely to seek permission to amend their pleadings in light of information first disclosed into a confidentiality ring at the appeal stage if their advisers had the opportunity to review such information at an earlier stage.

5.5 However, we would emphasise that (as in other contexts) a key issue will be determining who can be admitted to such confidentiality rings. In our experience, limiting a confidentiality ring to the parties' external advisers (lawyers, economists, etc) can often be problematic because, whilst it is often very helpful in informing those advisers' assessment of the case, they are then constrained (at least to some degree) in giving their clients advice which is sufficiently reasoned to be persuasive and effective. Moreover, external lawyers and economists are often not best placed to understand and interpret the documents and data which are being disclosed via the confidentiality ring (which may give rise to rights of defence concerns). In this connection, clients would not even have access to the non-confidential versions of documents. In practice, therefore, it may be beneficial to extend the confidentiality ring to include in-house lawyers and, in exceptional circumstances, the relevant decision-makers within the company, such as members of the regulatory finance team.

5.6 It would of course be essential to ensure that the appropriate safeguards were put in place to minimise the risk of onward disclosure beyond the confidentiality ring, particularly where confidential information was being disclosed to internal advisers and, in exceptional circumstances, decision-makers within the company – for example, information barriers might be required to exclude those within the company who might benefit commercially from access to the confidential information, such as those responsible for sales, pricing, business strategy etc. If this would be problematic in a given case, then we would suggest that this would be a clear indicator that the use of a confidentiality ring is not appropriate in that particular case. Where a confidentiality ring is put in place, appropriate sanctions would clearly also be required to deter breaches of confidentiality undertakings entered into in this context.

5.7 The approach adopted would also need to take into account the type of case and the specific circumstances of the case in question – for example, in the case of price control reviews, which inevitably involve consideration of detailed confidential business information and future plans, it is questionable whether internal advisers should be given access to such information even on a restricted basis. In contrast, a wider confidentiality ring with safeguards might be more appropriate in historic antitrust or licence breach investigations, although this would still need to be considered on a case-by-case basis. We also note in this regard that many smaller companies may not have external/specialist in-house lawyers, which may make it difficult to use a confidentiality ring in practice.

5.8 We would therefore suggest that before a confidentiality ring is adopted at the administrative stage the parties involved should be given an opportunity to make submissions to the relevant regulator on any proposed use of a confidentiality ring. Furthermore, the use of confidentiality rings at the administrative stage should not be automatic in all cases: care will need to be taken to balance the advantages and disadvantages of doing so in the particular circumstances of each individual case.

5.9 We consider that where a confidentiality ring is put in place at the administrative stage, there should be a role for the CAT in supervising them, in terms of approving the terms of proposed arrangements, determining any dispute which might arise and imposing sanctions for breach.

5.10 Oversight by the CAT could also lead to important benefits as it should encourage regulators to draw upon the CAT's extensive experience in implementing and managing confidentiality rings, including taking full advantage of the CAT's tried and tested confidentiality undertakings. A consistent approach by regulators to the structure and requirements of such undertakings would reduce the time spent by parties and the regulators drafting and negotiating their terms. In our experience, in utilising confidentiality rings at the administrative stage under the current regime, regulators (in particular the CC) can depart significantly from the CAT's approach, which can lead to considerable negotiation, cost and delay.

5.11 Finally, we note that the CMA has recently proposed in its draft statement of policy and approach in relation to transparency and disclosure (published for consultation in July 2013) that it "*may use confidentiality rings at access to file stage* [in CA98 investigations] *to handle the disclosure of confidential information, to a defined group of persons, where there appear to be identifiable benefits in doing so*." The draft CMA statement refers to a further CMA guidance document in which detail on this procedure is to be set out, but that further document will not be published for consultation until 17 September 2013, after the BIS consultation on reform of the appeals framework closes. We would suggest that the procedure followed for the use of confidentiality rings at the administrative stage in competition cases should, at least in terms of general principles, be the same as in regulatory cases, and that BIS and the CMA should, to the extent they are not doing so already, work closely in this regard.

Q.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?

5.12 As a preliminary point, the use of the term "new evidence" in this context is potentially rather misleading. What is under consideration here is not new evidence as such (as in the case of

new evidence adduced before a court of appeal that had not been adduced before the court of first instance), but rather material which, for whatever reason, was not made available to the regulator by the parties (or, in some cases, made available to the parties by the regulator[20]) during the administrative stage. However, for the purposes of this response we have adopted the terminology used in the Consultation Paper.

5.13 We welcome the acknowledgment in the Consultation Paper that there is no evidence of parties "gaming the system" by deliberately withholding relevant material in order to adduce it for the first time during an appeal.[21] This would be a particularly risky approach for parties to adopt, and it is not something which we have come across in practice. Where material which was available at the administrative stage is produced by the parties for the first time on appeal, in practice this is usually because the parties did not realise that the material was relevant at the earlier stage. For example, where the OFT's assessment of an alleged competition law infringement changes between the Statement of Objections and the final decision, material which was previously considered irrelevant may unexpectedly become relevant (and to deny parties the right to adduce such "new" evidence in response to the decision on an appeal in such circumstances would be manifestly unjust).

5.14 With regard to the admission of "new" evidence before the CAT on appeal, we note that the CAT's current rules already permit it to admit or exclude evidence, or to limit its use, where this is required in the interests of justice.[22] It also has the power to sanction any "late" production of evidence through its wide discretion to make costs orders.[23] The CAT has demonstrated that it is capable of using its existing powers and exercising its discretion appropriately on a case-by-case basis. Indeed, the CAT's practice in relation to admissibility of evidence not previously considered at the administrative stage was expressly endorsed by the Court of Appeal in *British Telecommunications Plc v OFCOM*,[24] where the Court of Appeal also rejected a request from OFCOM to lay down a more precise test to be followed. Furthermore, and contrary to the implication in the Consultation Paper, in our experience it is not the case that such "new" evidence is routinely admitted by the CAT on appeal under the present system, or that this prolongs proceedings and places the regulator at a disadvantage.

5.15 We do not therefore consider it necessary to set out in statute the factors the CAT should take into account in exercising its discretion to admit "new" evidence in either antitrust or Communications Act cases. The case for change has not been made out in the Consultation Paper. The underlying principle should continue to be that, if relevant evidence does not come to light (or the relevance of certain material does not become clear) until after the administrative stage has concluded, the CAT should be permitted to consider that evidence in determining the appeal if it considers it appropriate to do so in the interests of justice. Imposing additional restrictions by providing in statute that "new" evidence should not be

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20 For example, in the *Tobacco* case, the OFT did not disclose a crucial report by Professor Schaffer until the appeal stage, even though this material was available to it at the administrative stage.

21 Consultation, paragraph 3.23.

22 In particular, Rules 19(2)(e) and 22 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) ("the 2003 Rules").

23 See Rule 55 of the 2003 Rules.

24 *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245. In that case, OFCOM misstated the ambit of its own investigation to BT (the party seeking to admit "new" evidence) which meant that BT was unaware of precisely what evidence it needed to adduce until a very late stage in proceedings. The Court of Appeal made clear in that case that the CAT retained a broad discretion to admit new evidence, not least because, although these cases are referred to as "appeals", they are actually the first time that very important regulatory decisions are the subject of judicial scrutiny.

admitted unless it can be shown to be significant and relevant to the aspect of the decision which is being appealed, and that there are good reasons why the evidence was not produced earlier, would in practice be likely to lead to additional and longer appeals (contrary to the Government's intentions) as parties seek to dispute the admission or exclusion of material by reference to the statutory criteria.

5.16 We also note in this regard that in some cases it may be expedient to admit "new" evidence even where it could theoretically have been placed before the regulator (or before the parties) at the investigation stage, on the ground that to admit the evidence at the appeal stage reduces the risk of subsequent appeals to the Court of Appeal, and the related additional costs and delays which would be associated with that.

Q.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?

5.17 The regime introduced by Schedule 2 to the Civil Aviation Act 2012 has only recently been introduced and is largely untested. We would therefore be cautious about adopting it as a model to be applied to other price control appeals at this stage. This is particularly so in circumstances where the existing procedural rules are adequate to enable the CAT to control the extent to which any "new" evidence is permitted to be adduced on appeal (as explained above). This was illustrated in the price control context by the recent *Mobile Call Termination Appeals*, in which the CAT (upheld on appeal by the Court of Appeal) was sceptical as to whether, in the context of a price control determination, new evidence would be admitted in circumstances where a party had had the opportunity to adduce the evidence at an earlier stage in proceedings, and was therefore arguably "*the author of its own misfortune*".

Q.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?

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

5.18 We comment on questions 32 and 33 together.

5.19 As a matter of principle, while we agree that costs should create a *"disincentive on parties to appeal where there is no merit in the arguments being brought"* (paragraph 6.21 of the Consultation Paper), by the same token there should be a disincentive for regulators to take decisions which lack merit or proper reasoning. 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, as appears to be proposed in the Consultation Paper.

5.20 This is also relevant to the general principle outlined in our responses to the specific questions asked in the Consultation Paper on the standard of review (Chapter 4 of the Consultation Paper). The right to appeal against incorrect administrative decisions is important intrinsically both as a matter of justice and as a matter of human rights, as well as contributing to improving regulatory decision making: if regulators are protected from full-

merits appeals, whether through a different standard of review or through some form of protection from costs exposure, there is less likely to be rigour in their decision making.

5.21 The incentives for both parties and regulators need to work in a fair and symmetrical way – protecting regulators from the costs consequences of bad decisions will do nothing to achieve the objective of improving administrative decision-making – indeed, it risks doing precisely the opposite. Accordingly, the asymmetrical proposal in paragraph 6.22 of the Consultation Paper – that where the regulator wins it *"should be awarded its costs unless there are exceptional circumstances"*, but where the regulator loses *"costs should not be awarded against it"* other than in specified circumstances – would be grossly unfair, contrary to all notions of equity or justice, and inimical to good administrative decision-making. It would also be likely unfairly to deter parties (and in particular SMEs) from appealing regulators' decisions, even where there are good grounds for believing that an appeal would be successful. This would be contrary to the Government's stated objective of ensuring that access to justice is available to all firms and affected parties.

5.22 We would therefore recommend that instead the general principle of "loser pays" should be the starting point for costs orders, whether the loser is a regulator or a private party, subject to adjustment on a case-by-case basis at the CAT's discretion (as is possible under the current CAT Rules).

5.23 We have no objection in principle to regulators claiming their reasonable external legal and expert costs, where they are successful, but equally where the regulator loses costs should be able to be awarded against it. We do not believe that regulators should be able to claim other costs, such as the time of internal lawyers or case officers. If regulators are to be permitted to claim such internal costs, then we consider that parties should also be able to claim these costs in the event that they are successful (i.e. a symmetrical approach should be adopted).

Q.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?

Q.35 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?

5.24 We comment on questions 34 and 35 together.

5.25 The CAT's rules already make provision for dealing with grounds of appeal summarily and without a substantive hearing where appropriate, whether on the application of a regulator or by the CAT on its own initiative. Where an appeal has no realistic prospect of success, a "strike-out" application can be made by one of the parties at an early stage in the proceedings (although in our experience, regulatory and competition cases are often large and complex cases for which the "strike-out" process is unlikely to be appropriate). We do not consider that a case has been made out for introducing a specific obligation on the CAT to conduct an early detailed review of the merits of each appeal when first lodged. Expanding the current rules in this way to create a mandatory "initial assessment" stage also risks adding to costs and prolonging the appeals process, given the likelihood that the merits of the case will be argued at that initial stage, contrary to the Government's stated intention of streamlining the appeals process by making it as expeditious, and as inexpensive, as realistically possible.

5.26 Moreover, it is part of the existing duties of all regulators in the prudent management of their resources to consider their position on cases brought against them before the CAT, including considering if they need to take an active part (e.g. many telecoms cases are essentially commercial disputes between competitors where one is also a supplier to others), whether they can limit their involvement to issues relevant to the regulatory role, and whether there are grounds of appeal that are unmeritorious to the point where a strike out would be justified, without any need for specific additional duties to be legislated for.

5.27 Finally, we wish to point out that there is, in our experience, no evidence to suggest that unmeritorious appeals are being lodged. The decision to appeal against a competition or regulatory decision is not one which is taken lightly, and in practice parties are highly likely to be represented by very experienced specialist advisers and counsel, who would not encourage lodging an appeal which is founded on weak grounds and has no reasonable prospect of success.

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

5.28 We strongly support the proposed changes to antitrust decision making at the regulatory stage, through the change in decision-makers between investigation and final decisions, since this will (as described in paragraph 6.31 of the Consultation Paper) *"enhance the robustness of decisions and address the possibility of confirmation bias"*.

5.29 A further advantage, in terms of streamlining regulatory appeals, is that where there is such a decision-making process, there is a reasonable prospect that parties will be less likely to appeal against the decision or to limit themselves to narrower grounds – both because the decision is less likely to be flawed (e.g. by the effects of confirmation bias) and because the parties will have more of a sense that they have been treated fairly (rather than the same group of individuals being investigator, prosecutor, judge and jury).

5.30 Accordingly, where practical, we are in principle in favour of such a process being applied in other regulatory contexts, particularly where the outcome of an investigation is the imposition of a penalty on a regulated entity, or a requirement to change its business practices.

5.31 We do not, however, think that any similarity of process between antitrust and regulatory decisions at this stage, removes the need for a full appeal on the merits in the case of antitrust decisions, where the nature of the proceedings is recognised as quasi-criminal, and the penalties, reputational damage and other consequences in relation to follow-on actions and recidivism are significant. This requires full rights of defence, including an appeal on the merits.

Q.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?

5.32 As a general proposition, the greater the extent to which regulators consult with the parties in order to enhance transparency, the more likely it is that the decision will contain few surprises, which may serve to reduce the number of appeals.

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

5.33 The regulators already have significant powers to obtain information, and we are not convinced that there is a need to grant them any additional powers. In this regard, we would also query whether the regulators are making the best use of the investigatory powers they already have.

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

5.34 Non-infringement decisions should certainly continue to be appealable decisions. They are just as capable of being flawed as infringement decisions.

5.35 Many parties will have legitimate interests in a finding of non-infringement, including businesses that are victims of anticompetitive practices by their suppliers or by competitors which are foreclosing them from access to markets or essential inputs.[25] There is no reason why a flawed non-infringement decision should not be subject to a full-merits appeal by such parties, in the interests of ensuring competitive markets, consumer protection, the effective administration and enforcement of competition law, and of ensuring the robustness of decision-making. The existing distinction, as confirmed by the CAT and the High Court, between non-infringement decisions and administrative priority case closures (the latter being reviewable only by way of judicial review) should, however, be maintained.

6. MINIMISING THE LENGTH AND COST OF CASES (CHAPTER 7)

Q.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?

6.1 We consider that the CAT already adopts an appropriately robust yet flexible approach to managing the time taken for appeals in the vast majority of cases. In our experience, the CAT effectively balances the interests of the parties in having the key issues heard by the Tribunal with the public interest in the prompt administration of justice and cost-effective use of its limited resources. We would also note that it is rarely in the interests of parties to an appeal to prolong proceedings unnecessarily.

6.2 As a result, we are confident that, except possibly in a small minority of cases, the CAT already takes no more time than is reasonable and necessary to hear a case and deliver a thorough and properly reasoned judgment. Moreover, in practice, delays are often the result of the requirements of the parties appearing before the CAT (such as the availability of counsel), and are not directly within the CAT's control.

6.3 We therefore see no benefit in reducing the target time limit for "straightforward cases" from nine to six months, particularly given the risks of compromising a fair trial if the timeframe within which the parties must undertake necessary preparatory work is unduly constrained, and the inevitable debate which would inevitably arise as to what constitutes a "straightforward" case for these purposes. We consider that the CAT should set administrative targets for itself, in consultation with users (including regulators), rather than statutory targets being introduced.

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[25] We note the Government's proposals to enlarge the CAT's jurisdiction in private enforcement so as to include "standalone" as well as "follow-on" actions, but there will still be considerable benefits to being able to base a private action on a prior infringement decision, not least the fact that the issue of liability is already determined.

6.4 We also have concerns that an excessively short target time limit could encourage the CAT to remit issues back to the originating authority, rather than deciding the issue itself. Whilst such an approach could reduce the time taken for a single discrete appeal, it would almost certainly increase the overall time taken for all issues arising from a disputed decision to be heard and resolved, given the need for the original authority to reconsider the issue and the potential for further appeals from the new decision.[26]

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

6.5 For the reasons set out in the response to question 40 above, we have reservations about the value of introducing new target time limits.

Q.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?

6.6 We do not agree with the proposal to provide the CAT with new powers to limit the amount of evidence and expert witnesses, on the ground that the case for change has not been made out in the Consultation Paper.

6.7 The CAT's current powers are perfectly adequate to enable it to control (and, if appropriate, restrict) the evidence before it, and the CAT has shown itself to be willing to exercise these powers. For example, in *BAA Limited v Competition Commission*[27] the CAT refused to allow BAA to adduce expert evidence relating to the costs of divesting Stansted airport, because it did not consider this to be appropriate or necessary in the circumstances of the case. Similarly, in the appeals from OFCOM's *Ethernets* determination[28] the CAT refused permission to adduce an expert report relating to types and rates of interest, on the basis that the courts were already familiar with this issue and there was another expert witness who could deal with any questions on this point in any event.[29]

Q.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?

6.8 While some form of fast-track procedure approach may be appropriate in a small number of cases (e.g. urgent merger reviews), we consider that it is unlikely to be attractive to parties in the majority of appeals. As noted above, parties to appeals typically have a shared incentive to produce sufficient evidence to support their respective cases and neither party is likely to risk undermining its case materially by voluntarily agreeing to produce less evidence than it considers is necessary to support its case.

Q.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?

6.9 No comment.

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26 See, for example, the two appeals in the *Aberdeen Journals* case, one of which related to the original OFT infringement decision and the other to the OFT decision following remittal.

27 Case 1185/6/8/11 *BAA Limited v Competition Commission* [2012] CAT 3

28 Cases 1205-1207/3/3/13.

29 See the transcript of the case management conference held on 18 March 2013 (page 14 onwards).

Q.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?

6.10 As noted above in response to questions 19 and 31, given that the Civil Aviation Act 2012 model is new and has not been sufficiently tested, we are not in a position to recommend it as an appropriate model to follow.

Q.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?

6.11 No comment.

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

6.12 No comment.

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

6.13 No comment.

City of London Law Society Competition Law Committee
9 September 2013

Clifford Chance LLP

RESPONSE TO DEPARTMENT OF BUSINESS, INNOVATION AND SKILLS CONSULTATION ON STREAMLINING REGULATORY AND COMPETITION APPEALS

We are grateful for the opportunity to respond to the consultation of the Department of Business, Innovation and Skills on streamlining regulatory and competition appeals (the "**Consultation**"). Clifford Chance is an international law firm with extensive experience of regulatory and competition appeals in a number of jurisdictions. Our comments below are based on this experience. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients. Questions for which we have no comments are omitted.

We have read the submission of the Competition Appeal Tribunal ("**CAT**") and fully endorse the arguments and observations made in that submission in respect of the absence of a compelling case for change, the importance of maintaining a "full merits" standard of review and the likely consequences of a move to judicial review or limited grounds of review. Our comments and observations below should be construed accordingly.

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?

We do not agree with this proposal, for the following reasons:

- As the consultation paper admits, judicial review focuses on the process by which a decision has been reached, and the court has limited ability to investigate the merits of the decision. This will limit the issues that can be appealed, and may leave a party with no avenue of redress if it is dissatisfied with the merits of the decision.

- By placing the focus on process (rather than substance), companies subject to regulation will be incentivised to raise technical, procedural points more frequently and to challenge decisions taken during the course of a regulatory process (rather than appealing on the merits at the end of the process). Under the proposal, regulatory processes would, therefore, be at risk of increased interruption and delay.

- In addition, there is a risk that the proposal would change the nature of the interaction between regulated companies and the regulator. Instead of focussing on the substance of the matter at hand (with the comfort of a right of appeal once the outcome of the process is known), both parties will spend significantly more time and effort in scrutinising the decision-making process itself from a legal perspective. Increased procedural point scoring, rather than a robust debate on the merits, would not foster open and constructive dialogue between stakeholders and regulators. Nor would it enhance the UK's reputation with overseas investors, who provide substantial funding for long term investments by regulated companies on the basis of the UK's reputation for open, transparent and accountable regulation.

- The consultation paper states at 4.19 that "judicial review is also a flexible standard as it is not defined by statute but is based on case law" in support of an argument that the

grounds for judicial review could change over time. However, this is likely to lead to even more litigation as parties seek to argue that the judicial review court should indeed have changed its approach in their particular case, and it may take years for the courts to give conclusive guidance on this point, after many expensive and time-consuming appeals.

- We are not persuaded that a move to judicial review would result in a shorter or more efficient overall regulatory process (see our response to question 4 below).

- In our experience, application of the merits standard to important regulatory decisions such as price controls and competition law infringement findings has had a critical role in maintaining the high standards of regulators. It encourages them to focus on the correctness of their decisions, instead of the procedural issues that often become the focus of JR proceedings.

- This in turn has driven positive cultural changes within regulators. For example, Ofcom is generally considered to be a significantly more effective, engaged and innovative regulator than its predecessor Oftel, which was subject only to a modified judicial review standard under The Telecommunications (Appeals) Regulations 1999. As such, the limited empirical evidence available shows that the robust appeals system under the Communications Act 2003 has coincided with a period of innovative and effective regulation. In our view, a return to the regime in place prior to 2003 would be a significant backward step.

- We are particularly concerned by the suggestion of a move to the JR standard for appeals against Competition Act 1998 ("CA98") decisions (see our response to Q6).

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 do not disagree with these principles although we would object to them replacing a "full merits" appeal. The principles give a wide range of grounds on which decisions can be appealed, while at the same time making clear that only material errors of fact, law or procedure could be the subject of an appeal, and that "unreasonable" conduct would include conduct that no reasonable regulator would have engaged in. This should address the perception that appeals are being brought for trivial reasons, or simply in order to spin out the decision-making process, although we would question whether this perception is based on fact. We also share the concern expressed by the CAT that this would stimulate additional litigation (and appeals to the Court of Appeal) as parties seek to establish whether there is any material difference between the current and new standards.

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

We are not convinced that a change to either the judicial review standard or to focused specified grounds would have a positive impact on the length, cost and effectiveness of the appeals framework. A successful judicial review currently leads to a decision being remitted to the original decision-maker, and that additional time for the making of a second decision must be taken into account when considering the length of appeal cases, as must the possibility of a challenge to that second decision. This is what occurred in relation to the

BAA airports market inquiry before the Competition Commission. The final report was published in March 2009 and was subject to judicial review shortly thereafter. On appeal, the Court of Appeal restored the original decision of the Competition Commission in October 2010, following which BAA sought, but was refused, permission to appeal to the Supreme Court. The matter reverted to the Competition Commission some 18 months after the original decision, at which point the Competition Commission considered whether there had been any material change in circumstances. This decision was again subject to an application for judicial review. A judgment on the second judicial review application was given in February 2012, almost 3 years after the original decision. By contrast, the decision of the court or tribunal in a full merits appeal typically marks the end of the matter (save for a further appeal, which can never be ruled out).

We are also not persuaded by the figures in the consultation paper which suggest that judicial review is a quicker remedy than a full, merits-based appeal. In our view, it is likely that the differences between timings of appeals and hearings in Figures 3.3 and 3.4 is attributable to the differences between the types of case to which those standards currently apply - merger appeals, for instance, are subject to an expedited process, given the need for a quick resolution of the relevant issues within corporate transactional timetables – and the effect of certain highly complex "outlier" cases, such as the *Pay TV* and *Tobacco* appeals. Judicial review applications involving complex issues are not necessarily faster (particularly when the remittal stage is taken into account). As noted above, in the *BAA airports* case, the judicial review process took close to 3 years to deliver a final outcome.

Additionally, as we have stated in response to Q1, any change from a full merits review will mean that routes of appeal are closed to certain parties, or in certain circumstances, leading to an ineffective appeal framework, and the removal of access to justice in these respects is objectionable.

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 do not agree that there should be a change in the standard of review in these cases, for the reasons set out in response to Q1. If the Government is nevertheless minded to change the standard of review, any change should not be to a judicial review standard, for the reasons we have set out 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?

See our response to Q3. The length and cost of the appeal process is determined by the facts of the case, rather than the appeal process itself. As set out in our response to Q1, we consider that both of the alternative standards will result in a reduction in the effectiveness of the appeals framework.

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 particularly concerned by this proposal, for various reasons.

First, the consultation paper says at para 4.54 that "The flexibility of judicial review would allow the courts to consider the merits of the case where required" and at para 4.62 that "it would be for the courts to interpret how the requirements of Article of the ECHR should be applied in any particular case and whether (and how) the merits of the case should be reviewed". However, as we have pointed out, and as the consultation paper admits at para 4.66, this approach would inevitably lead to additional litigation as parties sought to determine just what the court should be prepared to do. We do not consider that this uncertainty would necessarily be "short-term", as predicted in para 4.62. Moreover, we consider that the requirements of the Human Rights Act 1998 and the ECHR will mean that the end-result of this period of uncertainty is likely to be a standard of appeal that is largely identical to that which is applied today.

Second, there are good reasons why human rights legislation and case law impose demanding standards in competition law infringement cases:

- Unlike most other regulatory decisions, competition authorities are responsible not only for deciding the relevant issues (in this case, whether an infringement has occurred and, if so, what penalty to impose) but also for selecting which cases to open and pursue. They are therefore particularly susceptible to the risk of confirmation bias,[1] which is why the possibility of a full review by an independent judicial body is so important.

- Many decisions are based on the evidence of immunity and leniency applicants, who have incentives to cast their evidence in a certain light, in order to maximise their chances of securing such immunity or leniency. It is only be at the appeal stage that those accused of infringement are able to challenge such evidence and submissions, and to cross examine relevant witnesses.

- A finding of infringement of CA98 creates an irrebuttable presumption of liability for follow-on damages claims (under Section 47A CA98) which in many cases are of greater magnitude than the penalty itself. It also exposes directors of the infringing company to disqualification orders). Weakening the standard of review would also limit the ability of the courts to test the facts and reasoning on which such presumed liability is based. The absence of an irrebuttable presumption of liability for follow-on damages claims in Italy is one reason why we consider that expansive interpretations of the implications for the UK regime of the *Menarini* judgment of the European Court of Human Rights should be avoided.

Third, restricting the grounds of appeal would directly conflict with the Government's statement in its March 2012 response to its earlier consultation on the reform of the UK

[1] Recent reforms within the OFT, such as the separation of responsibility for investigations and infringement decisions, go some way to mitigate these risks, but not very far, as they entail OFT officials sitting in judgment of the work undertaken by colleagues, in circumstances where those colleagues will later sit in judgment of other work. Moreover, to the extent that these new procedures do result in more robust decision making by the OFT and the CMA, this will have a positive impact on the proportion of decisions successfully appealed and the length of such appeals, which will undermine the case for introducing a weaker review standard at the appeal stage.

competition regime: “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.” Had the Government's current intentions been explained in its previous consultation, we – and, no doubt, others – would have argued much more strongly in favour of a judicial model for CA98 investigations, with infringement and fining decisions taken by the courts instead of the competition authorities. We stated in our response to that earlier consultation that a judicial model would have benefits that are finely balanced when compared with the current model. We would, however, have also pointed out that a judicial model would be far superior than a move to a judicial review standard or specified grounds of appeal.

Fourth, the Consultation asserts a number of express or implied justifications for moving to a judicial review standard in CA98 cases, for which no supporting evidence is offered, such as the assertions that parties adduce evidence of limited relevance to the key issues in a case (para 4.63), challenge decisions that are not "materially wrong", simply because they take a different view of the right answer (para 4.63), "seek to fully reargue the substantive merits of a regulator's whole decision" (para 4.64) and do not focus on "the real issues that could have a material impact on the decision" (para 4.64). Moreover, the Consultation asserts that application of the merits standard in CA98 cases leads to various problems, none of which are real concerns in our experience:

- The differing levels of scrutiny do not give rise to a need for "greater clarity and certainty upfront" (para. 4.21 of the Consultation). It is entirely appropriate and efficiency-enhancing that the CAT is able to tailor the level of its review to the circumstances of the case. In any event, as noted in para 4.55 of the Consultation, any move to a weaker standard of review would need to retain at least the same degree of flexibility in order to ensure compliance wither Article 6 ECHR.

- The merits based standard does not "reduce the credibility of the regulator" (para. 3.18). As noted in our response to Q1, we consider that it has instead had a critical role in maintaining the high standards of our national regulators.

- We are not persuaded that weakening the review standard would lead to shorter cases (see our response to Q4). To the extent that it would, we consider that this would not be the result of procedural efficiency, but would instead be at the expense of the effectiveness of the appeal process. CA98 decisions are typically factually complex, involve multiple parties and deal with conduct taking place over long time periods for which there is fragmentary evidence. In these circumstances, reducing the time within which a court is able to review the relevant evidence is likely to impact only on the quality of its resulting judgment.

Finally, we do not agree that it is appropriate to distinguish between "decisions which do not involve setting the level of penalties" and those that do, given the other onerous consequences of both types of decision (see above). The use of a similar distinction under the Treaty of the Functioning of the European Union is not a desirable feature to be replicated in the UK competition law regime.

For the reasons set out above and in response to Q1 we do not agree that there should be a change in the standard of review in these cases. If the Government is nevertheless minded to change the standard of review, any change should not be to a judicial review standard, for the

reasons we have set out above. If a change is to be made, it should be to "specified grounds" such as those set out in Box 4.1.

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?

As we have stated in response to Q3, we are not convinced that a change to either the judicial review standard or to focused specified grounds would have a positive impact on the length, cost and effectiveness of the appeals framework, and we object to any change that would mean routes of appeal are closed to certain parties or in certain circumstances and their access to justice is restricted.

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?

We do not agree that there should be a change in the standard of review in these cases, for the reasons set out above in response to Q1 and Q3. In addition, many of our reasons for opposing a move away from the merits standard in CA98 cases apply equally to price control decisions (there is no need for greater certainty as to the standard of review, the merits standard does not call into question the credibility of the regulator and a weaker review standard that involves cases being remitted to authorities for a further decision in the event of a successful appeal will not result on shorter regulatory processes).

In addition, para. 4,73 of the Consultation states:

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

Price controls are typically imposed in industries which are capital intensive. The long term investments required to maintain and develop the UK's infrastructure are funded, in large part, by international companies, investors and financial institutions, who chose to invest in this country (rather than other markets) on the basis of the UK's reputation for open, transparent and accountable regulation. The full merits appeal in relation to price controls is a key element of the regulatory framework, which should not be "watered down".

We agree that these are strong arguments for retaining full merits appeals in these cases.

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 we have stated in response to Q3, we are not convinced that a change to either the judicial review standard or to focused specified grounds would have a positive impact on the length, cost and effectiveness of the appeals framework, and we object to any change that would mean routes of appeal are closed to certain parties or in certain circumstances and their access to justice is restricted.

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?

For the reasons set out above, we would not support such a change.

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?

For the reasons set out above, we would not support such a change.

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?

In our experience and, as recognised by the consultation, in many cases the points on appeal are closely related to price regulation. For example, where the regulator is acting in a dispute resolution role, the dispute will not typically be a "commercial" one. Instead it will relate to the correct interpretation of a regulatory condition imposing a form of price regulation (e.g. a requirement to have cost-oriented or fair, reasonable and non-discriminatory prices). Given the substantial investments involved and the potential for retroactive price adjustments to be imposed in certain circumstances, a full appeal on the merits is justified.

We repeat the points made in our answers to Q1 and Q8.

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 we have stated in response to Q3, we are not convinced that a change to either the judicial review standard or to focused specified grounds would have a positive impact on the length, cost and effectiveness of the appeals framework, and we object to any change that would mean routes of appeal are closed to certain parties or in certain circumstances and their access to justice is restricted.

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?

In general, the existing CAT rules already enable the CAT to meet the objectives set out the paragraph 5.9 of the Consultation. The CAT has shown itself to be willing and able to use its

existing broad case management powers to ensure that appeals are conducted efficiently and expeditiously.

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?

We agree with this proposal.

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 with this proposal.

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

The CAT should be granted sufficient flexibility to decide on a case-by-case basis in the light of the particular circumstances whether the use of this power is appropriate. We would not, however, support the imposition of a mandatory approach.

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

We agree with this proposal.

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 agree with this proposal.

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

We agree that the CAT is the most appropriate appeal body in these circumstances.

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

We agree with this proposal.

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

We agree with this proposal.

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?

Given that these appeals can raise complex economic and regulatory issues, we consider that CAT would be the most appropriate appeal body to hear enforcement appeals.

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

No comment.

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

We agree with this proposal.

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?

We consider that the CAT would be the most appropriate appeal body to hear dispute resolution appeals.

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

We recognise that it is not desirable that parties are required to launch proceedings before both the CAT and the High Court in cases – such as *Cityhook* – in which it is not clear where the jurisdiction to review a particular act lies. However, following clarifications of relevant legal issues that have been provided in cases such as *Cityhook*, we consider that such complications are less likely to arise in the future. In other cases, where there is no legal uncertainty surrounding which court should be approached, we do not consider that the possibility of judicial review by the High Court of certain procedural issues gives rise to significant concerns. In some instances, we consider that a review of procedural fairness of specific investigative conduct by the High Court will be more effective when fully separated from considerations relating to the substantive merits of the case against the appellant.[2] .

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?

We agree with this proposal. As noted in the Consultation, confidential data is often crucial to both regulatory and competition decisions, and we agree that making such information

[2] The case of *Crest Nicholson Plc v Office of Fair Trading* [2009] EWHC 1875 is an example of this.

available at the administrative stage should hopefully lead to better decision-making and reduce the likelihood of appeals. Disclosing confidential information via a confidentiality ring at the administrative stage might also help reduce delays at the appeal stage, as parties would be less likely to seek permission to amend their pleadings in light of information first disclosed into a confidentiality ring at the appeal stage.

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 where a confidentiality ring is put in place at the administrative stage, there should be a role for the CAT in supervising them, in terms of approving the terms of proposed arrangements, determining any dispute which might arise and imposing sanctions for breach. This would enable the regulator to draw on CAT's experience, promote consistency and enable an appropriately tailored approach to be taken.

We note that the CMA draft statement in relation to transparency and disclosure (published for consultation in July 2013) states that it "*may use confidentiality rings at access to file stage* [in CA98 investigations] *to handle the disclosure of confidential information, to a defined group of persons, where there appear to be identifiable benefits in doing so*." The draft CMA statement refers to a further CMA guidance document which will not be published for consultation until 17 September 2013. We would suggest, where possible, it would be helpful to have a consistent approach to confidentiality rings across different regulators.

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 agree with this proposal, but question whether it is necessary to set out the factors in legislation given the risk of further appeals.

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 note that the regime under the Civil Aviation Act 2012 is recently introduced and is, as yet, untested. In principle, we consider that the same factors should be taken into account in all appeals where the appeal body is exercising the discretion to admit new evidence. We see no reason why the factors should be different depending on the type of appeal. However, this underscores the need for the CAT to have a degree of discretion under its procedural rules.

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 consider that changes are required to the current legislation on costs, and that the various courts and tribunals dealing with costs should retain the ability to make whatever costs orders are most suitable in the circumstances of each case.

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

It is our understanding that regulators may, under the current legislation, claim their costs, and we see no reason why they should be "encouraged" to claim those costs when they already have the ability to do so. Whether or not costs are claimed, and the amount of those costs, is a matter for each party to an adversarial proceeding.

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?

We agree with this proposal, but have no reason to believe that this is not already being done.

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.

We agree with this proposal, although we note that the CAT rules already make provision for dealing with grounds of appeal summarily and without a substantive hearing where appropriate, whether on the application of a regulator or by the CAT on its own initiative. Where an appeal has no realistic prospect of success, one of the parties would no doubt seek a "strike-out" application at an early stage in the proceedings.

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

Whether these principles should be applied to regulatory decision-making will need to be considered by each regulator. Each regulator should have a clear statement of decision-making principles which are subject to public consultation.

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?

Regular and timely consultation is, in our view, one of the most effective ways of ensuring robustness of regulatory decisions. The precise mechanisms for such consultations vary according to the regulator and the process, and we have engaged with the various regulators in a number of instances in recent years.

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

The appropriate investigation powers vary according to the regulator and the process, and we have engaged with the various regulators in a number of instances in recent years.

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 – or, more accurately decisions that there are no grounds for action - should continue to be appealable, in the same circumstances as they are at present. Such decisions have important precedential value that will not be realised if they are not subject to appeal. There is no reason why a flawed non-infringement decision should not be subject to a full-merits appeal by a complainant who may have pursued the case for a number of years. It should not be assumed that such parties would, as the Consultation envisages, avail themselves of their right to bring a private action before the courts, as in many cases it will not be possible to justify the costs involved.

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?

We do not consider that a target time is likely to improve the perception that cases are taking too long. There may be issues as to what is a "straightforward" case, and no two cases are ever alike in any event.

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

We repeat our response to Q40.

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 agree with this proposal, although we understand that the CAT already has the relevant powers to limit evidence and expert witnesses. If any change is to be made to these powers, we suggest that they should mirror those available to the High Court.

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 agree that a voluntary fast-track procedure would be useful, as long as the parties genuinely agree to it and do not feel coerced by the threat of an adverse costs order, for example.

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?

We would prefer to see the case management powers reflect those available in the High Court. This would have the advantage that parties who have previously litigated in court, and their lawyers, would be dealing with case management powers that they were used to, and which in some instances have been clarified through case law.

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?

No comment.

Clifford Chance LLP
11 September 2013

Communications Consumer Panel

Communications Consumer Panel response to BIS' consultation on the appeals framework for regulatory and competition decisions

Introduction

1. The Communications Consumer Panel welcomes this opportunity to respond to this consultation on the appeals framework for regulatory and competition decisions.

2. The Panel is an independent group established under the Communications Act 2003. Its role is to provide advice to Ofcom to ensure that the interests of consumers, including micro businesses, and citizens are central to regulatory decisions. The Panel also provides advice to Government and champions consumers' and citizens' communications interests with industry. The Panel has Members representing the interests of consumers in Scotland, Wales, Northern Ireland and England.

3. Under the Communications Act 2003, Ofcom's principal duties in carrying out its functions are (a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition. The Panel is often described as a 'critical friend' to Ofcom. We provide robust and independent advice that is constructive, realistic and cognisant of the trade-offs which regulatory decisions often involve. This is made possible by the fact that Ofcom shares information and ideas with the Panel early in the regulatory process, before consulting formally with other stakeholders. This enables us to give strategic advice on policies early on in their development to ensure consumer interests are built into Ofcom's decision-making from the outset.

Consultation response

4. By their very nature, regulatory decisions have significant consequences. As such, it is vital that they are based upon transparent, objective, evidence-based and robust consideration of the highest standard. As part of that decision-making process, business also has a responsibility to present evidence during the consideration period that it considers pertinent to the issue under debate.

5. We recognise that such decision-making often involves trade-offs, but what is fundamental is that, in addition to being legal, fair and rational, the decision correctly balances the interests of consumers, citizens and business.

6. Given the importance of such decisions, it is essential that regulators can be held to account and that there is a clear and well-documented mechanism for challenge. However, the Panel believes that the current process for regulatory appeals does not sufficiently take into account the interests of consumers. We are also conscious that, unlike the regulator, the Court does not have an explicit duty to further the interests of consumers and citizens.

7. The communications sector is a particularly fast-moving market. When regulation is developed in order to address market problems specifically affecting consumers, it is in consumers' interests to be able to benefit from such regulatory developments as soon as possible. Lengthy appeals which reopen consideration of the grounds of a decision delay the implementation of regulation – potentially to the detriment of the consumer and citizen.

8. Regulatory certainty also allows business greater confidence to create and invest. In the most general sense, greater competition can lead to improved choice, lower prices and an increased focus on innovation – which are all to the benefit of consumers. A long and unwieldy appeals process and regulatory uncertainty can limit businesses' ability to plan effectively and grow.

9. In addition to our concerns about delays and uncertainties related to the appeals system, we are also conscious of the risk of the inefficient use of resources. There is currently little financial disincentive to large firms to appeal decisions. However regulators such as Ofcom have a limited resource pool and budget. Every year decisions have to be made about which issues are a priority to address in the light of these limitations. While it remains vital that regulators' decisions are open to challenge and scrutiny, defending fewer intensive appeals would allow the reallocation of resources to work aimed to protect and promote the rights of consumers.

10. We would argue that appeals should be limited to where there is genuine concern that a regulator has acted unlawfully, failed to exercise its discretion appropriately, or made a factual or process error. We therefore support the proposal to move to judicial review (or specified grounds) appeals. Such appeals would preserve the required challenge to regulatory decisions but deliver swift and efficient justice for consumers, citizens and small and large businesses alike.

Communications Management Association

BIS Consultation on the Appeals Process

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

A response from the Communications Management Association

Responder First Name	David
Responder Last Name	Harrington
Responder Type	Organisation
Responder Sector	Consumer Groups
Responder Views	Details of this consultation were passed, with initial comments, to the 20 or so members who have experience in regulatory and policy issues. The response was sent to all members of the Association. The final version was cleared by the CMA Board
Responder Email	dharrington@tiscali.co.uk
BIS desk officer	regulatory.appeals@bis.gsi.gov.uk
Responder Organisation	Communications Management Association (CMA)
Response Commercially in Confidence	No
Contribution not to be published	No
Reason not to publish	
Can name be released	Yes

About CMA

CMA is an association of ICT professionals from the business community who have a professional interest in communications, in both private and public sectors. It is a registered charity over 50 years old, totally independent and without supplier bias. It is run by the members, for the members and aims to influence regulation and legislation, provide education and training and disseminate knowledge and information, for the public good. CMA's contribution to public consultations is generated via the process described in the Footnote to this response. (www.thecma.com)

Response

CMA's response is one of unequivocal support for the government's intention to restrict in a practical way the exploitation of the appeals process by some suppliers.

(At this point we wish to make it clear that the terms "businesses" and "firms" used in this response do NOT refer to suppliers of telecoms goods and services. CMA is essentially an organisation representing the interests of business USERS of such services. CMA does not represent domestic or other end users, normally referred to by DCMS and (in this consultation by BIS) as "consumers". CMA has repeatedly requested government to address this anomaly by, for example, an amendment to the Communications Act 2003, which would oblige Ofcom to make a formal differentiation between business users and consumers, whose expectations from the regulatory regime frequently diverge – see below. BIS will be aware that the contribution to GDP by the telecommunications supply industry is only one tenth of that from the rest of industry and commerce. However, the lobbying effort from the telecoms sector is focused and disproportionately well funded whereas that from business users tends to be fragmented and multi-faceted. CMA's role is to try to rebalance that position.)

For the past five years we have watched with increasing dismay the ability and willingness of the large suppliers to use the appeals process in cynical attempts to gain competitive advantage. The

consultation contains some examples, in particular the 4-year delay in implementing 4G mobile networks, to the huge disadvantage of UKplc.

We are especially concerned that the needs of businesses are not being addressed adequately within the UK's regulatory and competitive environment and that the major contributory factor to such inadequacy is the threat of litigation.

Specifically, we wish to highlight the following considerations that we feel must be addressed in order for UKplc to benefit from the rich opportunities that are inherently part of the information society, both at home and in a wider European context, yet are being pushed aside in policy forums in favour of the (legitimate but vested) interests of the suppliers:

1. **We are not only large, international companies: the market of professional users of ICT is diverse.** The power of the MNC (multinational corporation) market to negotiate is overrated, and the SME market does not have any leverage to do so. We need a regulatory environment that ensures a competitive market for telecommunications services so we can built efficient and effective ICT strategies.
2. **The business market requires special measures and attention.** Our needs are at variance with the needs of the consumer, and 'adapting' consumer-oriented regulations will not fit our – more complex – requirements.
3. **Infrastructure-based competition is no longer sufficient; we need service-based competition.** Service-based competition is more relevant to business, and generates increased innovation, more jobs, greater growth and improved social welfare.
4. **The fragmented international mobile service market hinders our ability to develop cross-border. L**ack of competition, inconsistent tariff structures, fragmented pricing and service models, the absence of truly 'international' providers… The result for us is high costs and inefficiency, which cannot support our ambitions.
5. **Europe should take a leading role in driving initiatives to limit roaming charges on the international level.** These amount to a tax on cross-border trade.
6. **Net neutrality is critical:** Blocking or throttling services is unfair, annoying and impedes innovation.
7. **We need more information on and confidence in cloud computing.** While cloud computing offers us interesting possibilities, we still have many questions to answer before we are comfortable using it for our critical applications.
8. **Data retention and privacy laws need to be harmonised and manageable.** Changing and varying laws make cross-border operations risky and add unnecessary legal costs.
9. **Lack of adequate competition inhibits our ability to react.** To get the best price, we are required to sign long-term contracts without the flexibility to respond to changing needs, markets and technology.
10. **Last-mile connectivity is a headache for everyone.** The high cost and lack of consistency make it very difficult to build a company network.

The BIS consultation correctly identifies the "chilling effect" that the fear of litigation has on Ofcom's programme and decision making. However, that is not the whole story. We have had first-hand admissions from senior policy-makers in government that their hands have been stilled by the latent threat of judicial review. In particular, there is no intention either in government or in Ofcom, to examine publicly the advantages of structural separation of BT. Another example is the refusal to even consider the implementation of national roaming as a relatively inexpensive way to improve mobile coverage in UK. In both those case the excuse has been the familiar and time-worn one of the negative impact that such public examinations might have on investment by the operators. CMA maintains that the effect on policy making has in fact been positively glacial and is primarily due to the reluctance of officials to risk their Departments being dragged through appeal or judicial review.

Meanwhile it seems that the danger of sliding back into a monopoly-supply of telecoms infrastructure in UK is increasingly real. Yet there is no evidence that this danger is being actively addressed at the policy level, taking into account any of the 10 points listed above. UK plc needs a far braver view by policy-makers of the telecoms market in the next ten years than is evident at the moment. A significant reduction in the threat of litigation would give a major impetus to provision of a strategy for the sector.

For those reasons we urge government to give more weight to the needs of business users than to the threats or blandishments of the larger telecoms suppliers and to proceed with the preferred Option 4, as defined in the BIS consultation.

Footnote - CMA's Internal Consultation Process on Regulatory Issues

Any consultation document (condoc) received by or notified to CMA is analysed initially by the appropriate Forum Leader for its relevance to business users based in the UK. (CMA's members are based in this country, with a third of them having responsibility for their employers' international networks and systems).
If the document is considered to be relevant to CMA, it is passed, with initial comments, to members of both the appropriate Forum and the 20 or so members of CMA's "Regulatory College" – ie: those members who have experience in regulatory issues, either with their current employer, or previously with a supplier. The CMA Chairman is also a member of the College. The detailed comments from the College are collated by the Forum Leader in the form of a draft response to the condoc. Note: if the condoc has significant international import, the views of the international user community are likely to be sought. This is done through the International Telecoms User Group (INTUG).
Time permitting, the draft response is sent to all members of the Association, with a request for comment. Comments received are used to modify the initial draft. The final version is cleared with members of the appropriate Forum and Regulatory College (and, if the subject of the consultation is sufficiently weighty, with the CMA Board). The cleared response is sent by the CMA Secretariat to the originating authority. It might be signed off by the Leader of CMA's Regulatory Forum, and/or by the CMA Chairman.

Competition Commission (CC)

Streamlining regulatory and competition appeals

Consultation on options for reform

Introduction

The Competition Commission (CC) has two roles relevant to this consultation. It is itself an appeal body, hearing appeals from the decisions of regulators in a number of areas. It also takes decisions on merger and market investigation references under the Enterprise Act 2002; these and a number of its regulatory decisions are subject to appeal on judicial review grounds. The CC's views on the questions raised by the Government's consultation derive from its experience in both capacities.

The CC shares the Government's objectives for the UK's regulatory appeals regime. In the CC's experience, features of a good appeal/review mechanism include:

- a review body that is accessible to those materially affected by decisions, which is seen to be independent and impartial; that provides an effective discipline for a public body without unduly inhibiting its ability to perform its functions effectively;

- a review body that has the requisite knowledge/expertise to understand the key issues quickly ('get to the bottom of things') and to make high-quality decisions which resolve matters where possible;

- a review body able to correct material factual errors as well as errors of discretion; and

- a process that is swift, fair, rigorous and reasonably predictable, that focuses on the key issues in dispute and decides them according to consistent analytical frameworks and procedures with as much finality as is practicable.

The CC shares the Government's view[1] that that the CC is (and from April 2014, the Competition and Markets Authority (CMA) will be) capable and well suited to review the regulatory decisions over which it currently has jurisdiction. This position was supported by the great majority of respondents who commented on the regulatory appeals and references aspects of the Government's consultation *A Competition Regime for* Growth. This suitability derives from their having:

- flexibility, with a pool of expert members;

- expertise, analytical capability and resourcing in competition and regulatory economics and law;

- size, enabling them to handle a sufficient throughput and variety of matters to maintain expertise and apply lessons learned in one economic sector in another;[2]

- the investigative, project management and decision-taking expertise of their members and staff, which have developed over time and enable adherence to strict statutory timetables; and

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[1] *Growth, Competition and the Competition Regime: Government Response to Consultation dated March 2012* (p88).
[2] The CC's regulatory capacity in particular has benefited from its handling of mergers and markets investigations and imposing remedies in regulated sectors (eg BAA airports). In future, the CMA will have the further advantage of being able to exploit synergies with the competition and consumer responsibilities currently held by the Office of Fair Trading.

- robust, tested mechanisms to ensure independence and impartiality and avoid regulatory capture.

CC stakeholder surveys indicate wide satisfaction with the way the CC has played its role in recent years.

The CC believes the current regulatory reference and appeal regimes have important strengths; not least, the structures applicable to different sectors are reasonably well understood by affected parties in those sectors; and it is helpful to have one body (the CC and in future, the CMA) acting as an appeal/reference body for regulatory decisions with similar characteristics (in particular, price control and licence modification decisions).

When thinking about the right appeal body for any particular decision it is important to consider who is best equipped to hear the appeal, having regard to the analysis that the appeal body is likely to need to undertake.

From 2002 to date the CC has reviewed 17 price control and licence modification decisions covering the telecommunications, water, energy and airport sectors.[3] These (as well as some of its merger and market investigations) have required the CC to develop and maintain a degree of expertise and knowledge relating to regulatory law, economics, regulatory accounting, financing and cost of capital assessment, the specific industry and regulatory regime.

The CC can see some scope for greater harmonization between the regimes. The development of new regimes has led to various differences between them, including, for example, around time limits, who can appeal/intervene, the involvement of the Competition Appeal Tribunal (CAT), the grounds/standard of appeal/reconsideration, cost recovery arrangements and onward appeal rights. The CC considers that some of the differences between regimes could be reduced and that there is some scope for reform to adjust some of the incentives affecting decisions to appeal/refer and the duration of appeals. However, the variations should not be exaggerated; many are justified by the different policy and European regulatory contexts of different sectors.

Accordingly, the CC would advise against regulatory reform to any one sector without a clear case for change founded in the experience of that regime as well as having regard to its implications for other sectors. It is important that thought is given to the overall effects of reform on regimes, so that they provide a fair appeals mechanism but do not incentivize unnecessary appeals. The incentives affecting the frequency of appeal vary by sector. For example, in the water sector the charge controls are generally decided around every five years, so in the last five years there has only been one set of decisions to appeal. By contrast Communications Act decisions have to be of shorter duration, have to take account of EU recommendations and have clear winners and losers among the commercial parties. So the greater frequency of appeals in the latter sector in recent times is not surprising. Changes in regime design can change incentives and therefore behaviour, sometimes in unpredictable ways.

While the regulatory appeals the CC does, and the CMA will determine will largely be determined on the merits, their own regulatory decisions, and market investigation and merger decisions taken under the Enterprise Act 2002, are subject to scrutiny on judicial review grounds. The CC believes this balance is largely correct. In the former case the CC is considering decisions already taken by expert regulators; in the other it is the second phase body in a two-phase system. In both cases the CC believes that judicial review is the appropriate standard to apply to review of its decisions.

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[3] This figure excludes an appeal brought under section 173 of the Energy Act 2004 which was subsequently cancelled (Utilita Electricity Limited v GEMA on Energy Code Modification P194 in 2006).

The CC's responses to the specific questions in the consultation document are below.

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?

The CC considers that the appropriate standard of review for particular decisions depends on the nature of the decision, and the extent to which it has already been subject to thorough consideration by a public body. The CC considers that a judicial review standard is appropriate where the decision appealed has already been subject to a thorough two-stage administrative review process, as is currently the case for appeals against CC decisions.

However, the CC is not convinced that the standards applied in judicial review would always be sufficient for it to effectively determine the regulatory appeals it receives which have been subject to a less thorough process. The CC would of course expect to apply whatever standard of review the law requires, and notes that it has not yet had experience of applying such standards itself when considering price or charge controls. But it notes that many of the regulatory decisions it takes involve the exercise of regulatory discretion in complex and technical areas where large sums are at stake, where a very thorough scrutiny of regulators' exercise of their discretion (while respecting their expertise) and of the accuracy of their work seems justified.

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 CC sees benefit in the transparency of having specified grounds for appeals, particularly if the Government's intention is that they should not be restricted to the usual judicial review standards, because it should encourage parties to focus appeals, and where there are common grounds between regimes enable the appeal body to apply a consistent approach to similar issues in different sectors. It notes that the principles for appeals set out in Box 4.1 appear to closely follow those set out in the existing appeal regimes for energy in GB and aviation. However, the CC notes that these are yet to be tested. The CC does not therefore consider it is possible to comment on how effective a review process they will permit; it believes that it may be preferable for government to wait and see how effective they are before spreading them to other sectors such as rail and water.

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

This is a difficult assessment to make, in part because in practice the courts adapt the intensity of their review to the circumstances of the case. It is possible that a move to a judicial review standard may, in some cases, lead to an increase in the margin of appreciation given to the regulator by the appeal body and so reduce the intensity of review but it should not be assumed that it would necessarily make appeals quicker or cheaper.

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?

In relation to the appropriate standard of review, see the response to Question 1 above. On the proposal to have more focused 'specified grounds', see the response to Question 2 above and comments below.

Specified grounds are already required in Communications Act 2003 appeals. Section 195(2) of that Act requires the CAT (and hence, in price control cases, the CC) to decide the appeal 'on the merits' **and** by reference to the grounds of appeal set out in the notice of appeal. But in addition, section 192(6) of that Act requires that the grounds of appeal in the notice must be set out in sufficient detail to indicate the extent (if any) the appellant contends Ofcom's decision was based on an error of fact or was wrong in law or both and it is appealing against the exercise of a discretion by Ofcom.

It is clear from CAT and Court of Appeal decisions that an appeal 'on the merits' does not mean a complete de novo hearing.[4] It is difficult to tell what the impact would be if the words 'on the merits' were removed and the existing grounds of appeal became more 'focused'. We recognize it might deter some appeals. However, we are not convinced that the range of issues the CC has to address where appeals are made would be materially reduced or its ability to determine them fairly improved. If the Government takes this proposal forward, the CC would welcome clarity on whether the Government would expect these changes to alter the margin of appreciation that should be given to the regulators by the appeal body as compared with the approach the CC has followed to date in Communications Act cases.

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?

See the response to Question 3 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?

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?

The CC has no comment to make on these questions.

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?

See the response to Questions 1 to 3 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?

The CC sees benefit in extending any proposed reforms to Northern Ireland, on the grounds of consistency of approach.

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?

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[4] See, for example, *BT v Ofcom* [2010] CAT 17, paragraphs 75 to 78.

In the last ten years, the CC has had a few regulatory references in the water sector, none in the rail sector and so far none in health. Therefore it is difficult for the CC to assess the costs and benefits of moving to a different appeal/review mechanism.

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?

See the response to Questions 1 to 3 above.

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 CC has no comment to make on this question.

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. The ability to appoint Chancery judges to sit as Chairman of the CAT is helpful in both expanding the CAT's capacity and bringing these judges' particular skills to bear.

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.

The CC has no comment to make on this question.

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

The CC has no comment to make on this question.

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

Yes. Please see the CC's introductory comments.

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?

Yes. It offers the prospect of simplifying the process through removing any duplication or inefficiency from the current participation of two appeal bodies in the process, and would be one example of reducing the inconsistency between regimes.

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

Although as yet untested, the process set out in the Civil Aviation Act 2012 has been developed recently in the light of experience of the current appeals process in the communications sector, so it may be an appropriate starting point, though some features (for example, timescales) might need to be adjusted to fit the circumstances of particular sectors.

The CC strongly favours statutory time limits as a discipline on itself and parties, but recognizes that they need to be carefully framed and sufficiently adjusted to the particular regulatory scheme that they do not produce unfairness.

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

The CC has no comment to make on this question.

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

The CC has determined one energy code modification under the Energy Act 2004. These decisions may have some different characteristics to some of the other regulatory decisions reviewable by the CC, not least as a result of the speed of decision taking the Act requires. While the CC does not have a strong view on the Government's proposal, it believes that it has the expertise and capability (as described more fully in its introductory comments) to continue to handle such appeals. It also notes that consideration needs to be given to whether Water Code modification decisions (if the Water Bill passes into legislation) should be decided by the same body as energy code modifications.

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

It is desirable to have a single route of appeal for all closely related decisions.

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

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

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

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

The CC has no comment to make on Questions 23 to 26.

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

See the response to Question 22 above.

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?

The statutory regimes regulating the handling of confidential information vary between the different statutes the CC applies, but the CC notes that they generally allow for the disclosure of confidential information in certain limited circumstances, in particular with consent or where it is necessary to enable a regulatory body to perform its functions. However, such disclosure raises various issues including the risk of inadvertent onward disclosure and the need for effective sanctions and controls to inhibit and deter onward disclosure.

There are a number of current sanctions and controls that may be relevant to controlling onward disclosure in particular cases, including criminal sanctions, professional disciplinary controls, and private actions. The CC would be happy to consider any particular proposals for improving the current arrangements if they enabled swift and effective controls and sanctions for breach to be applied quickly at the instigation of the regulators.

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?

The CC has no comment to make on this question.

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?

Yes. See the response to Question 19 above.

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 CC believes that it is important to avoid creating appeal regimes where a potential cost sanction might encourage timidity on the part of public bodies. However, how particular public bodies should be funded and how fines imposed by public bodies are collected and used is a matter for Government.

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

Yes. We think it imposes a helpful, if sometimes limited, discipline on regulated entities deciding whether to appeal decisions, and may have some impact on their incentives.

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?

The CC has no comment to make on this question.

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

The CC in principle approves of powers to reject wholly unmeritorious appeals but notes that the CAT already has some potentially relevant powers: see in particular rule 10 of the Competition Appeal Tribunal Rules.

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

While some general principles of good decision making apply to all decisions, there are enough differences between regimes to make it unwise to assume that a model that works for one will necessarily apply as well to another. The CC considers it more appropriate to leave it to the good judgement of regulatory authorities and appeal bodies to determine their rules and procedures to comply with their statutory duties and public law obligations.

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?

The CC recognizes the importance of transparency for fair process, engagement with interested parties, enhancing the quality of decisions and reducing the incidence of appeals. However, engaging with the key concerns of parties while running an efficient process is not always easy or susceptible to simple solutions.

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?

The CC has no comment to make on Questions 38 and 39.

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?

Where practicable, the CC is in favour of statutory time limits, which impose helpful discipline on case management for authorities and parties. We recognize their appropriateness will depend on the circumstances of the case.

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 CC is content with the CAT's current arrangements for evidence in judicial reviews of decisions taken by the CC. Similar to our response to Question 35, it is not clear that the CAT does not already have the necessary powers to limit evidence and witnesses.

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?

The CC has no comment to make on this question.

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?

The CC supports the proposal to amend the time limit for these appeals, provided the CC/CMA is given the necessary powers to manage and determine these cases independent

of the CAT. This is recognized in the Government's consultation. Although as yet untested, the process set out in the Civil Aviation Act 2012 seems an appropriate model to base any such changes, not least for the purposes of consistency.

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?

The CC supports this proposal, which is consistent with the general tightening of timescales effected by the Enterprise and Regulatory Reform Act as well as by the Civil Aviation Act as discussed above, and which implies a preference on the Government's part for more efficient, focused investigations.

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?

The CC is happy to consider ways of improving its procedures and minimizing burdens on persons involved in its proceedings. In general, it welcomes the introduction of civil fines for non-compliance with regulatory requests over recent years. However, it considers that there are limited situations where the power to impose civil fines could prove insufficient to secure compliance. It believes it would be helpful for the government to review whether these should in some cases be supplemented by the possibility of bringing defaulters before a court with enforcement powers.

Competition Law Association (CLA)

UK COMPETITION LAW ASSOCIATION

Consultation Response

BIS: Streamlining Regulatory and Competition Appeals

September 2013

1. Introduction and overview

1.1 This document is submitted on behalf of the UK Competition Law Association ("**CLA**") in response to the consultation launched on 19 June 2013 by the Department for Business Innovation and Skills ("**BIS**") on "Streamlining Regulatory and Competition Appeals".

1.2 The CLA is affiliated to the Ligue International du Droit de la Concurrence. The members of the CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of the CLA is to promote the freedom of competition and to combat unfair competition.[1]

1.3 The CLA welcomes the opportunity to respond to this Consultation on streamlining regulatory and competition appeals.

1.4 The CLA has a number of serious concerns with some of the proposals. In general, the CLA shares the concerns expressed by the Competition Appeal Tribunal ("**CAT**") in its response to the present Consultation. In particular, the CLA agrees with the CAT that there is no reason to suppose that a move to a "judicial review" standard of review in

[1] Further details on the CLA can be found on our website at http://www.competitionlawassociation.org.uk/.

either regulatory or antitrust appeals would reduce the number of appeals, the cost and length of appeals, or regulatory uncertainty; indeed, there are powerful reasons to suppose that such a change would have the opposite effect.

1.5 The CLA also shares the CAT's criticisms of much of the evidence relied on in support of the reforms suggested in the Consultation paper. Contrary to the thrust of the Consultation paper, the experience of the CLA's members before the CAT is that in general it deals with appeals, in cases that are often complex and of vital commercial importance to the parties, with as much speed and efficiency as is realistically possible. In particular:

(a) The experience of CLA members is that the CAT deals with cases as quickly as is consistent with parties having sufficient time to prepare their cases properly; and, far from appellants seeking to delay appeals in order to gain tactical advantage, the experience of CLA members is that it is regulators, as least as much as appellants, who seek to resist proposals that proceedings could be dealt with to a faster timetable.

(b) Although there was a period in the mid-2000s when there may have been legitimate scope for concern about sometimes lengthy delays by the CAT in giving judgment, since then the picture has considerably improved (the recent construction appeals being, for the reasons given by the CAT, a highly exceptional situation).

(c) In the experience of CLA members, the CAT generally strikes the right balance between written submissions and oral hearings (and the CLA shares the CAT's

view that oral hearings play a critical role in the fair resolution of appeals, and notes that a focused oral hearing is very frequently faster and more cost-effective than an exchange of detailed written submissions covering the same ground).

2. Specific Points on "Streamlining Regulatory and Competition Appeals"

2.1 This part of the response provides specific responses to the questions raised by the Consultation on "Streamlining Regulatory and Competition Appeals". The chapter and question numbering below follows the references used in the Consultation paper.

STANDARD OF REVIEW (CHAPTER 4)

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?

2.2 No, we do not agree. The case for any such presumption has not been sufficiently established. The existing use of full merits appeals should be retained not least in light of the following considerations:

(a) The fact that the agency's substantive analysis will be reviewed is likely to result in better decision-making in the first place.

(b) Review on the merits of the substantive analysis is likely to reduce the risk of error and ensure greater consistency of decision-making, particularly where there would not otherwise be any independent review on the substance.

(c) There is little evidence to suggest that a move to a judicial review type system would result in faster and more efficient decision-making. On the contrary, any change to the standard of review is likely to result in additional litigation over the new standard (including consistency of the new standard with requirements of EU law), with preliminary rulings by the CAT on such issues themselves potentially being the subject of further appeals (and hence delay).

(d) Competition law proceedings, which are recognized as being quasi-criminal in nature owing in part to the significant financial penalties, would otherwise risk breaching the European Convention on Human Rights ("**ECHR**"). This is discussed in more detail in the response to question 6 below.

2.3 Finally, we strongly dispute that speed and efficiency should be promoted potentially at the expense of "getting it right" on appeal.

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?

2.4 No, we do not agree. The case for changing from the current standard of review has not been sufficiently established.

2.5 Introducing statutory grounds of appeal will cause uncertainty and litigation on additional points, not least around how far the grounds are intended to be a departure from prior judicial statements on the standard of review. The proposed statutory grounds do not necessarily capture all the nuances of the existing case law and there will be question marks over how far this is or is not intentional. We see no benefit in providing a gloss

where the standards of review are now reasonably well settled and where, at least in most respects, the proposed specific grounds do not appear to be substantially different from those that have already been established by the courts (at least in Communications Act appeals).

2.6 To the extent there is a narrowing of the permissible grounds of appeal, we would repeat that we do not believe that the case for this has been sufficiently established. It is likely to defeat the Government's objectives by leading to lower quality decision-making and risk breaching the ECHR at a time when fundamental rights are receiving increased scrutiny within the EU legal system. We also note that a switch from full-merits appeal would be inconsistent with the Government's statement last year in the context of consulting on changes to the UK competition law regime that it intended to retain the full-merits appeal system.[2] Please see further our response to question 6 below.

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

2.7 A move to a judicial review standard is likely to extend the time taken before decisions become final as well as the cost involved in challenges. This is because:

(a) There will, at least initially, be additional litigation over the meaning of any new standard that will itself cause delays and extra cost.

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

(b) As is the case in judicial review, witness statements will still be submitted by all parties. Further, if there were any reduction in the volume of witness statements and expert evidence, it would have a limited impact on timing as all the appellant's evidence already has to be filed with the Notice of Appeal anyway where the appeal is currently to the CAT.

(c) There is unlikely to be much saving in terms of disclosure because there is no formal disclosure stage before the CAT anyway.

(d) Crucially, judicial review implies that it will not typically be appropriate for the CAT to reach its own view on the right answer where it finds a flaw in the process. There is always a remittal for the original decision maker to reconsider its decision unless the facts show there could only ever be one lawful answer. Paradoxically and entirely inconsistent with the aspirations that the Government has for faster decision-making, this may mean there will be more adverse findings against regulators because the CAT will need to allow an appeal where it finds a process error even if it might, at present, have agreed with the ultimate conclusion.[3] There will also be less finality because the original decision-maker will have to go through the process of reaching a new decision, which may itself then be challenged again. The process of remittal to the original decision-maker can lead to considerable delays in the proceedings as can be seen, for example, in the *Soda Ash* case before the European Commission and Courts – the European

[3] Under the appeal on the merits system, the CAT has the potential to let a decision stand even where there has been, for example, a procedural flaw. In *TalkTalk Telecom Group plc v Ofcom* [2012] CAT 1, the CAT held that a decision by Ofcom was procedurally flawed but that the rehearing on the merits cured the procedural flaw.

Commission's initial decisions were adopted in December 1990 and quashed in June 1995, and then the European Commission's re-adopted decisions were quashed by the European Court of Justice in October 2011, over 20 years after the initial decisions.[4] While the current process in Communications Act appeals does require remittal to Ofcom, it is typically with directions to take a particular decision on which there is little or no scope to consult or be challenged.

2.8 The appeals framework would be less effective both because of the requirement for reconsideration delaying finality and because the process will be less successful at remedying substantive errors (and will find errors on process grounds where the substantive decision is right).

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?

2.9 No, we do not agree for the reasons stated in response to questions 1 and 2 above. Additionally:

[4] The European Commission adopted initial infringement decisions against Solvay in December 1990 for breaches of Articles 101 (market sharing) and 102 TFEU (agreements with customers aimed at foreclosing competitors). These decisions were quashed by the General Court in June 1995 owing to violation of an essential procedural requirement (since the text of the decisions had not been authenticated before it was notified), with the European Court of Justice upholding the General Court's judgment in April 2000. The European Commission re-adopted both decisions in December 2000. Solvay appealed these new decisions. The General Court largely upheld the decisions in judgments handed down in December 2009, although it did find that the European Commission had erred in its assessment of the duration of the Article 101 infringement and in its assessment of the gravity of the Article 102 infringement. On further appeal by Solvay, the European Court of Justice held in October 2011 that Solvay's rights of defence arising from access to the European Commission's file and its right to be heard had been breached in the Article 101 and 102 cases and therefore quashed both European Commission re-adopted decisions. Although this may not be a typical example, it certainly shows the extent to which proceedings can drag out where cases are remitted to the administrative decision-maker.

(a) the risk of error is arguably greater for regulatory decisions by Ofcom than competition decisions by the CMA because there it uses a one-stage process without second-stage review;

(b) the full merits standard is clearly consistent with EU law, in particular Article 4 of the Framework Directive. While a flexible standard of judicial review might also satisfy the requirements of Article 4, it is less certain and has never been tested before the European Courts. Any attempt to constrain the flexibility with specified grounds will increase the risk of inconsistency and will certainly result in more litigation, including references to the European Courts and/or infringement proceedings against the United Kingdom; and

(c) there is no good reason why the existing standard of review should be seen as a cause of delay in the implementation of Ofcom decisions. Decisions are not suspended during appeals and, in any event, the CAT has shown itself well able to resolve appeals quickly when required.

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?

2.10 We refer to our responses to questions 2 and 3 above. Neither option is likely to reduce length or cost and may very well increase both. Both options would reduce the effectiveness of the appeals framework, at least to the extent that they narrow the existing grounds for challenge.

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?

2.11 No, we do not agree. In addition to points already made in response to questions 1-3 above, we would highlight further the risk of incompatibility with fundamental human rights through not having an appeal on the merits. Competition law violations in the UK can lead to draconian penalties for implicated companies and individuals, including heavy fines, private damages actions, divestiture orders, and director disqualification orders. It is widely recognized – and indeed this is recognized in the BIS Consultation itself – that competition law proceedings as a result have a quasi-criminal nature and are subject to the safeguards set out in Article 6 ECHR.[5] There is concern that, when the initial decision in competition law cases is taken by a body acting as investigator, prosecutor, and judge, it is necessary to have an appeal on the merits to ensure compliance with Article 6 ECHR.[6]

[5] *See*, for example, *Aberdeen Journals Limited v Director General of Fair Trading* [2002] CAT 4, para. 176 "We bear in mind, in that connection, that the Act involves the imposition of severe penalties and that proceedings under the Act are "criminal" for the purposes of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms." Equally, in the context of cartel proceedings under Article 101 TFEU, see, for example, the comments of Judge Vesterdorf in the *Polypropylene* case where he opined that, since fines imposed pursuant to Article 15 of Regulation 17/62 "*have a criminal law character, it is vitally important that the Court should seek to bring about a state of affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights*" (Opinion of Advocate General, Case T-1/89 *Rhône Poulenc SA v. Commission* [1991] ECR II 867).

[6] In *A. Menarini Diagnostics S.R.L. v Italy*, case no. 43509/08, judgment of the European Court of Human Rights ("ECtHR") of 27 September 2011, paras. 28-45 and 59, the ECtHR found that a fine imposed by the Italian antitrust authority for cartel activity involved a criminal charge and that it was not incompatible with Article 6(1) ECHR for a competition law sanction to be imposed by an administrative authority provided that the decision was subject to control by a court with full jurisdiction. Such a court should have the power to decide on all aspects of law and fact and, if necessary, to reformulate the decision on both facts and law.

2.12 When the UK Government was consulting on changes to the UK competition law regime in 2011, many stakeholders advocated moving to a prosecutorial system so as to ensure robust decision-making. The UK Government rejected a shift to a prosecutorial regime but noted that it would be wrong to reduce parties' rights and that it therefore intended that full-merits appeal would be maintained in the new regime.[7] It is hard to fathom why the UK Government has changed its viewed on this and particularly within such a short period of time.

Q.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?

2.13 We refer to our responses to questions 2 and 3 above. Neither option is likely to reduce length or cost and may very well increase both. Both options would reduce the effectiveness of the appeals framework, at least to the extent that they narrow the existing grounds for challenge.

Q.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?

2.14 We do not consider that a sufficient case has been established for changing the standard of review for price control decisions.

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

Q.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?

2.15 We refer to our responses to questions 2 and 3 above.

Q.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?

2.16 The CLA does not have any comment on this question.

Q.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?

2.17 The CLA does not have any comment on this question.

Q.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?

2.18 For the reasons provided above, the CLA disagrees entirely with the Government's proposal to move from a full-merits appeal system to judicial review.

Q.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?

2.19 For the reasons provided above, the CLA does not believe there is any evidence for concluding that appeal cases heard under judicial review or "consistent specified grounds" standards would be quicker than appeal cases heard on a full-merits basis. Indeed, it seems more likely that changing to a judicial review or "consistent specified grounds" standard would increase the overall length of cases. We refer to our responses to questions 2 and 3 above.

APPEAL BODIES AND ROUTES OF APPEAL (CHAPTER 5)

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

2.20 The CLA considers that flexibility already exists in the CAT's Rules to deal with cases fairly and in a timely manner and that the CAT utilises its Rules accordingly. Although improvements could be made to certain of the CAT's rules (*e.g.*, those relating to payments in), the CLA does not believe that wholesale reform of the CAT's Rule is warranted or desirable.

Q.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?

2.21 We agree.

Q.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.

2.22 We agree.

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

2.23 We agree, but consider that it should be the exception rather than the norm as one of the unique advantages of the CAT is its ability to bring to bear economic, business and/or sectoral expertise as well as legal expertise. We would propose that the CAT should only be permitted to sit with a single judge:

(a) where the parties agree; or

(b) where directed by the President on a case-by-case basis; or

(c) possibly in a narrow range of pre-specified cases, such as those requiring expedited treatment and/or involving pure questions of law.

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

2.24 Yes, we do agree that it is appropriate for appeals against price controls and licence modification decisions to be heard by the Competition Commission and its successor body, the Competition and Markets Authority ("CMA") as opposed to the CAT. The CLA assumes that this is something the Government will examine further when

establishing the CMA and the new UK competition regime. We hope that efforts will be made to ensure that the Competition Commission's experience in these types of appeal cases transfer seamlessly to the CMA.

Q.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?

2.25 There could be merit in price control decisions being appealed directly to the Competition Commission (and its successor body, the CMA). The current process is anomalous and results in considerable delay and extra costs, including both at the start of the process before a reference is made to the Competition Commission and at the end of the process where the CAT always conducts a review of the Competition Commission's determination. There can also be delay and extra cost in seeking rulings from the CAT on points that arise during the Competition Commission process. At the same time, though, the Competition Commission currently only has jurisdiction over "specified price control matters". This means that it is not uncommon for a single price control decision to result in grounds of appeal that need to be determined by both the CAT and Competition Commission simultaneously. For a direct appeal to the Competition Commission (and its successor, the CMA) to work effectively, we would suggest that either all communications price control appeals need to go to the Competition Commission/the CMA or there needs to be a process for co-ordinating appeals simultaneously progressing in the Competition Commission/the CMA and CAT and for transferring matters between the two. There may otherwise be an increase in appeals to

ensure that there is no risk of an appeal being dismissed for being brought in the wrong forum.

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

2.26 Yes (subject to our responses to questions 17 and 19 above).

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

2.27 The CLA does not have any strong view on this question, although it may well be appropriate to have Energy Code modification appeals to be heard by the CAT in the interests of consistency and streamlining.

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

Q.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?

2.28 We respond to questions 22 and 23 together.

2.29 We agree that there are advantages in having a single appeal body hearing appeals against enforcement decisions given the similarity of the issues that are likely to arise. We consider that it is likely to be best for the CAT to hear appeals against enforcement decisions since there will often also be overlaps with issues raised in appeals against ex

ante regulatory decisions. The CAT will also have useful prior knowledge of the relevant industries and regulatory regimes.

Q.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?

2.30 The CLA does not have any comment on this question.

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

Q.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?

2.31 We respond to questions 25 and 26 together.

2.32 We agree that there are advantages in having a single appeal body hearing dispute resolution appeals given the similarity of the issues that are likely to arise. We consider that it is likely to be best for the CAT to hear dispute resolution appeals since there will often also be overlaps with issues raised in appeals against ex ante regulatory decisions. Indeed, there are numerous such examples in the communications sector. For example, there have been simultaneous dispute resolution appeals and ex ante regulatory decision appeals in relation to both mobile termination rates and partial private circuits. The CAT will also have useful prior knowledge of the relevant industries and regulatory regimes.

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

2.33 We agree that the CAT should have general jurisdiction over all decisions under the Competition Act. Given that the CAT is to have power to grant warrants, it is anomalous that decision-making in the middle of an investigation (*e.g.*, the terms of a section 26 notice) requires review by the High Court, while decision-making at the beginning and end of cases is subject to the CAT's review. Moreover, in those cases where it is unclear whether the regulator has in fact taken a final decision on the merits (*e.g.*, the *Cityhook* case), it is unsatisfactory that a challenger has to hedge their bets by bringing parallel challenges before the CAT and the High Court.

GETTING DECISIONS AND INCENTIVES RIGHT (CHAPTER 6)

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

Q.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?

2.34 We respond to questions 28 and 29 together.

2.35 We would support the relevant agencies at the administrative stage having the option of using confidentiality rings in appropriate cases. The existing process means that those appealing regulatory decisions often do so based on incomplete information. When further information becomes available in the appeal it can result in substantial changes in

the appeal. Further, the parties appealing might not have appealed in some cases if they had seen the information beforehand.

2.36 However, confidentiality rings are by no means appropriate in all cases and there are practical and legal issues with creating confidentiality rings at the administrative stage – indeed, such rings can create more issues than they resolve. In certain cases, administrative decisions may need to be adopted on the basis of information that cannot be shared among the parties. Due process concerns can arise where decisions are taken that significantly affect the interests of a particular party on the basis of information only seen by that party's external advisor. Equally, sharing certain information among external advisors may simply be redundant where only the parties to the proceedings are in a position to interpret and/or to comment on the information being shared. Regulators may also be concerned that disclosure in the absence of a court order may breach statutory restrictions on the use of information obtained with compulsory powers. For these (and other) reasons, we consider that it would be beneficial for the CAT to be responsible for supervising confidentiality rings at the administrative stage.

2.37 We appreciate that there may be concerns about the ability to impose effective sanctions if confidentiality restrictions are not respected. It would nevertheless be possible to introduce statutory provisions so that breaches of confidentiality rings are subject to financial penalties. This is an area that merits further consideration and consultation.

Q.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?

2.38 We do not agree. The Consultation suggests an analogy between "new evidence" in this context and "new evidence" in the context of an appeal from a court of first instance to a court of appeal. Such an analogy is inapposite in the circumstances of an appeal from a regulator. Information may be adduced for the first time on appeal simply because the parties did not and could not understand its relevance and/or importance until the regulator published its decision. To deny parties the ability to adduce such evidence on appeal, in response to the decision made (or in response to an appeal against the decision), could be self-evidently unjust.

2.39 We note that it is proposed that parties should be able to adduce new evidence where it could not reasonably have been expected to have been adduced at the administrative stage, but also note that that test will in practice generate considerable litigation and draw the CAT into an (otherwise unnecessary) enquiry into the details of the conduct of the administrative procedure in order, for example, to resolve claims that the party concerned could not have been expected to realise at that stage that particular evidence was likely to be relevant. We further note that there is very little, if any, evidence that parties have sought to gain a tactical advantage by deliberately withholding relevant evidence until the appeal stage.

2.40 In general, we note that the CAT's existing approach to new evidence has been endorsed by the Court of Appeal in *British Telecommunications Plc v Ofcom*[8] and we see no justification for adopting a different approach.

[8] *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245.

Q.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?

2.41 We do not agree. The approach in the Civil Aviation Act 2012 is untested and there is no particular reason to suppose that it will work better than the existing approach. Further, the price control process adopted by the CAA arguably involves more intensive engagement than is the case with some regulators, such that the approach in the Civil Aviation Act 2012 may be more appropriate for aviation.

Q.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?

2.42 We do not agree. The right to recover costs should be symmetric. A successful appellant should not be penalised by having to bear its own costs. Further, one-way costs shifting would create inappropriate incentives for the conduct of appeals. For example, the regulator would have an incentive to put the appellant to as much cost as possible, which is liable to extend the appeal process. If regulators are concerned that the costs bills that they have to pay are excessive, then the appropriate course is for them to challenge the amount of such bills; we do not believe that the CAT would be anything other than sympathetic to a regulator confronted with an excessive costs claim.

2.43 We also share the CAT's concern that the principal effect of an asymmetric costs rule of the type proposed would be to deter smaller businesses from exercising their right to

appeal. In contrast, changes to the costs rules will not deter very large companies from appealing in cases of great commercial value to them.

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

2.44 The CLA sees no reason why regulators should not claim their costs (including internal legal costs) as they deem appropriate. The CAT's rules are flexible and can deal with such claims. We presume that the CAT would deal in the same way with a claim for internal legal costs by either a regulator or a private business.

Q.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?

2.45 We have no reason to believe that the administrative bodies are failing to scrutinise appeal grounds at an early stage. Further, additional challenges at an early stage are at least as likely to delay and extend proceedings as bring them to an early end. Indeed, the success rate of appeals before the CAT is quite high, which suggests that there is not a problem with obviously weak appeals being brought.

Q.35 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?

2.46 We do not consider that it would be appropriate for the CAT to act of its own initiative where the respondent has not itself considered it appropriate to seek a strike-out. To do so would risk creating an impression of a partial CAT unless there were a preliminary

assessment or permission hearing in every case, which would undoubtedly extend and delay the progress of most appeals. The CAT already has sufficiently flexible rules that enable it to indicate to parties if it considers that there is no merit in particular grounds of appeal. Moreover, we believe that businesses bringing appeals before the CAT are typically well advised by reputable and serious-minded external lawyers and therefore the risk of hopeless or frivolous cases being brought is small or non-existent.

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

2.47 We generally support the principles proposed for decision-making in antitrust cases. The more akin regulatory cases are to antitrust cases, the more likely it would be appropriate to apply the same principles to such regulatory cases.

Q.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?

2.48 More transparent consultation could reduce the number of appeals. The publication of draft decisions in appropriate cases can be helpful and the extension of confidentiality rings would be beneficial.

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

2.49 We are not convinced that any compelling need has been identified. Regulators already have extensive powers that are not necessarily used as effectively as they could be. We note, for example, that Ofcom has historically made relatively little use of its powers to

demand information under section 135 of the Communications Act 2003 and has imposed very few penalties for failure to comply even though it has suggested in some appeals that it has received less than full cooperation.

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

2.50 In practice, regulators adopt very few non-infringement decisions – indeed, the OFT tends to close investigations on grounds of priority. In the rare instances where a regulator does adopt a non-infringement decision, it will because the regulator considered the case to have sufficient importance and precedential value (so that it is likely to be an appropriate use of the CAT's resources to correct any errors made in that decision). The CLA considers that it would be anomalous to permit full merits appeals for infringement decisions but not for such non-infringement decisions. In the *Burgess* case, a finding by the OFT that there had been no abuse of dominance was overturned by the CAT on the grounds that the OFT's analysis of the relevant geographic market and the issue of abuse was inadequately supported by the evidence and contained errors of fact and law.[9] It is vital that there remains a check on incorrect decisions in future.

2.51 The Consultation paper argues that, where a regulator has issued a non-infringement or no grounds for action decision, interested parties would nevertheless remain free to challenge the agreement or conduct in court. However, such interested parties may well face challenges in establishing their substantive case in court in the face of a decision to the contrary by the relevant regulator. Further, particularly where the complainant is a

[9] *Burgess v OFT* [2005] CAT 25. The CAT also found procedural deficiencies with the decision.

small business (such as Burgess), it is wholly unrealistic to expect it to incur the expense and risk of stand-alone competition litigation in order to establish that a regulator's decision was incorrect.

MINIMISING THE LENGTH AND COST OF CASES (CHAPTER 7)

Q.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?

2.52 We do not see a need to reduce the target. As we have said in the introductory section to this response, the experience of CLA members is that majority of cases are already dealt with as quickly as is realistic and consistent with proper preparation of the parties' cases, and there could be disadvantages to imposing excessively tight targets, such as incentives to refer decisions back to regulators for reconsideration rather than reaching a final view on the first appeal. We also note that imposing tighter timetables would likely have a significant impact on regulators' resources so that, for example, regulators would need to be in a position to throw considerable resources into a case at very short notice, including at times of the year when staff generally expect to be allowed time off (such as the summer[10] and Christmas). We suspect that, given the increasing constraints on regulators' resources, this is unlikely to be realistic in many cases. It is also worth noting that delays in cases are often beyond the power of the CAT, for example, in relation to timetabling issues.

[10] We note, for example, that in the present *Eurotunnel* appeal, the Competition Commission resisted an application for a hearing in August on the basis, *inter alia*, of staff absence during that period.

2.53 More generally, we would note that the CAT does move very quickly when needed as, for example, in the case of merger appeals. In non-urgent appeals, the CAT has improved its performance following a period of longer appeal procedures in the mid-2000s and is now generally regarded as striking the right balance between speed and allowing the proper time for preparation of the parties' cases.

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

2.54 No, for the same reasons expressed in response to question 40.

Q.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?

2.55 We do not believe the CAT needs any additional powers in this respect. It already has sufficient case management powers and does exercise them, for example, to limit the number of experts called. Parties must be given some flexibility in how they construct their cases or else justice will be denied. Moreover, overly rigid rules could be counterproductive. Thus, for example, a strict limit on the number of factual witnesses to be allowed could result in more second-hand, less well-informed evidence.

Q.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?

2.56 We have no objection but we suspect it will rarely be used in appeals, not least since the matters in issue are often highly significant for the businesses concerned. We note that

parties already have considerable scope to limit the issues raised when they frame their notices of appeal.

Q.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?

2.57 We have seen little to suggest that the Competition Commission is dilatory in progressing appeals and, in our experience, it sets firm deadlines for parties that it rarely ever extends. Shorter time limits risk damaging the quality of the Competition Commission's decisions.

Q.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?

2.58 We are not convinced that the Competition Commission needs further case management powers, although there may be a stronger case for giving more powers if appeals are to be made direct to the Competition Commission.

*

* *

The CLA would be happy to discuss any of the comments provided above in more detail if it would be of assistance to BIS.

Consumer Futures

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

11 September 2013

Dear Mr Monblat

Response to "Streamlining regulatory and competition appeals: consultation on options for reform"

Thank you for providing us with the opportunity to respond to this consultation. This submission is entirely non-confidential and may be published on your website.

We wish to comment on the effect of the proposals on the communications sector.

We support proposals by the government to streamline the appeals process for the communications sector. As currently constituted, the system is too slow, too cumbersome and creates too much uncertainty for consumers. This in turn means final outcomes are delayed and the regulator's resource is diverted into to defending decisions legitimately arrived at.

Regulatory decisions in this sector are subject to a more onerous standard of review than in most others, despite it being a more dynamic and fast-moving sector than many. This increases the chance of important consumer benefits being delayed or averted while failing to guarantee a better outcome for consumers. This is because in many cases, the appeal court simply takes a different, rather than a necessarily better, view on forward-facing judgements for which there is no definitive right or wrong answer. Provided the regulator has correctly interpreted the law and the facts and has properly exercised its discretion in doing so, the appeal body should not seek to overturn its decisions.

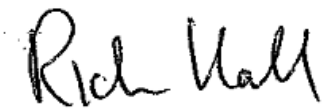
Because of the court's insistence on probing all aspects of the regulator's decision a culture of litigation by big providers has emerged in which the big providers – and often only the big providers - select only the grounds that suit their interests. While it is right that appellants should appeal decisions that they think were not properly arrived at, it cannot be right for big providers to place such an "each way bet" on regulator decisions.

Furthermore, because of this culture of litigation, other rival providers are often incentivised to appeal a decision in order to preserve those parts of the decision with which they are happy. This increases still further the volume of appeals, delaying the final outcome yet further and diverting yet more of the regulator's resource.

A move to the well-established judicial review standard would, we believe, result in swifter outcomes and greater certainty. By encouraging appeals that focused only on substantive errors of fact, law or the exercise of discretion, consumers could enjoy greater confidence in regulatory decisions without losing confidence in their robustness.

We remain concerned that Ofcom takes too long to arrive at decisions and the industry takes too long to implement those decisions. A key reason for this is the current appeals process. Looking forward, a number of important decisions – in particular Ofcom's review of switching – are likely to be delayed by the current appeals regime and the chilling effect it has on decision-making. It is important that consumers are able to switch easily, so delays to much needed reform here will be to the detriment of consumers. We therefore urge the government to move ahead with this long-overdue reform as swiftly as possible.

Yours,



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Friday 13 September 2013

Dear Tony

Streamlining regulatory and competition appeals – consultation on options for reform

Thank you for inviting comments on the consultation "streamlining regulatory and competition appeals – consultation on options for reform". I apologise for this late response and ask that our points can still be taken into consideration.

E.ON's activities include electricity generation, electricity supply, gas shipping and gas supply. These activities are largely regulated through licences. Consequently, our business and the products we offer our customers are subject to a large number of requirements imposed by the licences. This is despite each of these activities being carried out within competitive markets. The licences' importance means that modifications to them can have significant impact on the competitive dynamics of the relevant markets and thus on our customers and ourselves.

Given the importance of the licences, licensees need confidence that when modifications are carried out an appropriate balance will be achieved between resolving the issue warranting the modification and the different interests of the affected licensees. The current appeals mechanism forms a vital component in achieving this balance. A narrower appeals mechanism would weaken this balance and so introduce greater risk for licensees investing in the electricity and gas industries.

The electricity and gas industries have different fundamentals; for example, large volumes of gas can be easily stored whereas it is significantly more difficult for electricity. In both industries there is a large diversity in market participants. Any licence modification process, including the appeals component, has to be sufficiently broad to accommodate the wide range of issues surrounding each industry and

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the diverse nature of the affected licensees. The current merits based approach largely accommodates the wide range.

The current arrangements can appear difficult, slow and expensive. However, in practice for electricity and gas, at least, this acts as a very strong incentive for licensees and regulators to work together to deliver a licence modification that is acceptable to all parties and so avoid appeals. The very small number of appeals and references to the Competition Commission in electricity and gas tends to support this view. Introducing an appeals process, which has narrower scope than present, carries the risk of further limiting licensees' ability to appeal. This could lower the pressure on regulators to work with licensees so as to deliver licence modifications that are acceptable to all parties. Such an increased risk would have to be factored into investment decisions.

It was only in 2011 that the appeals framework around licence modification decisions by Ofgem was revised. This revision introduced the appeal to counter removing the requirement that licence modifications were only introduced with the agreement of the licensee, or after a reference to the Competition Commission. As a result, the grounds for objection to licence modifications had in effect been narrowed. We question why that increased risk for licensees should now be further increased through greater narrowing of the grounds for appeal.

Against this background, we ask that any reforms for streamlining regulatory and competition appeals do not result in further limitation on licensees' ability to appeal licence modification decisions.

I trust this sets out our concerns. Please do not hesitate to contact me if you have any questions about this response.

Yours sincerely

Ian Jackson

Regulatory Compliance Manager

Economic Insight Ltd on behalf of Hutchison 3G UK Limited

Economic evidence relating to the streamlining of regulatory and competition appeals

A report for Hutchison 3G UK Limited

August 2013

Economic Insight

Document contents

1. Executive Summary

The following sets out a short executive summary of our report examining the economic theory and evidence relating to reforming the existing appeals framework, which we have undertaken for Hutchison 3G UK Limited.

The executive summary addresses, in turn:

(i) ***The overall context and background to our report*** – and in particular, the Government's view that the existing framework is 'gold plated'.

(ii) ***Our assessment and analyses of the existing evidence base*** – which we find provides good reason to suppose that there would be significant net benefits of adopting a judicial review type approach (we further find that these benefits have been understated in the existing Impact Assessments).

(iii) ***Our views as to the key economic theories of relevance to determining the pros and cons of reforms to the grounds for appeals*** – where we find that the established literature provides evidence to indicate that a judicial review approach could be welfare enhancing.

1.1. Background context to our report

The UK Government is considering options for reforming the existing appeals framework in relation to regulatory, Competition Act and Communications Act decisions.

The context for this is the EU Communications Framework Directive; Article 4 of which sets out that nation states must reserve a right of appeal against regulatory decisions that ensures that the merits of cases are duly taken into account. Relatedly, the Government has taken the view that the existing appeals framework relating to the communications sector in the UK is 'gold plated' relative to the requirements of Article 4.

The Department for Business Innovation and Skills is currently consulting on whether either the grounds or standard of appeals should be reformed; and also, whether the processes for appeals could be more generally streamlined.

The objective of the consultation is to obtain views on whether the existing appeals framework for regulatory and competition decisions appropriately balances the need to provide a right of challenge against the need to allow regulatory and competition authorities to take decisions in a timely and efficient manner.

The consultation sets out potential packages of changes across four areas:

- **Grounds for appeals** – whether to move from an 'on the merits' approach to one based on judicial review or focused specified grounds.
- **Appeals bodies** – whether to reform the governance of appeals bodies, such as the Competition Appeals Tribunal.
- **Regulatory decision making** – reforms to increase transparency.
- **Streamlining the processes for hearing appeals** – such as target case time limits and/or fast track processes.

With regard to the above reforms, it is the potential changes to the 'grounds for appeal' (specifically in relation to telecommunications markets) which are the focus of his report.

In the above context, Hutchison 3G UK Limited has asked Economic Insight to examine what economic theory and evidence might suggest with regards to the benefits of reforming the grounds for appeals – and specifically, to consider the impact of moving from the prevailing 'on the merits' approach to one based on judicial review.

1.2. Our review of the existing evidence

Both the Department for Business Innovation and Skills and the Department for Culture Media and Sport have previously undertaken Impact Assessments to evaluate the potential impact of reforming the appeals framework (the latter focused on the communications sector, the former had a wider scope). We have therefore reviewed the detail of these Assessments in order to determine what the evidence contained within them might imply regarding the implications of moving to a judicial review type approach to appeals.

The existing evidence supports the case for moving away from an 'on the merits' approach

Based on this review, we find that both Impact Assessments provide a range of evidence that indicates that moving from the existing 'on the merits' approach to one based on judicial review or specified grounds could yield significant net benefits. For example, the Department for Business Innovation and Skills' Impact Assessment reports an expected net benefit of £65m in net present value terms arising from changing the grounds for appeals. These benefits could arise from a variety of factors, including: the time and resource costs savings to all affected stakeholders that would be realised under a more efficient appeals framework; and the gain to consumers of receiving the benefits of regulatory decisions sooner than would otherwise be the case.

The conclusions drawn to date from the existing evidence are overly conservative in relation to the likely benefit of reform

We find that the Department for Business Innovation and Skills' Impact Assessment (which is generally of most relevance) is overly conservative in relation to its evaluation and presentation of the 'most likely' expected net benefit of reforming the grounds for appeals. In particular, based on our own analyses of the data and evidence, we find that the Impact Assessment:

- Is overly cautious with respect to the assumed costs savings that would arise from there being reduced time and resource requirements under a judicial review type approach (indeed, the Impact Assessment explicitly acknowledges this).
- Is similarly over cautious with respect to its estimation of the potential consumer benefits that could arise.

Given the above, we have re-calculated the expected net benefit of the reform option pertaining to the change in the grounds for appeals (Option 2 in the Department for Business Innovation and Skills' Impact Assessment). Based on this, we find that a reasonable interpretation of

the data and evidence could imply that the 'most likely' expected net benefit would be up to £238m in net present value terms (compared to the £65m quoted in the Impact Assessment).

We further find that the existing evidence provides good reason to believe that a specified grounds approach to appeals would generate significant incremental costs over and above that of a judicial review approach. This is based on our view that a specified grounds approach would likely: (i) require additional time and resource at the appeal stage relative to judicial review; and (ii) result in transition costs being incurred during the initial application of the new framework that would not arise under a judicial review approach. However, this would require additional detailed assessment by policymakers, were any specified grounds approach to be further developed and considered.

The scope of our work has been limited to reviewing and evaluating the evidence 'as is' and there is potential for this evidence to be further developed

In undertaking our analysis of the existing evidence, it should be noted that we have not sought to challenge the underlying data on which it is based, nor to develop additional source data. We further note that:

- Firstly, a number of potentially significant benefits and costs have not been quantified in the existing evidence. In particular, we consider that any change to the appeals framework could materially affect the incentives – and therefore behaviours – of stakeholders. We therefore believe that any future option development and evaluation should seek to address this more fully (as set out below).

- Secondly, to date the specified grounds option for reform has not been formally defined at any level of detail. It is therefore difficult to determine, using the existing evidence, what the respective costs and benefits of such an approach might be. Consequently, were policymakers to take forward such an option, considerably more evidence and analysis would be required in order to evaluate its likely pros and cons.

1.3. An economic theory perspective

We consider what lessons can be learned from economic theory with regard to considering the likely impact of reforming the grounds for appeals. Here we note that, whilst there is limited evidence that directly addresses the subject of 'appeals processes,' there is a range of economic theory in a wider sense that is particularly relevant.

Our starting point for identifying relevant theory is to focus on the issue as to how reforms to the appeals framework might impact the incentives, and behaviours, of stakeholders – as this could materially affect the likely costs and benefits of reform.

In relation to the above, within the existing consultation documents and Impact Assessments, some consideration has been given to how reforms might affect behaviours. For example, one concern that has been raised is that any reform that lowers the level of scrutiny might lower the quality of regulatory decisions from a social welfare perspective (and clearly, it is entirely feasible to suppose a less stringent process *might* increase the chances of 'incorrect' regulatory decisions not being corrected). However, in our view – and given the importance of incentives and behaviours to the likely costs and benefits of reforms – a more holistic approach to these matters is required. For example, the precise design of an appeals framework could affect stakeholder incentives in relation to:

- whether appeals are brought in the first place;
- the nature and extent of evidence provided at both the initial and appeals stage;
- the motivations of regulatory and appeals bodies – and therefore the likely welfare consequences of the decisions they take;
- the overall predictability of the regulatory framework; and
- more generally, opportunities for regulatory gaming by stakeholders.

We find that there are three key branches of economic theory relevant to considering the above issues:

- ***Regulatory capture:*** whereby regulatory processes and decisions are influenced by the goals of special interest parties, rather than being exercised to optimise social welfare.

- ***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 firm investment decisions.

Once a fuller assessment of the above economic theory is undertaken, it is clear that there are also some 'in principle' reasons to suggest that a move to a judicial review type approach could be *welfare enhancing.* For example, it could reduce the scope for regulatory capture, increase investment incentives and/or increase incentives for information sharing at the first stage of regulatory determinations. Consequently, it would be erroneous to conclude that 'unquantified' factors necessarily point to the proposed reforms reducing welfare. Rather, in practice it will depend on the details of exactly what option is selected and how it is applied in the

real world. This finding is supported by the expert opinion of Dr Andrew Mell, a Fellow at Corpus Christi College Oxford; and expert academic economist.

Finally, to further illustrate the above, we develop a game theoretic framework, which provides evidence to show that – given a particular set of parameters and assumed incentives – reforms to the grounds for appeals framework (such as those under consideration) could very well be welfare increasing.

2. Introduction and context

The following sets out the overall background context to our report for Three, and briefly summarises the key issues.

The key context to our work is as follows:

(i) ***The UK Government is considering options for reforming the existing appeals framework*** in relation to regulatory and competition law decisions.

(ii) In particular, ***the Department for Business Innovation and Skills is currently consulting on whether either the grounds or standard of appeals should be reformed***; and also, whether the processes for appeals could be streamlined.

(iii) ***Hutchison 3G UK Limited has asked Economic Insight to examine what economic theory and evidence might suggest*** with regards to the benefits of reforming the grounds for appeals – with a particular focus on the telecommunications sector.

2.1. Introduction

This report sets out a range of economic evidence and analysis to support Hutchison 3G UK Limited's (Three) response to the Department for Business Innovation and Skills' (BIS) consultation on *'Options for Reform'* in relation to *'Streamlining Regulatory and Competition Appeals.'*[1]

The purpose of this is to provide an economics perspective as to the relative merits of the options currently under consideration by the BIS. Specifically, Three asked us to provide an assessment as to what economic theory and evidence might imply with regard to changing the grounds for appeals (in relation to: the Communications Act; Competition Act; and price control decisions)[2] from an 'on the merits' basis to either a flexible judicial review or specified grounds of appeal approach. This, therefore, is the central focus of our report.

In the remainder of this section, we set out the key background and context to our report. The remainder of this document is structured as follows:

- Section 3 provides our assessment of the existing evidence in relation to the likely costs and benefits of changing the grounds for appeals – and its implications for Three.
- Section 4 sets out our assessment of the relevant economic theory and its implications for reform options.
- Annex A contains a detailed literature review, used to inform the content set out in Section 4.

2.2. Key background context

In the following we describe the context of relevance to our report for Three. In particular, we provide a brief summary of: (i) the key background issues; (ii) the BIS 2013 consultation; and (iii) Three's position in relation to these matters.

2.2.1. Background and key issues

Both the grounds for appealing regulatory and/or competition authority decisions – and the standard of review to which they are subjected – can materially affect the balance between: (a) ensuring that there is an appropriate right of challenge; and (b) allowing the relevant authorities to make regulatory and competition decisions efficiently. Consequently, quite how the grounds / standard of appeal are determined can, in principle, substantially impact the overall costs and benefits of any broader appeals framework.

Related to the above, at this time the UK Government is considering options for reforming the existing appeals framework (see following discussion of the latest BIS consultation). This review is being undertaken in the context of the EU Communications Framework Directive (The Framework Directive); Article 4 of which sets out that nation states must reserve a right of appeal against regulatory decisions that ensures: *"that the merits of the case are duly taken into account."*[3] Of particular relevance to Three, the Government has expressed a view that the current UK appeals framework is *'gold-plated'* relative to the requirements formally laid down by The Framework Directive.

The key issues currently under consideration (which are set out more fully subsequently) are: whether the current appeals framework should be amended in terms of the grounds and standard of appeal; and whether the appeals processes can be streamlined more generally.

This current BIS consultation succeeds two earlier consultations relating the same issues: (i) the BIS (September 2010) consultation; and the DCMS (August 2011) consultation.[4]

2.2.2. The BIS 2013 consultation

On June 19th 2013 the BIS published its consultation on *'Options for Reform'* in relation to Streamlining Regulatory and Competition Appeals.

The objective of the consultation is to obtain views on whether the existing appeals framework for regulatory and competition decisions appropriately balances the need to provide a right of challenge against the need to allow regulatory and competition authorities to take decisions in a timely and efficient manner.

The consultation seeks views on the case for streamlining the current appeals process so that:

- It is more focused on identifying material errors;
- Appeals bodies' expertise is applied in the most appropriate way and appeal routes are more consistent across sectors, to provide greater certainty and better use of resources;
- It is more accessible to all affected parties;

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1 *'Streamlining Regulatory and Competition Appeals – consultation on Options for Reform.' The Department for Business Innovation and Skills (2013).*

2 *Specifically: the Communications Act (2003); the Competition Act (1998); and where price control decisions relate to all such decisions made by Ofcom in relation to the telecommunications sector.*

3 *See Article 4(1) of the: 'EU Electronic Communications Framework Directive.'*

4 *'Consultation regarding implementation of the revised EU electronic communications framework.' The BIS (September 2010); and 'Consultation regarding the implementation of the revised EU electronic communications framework (the revised framework)'. DCMS (August 2011).*

- Incentives in the system are aligned with Government's objectives for the appeals framework;
- Appeals processes are as efficient and cost effective as possible.

The consultation sets out potential packages of changes across four areas:

» Firstly, in relation to **grounds for appeals,** the consultation considers the case for changing from the existing 'on the merits' grounds to either a judicial review (JR) standard, or one of 'focused specified grounds' (specified grounds).

» Secondly, with regard to ***appeals bodie***s, the consultation considers a range of reforms, including changes to the governance of the Competition Appeals Tribunal (CAT).

» Thirdly, the consultation considers reforms to **regulatory decision making**, designed to improve transparency.

» Fourthly, changes designed to **streamline the processes for hearing appeals** are considered – such as target case time limits and/or fast track processes.

With regard to reforms to the 'grounds for appeal' – which is the focus of this report – the proposed change of central importance to Three is in relation to the standard of review for appeals (regarding the Communications Act, the Competition Act and in relation to price control decisions) from an 'on the merits' basis to – and as indicated above – either a JR or 'specified grounds' basis.

2.2.3. Three's position

Three has previously submitted a range of evidence and argumentation in relation to the above issues. In particular, it has submitted responses to both the BIS (2010) and DCMS (2011) consultations addressing these matters. In the following we briefly summarise the key aspects of Three's position.

Three agrees with the Government that the current regime for appeals of Ofcom decisions goes substantially beyond the requirements of The Framework Directive. In particular, Three believes that the current approach has resulted in detailed litigations that have deflected Ofcom's resources from the areas on which it should be focused; but have also imposed material costs on the industry (particularly in relation to smaller players). Consistent with this, Three has therefore argued that the appeals regime should move to one of 'enhanced JR'.

In support of this overall position, Three has raised a number of specific points, which are as follows:

» **JR is transparent and well understood**, unlike the existing approach. Three suggests that the prevailing appeals regime contains significant areas of uncertainty as to what the precise scope of 'appeals on the merits' means in practice. This uncertainty relates to both: (i) when litigants are permitted to introduce evidence in proceedings not provided to Ofcom; and (ii) the level of scrutiny that the CAT should apply to Ofcom decisions. Three believes that this uncertainty means that each time a new case is brought to the CAT, there is scope for such issues to be debated. By comparison, the modern JR process is well established and understood.

» **The current approach is inefficient and creates perverse incentives.** Three believes that modern JR is fast, efficient and focused on material flaws in decision-marking. This contrasts with the slow and resource intensive processes associated with the prevailing approach. Three is further of the view that the existing framework could: (i) create incentives for certain players to appeal even when there is limited chance of success as the downside is limited; (ii) create incentives for parties to withhold evidence until the appeals stage (or at least not to consider fully what evidence could be developed and submitted prior to appeal).

» **The existing framework favours incumbents or players with more resource.** Three notes that substantial resources are required under the prevailing approach, whereby every regulatory decision is potentially subject to detailed scrutiny at the appeal stage. Three considers that, as the cost of these is the same regardless of whether a party is a large established player or a small new entrant, the burden of the regime is, arguably, higher in proportionate terms for smaller operators (who might be vital to the functioning of competition).

» **The current system is inconsistent with other sectors.** Three observes that the majority of decisions regulators take in other sectors are only subject to JR (or enhanced JR). Three believes that there are no good reasons to suppose that the standard of review should differ across other sectors. If anything, the fast moving nature of the communications sector is a good reason for more responsive – rather than protracted – litigation.

» **For practical reasons, the existing system is unworkable.** The BIS has acknowledged that the revised Framework would require changes that would have profound impacts on Ofcom's resourcing; and accordingly, Three considers the current position to be unsustainable.

3. Review of existing evidence on the costs and benefits of reforming grounds for appeals

This section sets out our review of the existing evidence concerning the potential costs and benefits of reforming the 'grounds for appeals.' We specifically analyse both the BIS and DCMS Impact Assessments and provide our view as to what inferences should be drawn from them.

Our key conclusions and findings are as follows:

(i) Both the BIS and DCMS Impact Assessments ***provide evidence that moving from the existing 'on the merits' approach to appeals to one based on JR*** or 'specified grounds' could yield significant net benefits.

(ii) ***The 'most likely' estimate of the expected net benefit of reform in the BIS report is overly conservative*** (£65m NPV). We find that, using the data and evidence relied upon by the BIS, a reasonable view of the most likely net benefit could be £238m (NPV).

(iii) Although the existing evidence limits the inferences one can draw regarding differences between a JR and 'specified grounds' approach, there is sufficient basis for supposing that ***specified grounds would impose significant incremental costs relative to JR.***

3.1. Section overview

Here we set out a summary – and review – of the existing evidence and analysis of relevance to a consideration of changes to the prevailing grounds for appeals framework. In particular, we provide a critical assessment of the existing evidence regarding the potential costs and benefits of moving away from the existing 'on the merits' approach to one based on JR. In doing this we present a range of analyses of our own relating to the existing evidence base. The remainder of this section is structured as follows:

- A review of the BIS Impact Assessment.
- A review of the DCMS Impact Assessment.
- A brief review of evidence contained in the Towerhouse Consulting report.
- Finally, we summarise our key conclusions and findings, based on our analyses of the existing evidence.

3.2. Review of the BIS Impact assessment

Below we set out our review of the analysis undertaken by the BIS to inform its Impact Assessment of moving from the current 'on the merits' approach to appeals, to one based on either JR or 'specified grounds.' In undertaking this review, we examine the details of the BIS' methodology and calculations; and provide our assessment and interpretation of these.

3.2.1. Summary of the BIS analysis

The BIS Impact Assessment examines the potential costs and benefits associated with its Options for Reform. It therefore addresses options relating to: changes to the standard of review for appeals (Option 2 in the report); and streamlining of the regulatory process (Option 3 in the report). As Option 2 is of primary relevance to the scope of our work, we have focused on this.

It is important to note that, whilst Option 2 refers to the option of moving from an 'appeals on the merit' approach to an alternative approach (either JR or 'specified grounds'), the BIS Impact Assessment does not precisely define what this means in practice. In particular, the description of Option 2 provided is as follows: *"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."*[5]

In relation to this, we note the following:

- From the above description, we cannot determine the extent to which Option 2 is explicitly based on assuming a JR approach, a 'specified grounds' approach, or some mix of both (relative to the prevailing 'on the merits' approach).
- To the extent that Option 2 might reflect elements of a 'specified grounds' approach, we do not know on what basis that might have been defined and therefore, what assumptions might have been made in that regard.
- The approach to the analysis and evidence contained in the Impact Assessment would - nonetheless - seem to be broadly consistent with the BIS *primarily* having a JR approach in mind. In particular, the cost savings associated with there being reduced time at CAT appeals specifically references the difference in appeals time under JR relative to an overall average (discussed further subsequently).

The above has a number of important implications regarding both how one can reasonably interpret the analysis, but also with regard to future option and policy development. Firstly, we think it naturally limits the extent to which one can draw inferences regarding the likely differences in the costs and benefits under a JR versus a 'specified grounds' approach (but that is not to say that no such inferences can be dawn). However, as a number of the parameters relied upon by the BIS are made with reference to a JR approach, we suggest that the reported net benefits of Option 2 could be interpreted as being 'most consistent' with a move to a JR framework, rather than one based on 'specified grounds.' Thirdly, given the above limitations, were the BIS to consider in more detail a 'specified grounds' approach, considerable further evidence and analysis would be required in order to both accurately define that – and subsequently, to determine its likely associated costs and benefits.

3.2.2. Our review of the BIS Impact Assessment

The BIS estimates that the 'most likely' potential benefits of moving to a JR or 'specified grounds' of appeals basis would be £65m in net present value (NPV) terms. In other words, it expects there to be material benefits from reforming the current framework for appeals. This estimate rests on two key assumptions:

- First, the amount of time – and therefore cost – saving associated with the appeals process itself (where costs are assumed to be saved in

[5] *'Impact Assessment: Streamlining Regulatory and competition Appeals: consultation on options for reform.' The BIS (June 2012). Page 16.*

relation to: appellants, regulators, courts/tribunals and interveners).

» Second, the gain to consumers associated with them receiving the estimated benefits associated with regulatory decisions earlier (i.e. avoiding benefits being delayed).

Having reviewed the BIS Impact Assessment, we think that there are reasons to believe that the BIS has been unnecessarily cautious in relation to both of the above assumptions (and therefore, its quantification of the 'most likely' net benefits of moving away from an 'on the merits' framework).

3.2.2.1. Re-assessing consumer benefits

Starting with the second of the above two assumptions, the BIS states in its Impact Assessment that: *"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 £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."*[6] The BIS further states that the source for its information is the DCMS Impact Assessment.[7]

We have reviewed the data of relevance in the DCMS Impact Assessment, and note that in relation to the BIS assumptions:

» Firstly, that the average cost to consumers per case per month of delay implied by the DCMS data is £0.9m (£0.7m excluding the pay TV case).

» Second, that in its analysis, the BIS assumed a saving of just £0.1m per case per month of delay. However, this appears to be only an assumption, with no evidential basis. In fact, this amount is lower than the implied saving in all of the relevant examples included in the DCMS report.

The following table shows the relevant DCMS data and the implied cost to consumers per month of delay.

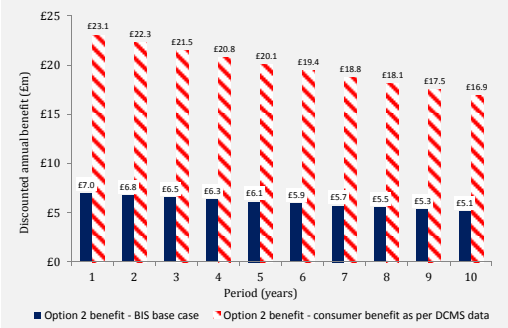
Table 1: Cost of delay to consumers

Regulatory decision / case	Delay (months)	Estimated consumer benefit of decision (£m)	Cost of delay per month (£m)
Pay TV market investigation	12	£20.00	£1.67
Mobile mis-selling	3	£3.00	£1.00
Mobile number portability	1	£0.16	£0.16
Tackling abandoned and silent calls	2	£1.70	£0.85
Average			**£0.92**

Source: Economic Insight analysis of DCMS figures[8]

Given that there does not appear to be an evidential basis for the £0.1m cost of delay (per case per month) assumed by the BIS to quantify the benefit to consumers, we think it would be appropriate to recalculate the net benefit of the BIS's Option 2 to reflect the data reported by the DCMS (i.e. we have assumed a benefit of avoided delay of £0.9m per case per month) as shown in the following figure.

Figure 1: Net benefit of BIS Option 2 re-stated for increased consumer benefits from avoided delay



Source: Economic Insight

The above analysis shows that the expected benefit of the BIS' Option 2 increases from £65m to £198m in NPV terms, once the consumer benefit implied by the DCMS figures is applied.[9]

[6] *'Impact Assessment: Streamlining Regulatory and competition Appeals: consultation on options for reform.' The BIS (June 2012). Page 17.*

[7] *'Reforming the Appeals Regime for the Electronic Communications Sector.' DCMS (2011).*

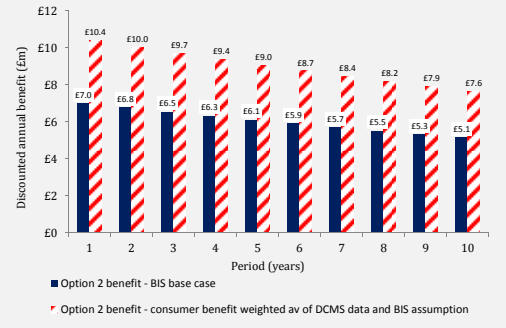
[8] *Based on Table 2 of DCMS Impact Assessment.*

[9] *Discounted at 3.5% as per the BIS Impact Assessment. Note, the BIS reports a net benefit of £65m in relation to Option 2, but using the stated cost figures in the report, we calculate it to be £60m. This does not*

This suggests that the expected benefits of moving from the existing 'on the merits' framework to one based on JR could be substantially higher than is reflected in the BIS' 'most likely' assessment of the costs and benefits.

We note that the reason forwarded by the BIS for assuming a lower consumer benefit of just £0.1m (per month delay per case) was that the DCMS data only focused on the communications sector, whereas the BIS was seeking to assess benefits across a range of sectors. The BIS was therefore concerned that, if the consumer benefits associated with communications cases is generally higher than the overall average, using the DCMS data might over-state the benefit of its Option 2. As a sensitivity therefore, we have further re-calculated the expected net benefit of Option 2 based on a weighted average of the £0.92m value of delay per case per month (as per the DCMS data) and the £0.1m assumed by the BIS. In particular, we have applied the £0.92m value only to Ofcom telecoms cases as identified in the BIS cost model, and have applied the lower £0.1m value to all other cases.[10] The results of this are shown in the following figure.

Figure 2: Net benefit of BIS Option 2 re-stated based on weighted average of BIS assumption and DCMS data regarding the value of delay



Source: Economic Insight

Under this scenario, the expected net benefit of the BIS' Option 2 is £89m (NPV), which is lower than that shown in our first analysis, but still substantially higher than the £65m reported by the BIS. In interpreting this, however, it is important to recall that there does not appear to be any evidential basis for the £0.1m value of delay per month assumed by the BIS, which we have used to calculate the weighted average value of case delays to consumers.

It should be noted that the above analyses – which use the conceptual approach adopted by the BIS – rests on the view that the total amount of consumer benefit from regulatory decisions is unaffected by the appeals framework in question. In such circumstances, the consumer benefit of an expedited appeals framework is that consumers receive the same expected welfare gain sooner. In practice however, it may be that: (i) the total expected consumer welfare associated with a regulatory decision is itself influenced by the appeals framework; and could be greater or smaller than under the status quo; and / or (ii) that the time period for which expected benefits persist could also be a function of the appeals framework, which would affect the NPV of consumer benefits.

3.2.2.2. Re-assessing the benefits of potential cost savings

We also believe that the BIS has been overly cautious with regard to estimating the benefit of the cost savings associated with the reduced time and resource requirements of appeals under its Option 2 approach. In fact, the BIS explicitly acknowledges this, as follows: *"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… There is some evidence that our estimate is too conservative – for example, cases currently taken by the CAT on a JR basis take an average of 4 months compared to an overall average of 9.07 months of all CAT cases between 2008 and 2012."*[11]

In relation to the above, we note that, based on the ratio between the average 4 months at CAT under a JR approach to the overall average of 9.07 months for CAT appeals, a JR approach *could* imply a time (and therefore cost) saving of 44%, rather than the 25% assumed by the BIS. This would be true if one assumed that the whole of the difference in 'case time' between JR and the CAT average was due to the grounds/standard for appeal, rather than other differences in the characteristics of cases (in practice, it would be practically challenging to control for such differences).

In addition, we note that the DCMS assumed that the time/resource savings would translate to a 20% cost saving ultimately increasing to a 30% reduction. Importantly, the DCMS further remarked that *"both of these estimates are considered to be conservative."*[12] Given the DCMS' interpretation of its own analysis – and in the context of the substantial difference in time taken

impact our analysis, which focuses on the incremental change of using alternative input assumptions.

[10] *This has been done by using the data shown in the BIS 'Cost Model' shown in Annex A of its Impact Assessment, whereby we have weighted the delay benefit values by the 'current time' cases take in months for telecoms cases (i.e. those only marked as 'Ofcom, telecoms') and 'all others'.*

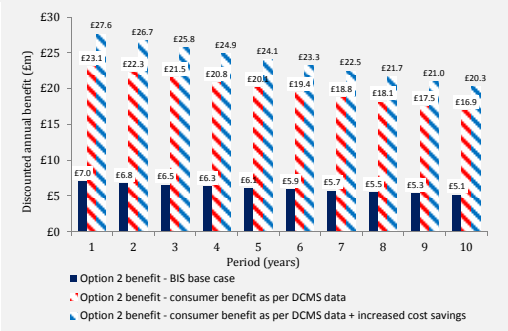
[11] *'Impact Assessment: Streamlining Regulatory and competition Appeals: consultation on options for reform.' The BIS (June 2012). Page 16.*

[12] *'Reforming the Appeals Regime for the Electronic Communications Sector: Impact Assessment.' DCMS (2011). Page 19.*

at CAT appeal under JR relative to the average – we believe that there is already material evidence to suppose that the BIS' assumption of only a 25% cost saving is inappropriately small.

We have, therefore, again re-calculated the expected net benefit of Option 2 as reported by the BIS, reflecting both: (i) the increased consumer benefits (as shown previously in Figure 1); and (ii) increased cost savings of 44%. The results are shown in the following figure.

Figure 3: Net benefit of BIS Option 2 re-stated for increased consumer benefits from avoided delay and increased cost savings



Source: Economic Insight

The above analysis shows that, once both the consumer benefits consistent with the DCMS data and the increased savings in time costs (consistent with the evidence described here) are included, the expected net benefit of the BIS Option 2 increases to £238m in NPV terms.

There are reasons to believe that the BIS' assessment of the 'most likely' net benefit of moving to a JR or specified grounds approach (of £65m in NPV terms) is too conservative. We find that, using appropriate data and evidence – to which the BIS Impact Assessment makes reference – the 'most likely' case could yield a significantly higher expected net benefit of up to £238m in NPV terms."

In summary, there are reasons to believe that the BIS' assessment of the 'most likely' net benefit of moving to a JR or 'specified grounds' approach (of £65m in NPV terms) is too conservative. We find that, using appropriate data and evidence – to which the BIS Impact Assessment makes reference – the 'most likely' case could yield a significantly higher expected net benefit of up to £238m in NPV terms. We further note that this figure is well within to total possible range of projected benefits calculated by the BIS, which included an upper bound of £510m (NPV).

3.2.2.3. Potential costs

The BIS Impact Assessment identified a number of potential costs associated with moving from an 'on the merits' approach to appeals to a JR or 'specified grounds' basis (i.e. its Option 2). However, the BIS has not attempted to monetise these costs. They are described as follows:

- That there may be a risk that by reducing the level of scrutiny there may be an increased probability of incorrect regulatory decisions not being overturned.
- That there may be two types of transition costs – specifically:
  - The transition costs to market participants of understanding the new regime. The BIS has indicated that it expects these costs to be low.
  - There could be a short-term increase in the number of appeals as firms test how courts will interpret the new standard of review.

We believe that both of the identified 'transition costs' would be negligible (or potentially, even zero) under a JR approach. This is because:

- Firstly, the JR framework is already well established and understood by law firms, economists and more generally by commercial entities. Therefore, it is not clear that any 'information' would need to be provided to market participants in order to understand a JR approach.
- Secondly, again because the JR framework is already established and has been tested substantively with case law, it seems doubtful that under a JR approach one would expect even a short term increase in the number of appeals.

The above potential transition costs would seem, therefore, to be more relevant to a 'specified grounds' approach to appeals, where clearly one would: (i) need to set out and subsequently communicate to relevant stakeholders exactly how the new regime would work; and (ii) as by definition there would be not any case law / precedent relating to those 'specified grounds' of appeal, a short-term increase in the volume of appeals *may* occur.

3.2.2.4. Inferences regarding differences between 'specified grounds' and JR approaches

As noted earlier, there are natural limitations as to the extent one can draw inferences regarding potential differences in the costs and benefits between a 'specified grounds' and JR approach using the BIS Impact Assessment.

Nonetheless, we think that a 'specified grounds' approach is likely to have two types of

incremental costs (over and above a JR approach) that one could seek to quantify:

- ***Additional time and resource costs.*** Firstly, under a 'specified grounds' approach there is likely to be more uncertainty as to the exact parameters of what is 'in scope' in relation to any given appeal. Therefore, appeals are likely to be more time and resource intensive relative to a JR approach. For example, at appeal parties will spend additional time in oral argumentation in order to determine the relevant scope. In principle, this additional time could be assessed and quantified.

- ***Transition costs.*** Secondly, we think it doubtful that a JR approach would result in there being any material transition costs (for reasons described earlier). Consequently, if one could separately identify and measure transition costs, these could also be considered to be incremental costs associated with a 'specified grounds' approach over and above a JR approach.

The BIS Impact Assessment can be used to provide an indicative quantification of the incremental cost of 'specified grounds' relative to JR arising from the *'additional time and resource costs'* that could be incurred under 'specified grounds.'

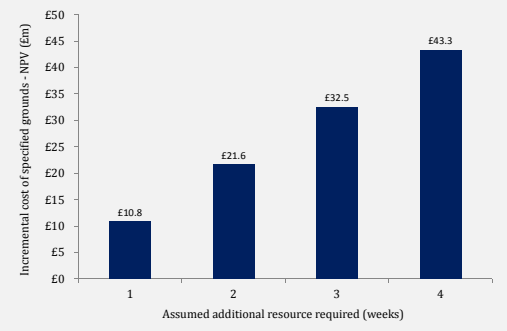
The BIS document sets out that the average length of time at CAT appeal is just 4 months under JR, relative to a 9.07 months overall average. We believe that a 'specified grounds' approach – whilst more efficient than the status quo – would be more time and resource intensive than JR. Consequently, the time spent at appeal under 'specified grounds' is likely to be higher than 4 months, but less than 9.07 months.

Starting from our previously described analysis of the BIS Impact Assessment, we calculated the expected net benefit 'per week of resource saved' implied by the data.[13] We then undertook a 'what if' analysis, to examine what the incremental cost of 'specified grounds' might be (relative to JR) were we to assume that 'specified grounds' required between 1 and 4 weeks of additional time (and therefore, resource). We believe a 'what if' approach is appropriate because:

- at this time the precise definition of 'specified grounds' is uncertain - and consequently, one cannot objectively determine the likely time and resource implications; and
- even once a definition of 'specified grounds' is determined, the estimation of any incremental resource relative to JR would be somewhat subjective.

The results of our analysis are shown in Figure 4.

Figure 4: 'What if' analysis of incremental cost of specified grounds relative to JR



Source: Economic Insight

We find that, using the above methodology, the incremental costs of 'specified grounds' relative to JR could be between £11m and £43m in NPV terms, which is material relative to the overall levels of expected benefit under consideration. We further note that – in addition to the above 'time and resource' costs – transition costs could also be regarded as being incremental to 'specified grounds' relative to JR; and this is considered further subsequently.

With regard to transition costs, the BIS Impact Assessment does not seek to quantify these; but, rather, acknowledges that they would arise and provides a brief description of them. There is, therefore, no quantitative evidence within the BIS Assessment that allows us to estimate the incremental cost of 'specified grounds' (relative to JR) associated with transition costs. However, the DCMS Impact Assessment *does* include data that allows us to infer the size transition costs. We therefore subsequently make use of this to examine the potential incremental cost of 'specified grounds' relative to JR (see our review of the DCMS Impact Assessment below).

3.3. DCMS analysis

Below we provide a summary and review of the Impact Assessment published by the DCMS in 2011. In particular – and as per our review of the BIS analysis – we set out both: (i) a short summary of the key issues raised by the Assessment; and (ii) our critical review of the Assessment, including providing our own analysis of the data and evidence contained within it and our views as to the inferences that should be drawn of relevance to Three.

3.3.1. Summary of the DCMS analysis

In June 2011 the DCMS published its Impact Assessment with regards to 'Reforming the

[13] *Specifically we started from our revised net benefit, including the increased cost saving of 44% and the revised consumer benefit. We then divided this by the number of 'saved' weeks implied by the methodology (i.e. the reduction from 9.07 to 4 months in time spent at appeal, expressed in weeks) then multiplied this by the assumed additional number of weeks required under specified grounds relative to JR. NPVs were calculated using a 3.5% discount rate.*

Appeals Regime for the Electronic Communications Sector.' As noted above, the BIS made reference to a range of the data and assumptions contained within this in its more recent Impact Assessment.

The scope of the DCMS Impact Assessment was limited to the communications sector (noting that the BIS assessment described earlier had a much wider scope). In particular, the DCMS specifically evaluated the potential costs and benefits associated with Government choosing to: *"reform the appeals process and implement a JR which duly takes account of the merits"*[14] relative to maintaining the status quo 'on the merits' approach.

In line with the BIS Impact Assessment, the DCMS found that there were likely to be material benefits of moving away from an 'on the merits' approach to appeals to one based on JR. The DCMS specifically found that the expected net benefit was £173m in NPV terms (with a low estimate of £117m and a high of £229m). It should be noted the best estimate of £173m is materially higher than the £65m reported by the BIS – this is particularly noteworthy given that the scope of the DCMS analysis covers only the communications sector, whereas the scope of the BIS analysis is much broader. Our review of the DCMS approach suggests that this is due to a number of factors – but in particular, the DCMS assumed materially higher annual consumer benefits than those assumed by the BIS.

Conceptually the key 'types' of benefits considered (and quantified) by the DCMS are consistent with those included in the BIS Impact Assessment; namely:

- A saving in time, resource, and therefore cost associated with appeals being less time consuming to undertake.
- A gain to consumers associated with receiving the 'benefits' of regulatory decisions.

In addition, the DCMS makes reference to a number of potential wider benefits, which include:

- By making regulatory decisions less prone to delay there will be greater certainty, which may mean that firms can better plan their investments.
- It could also reduce entry barriers and promote innovation.

With regard to costs; as per the BIS assessment, the DCMS identified potential transition costs associated with an increased number of appeals as stakeholders initially seek to test the parameters of any new regime.

3.3.2. Our review of the DMCS Impact Assessment

As noted above, a key difference in the analysis contained in the DMCS Impact Assessment relative to that of the BIS is that the DCMS assumes a materially higher level of consumer benefit. Specifically, we note that the DCMS analysis assumes annual consumer benefits of between £12m and £24m pa, compared to a figure of £2m[15] in the BIS Impact Assessment. This difference is even more pronounced when one considers that the DCMS analysis was restricted to the communications sector, whereas the scope of the BIS Impact Assessment was much wider.

The reason for this material difference arises from there being fundamentally varying approaches across the two assessments. In particular;

- The DCMS approach is based on multiplying the total estimated annual consumer benefit associated with regulatory decisions by an assumed number of delayed cases pa (specifically, it multiplies an annual consumer benefit per delayed case of between £2m and £3m by an assumed 6 or 8 delayed cases to get to the range of £12m-£24m of annual consumer benefit as quoted above).
- The BIS approach, on the other hand, uses the same data as relied upon by the DCMS, but quantifies the gain of having expedited appeals in terms of consumers receiving the total expected welfare benefit of regulatory decisions *sooner* than under the status quo. This is done by assessing the average delay 'per month per case' that would be avoided under a faster appeals process.

In simple terms, the DCMS approach appears to be akin to assuming that under the prevailing appeals framework, none of the expected consumer benefit from regulatory decisions is realised, but that all of it is realised under a revised JR or 'specified grounds' approach. This, in our view, is a questionable approach (i.e. just because a regulatory decision is delayed, that does not mean to say that none of the associated consumer benefits would be realised).

The BIS approach, however, assumes that under both the current and any revised approach to appeals, consumers would ultimately receive the same *total* expected benefits from regulatory decisions in absolute terms. Rather, it's just that these benefits are currently deferred due to the slowness of appeals under the prevailing 'on the merits' approach. Therefore, from an NPV perspective, consumers are better off under an expedited process, as those benefits are realised earlier.

[14] *'Reforming the Appeals Regime for the Electronic Communications Sector.' Impact Assessment DCMS (2011). Page 1.*

[15] *Rounded up from £1.96m*

Given the above, we consider that the approach taken in the more recent BIS Impact Assessment is the more appropriate; and that consequently, the DCMS analysis is likely to have materially over-stated potential consumer benefits.

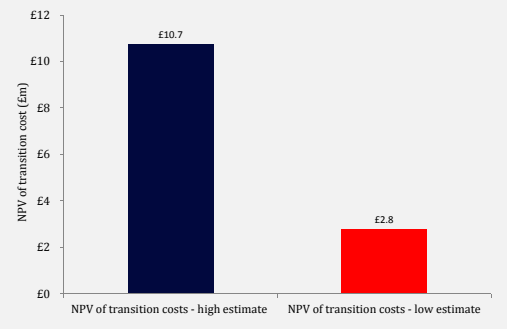
3.3.2.1. Estimating transition costs

Of particular relevance to Three's position, the DCMS Impact Assessment did implicitly include a quantification of 'transition costs' of moving to a new regime. These are assumed to capture, in part, an initial increase in the number of appeals associated with stakeholders seeking to test the parameters of a new framework.

In our view, such 'transition' costs are far more likely to arise under a 'specified grounds' approach to appeals rather than under a JR approach. This is because JR is already a well-established process. Consequently, we think that one interpretation of the transition costs is that they could represent one element of the 'incremental costs' of adopting a 'specified grounds' approach (over and above a JR approach).

We have therefore calculated the NPV of the transition costs implied by the DCMS analysis, as shown in Figure 5.

Figure 5: Transition costs implied by DCMS analysis



Source: Economic Insight

The analysis shows that, using the DCMS figures, transition costs range from £2.8m to £10.7m pa on an NPV basis. We would suggest that this provides indicative evidence of *one* element of the incremental costs of adopting a 'specified grounds' rather than JR approach. It should further be noted that the DCMS assessment related only to the communications sector; but in reality, such costs would be incurred across the range of sectors to which the reforms are applied. Consequently the full extent of any transition costs associated with 'specified grounds' could be materially higher than implied by these figures.

Finally, it should also be noted that these transition costs would be additional to any incremental time/resource costs associated with 'specified grounds' of appeals, as estimated previously in Figure 4.

3.4. Other evidence: Towerhouse Consulting Report

In 2010 Towerhouse Consulting published a report examining the existing appeals regime in relation to the telecommunications sector (i.e. under Section 192 of the Communications Act 2003).[16]

The report recommended that the existing 'on the merits' approach to appeals works well and should be retained. Specific findings put forward in the report include:

- 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."*[17]
- 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.

We have a number of observations regarding the conclusions reached in the Towerhouse report – and the evidence on which they are based. These are as follows.

First, the report contains largely qualitative evidence, such as (i) structured interviews with industry stakeholders; (ii) a qualitative review of relevant appeals; and (iii) 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.

Second (and related to the above) the authors assert that under the current approach appeals

[16] *'Appeals from Ofcom decisions: Time for reform?' Towerhouse Consulting (2011).*

[17] *'Appeals from Ofcom decisions: Time for reform?' Towerhouse Consulting (2011). Page 4.*

are *"not generally excessively lengthy."*[18] We note that (i) this is an entirely subjective statement; and one could equally review the same data on appeals timings and forward the counter view; and (ii) that in any case, that is not to say that an alternative approach, such as JR, would not be less lengthy, with associated cost savings which need to be measured (as per the BIS Impact Assessment).

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 stakeholder's experience of it makes it relatively certain compared to any new appeals framework. We have a number of observations regarding the above points:

- In order to determine whether the existing framework either creates or mitigates uncertainty, one must firstly define the appropriate counterfactual, which the report fails to do. In particular, under a JR approach (rather than a 'specified grounds' approach) a number of the points raised in the report would seem to be less relevant.

- Notwithstanding the above, the question as to whether one form of appeal makes it more or less likely to arrive at the 'correct' answer is irrelevant to the issue of uncertainty. What matters from an investment perspective is the predictability of regulatory decisions, regardless of whether those decisions are optimal from a social welfare perspective.

- We agree that the fact that the existing regime has been established for some time means that there will be an 'experience' value that might mitigate uncertainty relative to an entirely new appeals framework. However, as noted elsewhere, the modern JR process is itself well established and understood and so, relative to that, it is hard to see how the 'experience' value associated with the prevailing 'on the merits' approach would lead one to conclude that it provides more certainty. This relates to our first observation above – that the report failed to properly define a counterfactual.

Finally, we note that the report sets out a game theoretic framework to illustrate the potential benefits of the prevailing 'on the merits' approach to appeals. However, here we note that the existence of any 'in principle' benefits does not preclude the possibility of alternatives being more net beneficial once those alternatives are properly defined and their respective costs and benefits quantified. Furthermore, it is entirely possible to similarly use a game theoretic framework to demonstrate the potential advantages of a JR approach, which we do in Section 4 of this report.

3.5. Summary of our views regarding the existing evidence base

Having reviewed and conducted an analysis of the existing evidence base, we find that:

- Both the BIS and DCMS Impact Assessment provide evidence to suppose that moving away from the existing 'on the merits' approach to appeals (to one based on JR or 'specified grounds') is likely to yield significant net benefits.

- Of these, the BIS Impact Assessment is potentially of most relevance and – whilst the option evaluated is not explicitly defined – we consider it to be most consistent with a move to JR.

- We further find that the 'most likely' estimate of the expected net benefit in the BIS report is overly conservative, given a reasonable interpretation of the data and evidence on which it is based. In particular, we think that a net benefit of £238m in NPV terms could represent a reasonable interpretation of the 'most likely' outcome.

- Both the BIS and DCMS Assessments also provide some evidence and data that can be used to infer the potential advantages of a JR approach relative to a 'specified grounds' approach. In particular, they allow us to identify the potential incremental costs of a 'specified grounds' approach, which could be in excess of £43m in NPV terms (although this should be regarded as indicative only at this stage).

In terms of areas where we think any future assessment of policy options could benefit from additional analysis, we have two main observations:

- Firstly, a 'specified grounds' approach to appeals could mean a variety of different things in practice. Consequently, to properly evaluate the costs and benefits of this relative to either JR or the prevailing 'on the merits' approach, one firstly needs to define – at a detailed level – exactly what such an option would look like and to consider how it would apply in practice. At present, we think the existing evidence base

[18] *'Appeals from Ofcom decisions: Time for reform?' Towerhouse Consulting (2011). Page 19.*

provides a good indication of the relevant categories of costs and benefits of moving away from an 'on the merits' approach, and also a reasonable view as to the potential 'order of magnitude' of those benefits with respect to a JR type approach. However, the ambiguity around 'specified grounds' means that at present, only limited conclusions can be drawn regarding the potential costs and benefits of this. Critically, therefore, this means that were policy makers to consider taking forward a 'specified grounds' approach, considerable further work and analysis would be required in order to ensure that one could robustly determine its suitability. Without that, there would seem to be considerable risk of developing a policy that (based on the existing data) could have substantial incremental costs relative to a JR approach.

- Secondly, we think that more work could be done to explore and develop evidence around the (currently) non-quantified benefits and costs associated with the reforms to grounds for appeals. In particular – and as we discuss further in the subsequent section of this report – we think that the proposed reforms have the potential to impact stakeholder incentives in a number of ways that could materially affect costs and benefits. Whilst we understand that evidencing such costs and benefits is not straightforward, that is not to say that it could not be done. Without a full consideration of such factors, we believe there is a chance that one could either over or under-state the benefit of the proposed reforms (but in practice, more likely).

4. Implications of economic theory for likely impact of reforms

In this section we set out our assessment as to what economic theory suggests might be the impact of changes to the grounds for appeals. In particular, we provide our views as to the types of costs and benefits that we think should be addressed when assessing the case for reform.

Our key findings are that:

(i) ***Changes to the basis for appeals are likely to materially impact the incentives*** (and therefore behaviours) of affected stakeholders – which will in turn determine the expected costs and benefits of reform.

(ii) Whilst it is practically challenging to quantify such impacts, economic theory can be used to provide ***a robust framework for considering changes to incentives.***

(iii) Directionally, economics suggests that these ***incentive affects could lead to there being additional benefits in adopting a JR approach,*** which have not been quantified in the existing evidence.

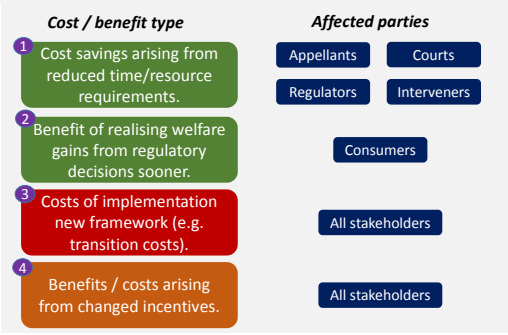
4.1. A framework for considering the costs and benefits of changes to the grounds for appeals

In this section we set out our view as to the appropriate framework and approach for evaluating the costs and benefits of potential changes to the grounds for appeal from an economics perspective. In particular, we consider: (i) the key *types* of costs and benefits that should be evaluated; and (ii) what economic theory and evidence can be identified and/or developed in order to inform an assessment of those costs and benefits.

Firstly, we think that it is essential to properly 'define' precisely what grounds of appeal option(s) one is seeking to evaluate relative to the status quo. As noted previously in this report, whilst the modern JR process is well understood and defined, 'specified grounds' approaches have not been applied historically, and are therefore less well understood. Relatedly, a limitation regarding the existing evidence and Impact Assessments is that they do not define exactly what a 'specified grounds' approach might look like in practice. Consequently, our first suggestion is that any framework for assessing the net benefits of reforms – particularly in relation to 'specified grounds' options – requires a detailed consideration and description as to exactly what such options would look like in the real world.

Notwithstanding the above, in relation to any option for reform, we think that there are likely to be four key categories of costs and benefits that require evaluation, as illustrated in Figure 6.

Figure 6: Framework for assessing costs and benefits



Source: Economic Insight

The first three of these (cost savings from reduced time/resource; gain to consumers of receiving the benefit of regulatory decisions earlier; and the costs of implementing new approaches) are all captured to varying degrees in the BIS and DCMS Impact Assessments. The final category, however (the benefits and costs associated with changed incentives) is only captured at a relatively high level. We therefore consider that this is a matter that merits further analysis and consideration – and so we focus on this issue in the remainder of this section.

Firstly, it is important that we define what we mean by 'benefits/costs arising from changed incentives'. Here we note that in principle the precise design of any appeals framework has the potential to impact the incentives of affected stakeholders in relation to:

- whether appeals are brought in the first place;
- the nature and extent of evidence provided at both the initial and appeals stage;
- the motivations of regulatory and appeals bodies – and therefore the likely welfare consequences of the decisions they take;
- the overall predictability of the regulatory framework; and
- more generally, opportunities for regulatory gaming by stakeholders.

We note that some of the above is discussed within the existing evidence. For example, both the BIS and DCMS Impact Assessments refer to the potential impact on the quality of regulatory decisions under reform options; and the DCMS analysis specifically made reference to the scope for impacts on investment incentives in the face of uncertainty.

We are also of the view that seeking to formally quantify either benefits or costs associated with changes relating to incentives/behaviours is challenging. However, we think that understanding the *potential* impacts of any proposed reform on stakeholder behaviours is critical to a proper understanding of likely costs and benefits. For these reasons there is considerable merit in:

» Seeking to identify the economic theories of relevance to understanding how stakeholder behaviours might be influenced by reforms to the grounds for appeals.

» Using those theories to develop a framework within which one can analyse the potential *consequences* of changes in behaviour for the costs and benefits of reform options.

We have therefore undertaken a review of the relevant economics literature relating to these potential incentive affects (summarised in Annex A to this report). In the remainder of this section we set out:

- Our views as to the key theories of relevance to understanding how incentives might change under various options for reform; and
- A game theoretic framework, which we use to illustrate the potential impact on costs and benefits of changes to stakeholder behaviours arising from changes in their incentives.

4.2. Relevant economic theory and its implications for appeals processes

In the following we review the economics literature of relevance to reforms to the grounds for appeals. Whilst there are no (or limited) academic papers that deal directly with optimising appeals processes, we can apply relevant theories and principles identified in the published economics literature to the case in hand. In particular, and as set out in the preceding section, we have focused on considering what economic theory can tell us regarding how the *incentives* and *behaviours* of stakeholders might change under alternative appeals frameworks. All papers reviewed for the purpose of this report are summarised in Annex A.

In relation to the above, we note that within the existing consultation documents and Impact Assessments, some consideration has been given to how reforms might affect behaviours. For example, one concern that has been raised is that any reform that lowers the level of scrutiny might lower the quality of regulatory decisions from a social welfare perspective (and clearly, it is entirely feasible to suppose a less stringent process *might* increase the chances of 'incorrect' regulatory decisions not being corrected). However, in our view – and given the importance of incentives and behaviours to the likely costs and benefits of reforms – a more holistic approach to these matters is required.

There are three primary areas of economic theory of relevance to understanding how incentives and behaviours could change as a result of reforming the grounds for appeals. These are:

- ***Regulatory capture:*** whereby regulatory processes and decisions are influenced by the goals of special interest parties, rather than being exercised to optimise social welfare.
- ***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 firm investment decisions.

Each of these areas of economic theory is considered further below in the context of making changes to the prevailing appeals framework.

4.2.1. Regulatory Capture

Regulatory capture occurs when regulatory processes or decisions are influenced to the benefit of special interest groups, rather being made with reference to maximising social welfare (or to achieve the regulator's stipulated objectives).

Of relevance to this is the literature regarding the underlying motivation of regulators. For example, Levine and Forrence (1990)[19] discuss whether the ultimate goal of a regulator is to pursue the public interest, or whether they are also motivated by other factors, such as personal gain. Here they outline that such personal gain can take many forms, such as: individuals or the body seeking to retain their/its current role; self-gratification from the exercise of power; or post office-holding personal wealth (such as future employment). Here, of course, it is important to note that the motivations of 'public interest' and 'personal gain' are not mutually exclusive and (as with all economic agents) in practice a wide range of motivational factors could influence the behaviour of regulators.

As personal gain may in part be a function of the amount and allocation of resources under a regulator's control, a regulator may be averse to expending such resource on appeals. Thus, an inventive for avoiding appeals may arise that is independent of social welfare. Relatedly, therefore, there may be an incentive to take initial decisions that limit the chances of there being an 'excessive' number of appeals. From a 'regulatory capture' perspective this, then, could mean that in such circumstances, a regulator is at risk of being captured by firms/agents that it considers to be most likely to bring appeals.

Personal gain considerations may also drive regulators to be motivated by 'reputation.' For example, in the context of the theory relating to 'post-office personal wealth,' a regulator might have particular regard to how its decisions are perceived by certain firms/agents. This regard for 'external reputation' might also, therefore, explicitly or implicitly influence decisions in a way that gives rise to regulatory capture.

Reputational effects as a cause of capture is further examined in the theory put forward by Hakenes and Schnabel (2013).[20] They present a model in which regulatory capture can occur through the complexity and sophistication of firms' arguments. They show that if a regulator has vested interests in an industry, they may not wish to admit to not understanding (or to not having sufficient resource to understand) a complex argument put forward by a firm – as such an admission might damage their reputation (and, for example, future private gains). Thus this gives rise to the scope for regulatory bias through 'complex arguments.'

[19] *'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis.' Levine and Forrence. Journal of Law, Economics and Organization. (1990).*

[20] *'Regulatory Capture by Sophistication.' Hakenes and Schnabel. CEPR (2013).*

Regulatory capture theory provides a number of perspectives on the potential impact of reforming the grounds for appeals.

Firstly, lodging an appeal is understandably costly to a firm; and, therefore (all else equal) it might be that appeals are more likely to be made by larger (typically incumbent) firms, who may also have more to lose. If – for reasons set out in the preceding – a regulator was averse to a high number of appeals, a regulator may be 'captured' into making pro-incumbent decisions. In this regard, parallels can be drawn between appeals and lobbying, where it was noted by Igan et al (2011) that lobbying is highly convex in the size of the firm. If reforms to the grounds for appeals result in the cost of appeals being reduced for firms and regulators then: (i) in regard to the former, the scope of bias in favour of incumbents might be reduced; and (ii) regarding the latter, the overall scope for capture is reduced to the extent that its underlying cause is linked to a regulator's aversion to expending resource on appeals.

Secondly, if regulators have reputational motivations, this might also give rise to the possibility of capture by large/incumbent firms. This could arise if individuals within the regulator cared more about the perception of their decisions by larger firms, either because: (i) those firms provided greater future employment opportunities; and/or (ii) because in wishing to be seen to make 'correct' decisions, the views of larger firms carry more weight (particularly in relation to the 'complex argument' theory). Whilst such reputational motivations are not themselves eradicated by changes to the grounds for appeals, the impact of them may be mitigated. For example, if a less stringent standard of appeal better enabled smaller players to challenge decisions, any 'reputational' bias in favour of incumbents could be reduced. Similarly, if overall appeals process was less resource intensive, then the scope for capture via the 'complex argument' theory is reduced – as in principle the regulator would have additional capacity to engage in detailed evidence.

4.2.2. Game Theory

Game theory provides a framework for analysing the decisions that firms, regulators (and other agents) make, based on assumptions regarding their likely motivations, and the parameters (i.e. 'rules of the game') within which they must operate. Game theory provides a highly relevant tool for considering the options for reforms to the appeals process.

Regulatory reputation – a note by Dr Andrew Mell, Fellow of Corpus Christi College, Oxford

Reputation is normally a force for good in economic analysis. However, reputational concerns may sometimes give regulators perverse incentives. One example has already been discussed in terms of Hakenes & Schnabel's (2013) analysis of "rubber stamping" in order to hide one's ignorance in the face of sophisticated arguments. Leaver (2009) offers a similar example, where the objective of the regulator is to minimise "squawking", best thought of as public complaints about errors. Interest groups will draw attention to mistakes where the regulator has been tough, but will keep quiet about mistakes in their favour. If having one's mistakes aired publicly is costly, this introduces a bias for regulatory decision making. As Leaver (2009) points out, if there are interest groups on both sides of the argument, then the bias introduced by minimal squawk behaviour disappears as mistakes will be pointed out publicly whether the regulator is too tough or too generous to the firm. So they might as well try to make the right decision. Hence, to the extent that moving to a judicial review based approach to appeals rather than an "on the merits" approach will lower the cost of an appeal and encourage consumer groups to appeal overly generous decisions, it should improve initial decision making.

Whether reputational concerns do provide perverse incentives for regulators will depend crucially on the environment. For example, if there were no stigma in admitting that an argument was too complex, then the result from Hakenes & Schnabel (2013) would disappear. Indeed, under a Judicial Review appeal structure, the reputational incentives for regulators when faced with complicated arguments could run in the opposite direction from that outlined by Hakenes & Schnabel. The lower cost of launching an appeal means that the regulator might face uncomfortable questions from the opponents of those who made complicated arguments. So, any rubber stamping to hide ignorance may get discovered, leaving the regulator with a worse reputation than if they had admitted their inability to understand the argument in the first place. They would not be so badly thought of if they had at least demonstrated Socratic wisdom.

References and notes

Hakenes and Schnabel, 'Regulatory Capture by Sophistication.' CEPR (2013).

Clare Leaver, Bureaucratic Minimal Squawk Behavior: Theory and Evidence from Regulatory Agencies, American Economic Review 2009, 99:3, 572– 607

Hendrik Hakenes & Isabel Schnabel 'Regulatory Capture by Sophistication CEPR (2013).

It should be noted that the Hakenes & Schnabel paper deals with the relationship between regulators and banks in the years prior to the Financial Crisis and, as such, is looking at a special case characterised by a lack of any organised interested groups on the other side of the argument.

Shavell (2004)[21] builds a model that represents an appeals process, which involves two opposing litigants, an adjudicator and an appeals court. The main assumptions are: the adjudicator has a utility function that isn't strictly increasing in social welfare i.e. it has incentives to choose an outcome that isn't socially optimal; and that if there is an appeal, the appeals court will impose the socially optimal decision. They demonstrate that the lower the cost of appeal, the closer the adjudicator's decision will be to the socially optimal, as they wish to avoid an appeal being made. Alternatively, if the cost of appeal is so high that appeals won't be lodged, the adjudicator can make whatever decision is best for them. Shavell's model, therefore, is generally supportive of the idea that a 'less costly' (or at least, more efficient) appeals process will generally increase the incentives for regulators to make better decisions in the first place. However, this result rests on 'all else being equal' – and in practice, to the extent that reforms impact the nature of scrutiny applied (in addition to the cost of appeals) so alternative results can arise.

Game theory can also be used to analyse the amount of information that a firm may make available to the regulator. Under the current regime, a firm knows that they can disclose further information at an appeals stage if the initial decision is not to their liking. As such, regulators may be more likely to make sub-optimal decisions in the first instance (as they may not have all of the relevant – or highest quality – information).

Related to the above, Milgrom and Roberts (1986)[22] find that the sharing of information can be encouraged through a sceptical regulator and competing interests. For example, suppose a regulator's position is that – in the absence of compelling evidence – it should be generally sceptical of a firm's position, and so would take the 'worst case' decision from that firm's perspective. Suppose also that this stance is known to the firm; then clearly, the firm is generally incentivised to share the information it has. This is because the firm fears that it will get a better decision than had it withheld the information, *even if the information itself is 'harmful'* in the sense that it is not supportive of achieving the 'best case' outcome for the firm. If, on the other hand, the regulator's stance differs from the above, then incentives could arise for firms to withhold evidence until an appeals stage (which could be welfare reducing).

To the extent that a JR approach might limit the scope for the introduction of new/additional evidence at the appeals stage, then this might mitigate any incentives to withhold evidence – so reducing the scope for reductions in social welfare.

4.2.3. Investment Incentives

The third area of economic theory that merits consideration is that relating to investment incentives. Here theory generally shows that, as uncertainty about future regulation increases, the level of investment decreases. For example, Ishii and Yan (2004)[23] use the notion of an option value to analyse investment under regulatory uncertainty. This is when a firm values the ability to make an investment decision later in time, once it knows more about the regulatory environment in which the return on such investment will be subject to. This happens when the NPV of an investment in the current time period is positive, but smaller than the expected NPV of the investment if made in a subsequent time period. They find a strong link between lesser aggregate investment and greater regulatory uncertainty.

Emperical evidence is also supportive of the link between regulatory uncertainty and reduced investment. For example, Ishii and Yan, along with Teisberg (1993)[24] and Bittlingmayer (2001)[25] all illustrate this. Within industries that require a high level of capital investment (such as the communications sector) the importance of regulatory certainty is, therefore, particularly acute.

In the long run, it is unclear whether regulatory uncertainty will be affected by the choice of appeals framework. This is because uncertainty is in part a function of the experience of agents operating within that particular framework; and the transparency of that framework. In principle, therefore, in the longer run – once agents have experienced a framework sufficiently – each approach might be as predicable (or certain) as the next. However, it seems clear that, in the short run at least, any 'new' approach (such as 'specified grounds') would invariably increase regulatory uncertainty. This would seem to be less likely to apply in the case of a JR approach, however, where there is already widespread experience and understanding of how the process works and the range of decisions that are typically taken.

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[21] *'The Appeals Process and Adjudicating Incentives.' Shavell. Harvard Law School (2004).*

[22] *'Relying on the Information of Interested Parties.' Milgrom and Roberts. RAND Journal of Economics (1986).*

[23] *'Investment under Regulatory Uncertainty: US Electricity Generation Investment Since 1996.' Ishii and Yan. CSEM (2004).*

[24] *'Capital Investment Strategies under Uncertain Regulation.' Teisberg. RAND Journal of Eocnomics (1993).*

[25] *'Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement.' Bittlingmayer. Cato Journal (2001).*

4.2.5. Conclusions

This section has shown that various theories and principles from the economics literature can be used to help inform an assessment of how incentives and behaviours might be affected by reforming the grounds for appeals. Given the importance of such factors in determining the overall costs and benefits of potential reforms, we believe that they merit more detailed consideration in any future evaluation of policy options.

We further note that it is overly simplistic to conclude that, from a behavioural and incentive perspective, a lower standard of appeal will translate to lower quality regulatory decisions (and therefore reduced welfare). In fact, the theories examined here equally allow for a range of plausible outcomes under which overall welfare could be increased under a move to a JR approach to appeals. Specifically:

- By lowering the overall cost of appeals to firms and regulators (as per a JR approach) there could be: (i) less scope for regulatory bias in favour of large/incumbent firms; and/or (ii) reduced overall scope for regulatory capture.
- Reducing the cost of appeal could incentivise regulators to make 'better' initial decisions.
- A less stringent appeals framework could provide increased incentives for information sharing at the initial regulatory decision stage – which could, in turn, increase social welfare.
- In the short term, a JR process may result in increased regulatory certainty relative to a (as yet undefined) 'specified grounds' approach, which would tend to result in stronger investment incentives.

In the next section we build our own game theory model to investigate some of these points further.

4.3. A game theoretic approach to considering the benefits of reform

The purpose of this section is to briefly illustrate how the arguments set out earlier in this report can be formalised in a simple game theoretic framework. We use it to illustrate that such a framework can demonstrate that a change in the standard of appeal could increase the likelihood that decisions are made in society's interests, contrary to the result of the Towerhouse Consulting model.

4.3.1. Overview of the game

The game has two main stages.

In the first stage, the regulator decides how 'strongly' it should intervene; and announces its decision. A 'stronger' intervention increases the welfare of consumers and/or new entrants at the expense of an incumbent. The objective of the regulator is to maximise social welfare.

Absent an appeals process, interventions that result in the lowest (positive) profits for the incumbent would maximise social welfare.

With an appeals process, interventions that result in lowest profits for the incumbent need not maximise social welfare for two reasons: (a) the regulator incurs a cost of k to participate in the appeals process; and (b) the probability of a successful appeal p could compromise its reputation and so increase the costs it incurs to successfully intervene in future.

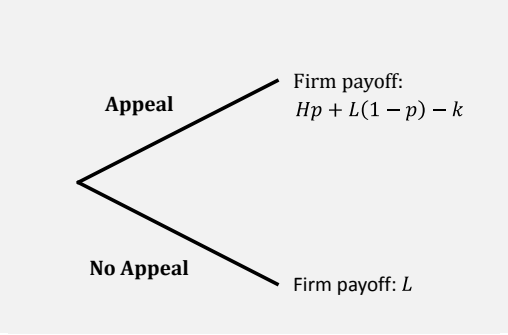
In the second stage, the incumbent decides whether to appeal the decision or not, as illustrated in the figure below. The objective of the incumbent is to maximise its current and future profits.

If the incumbent chooses not to appeal, it earns low profits *(L).*

If the incumbent chooses to appeal, it earns high profits *(H)* with probability p (decision overturned) and low profits *(L)* with probability *1-p* (decision maintained); and incurs a cost of *k.* Therefore its expected profit from appeal is: *Hp+L(1-p)-k.*

To understand the implications of this game, it is helpful to use 'backward induction'. That is, the first step is to consider under what circumstances the firm would decide to appeal in the second stage.

Figure 7: Illustration of game theory framework



Source: Economic Insight

4.3.2. Implications for likelihood of appeal

The firm will appeal in the second stage if the expected profit from appealing offsets the expected profit from not appealing, that is if *Hp+L(1-p)-k > L* or if *(H-L)p>k.* This result is intuitive; it says the likelihood of a firm appealing rises as: (1) the gap between the high profits and low profits rises (this could be influenced by type and strength of intervention, discussed further below); (2) the probability of the appeal being successful rises; and (3) the cost of appeal falls.

The result also provides an alternative way of expressing what BIS has described as a 'one-way-bet'. The downside to the firm of appealing is *k;* and a 'one-way-bet' happens when, irrespective of the probability of success, an appeal is worthwhile – that is, when the gap between *H* and *L* is so large that even a modest chance of success (i.e. an appeal with little merit) would offset *k.*

This simple game can also be used to help understand the effect of moving from an 'on the merits' standard to a JR standard of appeal on the incentives of the firm to appeal the regulator's decision.

One argument that has been made is that such a change in the standard of appeal would reduce the incentive to appeal, because the probability of success *p* would be lower. Then, it is argued, a lower threat of appeal reduces the likelihood that a regulator would make a decision that is in the interests of society – and so moving to a JR standard would affect a regulator's decision making for the worse.

However, this simple game illustrates that this outcome is by no means guaranteed and, indeed, a move to JR could have the opposite effect. This is because the move from an 'on the merits' standard to a JR standard also reduces the cost of appealing (as suggested by the evidence earlier in this report), which would increase the threat of appeal. This is in line with qualitative arguments set out in previous sections of this report.[26]

What matters from a policy perspective, therefore, is whether the positive effect that is transmitted through the change in *k* is offset by, or offsets, the negative effect that is transmitted through the change in *p.* Clearly, this is an empirical question that cannot be answered by theory alone.

The next step is to consider what decision the regulator would make in terms of the strength of its intervention – in this model, the extent to which it could make a decision that is more favourable to the incumbent – and, by implication, less favourable to society. In particular, we are interested to understand how reducing the cost of appeal could have a bearing on these decisions.

4.3.3. Implication for the strength of intervention

This type of model predicts that a reduction in the cost of appeal has an *ambiguous* effect on the 'strength' of regulatory intervention.

The first effect is as set out above and described earlier in this report: a reduction in the cost of appeal increases the likelihood of an appeal, which could serve to discipline the regulator into making a decision that is more favourable to society.

The second effect works in the opposite direction. A reduction in the cost of appeal increases the likelihood of an appeal and, in some circumstances, may therefore encourage the regulator to give 'more' to the incumbent (in terms of a more favourable decision) to stop it from appealing. This would happen, for example, if the regulator wishes to avoid an appeal altogether, for example to preserve its reputation (as discussed above above).

Again, what matters from a policy perspective is whether the first effect offsets the second effect. In particular, the influence a regulator's future decision making ability / reputation has on current decisions, and what role being appealed has in that.

In summary, a game theoretic framework illustrates that the overall welfare impact (arising from changes in behaviours and incentives) of moving to a JR type approach is ambiguous. Therefore, it would be erroneous to assert that the impact of JR is unambiguously negative.

[26] *In principle, the change of standard could also affect the levels of the H and L profits, which we do not consider here.*

Annex A: literature review

This annex provides a summary of the relevant economics literature, which we have reviewed to inform the content of Section 4 to this report. Papers are summarised by: (i) game theory; (ii) regulatory capture; and (iii) investment incentives.

Game Theory

***'The Appeals Process and Adjudicating Incentives.'* Harvard Law School, Shavell (2004)**

An appeals process, in which litigants can have the decisions of an adjudicator reviewed by a higher authority, is a feature of many legal systems and can lead to the making of better decisions. This paper presents a model, with various extensions, that analyse the incentives and outcomes in regard to appeals processes. The existence of an appeals process can create incentives for the adjudicator (e.g. regulator) to make the socially desirable decision. The mere threat of an appeal is sufficient to move their decision towards the social optimum, whilst no actual appeal will occur.

Their base model involves two potential opposing litigants, an adjudicator and an appeals court. In the first time period the adjudicator makes a decision, in the second time period either litigant can choose to appeal (at a cost), and in the third time period an appeals court makes the final decision if an appeal is lodged. The decision affects the litigants' utility, social welfare and the adjudicator's utility. The adjudicator might have a different idea as to what the social optimum is, or have vested interests in the outcome. If an appeal is made, it is assumed that the appeals court will set the decision equal to the social optimum.

A litigant will make an appeal if their utility from the original decision is less than the utility from the socially optimal decision minus the costs of appeal. Since they know that if an appeal is lodged the court of appeal will instate the social optimal, it is only worth appealing if they stand to gain utility compared to the adjudicator's decision. Since the adjudicator knows the costs of appeal to a litigant, they make their decision to avoid an appeal but otherwise maximise their utility. Thus the cost of appeal is directly linked to the decision, and how close it is to the social optimum. The higher the cost of appeal the further away the decision will be from the social optimum, and the lower the cost the closer the decision will be to the social optimum.

The paper then goes on to look at various extensions to the base model, including subsidy of the appeals process. Subsidising the cost of appeal has the same effect that decreasing the private cost of appeal has. As no appeal is ever made, the subsidy never has to be paid and social welfare increases if the subsidy increases. In the extreme case that the subsidy equals the cost of appeal the adjudicator knows that if their decision is not the social optimal there will be an appeal, and as such their decision is equal to the social optimal.

***'Antitrust Law and Regulatory Gaming.'* Texas Law Review, Dogan and Lemley (2008)**

This paper examines the link between regulation and antitrust enforcement in the US. Regulation may or may not promote competition or efficiency, depending on the goals of the regulator and the degree of regulatory capture. The authors insist that oversight by antitrust law of regulated markets is essential to ensure competitive outcomes. Regulation is not a substitute for anticompetitive laws and in some cases can exacerbate the risk of exclusionary behaviour if not accompanied by anticompetitive law enforcement.

They define regulatory gaming as private behaviour that harnesses pro-competitive or neutral regulations and uses it for exclusionary purposes. Complex regulatory systems can create opportunities for dominant parties to dictate industry standards or delay entry of other competitors. If industry standards are set by government bodies, a firm may be able to bias the rules by providing material that is misleading, or omit certain facts, and thus game the regulatory system. Also, as observed often in the pharmaceutical industry, a dominant firm may be able to prevent competition entering the market. Pharmaceutical companies are known to repeatedly change drug formulations to prevent generic substitutions. The paper aims to show that whether or not particular acts of regulatory gaming harm competition, should be an antitrust question, rather than a question of interpreting statutes or regulations.

The authors put forward three principles for deciding when antitrust law should apply to regulated markets. First, antitrust law is correct to defer to the decisions that a regulator has made. A regulator can impose a restriction, for example setting a price or controlling market entry, which is anticompetitive in nature but the regulator is within its right to do so in achieving its goals. Secondly, private behaviour that persuades a regulator to limit competition is not necessarily regulatory gaming, it can just be public action, albeit encouraged by an interested private party. And thirdly, if a private firm takes advantage of regulatory rules, and the government has not decided to take an anticompetitive course, then antitrust law has an important role to play. These principles preserve a complementary relationship

between regulation and antitrust law. The need for antitrust law becomes particularly acute when the regulatory scheme creates opportunities for exclusionary conduct i.e. regulatory gaming.

They investigate three different forms of regulatory gaming and consider the role of antitrust law in reviewing the behaviour. This does not mean that the behaviour is always condemned, rather that antitrust law should decide the final outcome of the case. Firstly, and as discussed earlier, the pharmaceutical industry presents an example of an opportunity to game the regulatory system. To exclude generic manufacturers from the market, drugs firms can change the specifications of their patented products and delay the entry of generic manufacturers. The regulator, the US Food and Drug Administrator, is fully aware of the gaming but can do nothing to stop it and as such should be a matter for antitrust law.

Secondly, they look at capture of standard-setting. The direct manipulation of the process of setting regulatory standards can be achieved through deceit or other misconduct. The authors cite the case of Unocal, which lobbied for the adoption of a set of standards for low emission gasoline. Unocal owned the patent rights to the specific set of standards they were promoting but did not disclose this until after the standards had been adopted and royalties earned. This example shows how misrepresentations can convert a neutral regulatory process into an exclusionary tool, and again deserve the attention of antitrust law.

The third case of regulatory gaming is that of price squeezes. This is when a vertically integrated firm with a regulated monopoly in the upstream market sets its wholesale and retail prices such that competing downstream firms cannot make a profit. If the wholesale price is high enough, and the retail price low enough, competing downstream firms will not be able to cover their costs and exit the market. Price squeezes can, depending on the circumstances, involve a regulatory game. In a partially regulated market, where the wholesale price is set by the regulator but the retail price is unrestricted, the vertically integrated firm may be able to foster an un-competitively high wholesale price. As the regulator will need cost information from the monopoly firm to judge what the price should be, the opportunity occurs to influence the decision by what evidence they provide. Again, this presents a case for antitrust law.

***'Relying on the Information of Interested Parties.'* RAND Journal of Economics, Milgrom and Roberts (1986)**

This paper builds various game theory models looking at the amount of information that will be disclosed to a decision maker by individuals who are affected by the decision. A common problem faced by decision makers is the need to rely on information provided by individuals who are affected by their decisions. Individuals may try to manipulate the decision maker's choice by concealing or distorting information, but their efforts don't always succeed. The authors propose two general forms of strategy to overcome these obstacles. Firstly, although lacking information about the specific situation, a decision maker may nevertheless be sophisticated about interpreting any information reported to them by recognising that self-interest may alter reports. Sophisticated scepticism can be an important tool in achieving an informed decision. Secondly, useful information may be extracted by inducing well-informed parties with competing interests to compete in providing information.

The authors conclude that a sceptical decision maker can induce an individual to reveal information that is damaging to its interests out of the fear that the sceptical decision makes will assume something worse if the information is not disclosed.

General Regulatory Capture

***'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis.'* Journal of Law, Economics and Organization, Levine and Forrence (1990)**

This is one of the seminal papers on regulatory capture. It discusses whether the ultimate goal of regulatory bodies is to pursue the public interest, or whether they are just used as an arena for those with vested interests to contend for the right to use government power for their own advantage. Embedded in this question is another about what motivates a regulator – do they seek to establish the 'best' outcome in a civic sense or are they only interested in personal gain? Personal gains can be in the form of utility derived from holding office (Downs 1957, 1967), or pecuniary, such as employment after their regulatory position.

'Public interest' theory revolves around perusing the public good or the public interest. It is usually silent on the relationship between publicly motivated policy makers and their superiors and subordinates. Opposing the public interest theory is that of regulatory capture which describes actors in the regulatory process having narrow, self-interested goals – principally job retention, self-gratification from the exercise of power, or post office-holding personal wealth. These personal gains are often acquired by using regulatory power to help others achieve similar, often pecuniary, goals. In this theory, government regulation reflects the influence of special interests and is created and operated for their benefit.

The paper builds a model that centres around two main variables: monitoring costs; and motivation. Monitoring costs refer to the costs incurred by those who oversee, are responsible for, or are answered to by the regulator. Motivations can be

deduced by determining what a regulator might do if they were allowed 'slack'. Their model divides public interest across two dimensions: private versus public interest to distinguish between two kinds of motivation; and general versus special interests to distinguish between two kinds of political dominance.

Private interests are related to the preferences of private individuals and determine the private welfare of the individual. Public interests on the other hand are derived from individuals' preferences towards others. Maximising an individual's public interest requires specifying the behaviour or condition of others.

Policies or actions, whether motivated by private or public interests, can be defined as general interest or special interest, depending on what kind of support they would receive if information, education, organisation, and monitoring costs were zero. General interest policies or actions are those that would be supported by the general population if there were no restrictions on monitoring i.e. if people fully understood and could act upon the matter, they would support it. Special interest policies or actions are those that would only be supported by a minority of self-interested individuals. In the event of non-zero information, education, organisation and monitoring costs (referred to as 'slack') politicians and regulators can favour special interests in return for political support or other pecuniary benefits. Regulatory capture occurs when decisions are made for private interests that benefit special interest groups.

The presence of regulatory capture is determined by the motivations of the regulator (whether they act wish to act upon private, special interests), and the monitoring costs (whether information, education and organisation and costs are zero). Capture can therefore occur if monitoring costs are non-zero.

***'Regulatory Capture: A Review.'* Oxford Review of Economic Policy, Ernesto Dal Bó (2006)**

This article reviews both the theoretical and empirical literatures on regulatory capture.

It first notes that the term 'regulatory capture' can have both a broad and narrow meaning. According to the broad interpretation, regulatory capture is the process through which special interests affect state intervention in any of its forms, which can include areas as diverse as the setting of taxes, the choice of foreign policy, or legislation affecting research and development. Under the narrow interpretation, regulatory capture is specifically the process through which regulated monopolies end up manipulating agencies that are supposed to control them.

The first section of the review discusses the argument put forward by Stigler (1971) and the formulisation of these ideas by Peltzman (1976). Stigler sets out the demand and supply for regulation. The demand for regulation is connected primarily to two features of the group of beneficiaries: whether it is large; and whether the group has large stakes in regulation. Without these two conditions there will not be sufficient demand for regulation to occur. The supply side is driven by the machinery that produces regulation, the public sector. Politicians wish to please certain groups in return for money or votes, and thus create regulation.

Peltzman sets out three different models. The review focuses on the second that deals with price regulation. The model consists of three classes of players: a politician who holds power; producers; and consumers. The politician wants to maximise his 'power' or 'majority', which is a function of the prices that consumers pay and the profit that producers make. The politician's majority decreases as price paid by consumers increase, but increases as profits increase. The politician therefore has to trade off price and profits. The model predicts that regulation will result in a price that is between the monopolistic and competitive price.

The third section of the review then sets out a multi-tier agent-principal model which introduces private information and collusion. The model consists of citizens, a firm, the regulator, and the government. The model identifies two outcomes. The first is where there is a regulated monopoly producer, however the regulator does not know the true marginal cost that the firm faces. Given that the firm is valuable to the citizens, the regulator does not want to set a price under marginal cost and drive the firm out of business. The regulator therefore sets a price that is under the monopolistic price but somewhere above marginal cost.

The second outcome arises if the regulator finds out the true marginal cost. The firm then has the incentive to bribe the regulator to tell the government that it doesn't know the true marginal cost so an above-competitive price can be set. The government then has the incentive to offer a contract to the regulator to induce truth telling, and a contract to the firm to minimise collusion.

The fifth section of the review focuses on revolving doors. This is the fact that many regulators start their careers in the industry that they regulate, or end up getting jobs in it afterwards. These circumstances present clear sources of bias. Regulators who have previously worked in the industry may have been 'socialised' in that industry environment. Regulators who may wish to get a job in industry after they leave may make pro industry decisions to increase their chances of future employment.

***'Preventing Regulatory Capture: Special Interest Influence and How to Limit it.'* The Tobin Project, Carpenter and Moss – eds (2013)**

This book brings together set of authors from a range of disciplines who carefully examine

contemporary regulation to gain a clearer grasp of what regulatory capture is, where and to what extent it occurs, what prevents it from occurring more fully and pervasively, and, finally, to distil lessons for policymakers and the public for how capture can be mitigated, and the public interest protected.

Luigi Zingales, in the chapter "Preventing Economists' Capture", puts forward a set of conditions that lead to regulatory capture: career concern; information; and environmental pressure. Outside interests can influence the decisions of a regulator by offering, implicitly or explicitly, employment outside of the regulatory arena. This form of capture does not require an explicit trade of a favourable decision for a future job. Outside interests may hire former regulators who have been sympathetic to them in regulation which then creates the incentive for a regulator to take decisions that are not in the public interest.

Regulators need plenty of industry-specific information to do their jobs effectively. Much of this information is held by the regulated. Without a specific disclosure agreement the regulator has to negotiate with the regulated to obtain information, and as such presents an opportunity to trade information for favourable treatment.

Regulators tend to possess industry-specific human capital, accumulated through formal training and years of work in the specific industry. This specialised human capital creates a natural interest in supporting activities that use this human capital. Further compounding these environmental pressures is the fact that regulators listen to the opinions of and information from their network of trusted friends and contacts. These trusted sources tend to come from the same industry and put forward pro-industry views which can sway the regulator even further.

The economic literature on regulatory capture relies on a fundamental asymmetry in the influence of various groups, since in a perfectly competitive world competition among conflicting interests will lead to the efficient outcome (Becker, 1983). If all interested parties had equal opportunities to lobby and influence regulators then there would be less of an issue. It is because firms come in different sizes, and lobbying has some fixed costs, that lobbying is highly convex in the size of the firm (Igan et al 2011). Olson (1965) argued that relatively small players capture a small fraction of the benefit of lobbying, while they have to pay the full cost, and therefore under invest in it.

Zingales puts forward two general preventative methods to regulatory capture: the power of the media; and antitrust enforcement. When new regulation is put in place most individuals do not have the incentive to pay attention. The chance that it will affect them is very small and the cost of investigation is relatively high. The media however, can take on this information gathering burden and relay information back to the individual in the form of interesting news. Media coverage can then negate the influence of special interest groups by informing and vocalising the opinions of the general public.

Antitrust enforcement can have an indirect impact by levelling the playing field. Disparities in power arise from disparities in size and concentration, two variables that can be affected by antitrust policy. Thus, a strong antitrust enforcement has two indirect benefits. By reducing size and concentration, it levels the playing field in the influence game. In addition, by breaking monopolies it breaks the homogeneity of interests, creating some competition among conflicting lobbyists.

***'Regulatory Capture by Sophistication.'* University of Bonn, Hakenes and Schnabel (2013)**

One explanation for the poor performance of regulation in the recent financial crisis is that regulators had been captured by the financial sector. This paper presents a micro-founded model in which banks capture regulators through the complexity and sophistication of their arguments.

Banks are able to put forward various arguments of different complexity regarding regulation. Regulators, who may have a vested interest in the industry may not want to admit they do not understand the arguments put forward. If a regulator wants to get a job in industry after they leave the regulator they wish to appear to understand the subject matter. If they admit to not understanding they become less attractive to future employers. Banks therefore have the incentive to put forward complex arguments that may not be comprehendible to the regulator. Those that are more able of putting forward more complex arguments, potentially through better resources, are more able to influence regulation in their favour.

***'Buying Policy? The Effects of Lobbyists' Resources on Their Policy Success.'* Political Research Quarterly, McKay (2011)**

This paper looks into the relationship between US lobbyists' resources and their success in determining policy. They use data from the Washington Representatives Study by Heniz et al (1990, 1993), that covers 776 lobbyists in four policy areas in the years 1977-1982.

They build several empirical models that relate the achievement of lobbyists' objectives to their financial wealth, experience, connections and lobbying intensity. Little relationship is found between organisations' financial resources and their policy success. However, greater financial resource is linked to certain lobbying tactics and traits, and some of these are linked to greater policy success.

Investment Uncertainty

***'Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement.'* Cato Journal, Bittlingmayer (2001)**

This paper investigates the relationship between regulatory and legal uncertainty and the level of investment made by firms. Business investment tends to be volatile and factors that in theory should affect investment have been shown to have little influence in practice. Typically, theory points to the cost of capital and the demand for goods as the drivers of investment. Interest rates, the price of capital goods and tax policy are obvious variables that will impact these drivers. However, the author claims the empirical evidence shows that there is little connection between these variables and investment. He builds a new model that looks at the effect of policy uncertainty on investment.

To introduce the idea, the author gives four examples from American history of industries that have endured periods of uncertainty due to political pressure surround anticompetitive issues, and shows that investment during this time is lower. These example are from the industries of: steel; vehicle production; pharmaceuticals; and petroleum refining. The author then builds an empirical model that relates investment to industry gross domestic product, capital stock and the number of antitrust filings. The results of this model show that the low investment of the late 1950s and early 1960s we due at least in part to a resurgence of aggressive antitrust cases, and the uncertainty that came with them.

***'Capital Investment Strategies under Uncertain Regulation.'* RAND Journal of Economics, Teisberg (1993)**

This paper looks specifically at the effect of regulatory profit and loss restrictions on electric utility firms' investment decisions. In the 1950s and 1960s electric utilities firms invested in new, large-scale capacity plants at regular intervals. Since the 1970s utility firms have been more inclined to build smaller, less capital-intensive plants that have shorter construction lead times. The most common explanation for this is that utilities now face allowed rates of return that are below their cost of capital and uncertainty about regulatory allowances has increased dramatically in the 1970s and 1980s.

The paper concludes the recent preference of utilities for smaller, shorter-lead-time projects can be explained in by asymmetric distributions of possible profit and loss restrictions. Firms choose smaller projects to reduce the expected size of regulatory penalties and shorter-lead-time projects to reduce the chance that the usefulness of the plant will be very different from the original expectations.

***'Investment under Regulatory Uncertainty: US Electricity Generation Investment Since 1996.'* CSEM, Ishii and Yan (2004)**

This paper investigates the effect of regulatory uncertainty on the level of investment made by firms. Specifically, it looks at the investment behaviour of US electricity generation firms from 1996 to 2000 and how it was affected by uncertainty surrounding possible comprehensive regulatory restructuring. They find a strong link between lesser aggregate generation investment and greater restructuring uncertainty.

In the US and other countries, many government bodies have implemented regulatory restructuring with a key motivation to attract investment from outside of established utility firms. However, many industry observers and experts have attributed the dramatic slowdown in new generation investment to this very regulatory restructuring. The paper uses the notion of 'option value' whereby it values the ability to make an investment decision later in time, once it knows more about the regulatory environment by which the return on such investment will be subject to. This happens when the net present value (NPV) of an investment in the current time period is positive, but smaller than the expected NPV of the investment if made in a subsequent time period.

Their econometric analysis give suggesting evidence of the presence of such an option value from regulatory uncertainty that can be earned by delaying investment. They note however that their results may be biased by that fact that they cannot separate the option value effect from the real effect of regulatory restructuring (impacts on the revenue and costs of new generation investment).

Other relevant context

Overview of DWP reforms

The Department of Work and Pensions (DWP) is changing the appeals process in regard to benefits and child maintenance cases. Three changes are being implemented. Firstly, the DWP will reconsider all decisions *itself* before an appeal to Her Majesty's Courts and Tribunals Service (HMCTS) is allowed. This is known as 'mandatory reconsideration' and aims to ensure that people fully understand a decision and provide additional information earlier in the process. Secondly, if someone is still not happy with a decision, they will have to appeal to HMCTS directly. This brings the process in line with other appeals handled by the service. Thirdly, the DWP has agreed to time limits with regard to returning responses to HMCTS. These changes are due to start to come into force in October 2013.

http://www.dwp.gov.uk/adviser/updates/appls-process-changesl/

Planning Appeals Procedure

The Government has recently consulted on making improvements to the planning appeal process. The focus was to make the process faster and more transparent, along with improving consistency and increase certainty of decision timescales. Specifically, they were looking to bring into effect: earlier submissions; agreement of common ground upfront; starting hearings earlier; simpler processes for smaller claims; aligning similar appeals; and issue a guide to the planning appeal process. The impact assessment estimates a net present value of the changes of £46.1m.

https://www.gov.uk/government/consultations/technical-review-of-planning-appeal-procedures

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EDF Energy

Response Form: Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

EDF Energy

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 ☒ No ☐ Not sure

Comments:

1. EDF Energy opposes any weakening of the standard of review for appeals in the energy sector. We believe the consultation fails to provide any robust justification for such a significant regulatory change. The objective of the appeals process must be to both uphold regulatory decisions when they are well made and also by correcting decisions when they are wrong or badly made. To achieve this objective the standard of proof and related evidence must be a central concern of the reforms. By definition if they are weakened regulatory accountability is lessened and worse decisions will be made in the long run.

2. We do not see that the problems identified in the consultation are in fact issues that need to be reformed. This is summarised in Table 1.

Table 1

Problem	Comment
Merits based appeal leads to drawn out procedures. JR is faster	It has not been demonstrated that adopting a JR standard will be faster than a full merits appeal. If a case is successful under JR then it will be referred back to the regulator for a new decision, given the review is essentially limited to the legality of the decision rather than its correctness. This is not included in the table in Annex E but still critical to the reports objective of speeding decision making up "end to end". Furthermore, we question the robustness of the analysis undertaken in terms of the average time taken for appeals (Table 3.3) and in particular the way in which the appeals are compared on a 'like for like' basis.
Merits based appeals are inappropriate	Given the reputational and financial risks associated with competition or licence infringements (i.e. up to 10% turnover fine) basic justice requires the right to appeal. This is especially true as the regulatory authorities are investigators, prosecutors and judges. Merits based appeals have been the norm and are common in other jurisdictions in particular Europe.
Regulators face challenges from industry	The decision to make an appeal is never taken lightly. There needs to be good grounds for appeal in the first place or it risks being struck off. Furthermore, the costs of appealing cannot be treated as insignificant both in terms of a party's individual costs and also the potential liability of picking up the regulators costs as a result of an unsuccessful challenge. When considering the number of cases appealed compared to the number of regulatory decisions made, evidence in the energy sector (and in other sectors) does not point to there being a strong incentive to challenge the regulator.

3. It is not clear to us that the JR standard will solve the problems stated in the consultation as summarised in the table below. During the life of the major industry codes 980 modifications have been raised (CUSC 220; UNC 464 and BSC 296). The energy codes have not been the subject of repeated appeal. The modification process itself is designed to reduce the number of appeals by providing interested parties (including certain consumer groups) the opportunity to raise alternative modifications. The significance of this part of the process has been overlooked by the consultation document as it has drastically reduced the number of potential appeals.

4. We strongly prefer merits based appeals. This is on the basis that by definition, the justification for regulating is due to the specific characteristics of the sector which are outside conventional competition policy.

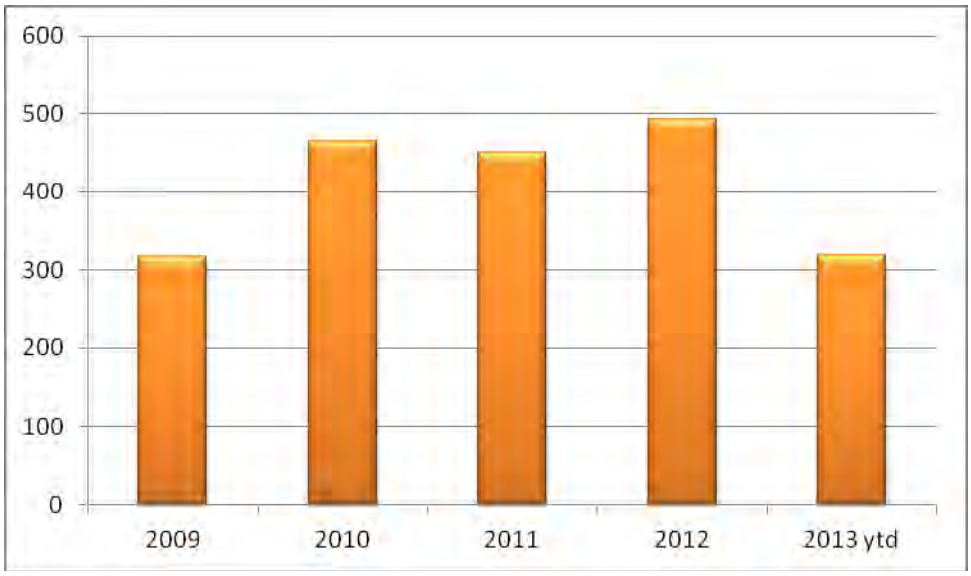
5. Regulators are both judge and prosecutors who have a high degree of discretion in interpreting their own regulatory frameworks. This is especially important for principles based

licence conditions where compliance creates regulatory uncertainty and the need for legitimate grounds of appeal.

6. The presumption of using the JR standard may not capture all the issues created by regulatory change. It is less effective in dealing with the impact of a decision on the competitive process and wealth transfers between regulated parties resulting from changes to industry codes.

7. Figure 1 shows the consultation workload for EDF Energy derived from Government and regulators. We have a finite amount of resources to scrutinise change. New evidence in the case of appeal is almost certain come to light. We do not see how this necessarily leads to a worse outcome or would automatically lead to extended decision making timetable if the case is managed well.

Figure 1: Number of consultations per year responded to by EDF Energy (excluding modifications)



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 ☐ No ☐ Not sure

Comments:

We agree with the principles set out in Box 4.1 but do not see a reason why they should not as a minimum apply to all regulatory appeals. As stated in question 1, the case for sectoral regulation is based on the characteristics of the sector being regulated.

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

Comments:

We do not see any evidence to suggest that a JR framework is necessarily faster or cheaper than a sector specific merit based standard. In energy certain appeals such as licence conditions have a carefully defined timetable which has the effect of reducing costs and creating certainty with regard to timings.

Furthermore, the Impact Assessment claims a positive benefit case (using assumed cost savings from shorter appeals) from moving to a reduced standard of review and streamlining the regulatory appeals process. However, this assessment outcome 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 the prospect that a decision might be appealed). Given the economic impact of such regulatory decisions, even a small improvement in quality is likely to dominate any benefit assessment of any reform options.

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 ☒ No ☐ Not sure

Comments:

EDF Energy supports an effective appeal system that fosters high quality, independent, robust and predictable regulatory decision making. Such an environment will promote competition, benefit consumers and increase investor confidence in the sector. We believe that this is best achieved by the existence of a right to challenge regulatory decisions on the full merits standard which would encourage regulators to ensure their decisions are of sufficient quality as to withstand independent scrutiny and provide an opportunity to correct errors when they occur.

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?

Comments:

N/A

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 ☒ No ☐ Not sure

Comments:

We see no evidence that there has been a material failure in the procedures as they have operated to date or that the changes will deliver the perceived benefits. Nor is any evidence presented as to why a merits appeal in relation to decisions under the CA98 is inappropriate. Furthermore, it would be disappointing if new measures weakened the stable and predictable nature of the scope and operation of the CA98 regulatory regime that has been established and tested in court.

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?

Comments:

We do not see any evidence to suggest that a JR framework is necessarily faster or cheaper than a sector specific merits based appeal regime. For the reasons set out in our response to Q4, we believe an appeal on the full merits would be the most effective appeal framework for all types of regulatory decisions.

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?

☐ Yes ☒ No ☐ Not sure

Comments:

We do not support any change to the existing appeal framework for the reasons provided in our response to earlier questions. In addition, changes in appealing price controls could have an impact on not just the outcome of a particular decision but also the regulatory risk and ultimately cost of capital of the regulated businesses concerned. The potential economic significance of such decisions requires the strongest scrutiny of such regulatory decisions.

Furthermore, we note that the position of the Competition Commission (CC) is currently subject to significant change through the introduction of the Competition and Markets Authority (CMA) and the transfer of the functions of the CC and OFT to the CMA. The framework in which the CMA will operate is currently subject to consultation and so any proposal (and justification) to move away from the current standard of the review for appeals currently heard by the CC needs to take account of the wider reforms that are in progress.

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?

Comments:

We do not see any evidence to suggest that a JR framework is necessarily faster or cheaper than a sector specific merit based standard. In fact it is possible that the reverse may be true.

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?

Comments:

N/A

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?

Comments:

N/A

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?

Comments:

We do not support any moves to lessen the standard of the review of regulatory decisions that currently exists.

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?

Comments:

Please see response to earlier questions.

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?

Comments:

In principle, we welcome a review of the governance arrangements, rules and operation of the CAT in order to ensure that they remain fit for purpose and in line with best practice given the wider reforms to the competition regime. However, it is important that any moves to increase controls on the evidence admissible or decrease the time allowed to conduct appeals does not in any way constrain a party's access to justice and a fair hearing nor lessen the ability of judges to exercise independent judgment.

From our perspective the CAT has functioned reasonably well and we see no reason for major reform.

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 ☐ No ☐ Not sure

Comments:

We support measures designed to remove any bureaucratic barriers enabling appropriate judges to sit in 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.

☒ Yes ☐ No ☐ Not sure

Comments:

We see no reason to maintain the current eight year term limit. The proposed change will avoid the loss of valuable expertise in competition and regulatory appeals. As such no limit should apply subject to the retirement age applicable to their office.

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

☐ Yes ☒ No ☐ Not sure

Comments:

This erodes the effectiveness of the CAT. The panel members are one of the strengths of the CAT which far outweighs any minor cost savings.

We do not think that it is always possible to determine from the outset that a case may be "straightforward" or simply relate to points of law. Therefore, whilst it may be appropriate for the CAT to have the flexibility to decide whether to sit as a Panel or with a single judge depending on the particular circumstances of the case, we would oppose any mandatory approach.

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

☒ Yes ☐ No ☐ Not sure

Comments:

The issue for a regulated business is that it has access to an appeal body that has the necessary range of economic, legal and financial analysis expertise relevant for the sector. In terms of licence modification or price controls cases will inevitably be linked to complex industry specific issues. We currently see no reason to amend the existing arrangements in the energy 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 ☐ No ☒ Not sure

Comments:

N/A

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

☒ Yes ☐ No ☐ Not sure

Comments:

We believe the CAT is well equipped to hear ex ante appeals.

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

☒ Yes ☐ No ☐ Not sure

Comments:

We are not opposed in principle to the CAT hearing energy code modification appeals.

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

☐ Yes ☒ No ☐ Not sure

Comments:

Enforcement decisions, and any subsequent appeals, are in many cases not simply a matter of law but can involve some regulator judgement and/or economic analysis and be complex in nature. In particular, the shift towards more principles based regulation in the energy sector carries a higher risk of arbitrary enforcement given the more subjective nature of the regulations and the level of discretion at the disposal of the regulator. Consequently, we believe there may be benefits in retaining flexibility and that a one size fits all approach may not be appropriate.

We acknowledge that where licensees have been robustly proven to breach licence conditions appropriate sanctions should apply. However, enforcement decisions can have a significant financial impact on licensees both in terms of the level of fine and the detrimental impact on brand and customer trust. As such licensees should have the ability to appeal on the merits the actual decision to find a licensee has breached its obligations rather than the current limited ability of only appealing the imposition and/or quantum of a penalty order under a JR standard of review.

We believe any risk of increasing the likelihood of an appeal being raised could be mitigated by the adoption of a two stage enforcement process by the regulator. This would provide for an initial stage of dialogue between the regulator and the licensee allowing the licensee to explain its approach and to agree improvements as appropriate. Formal enforcement action would only commence where a licensee had not made appropriate changes in the agreed timescales or otherwise failed to resolve the issues giving rise to the original concerns or suspected breach. We believe this new approach to enforcement would promote best practice, improve and rebuild trust in licensees and confidence in the energy sector generally.

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 ☒ No ☐ Not sure

Comments:

We believe that if there is to be a single body to hear enforcement appeals then the CAT may be the most appropriate body.

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?

Comments:

N/A

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

☒ Yes ☐ No ☐ Not sure

Comments:

We believe a model whereby dispute resolutions are appealable only to the CAT (with the possibility of a further appeal to the Court of Appeal on points of law) would be appropriate given the CAT's greater expertise and knowledge of the regulated sectors.

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?

Comments:

See Q25.

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

☒ Yes ☐ No ☐ Not sure

Comments:

In order to address potential jurisdiction issues that currently exist, we see merit in allowing the CAT to hear judicial review applications in respect of CA98 cases.

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 ☐ No ☐ Not sure

Comments:

We believe there may be merit in this proposal provided there are appropriate sanctions for inadvertent disclosure of confidential information.

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?

Comments:

Confidentiality agreements are a well established mechanism for the CAT. We see no reason why this has to be modified simply because the procedure is applied at the administrative phase. We currently see no reason why the CAT could not perform a supervisory role in respect of such rings.

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

☐ Yes ☒ No ☐ Not sure

Comments:

As we stated in question one, the sheer regulatory volume of consultations means that regulated companies can only invest a finite amount of time and resource to modifications, licence changes and code modifications. EDF Energy responds to just less than one consultation a day (excluding code modifications). It is likely that new insights will emerge in our assessment. We therefore require some flexibility if the right decision is to be made. We think the CAT is clearly capable of distinguishing between the legitimate development of argument and deliberate tactics to subvert the 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?

☐ Yes ☒ No ☐ Not sure

Comments:

It is premature to judge the appeal system as it has only been recently implemented.

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?

☐ Yes ☒ No ☐ Not sure

Comments:

We oppose any moves to introduce an asymmetrical cost recovery mechanism that clearly favours regulators and which introduces an access barrier to justice for all businesses, including when regulatory decisions are wrong. We believe this to be unjust and at odds with the well established principle of 'loser pays' which fairly reflects the outcome of the case.

There are a number of issues associated with costs not considered in the consultation. Ofgem recovers the costs of the case from the regulated industries if they lose. Therefore, Ofgem has different incentives structures than the regulated industries. The regulators can buy in bigger legal teams with less consideration than the appellants. The costs of appeal therefore have a disproportionate impact on smaller than larger players and could prove to be a significant disincentive to seek justice. We believe that where costs are awarded against appellants following an unsuccessful appeal only the reasonable costs, given the circumstances of the case, incurred by the regulator should be recoverable.

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

☒ Yes ☐ No ☐ Not sure

Comments:

The overriding principle should be that costs awards allow for either party to recover their reasonable costs. We see no reason why internal legal costs should be excluded. The key issue is that regulators are prevented from using any cost recovery advantage and hiring unreasonably large external legal teams.

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 ☒ No ☐ Not sure

Comments:

We find it difficult to see the benefit of this proposal as we believe that the existing filters are appropriate and have not encouraged vexatious appeals.

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 ☒ No ☐ Not sure

Comments:

As above, we find it difficult to see the benefit of this proposal as we believe that the existing filters have not encouraged vexatious appeals. If an appeal looks like it will fail we see no financial incentive for the appellant to continue with the case. The CAT's current rules of procedures already make appropriate provision for this.

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

☐ Yes ☐ No ☒ Not sure

Comments:

We support measures that will further enhance the robustness and quality of regulatory decisions and which reduce the risk of regulators exhibiting confirmation bias. We believe that regulators should consider best practice when developing procedures for taking regulatory action. We note that discussions are ongoing in respect of the arrangements for antitrust decision-making and so, we are unable at this stage to duly consider whether such proposals should be applied in other regulatory decision making regimes.

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?

Comments:

The most effective way to avoid appeals is for regulators to actively and transparently adopt the principles of better regulation throughout their regulatory decision making process.

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

☐ Yes ☒ No ☐ Not sure

Comments:

We do not believe there is a need to enhance the extensive information gathering powers granted to the energy regulator under the Gas and Electricity Acts, Competition Act 1998 and European legislation.

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

Comments:

We do not think there is a problem in this area, as case law has solved many of the uncertainties. This may change with the development of private enforcement.

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 ☒ No ☐ Not sure

Comments:

We support a regime where appeals are handled expeditiously and fairly. We believe the appropriate target time limit is linked to the standard of review to which cases are heard. We believe that the proposal set out in the consultation to move to a six month time limit is based on the proposal to move to a judicial review standard. As set out in our answers above, we do not support such a move and therefore we are not convinced that there is currently a case to modify the existing time limits.

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 ☐ No ☐ Not sure

Comments:

We believe that a twelve month target is appropriate provided that flexibility exists to ensure that at all times justice is done and complex cases can be properly addressed.

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 ☒ No ☐ Not sure

Comments:

This proposal may prevent a fair hearing if there is an explicit limit on experts and witnesses. We do not concur with the implicit assumption that expert witnesses are a tactic used by appellants to delay or obfuscate proceedings and it is just as likely that their use reflects the complex nature of the case.

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?

Comments:

We see no reason why this should not be available where all parties agree.

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?

Comments:

We note that this has been the practice in the energy sector in GB since 2011. However, we also note that no price control appeal has been raised since the introduction of this time limit. There is no evidence therefore that this is an appropriate time limit for all price control appeals.

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?

Comments:

There has not been enough experience of this process to make an informed 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?

Comments:

N/A

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

Comments:

Target times will not necessarily reflect the complexity and volume of cases generated by suspect regulatory decisions. It will be possible to reduce the length of the investigation timetable but this can only be achieved with more resources. So far flexibility of the panel system which allows for more or less resources according to case load for the CC and CAT seems to have worked well.

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

Comments:

We emphasise the role of better regulation which prevents the need for appeals in the first place.

Electricity Association of Ireland (EAI)

127 Baggot Street Lower,
Dublin 2,
Ireland.

11th September 2013

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

Response Form: Streamlining Regulatory and Competition Appeals
Consultation on Options for Reform

Dear Mr Monblat,

I am writing to thank you on behalf of the Electricity Association of Ireland (EAI) concerning the above UK Government Consultation.

EAI is the main representative body for electricity companies operating within the Single Electricity Market of Northern Ireland and the Republic of Ireland. Our membership comprises over 90% of the generation and supply activities and 100% of distribution activities on the island of Ireland.

EAI is responding to this consultation in the context of its membership located in Northern Ireland and the acknowledged consequential implications of this Consultation for Regulatory and Competition Appeals policy and legislation in Northern Ireland.

We acknowledge the scrutiny given to the issue in hand within the Consultation documents. However, our submission does not address the totality of the questions raised in this Consultation, rather it considers 3 points of importance in the context of Northern Ireland but which have more general application:

1. The issue of costs acting as barrier to accessing an appeals mechanism and the defective governance system that may arise as a result. This cost issue particularly applies in the case of Northern Ireland where are far fewer licensees and generally much smaller operators in the electricity market than in GB. They do not have the same level of resources whether in manpower or otherwise to be able as effectively to challenge issues.

2. The requirement to make provision in legislation for a right to appeal decisions of supra-national regulatory bodies to non-judicial bodies in the first instance. This arises most immediately in the case of the Single Electricity Market (SEM) Committee but may apply more generally in the future as electricity market coupling between the UK and mainland European member states intensifies in the context of a single European electricity market.

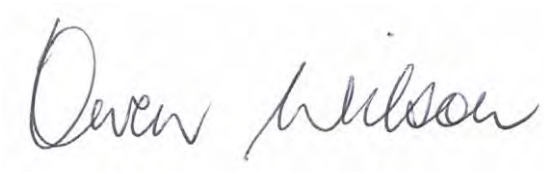
3. Narrowing the grounds for the majority of regulatory and competition appeals[1] will not remove a barrier to effective regulatory decision making. It will limit the scrutiny to which regulatory decisions are subject and reduce the incentives on regulators to properly reason and evidence their decisions. The net result is to undermine investor confidence in the regulatory decision making process, which adds significant risk to sectors that employ large sunk costs.

The effective absence of a suitable appeals mechanism in Northern Ireland, as provided for in the Third Energy Package (specifically Articles 37(17) and 41(17) of the Electricity and Gas Directives respectively), due to the high cost barrier of current appeal mechanisms (and a focus on process and points of law rather fundamental merits of a decision through JR) reduces the degree of accountability of the independent regulatory authorities are subject to and risks creating a false sense of confidence in the quality and effectiveness of the regulatory regimes. This aspect is noted in the Consultation and was emphasised in a report prepared by the Economist Intelligence Unit for the Government of Ireland which commented that …..*"…the lack of an effective appeals mechanism is likely to be more costly than any delays caused by appeals. Any delay resulting from an appeal is temporary, whereas bad regulatory decisions impose on-going costs".*[2] The Impact Assessment does not appear to account for any value created or saved by better quality decisions that result from an effective appeals regime.

Some more detail on these points is provided in the attached Response Form to which answers/comments have been provide in respect of Questions 1, 2, 3, 5, 8, 10, 15, 16, 23, 25, 26, 31, and 43.

I trust these views can be taken into consideration.

Yours sincerely,



Owen Wilson
Chief Executive
Electricity Association of Ireland (EAI)

[1] To either a Judicial Review standard or to "focused specified grounds" as suggested on page 35 of the consultation document.

[2] www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/EIU_Review_of_Regulatory_Environment_in_Ireland.pdf

HM Government

Response Form: Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

19 June 2013

Department for Business Innovation & Skills

Response Form: Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

Issued: 19 June 2013

Respond by: 11 September 2013

Enquiries to:

Regulatory and Competition Appeals Consultation

Consumer and Competition Policy Directorate

Department for Business, Innovation and Skills

1 Victoria Street

London

SW1H 0ET

Tel: 0207 215 6982

Email: regulatory.appeals@bis.gsi.gov.uk

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

This information is also available on the GOV.UK website: https://www.gov.uk/government/consultations/regulatory-and-competition-appeals-options-for-reform

How to Respond

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

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

The consultation response form is available electronically on the consultation page: www.gov.uk/government/consultations/streamlining-regulatory-and-competition-appeals-options-for-reform (until 11 September 2013). The form can be submitted online/by email or by letter or fax to:

Regulatory and Competition Appeals Consultation

Consumer and Competition Policy Directorate

Department of Business, Innovation and Skills

1 Victoria Street

London

SW1H 0ET

Tel: 0207 215 6982

Fax: 0207 215 0235

Email: regulatory.appeals@bis.gsi.gov.uk

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

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

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

Confidentiality & Data Protection

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

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

Help with queries

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

What happens next?

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

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

Comments or complaints

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

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

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

The consultation principles are in Annex J.

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

Chapter 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 ☐ No ☐ Not sure

Comments:

This Question is somewhat ambiguous. EAI considers that both standards of review should be available i.e. there are often grounds where a judicial review standard would suffice but a wider standard of review may also sometimes be appropriate and the option of a wider standard should not be limited.. We argue this in the context that Directive 2009/72/EC provides that "Member States shall ensure that suitable mechanisms exist at national level under which a party affected by a decision of a regulatory authority has a right of appeal to a body independent of the parties involved and of any government" *(Article 37 (17)). This is further emphasised in the EU Commission's Commission Information Note[3] on the Electricity and Gas Directives which comments that* "This provision should in the view of the Commission's services not only apply to decisions of the NRA when exercising its powers and carrying out its duties, but also e.g. to decisions of the NRA related to the confidentiality of information".

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 ☐ No ☐ Not sure

Comments:

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

Comments:

EAI's concern is not so much with the length or effectiveness of the appeals process but with the breadth of decisions open to appeal and the potential for higher costs to further restrict the appeals option for regulated entities. Given the scale of regulatory decision-making, the very limited numbers of appeals that have arisen in the UK over the period 2008-12 indicate a particularly cautious use of this option by operators. It is arguable that this caution is at least in part due to the costs associated with current appeals processes (in addition to the desire to maintain a functioning working relationship with the regulator).

The average size of an energy company in Northern Ireland is significantly smaller than in GB. This is an inherent structural feature if a competitive element is to be maintained in this regional market. Therefore the burden of a judicial review standard for both licence and non-licence modifications presents is a formidable obstacle to due process particularly in light of appeals having to be made through the courts for Northern Ireland market participants.

[3] COMMISSION STAFF WORKING PAPER: INTERPRETATIVE NOTE ON DIRECTIVE 2009/72/EC CONCERNING COMMON RULES FOR THE INTERNAL MARKET IN ELECTRICITY AND DIRECTIVE 2009/73/EC CONCERNING COMMON RULES FOR THE INTERNAL MARKET IN NATURAL GAS

With the wide-ranging increase in regulator powers under the Third Energy Package, a balancing right to challenge decisions/ directions of regulators is required. EAI believes there should be a fit for purpose, comprehensive non-judicial appeal process in place for all regulatory decisions materially affecting a licence holder, reducing the need for appeal and redress through the court system and all the inefficiencies and expense for all parties that the court system entails. An appeals process that exists in name only will serve no one's interests.

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 ☐ No ☐ Not sure

Comments:

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?

Comments:

As a general principle, EAI considers that both judicial review standards and focus specified grounds for appeals should be available to appellants if regulatory bodies are to be held accountable for all decision-making as intended by the Electricity Directive. Appeals should be permitted to be made to non-judicial bodies on the basis of either types of standard i) or ii). Where a non-judicial review process applies then focused, specified grounds should be established. Absent this then a large number of smaller licensed entities will be excluded effectively from any appeals process.

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 ☐ No ☐ Not sure

Comments:

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?

Comments:

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?

☐ Yes ☐ No ☐ Not sure

Comments:

As a general principle EAI considers that where a non-judicial review process applies then focused, specified grounds should be established.

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?

Comments:

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?

Comments:

To the extent that the proposals being consulted on recognise the factor of scale (relative company size) and the affordability of appeals procedures for smaller companies then the proposals should extend to Northern Ireland. The comments made above are made in the context of NI participants in particular.Furthermore, as EAI already commented in its submission to the NI Executive consultation, a framework is required in which all regulatory decisions are open to appeal and that permits, within reasonable constraints, aggrieved parties taking such appeals.

Furthermore, EAI wishes to highlight the particular issue of appeals against decisions of supra-national regulatory bodies. This arises most immediately in the context of the absence of any statutory recognised right to appeal to a non-judicial body against decisions of the joint Northern Ireland - Ireland regulatory body for the electricity market i.e. the Single Electricity Market (SEM) Committee. We would urge the Government to consider this current anomaly given it may have more general application in the future as electricity market coupling between the UK and mainland European member states intensifies in the context of a single European electricity market.

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?

Comments:

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?

Comments:

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?

Comments:

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]?

Comments:

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 ☐ No ☐ Not sure

Comments:

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 ☐ No ☐ Not sure

Comments:

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

☐ Yes ☐ No ☐ Not sure

Comments:

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

✓☐ Yes ☐ No ☐ Not sure

Comments:

Yes, price control appeals in particular require a body that is able to properly assess the interactions between a series of complex and interlinked technical issues. We feel that these are better explored and adjudicated on by the Competition Commission.

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 ☐ No ☐ Not sure

Comments:

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

☐ Yes ☐ No ☐ Not sure

Comments:

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

☐ Yes ☐ No ☐ Not sure

Comments:

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

☐ Yes ☐ No ☐ Not sure

Comments:

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 ☐ No ☐ Not sure

Comments:

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?

Comments:

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

✓☐ Yes ☐ No ☐ Not sure

Comments:

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?

Comments:

EAI sees merit in both arguments but on balance would favour the High Court of Northern Ireland being the appeals body for that jurisdiction.

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

☐ Yes ☐ No ☐ Not sure

Comments:

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 ☐ No ☐ Not sure

Comments:

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?

Comments:

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 ☐ No ☐ Not sure

Comments:

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?

☐ Yes ✓☐ No ☐ Not sure

Comments:

This Schedule would appear to severely restrict the opportunity to adduce new evidence. Given the very limited number of appeals made, EAI queries whether it has been sufficiently demonstrated that such a restriction is required.

We would prefer if the provision permitted a party who wishes to adduce new evidence to do so if they show good reason to justify the introduction of 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?

☐ Yes ☐ No ☐ Not sure

Comments:

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

☐ Yes ☐ No ☐ Not sure

Comments:

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 ☐ No ☐ Not sure

Comments:

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 ☐ No ☐ Not sure

Comments:

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

☐ Yes ☐ No ☐ Not sure

Comments:

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?

Comments:

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

☐ Yes ☐ No ☐ Not sure

Comments:

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

Comments:

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 ☐ No ☐ Not sure

Comments:

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 ☐ No ☐ Not sure

Comments:

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 ☐ No ☐ Not sure

Comments:

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?

Comments:

EAI's primary concern is that there is an effective appeals system available which parties can access at reasonable cost. Otherwise, as highlighted previously, an appeals process in name only or one in which only parties with strong financial resources can participate will result – as is effectively the case today in Northern Ireland. Consequently, EAI would support any mechanism that has the potential to cap costs on joint agreement by both parties.

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?

Comments:

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?

Comments:

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?

Comments:

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

Comments:

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

Comments:

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☐

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

✓☐ Yes ☐ No

BIS/13/876RF

Electricity North West (ENWL)

ENWL Logo RGB
Tony Monblat

Consumer and Competition Policy Directorate

Department for Business, Innovation and Skills

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London

SW1H 0ET

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304 Bridgewater Place, Birchwood Park

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11 September 2013

Dear Tony,

Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform

Thank you for the opportunity to respond to the above consultation. This response is on behalf of Electricity North West, an electricity distribution network based in the North West of England and regulated by Ofgem. We have contributed to the Energy Networks Association (ENA) response to this consultation and fully support the positions in that document. We are responding to reinforce the ENA position and highlight our concerns with the proposals.

We have noted the numerous references made in the paper on the specific issues in the Telecoms sector and that these concerns appear to be the driver for universal change. Whilst we are not in a position to comment on the appropriateness or effectiveness of the appeals process in that sector, we can confirm the effectiveness of the energy sector's appeal mechanisms. The energy sector has a well established regulatory appeals process which was recently amended as a result of the implementation of the Third EU Energy Package. This system is working well for customers, regulators and investors. We see no reason to change the appeals basis in all sectors as a result of specific concerns in one sector and do not believe that BIS has demonstrated the benefits of moving to a consistent regime. BIS should seek a more proportionate solution to address the concerns within the Telecoms sector rather than damage a well understood process. This would result in reduced regulatory certainty for investors and an increase in risk in all other sectors.

Additionally, the proposed adoption of a universal judicial review standard for all sectors is inappropriate for appealing against regulatory decisions (including industry code modifications). The merits-based appeal (rather than judicial review) creates greater regulatory certainty by providing a higher level of scrutiny and accountability for the Regulator's decisions. Adopting a different approach will weaken the controls on Regulators to produce appropriate and justifiable decisions.

The consultation goes on to suggest that investors across sectors may have less certainty about how the regime operates because of differences in appeal route. We do not agree with this statement and the consultation fails to provide any evidence to justify this position. From our perspective, debt and equity investors fully understand the appeal routes for price control decisions, licence modifications and code changes in the energy sector. Any modification to these appeals will increase their risk perception of the energy industry which will feed through into increased costs for customers.

If you have any queries with any of our positions in this letter, please feel free to contact me.

Yours sincerely,

Paul Bircham

Regulation Director

Energia

Response by Energia to the Department of Business Innovation and Skills

Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform

11 September 2013

1. General comments

Energia welcomes this opportunity to respond to the Department of Business Innovation and Skills (BIS) consultation on options for streamlining regulatory and competition appeals. Energia, a member of the Viridian Group, is the largest independent energy supply company on the island of Ireland. Energia's commitment to this market and to sustainable energy is evidenced by its considerable investment in both thermal and renewable generation assets[1]. Energia is an active member of the Electricity Association of Ireland (EAI) which is an all-island representative body.

Energia fully endorses the EAI response to this consultation. In this brief submission, which should be considered supplementary to the EAI response, we discuss, particularly with reference to Northern Ireland (NI) specific differences, our key concerns with the overriding presumption of the Government in the consultation paper that *"…judicial review should provide appropriate and proportionate appeal rights…"* We would have significant concerns about this presumption applying to Northern Ireland.

In the context of Northern Ireland, bearing in mind the Third Energy Directive and the nature of energy matters more generally, we strongly consider a need 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. It should also bear in mind the cross-jurisdictional nature of the Single Electricity Market (SEM). Apart from its narrow scope, with a focus on points of law and process, judicial review is prohibitively expensive, especially in Northern Ireland where gas and electricity licensees are generally much smaller and fewer in number than their GB counterparts.

2. Northern Ireland considerations

Energia is not persuaded that there is an automatic read across of the GB approach. It must be recognised that the nature of the industry is different in that there are fewer licensees in NI. This means that there is less opportunity for points to be raised by licensees in regulatory consultations, and it is therefore potentially easier for the Utility Regulator to underestimate the strength, or disregard the level, of objection. It should also be noted that licensees in NI are generally smaller companies than in Great Britain. They do not have the same level of resources whether in manpower or otherwise to be able as effectively to challenge issues. This, amongst other features of regulatory practice in Northern Ireland, creates a potential for subjectivity in regulatory decision making which renders it imperative that a suitable appeals mechanism exist against which regulatory decisions (and not just those confined to licence modifications and price controls) can be effectively challenged on a reasonable basis. It is therefore essential that a more streamlined appeal process to

[1] See http://www.energia.ie/ for more details about Energia.

challenge poor and ineffectual regulatory decisions is established in Northern Ireland that should also be cognisant of the cross-jurisdictional nature of the SEM.

Energy Networks Association (ENA)

Consumer and Competition Policy Directorate
Department of Business, Innovation and Skills
1 Victoria Street
London
SW1H OET

11th September 2013

Dear Sir/Madam

I am writing on behalf of Energy Networks Association (ENA), the voice of the networks. ENA is the industry body for UK and Ireland gas and electricity transmission and distribution networks, essentially, the 'wires and pipes' that deliver this vital service to our homes and businesses.

ENA welcomes the opportunity to respond to this consultation on the options for reform of regulatory and competition appeals.

Standard of Appeal

As economically regulated businesses, ENA's members aim to work closely with the regulator, Ofgem, to follow the principles of economic regulation as set out in the consultation, that of:

- accountability;
- focus;
- predictability;
- coherence;
- adaptability; and
- efficiency.

ENA and its members are aware of the costs to regulators, regulated companies and the wider economy from appeals and the need for decisions to be made and enforced in a timely manner. We do not, however, support the government's proposal to reduce parties' appeal rights and do not believe such a reduction of parties' rights will achieve the government's proposed aims in the consultation.

In the energy sector, the rights of appeal were significantly amended in 2011 but remain subject to an appeal mechanism (as required by EU law) that is related to the merits. Since the amendments, there have been no appeals so there is no evidence to suggest that the appeals system is broken.

One of the key principles of the changes to the appeals regime in energy in 2011 was the introduction of the rights of third parties to raise appeals. Our members feel that any move to a predominately Judicial Review (JR) approach would significantly undermine the intent of these changes.

A merits based approach should always be preferred on the basis that it drives better and more considered regulatory decisions.

It should be noted that appeals are not always settled in favour of the appellant. Indeed in the energy sector, our members are conscious that there is always the potential that they may lose in an appeal, especially in relation to price controls.

The tone of the consultation document seems to imply that appeals always work against the customers' interest by delaying regulatory actions or decisions. ENA believes that there is evidence from the telecommunications sector where appeals have worked to improve the position for customers by moving the balance of the regulatory decisions towards the customer and away from the regulated entity.

Aligning sectors

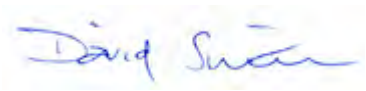
Variations in the number of appeals across the sectors does not necessarily indicate that certain sectors are working better (or worse) than others or that it is easier, or there is more desire, to raise appeals in some sectors as against others. It may simply indicate that there are differences in the markets in which each sector operates.

Each of the regulated sectors that are covered by this consultation has different statutory frameworks (including differing underlying European laws) and, therefore, it is not surprising that different appeal rights exist. ENA and its members do not believe that there is evidence to suggest that making appeal rights consistent across sectors will bring any benefits. Consistency within sectors is a concern for investors, not consistency across different regulated sectors.

Given the above, our members do not feel that the case for changing appeal rights in the energy sector has been made and there does not currently appear to be any evidence to support fundamental changes across all the regulated sectors.

I trust that you find these comments useful, we would be happy to meet with you and the relevant members of your team to discuss them further.

Yours faithfully



David Smith

CEO, Energy Networks Association

Response Form: Streamlining Regulatory and Competition Appeals

Consultation on Options for Reform

19 June 2013

This response is made on behalf of the Energy Networks Association. Our members have not expressed opinions to all of the 48 questions raised in this consultation, but have chosen to provide views on those aspects that are relevant to them and to the energy sector in the UK.

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?

Comments:

We do not support a general principle that there should be a presumption that appeals should be heard on a JR standard unless there are specific legal or policy reasons for a different approach. We consider that a merits based approach should be the starting point in designing any appeal process.

For example, we feel that there should remain a standard of review for licence modification decisions (including price controls) which allows for greater scrutiny than the traditional JR. As regulated entities, price control decisions and other licence modification decisions are central to the way in which our members operate. Settlements such as the RIIO GD1 and T1 agreed in early 2013 and the RIIO ED1 which will be finalised with the electricity Distribution Network Operators (DNOs) in 2015 are economically complex and require a substantial degree of judgement on the part of Ofgem as the regulator. A JR would provide an insufficient level of accountability and scrutiny of these decisions. Indeed, given the very limited benefits of reform identified in the impact assessment when compared to the size of price control settlements, it is clear that any benefits of reform could easily be outweighed by a price control decision that was "wrong" despite not being challengeable by way of judicial review.

Another example is appeals in relation to industry code decisions which can, and do, have significant economic impacts upon our members and we believe that the network operators should retain the right to have merits based appeals on such 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?

Comments:

See comments to question 1 above. We consider that there is no case for change for appeals procedures that are carried out on grounds other than JR.

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

Comments:

A move to a JR standard may reduce the length and therefore cost of some appeals where they are simple and do not rely on a substantial level of judgement by the regulator. However, where the decision being appealed is duly complex or relies on judgement by the regulator, JR would not be appropriate and therefore the timescales could be unnecessarily lengthened if the appeal were to go first to JR and then to a further appeal. Given that licence modification decisions generally raise complex issues relating to revenues (price controls) or impose costs (through regulatory requirements) on parties, we consider that the present standard relating to the merits of the issue remains appropriate, as well as being required by the underlying EU rules in the Third Package of EU legislation.

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?

Comments:

We do not agree that there should be a change in the standard of review for Competition Act infringement decisions which, as highlighted in the consultation document, can result in significant and punitive fines being imposed. It is important that these decisions are subjected to a high degree of scrutiny which a JR or 'specified grounds' would not provide.

Indeed, when the CMA was being designed, it was decided not to adopt a prosecutorial model on the basis that a full appeal was available. Without this, there cannot be adequate protection of parties' interests and there is no justification in the consultation for changing this position. Indeed, the Government clearly expressed the view, just 11 months ago, a prosecutorial system was not needed because an appeal on the merits was available. Nothing in the intervening short period has happened to justify a change from this approach.

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?

Comments:

As per the response to Q6, JR or 'specified grounds' are not appropriate. Timescales could well be increased if there were multiple appeals. Furthermore, the change to a JR standard could lead to a great deal of litigation and appeals in order to determine what this standard really meant for the energy sector in the context of the EU Third Package.

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?

Comments:

We do not agree that there should be a change in the standard of review. We strongly believe that a standard of review for price control decisions which allows for greater scrutiny than the traditional JR route should be retained – our rationale for this is set out in 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?

Comments:

To improve the length, cost and effectiveness of appeals further consideration should be given to changes that could be made to the procedural rules rather than the standard of appeal.

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?

Comments:

We do not believe that there is any case provided in the consultation to suggest that a move away from the standards already provided for in the sector would be justified.

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]?

Comments:

We believe that both the CAT and the Competition Commission provide the relevant skills and experience in hearing appeals in the regulated sectors they currently work in. We are generally supportive of the proposed government consultation of the CAT rules in the autumn.

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

Comments:

Yes, there appears to be no case for change as this is the body with the skills and experience to consider the complex economic issues involved.

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

Comments:

We understand that the government is looking to move energy code modifications from the Competition Commission to the CAT, in a similar way to other ex-ante decision appeals, to ensure that these appeals benefit from the CAT's experience in hearing adversarial appeals on regulatory matters. ENA members, as owners of these codes would request further information on how this would work in practice, but generally consider there is no case for change.

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

Comments:

See Q20 above

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

Comments:

There is no obvious case to suggest that a single body should hear all 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?

☐ Yes ☐ No ☐ Not sure

Comments:

We consider that, where there are no complex economic issues, the High Court is the appropriate appeal body. There could however be the ability to transfer a case to the CAT where there are complex economic issues to be considered.

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

Comments:

There is no obvious case to suggest that a single body should hear all cases.

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?

Comments:

We consider that, where there are no complex economic issues, the High Court is the appropriate appeal body. There could however be the ability to transfer a case to the CAT where there are complex economic issues to be considered.

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

Comments:

We believe that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998, in addition to its current role in considering appeals against such decisions. As the specialist competition judicial body, the CAT is best placed to do this to avoid the burdensome and inefficient duplication of work and costs as seen in the Cityhook vs. OFT case of 2009 where the appellant appealed to the CAT following the closing of the file by the OFT (amounting in substance to a non-infringement decision) as highlighted in paragraph 5.42 of the consultation document.

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?

Comments:

The proposal to increase the use of confidentiality rings at the administrative stage of the decision making process is a sound one.

As noted in the consultation document the foreknowledge of parties involved in the process and sufficient engagement between authorities and parties during the administrative stage should focus appeals on the key issues and not lead to parties disputing fallacious evidence, thereby delaying the regulatory decision making process.

By facilitating the further use of confidentiality rings in this early stage, relevant confidential documents can be disclosed between the appellant and the authority without redaction or the risk of disclosure which should lead to better decision making at the administrative stage which in turn should reduce the need for appeal. This should also lighten the administrative burden on all the parties who are then required to undertake the redaction process which is burdensome and costly.

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?

Comments:

We are happy with the proposals for the operations of such rings as set out in the consultation document. In addition, we consider that it is important that individuals with the relevant knowledge are permitted in the confidentiality ring and not necessarily just legal advisers, as is sometimes the practice.

We believe that there is benefit to an independent body supervising these 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?

Comments:

We are supportive of the government proposal to set out in statute the scope of the CAT's discretion to admit new evidence in antitrust and Communications Act cases, where the person wishing to introduce it shows good reason the evidence could not reasonably be expected to have been placed before the administrative authority, the evidence is likely to have an important effect on the outcome of the appeal and that it is in the interests of justice that the evidence be admitted.

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?

Comments:

We agree with the approach taken in schedule 2 to the Civil Aviation Act 2012, which prevents evidence being considered if it was not considered by the CAA, unless the CAA could not have been expected to consider the evidence, that the evidence is likely to have an important effect on the outcome of the application or appeal and that the evidence could not reasonably be expected to be raised to the CAA.

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?

Comments:

We believe that in order to ensure a fair, open and transparent appeals process, in circumstances where a regulator is successful, the regulator should be awarded costs except in circumstances where they are found to be or have been acting unfairly or unreasonably – however where a regulator is unsuccessful we feel that it is only good legal practice that costs should "follow the events" and therefore an unsuccessful regulator should be required to pay costs whether or not there have been exceptional circumstances.

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

Comments:

Following on from the response to question 32, we feel that whilst it may be considered that regulators should be encouraged to claim back their full costs including their in-house legal costs when they are successful in an appeal, there could be an element of "double counting". The regulator is funded for all its internal costs through the licence fee arrangements and therefore the cost of internal legal provision is already funded by the industry it regulates and arguably by the appellant themselves. Further consideration needs to be given to this potential to 'double count' and how it can be avoided.

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?

Comments:

We believe that the administrative bodies should be in a position to more actively scrutinise appeal grounds and where appropriate challenge them at the CAT in the early stages – this should lead to a stronger challenge as to the validity of any appeal, the relevance of the sufficiency of interest of the appellant and indeed prevent or deter vexatious proceedings.

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.

Comments:

We believe it is valid for the CAT to be granted the right to review and indeed reject appeals or aspects of an appeal which stand little chance of success or can be seen to be vexatious or speculative.

However, there must remain robust measures in place to ensure that there is a sufficient level of scrutiny applied by the CAT in its initial assessment on the merits of the appeal and the grounds upon which it is or is not likely to be successful.

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

Comments:

We consider that the principles of decision making, as highlighted in the consultation document, in relation to decision making for antitrust cases should be applied 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?

Comments:

ENA members maintain positive relations with Ofgem through price control review and other elements of regulatory decision making processes. Annually Ofgem consults on and produces a Simplification plan and Annual Report which our members actively contribute to and this helps to reduce any potential need to appeal due to the open and transparent dialogue had between the regulator and the industry. However, there is still room for improvement around early consultation and transparency in the decision making process.

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

Comments:

We believe that regulators already have sufficient powers for example through the ability to request information, contained in companies' licences.

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

Comments:

We believe that in cases where there has been a non-infringement decision there should continue to be a right to appeal.

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?

Comments:

We support the government aims that appeals should be carried out in the most efficient way and that robust decisions are reached as swiftly as possible with minimum costs. As part of this we are supportive of the CAT being required to reduce its target timescales for straightforward cases to 6 months. We also agree that the CAT should be required to introduce a target timescale for all other cases of 12 months. However, it is important to ensure that the CAT's priority remains making the right decision as opposed to simply making a decision within the prescribed timescales.

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?

Comments:

Whilst we can see the logic in allowing the CAT the power to limit the amount of evidence and expert witnesses, we believe it remains important that appellants have a proper chance to put forward evidence which supports their case. The setting of these limits would therefore need to be clearly thought through and be demonstrated to be set at a fair level, taking into account the effect of any other procedural measures that might be imposed following this consultation.

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?

Comments:

We are very supportive of the voluntary fast track procedure, whereby parties themselves agree at the outset to limit the amount of evidence or cap costs. Where parties can agree, and this agreement is reached within a reasonable period of time, such a process should lead to simpler, less contentious cases and enable these cases to be concluded quicker.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Please see our cover letter

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes ☐ No

Energy UK

The voice of the energy industry

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

Sent via e-mail: tony.monblat@bis.gsi.gov.uk

11 September 2013

Dear Mr Monblat

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

I am pleased to attach Energy UK's response to BIS' consultation on Streamlining Regulatory and Competition Appeals. It is not confidential.

If you have any questions, please do not hesitate to contact me on 020 7747 2962 or alun.rees@energy-uk.org.uk

Yours sincerely

Alun Rees
Policy and External Relations Manager

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The voice of the energy industry

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

Energy UK response

11 September 2013

1. Introduction

1.1. Energy UK is the trade association for the energy industry. Energy UK has over 80 companies as members that together cover the broad range of energy providers and suppliers and include companies of all sizes working in all forms of gas and electricity supply and energy networks. Energy UK members generate more than 90% of UK electricity, provide light and heat to some 26 million homes and last year invested £10billion in the British economy.

1.2. Energy UK strongly believes in promoting competitive energy markets that produce good outcomes for consumers. In this context, we are committed to working with Government, regulators, consumer groups and our members to develop reforms which enhance consumer trust and effective engagement. At the same time, Energy UK believes in a stable and predictable regulatory regime that fosters innovation, market entry and growth, bringing benefits to consumers and helping to provide the certainty that is needed to encourage investment and enhance the competitiveness of the UK economy.

1.3. These high-level principles underpin Energy UK's response to BIS' consultation on Streamlining Regulatory and Competition Appeals. Appeal rights are an extremely important subject; they go right to the heart of the UK's ability to attract investment at sustainable costs of capital, particularly in regulated sectors like utilities where investments are long-term and involve very significant sunk costs. In this regard, BIS' consultation contains some proposals that are acutely concerning to Energy UK, not least because we believe they will ultimately be detrimental to consumer interests. We would like to meet with BIS to discuss these issues at its earliest possible convenience.

2. Executive Summary

2.1. Energy UK supports the Government's objective of achieving better regulatory decisions, thereby giving firms the confidence to invest and innovate, and in turn promoting economic growth. It is therefore extremely regrettable to say that **the main thrust of BIS' proposed reforms is precisely the opposite of what is required to achieve these aims in the energy sector**. We note that the Competition Appeals Tribunal (CAT) has drawn a similar conclusion in respect of BIS' proposals more generally[1].

[1] "*Even where the objectives are clear, there is a danger that implementing some of the Government's proposals would achieve the opposite result from what was intended*": Competition Appeals Tribunal, "Streamlining Regulatory and Competition Appeals", August 2013, p. 5

2.2. In summary, although the concern is not currently borne out by experience in the energy sector, we are sympathetic to the view that an effective regime is one which is not hampered by spurious, ill thought-out or inappropriate appeals. As such, Energy UK is supportive of the continuation of a merits-based process that has well-functioning gate-keeping arrangements in keeping with judicial independence. In particular, the appeals body should be able to decide:
   a) Whether the appeal warrants further scrutiny;
   b) Whether the appeal should be rejected (i.e. has no reasonable chance of success); and
   c) Whether further information is required before deciding whether to proceed.

2.3. Energy UK vehemently opposes any proposal to narrow the grounds for regulatory and competition appeals in the energy sector from the status quo, either to a judicial review (JR) standard or to "focused specified grounds" (FSG) set out on page 35 of the consultation document. We explain why below.

2.4. BIS' rationale for intervention appears to be that the number and duration of appeals acts as a barrier to effective regulatory decision making. In other words, BIS asserts that there are too many appeals and that they last too long. This is not borne out by the evidence in respect of the energy sector.
   a) As Annex E to the consultation document shows, only four Ofgem decisions have been appealed in the past four years. Of those four decisions, three were taken to the High Court on judicial review (JR) grounds, which is the very standard that BIS is suggesting to be adopted as a presumption. On this basis, BIS' justification for intervention amounts to an implication that one appeal in four years is too many, a view which is difficult to sympathise with.
   b) With respect to duration of appeal, Annex E also shows that the two applicable JR cases lasted 9.5 and 15.17 months, whereas the Competition Act appeal to the CAT lasted 12.43 months. This does not imply a significant difference. In any case, there is insufficient evidence to justify change.

2.5. More broadly, Energy UK notes that the Competition Appeals Tribunal (CAT) is particularly concerned about BIS use of evidence to support its proposals, which it describes as "insufficient, selective, and/or misleading"[2].

2.6. Perhaps more importantly, BIS' starting premise is seriously flawed. Increasing the speed of decisions by reducing the scrutiny to which those decisions are subject will not lead to better decisions; it will have the opposite effect. Energy UK seeks an appeals mechanism that promotes high quality, timely decisions, not decisions taken in haste to the detriment of quality.

2.7. In the energy sector currently, (i) Competition Act decisions,, (ii) price control decisions, (iii) licence modification decisions, (iv) industry code modification decisions and (v) financial penalties imposed in relation to Licence Condition enforcement decisions[3] are all appealable on the merits, with the latter four being more tightly defined than the first.

2.8. Both judicial review and BIS' proposed "focused specified grounds" would be significantly narrower than the existing "merits" standards referred to in 2.5 above. As a consequence of the

[2] Competition Appeals Tribunal, "Streamlining Regulatory and Competition Appeals", August 2013, p. 3. For instance, the CAT draws attention to BIS' use of the words of Lord Justice Jacob to support its "concern that the appeal body could act as a second regulator 'waiting in the wings'". In fact, the CAT confirms, Lord Justice Jacob "was describing what *ought not* to happen, rather than what *does* happen" and states that BIS' "particular concern has no basis in reality".

[3] 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. During the Lords Report stage of the Utilities Bill on 5 July 2000 (col 1535), Lord McIntosh of Haringey stated why the provisions provide for an intensity of review which goes beyond judicial review standards. (http://www.publications.parliament.uk/pa/ld199900/ldhansrd/vo000705/text/00705-17.htm#00705-17_spnew2) 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.

lower level of scrutiny that each would apply, both would (i) reduce incentives on regulators to make decisions that are sufficiently reasoned, evidenced or strike the right balance between their statutory duties in the first place, and (ii) reduce the opportunity to correct errors when they do occur. The CAT shares Energy UK's view that "reducing the level of scrutiny will tend to lower the incentives for regulators to make sound decisions"[4].

2.9. Both JR and FSG would, therefore, increase the risk of poor regulatory decisions. As a result of the riskier environment, investors will be likely to require a greater return on their capital (costs of which will be passed onto consumers) or simply seek more attractive destinations for their capital than the UK. This effect would be acutely felt in sectors like utilities, where investments are long term and involve very significant sunk costs, and, therefore, where an even greater confidence in quality regulatory decisions is required over time. In order to achieve this level of confidence, Energy UK believes that merits-based appeals should be retained across the board.

2.10. Energy UK considers that BIS' Impact Assessment (IA) is incomplete, and therefore does not draw the correct conclusions. Although the IA 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 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. Conversely, given the high value of many decisions (including price control decisions), even one decision that was wrong, but not challengeable under any revised arrangements could easily outweigh the notional benefits of reform because of the costs involved. Furthermore, the number of judicial reviews may substantially increase if it is the only appeal route available.

2.11. Energy UK also believes that the parameters of an appeals regime may well vary according to the issues in question, and therefore that homogeneity should not be presumed as desirable.

2.12. In conclusion, Energy UK urges BIS to reconsider its proposals, particularly given the importance of the appeals regime for ensuring high quality regulation of a major industry that is critical to the recovery and growth of the UK. In order to assist in developing a regime that is fit-for-purpose and meets BIS' concerns, Energy UK proposes that a workshop is convened with all despatch consisting of industry, officials and external experts to seek an effective solution.

2.13. The rest of this document contains a more detailed description of the shortcomings and, in one case, potential merits, of FSG and JR relative to the status quo, along with answers to the specific consultation questions in appendix 1.

3. Focused specified grounds

3.1. In addition to the substance of a decision, it is essential that the drafting used to implement it is challengeable. 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 regulatory rules affecting them. If FSG were introduced for regulatory decisions, firms would no longer be able to appeal a decision on the basis that "the modifications fail to achieve, in whole or in part, the effect stated by the Authority". This is the first reason why there is an obvious shortcoming in the design of FSG compared to the status quo.

3.2. The second shortcoming of FSG is that they do not contain the ability to appeal regulatory decisions on the grounds that the Authority failed to have regard to the carrying out of its principal objective or certain specified duties, or failed to give proper weight to any such factor. This has been replaced with grounds that the decision was "outside the limit of what [the regulator] could reasonably decide in the exercise of a discretion". Energy UK considers that FSG substantially reduces the level of scrutiny, not least because "outside the limits of" reasonableness seems akin to Wednesbury unreasonableness (i.e. a judgement so unreasonable that no reasonable person could have so adjudged), in which case this ground would be similar to irrationality under JR.

[4] CAT response, p. 6

3.3. Notwithstanding the comments in points 3.1 and 3.2 above, we believe that part (e) of BIS' suggested grounds under FSG is worth exploring. This refers to whether a "decision was based on a judgement or a prediction which [the regulator] could not reasonably make". As BIS outlines on page 31 of the consultation document, this ground could help to ensure that regulators have applied sufficient rigorous economic analysis to a problem and, based on that analysis, drawn a reasonable conclusion about what might happen in the future. Energy UK is less certain, however, that the wording of ground (e) of FSG will ensure that regulators strike the right balance between their statutory objectives and duties. As a result, we consider that the status quo should, at the very least, be retained, and potentially built upon.

4. Judicial review

4.1. There are a number of material differences between a JR standard and the current grounds of appeal in the energy sector. The appeal grounds provided by the Electricity and Gas (Internal Markets) Regulations 2011, introduced to amend the licence modification procedure, serve as a useful illustration of these differences:

> *(a) that the Authority failed properly to have regard to any matter mentioned in subsection (2);*
> *(b) that the Authority failed to give the appropriate weight to any matter mentioned in subsection (2);*
> *(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 by virtue of section 23(7)(b)(8);*
> *(e) that the decision was wrong in law.*

4.2. When the Government introduced this "carefully defined right of appeal on the merits"[5] in 2011, it did so deliberately and for good reason. DECC, the relevant department, argued that decisions for licence modifications required "an appeal process which is capable of scrutinising factual issues of an economic/technical nature"[6]. For this reason, the Government concluded that "a mechanism over and above an ability to bring a claim for Judicial Review is required in these circumstances"[7]. The changes were also brought in to comply with the requirements of the EU Third package, which expressly refers to an appeal.

4.3. The Government's conclusion was correct in 2011 and remains correct today; nothing has changed to suggest that appeals to licence modifications do not now need to be wide enough to consider factual and economic issues, as well as illegality. Indeed, licence modification decisions (including price controls), are frequently founded on economic theory, which develops over time. It is vitally important that such economic theory, as well as the facts of the case, can be scrutinised and tested by experts in the field. Narrow JR grounds of irrationality, illegality and procedural impropriety would not provide for this. Indeed, the Competition Appeals Tribunal (CAT) has summarised that "judicial review proceedings are solely concerned with the lawfulness of a decision and not its correctness"[8].

4.4. Added to the inability to appeal on questions of fact, JR has the same deficiencies as FSG outlined above in 3.1 and 3.2, though arguably more pronounced.
- a) JR does not protect firms from poor drafting of licence conditions (i.e. that modifications will not achieve the policy intent) except, possibly, in the most egregious cases.
- b) JR does not provide comparable checks on how regulators exercise their judgement and discretion, for example to ensure that they strike an appropriate balance between their statutory objectives and duties.

4.5. In addition to the policy-oriented arguments laid out above, it is worth noting that the EU Third Package Directives oblige Member states to ensure that "suitable mechanisms exist at national

[5] DECC, Consultation on licence modification appeals, September 2010, p. 15
[6] DECC, Consultation on licence modification appeals, September 2010, p. 15
[7] DECC, Consultation on licence modification appeals, September 2010
[8] Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform [2008]

level under which a party affected by a decision of a regulatory authority has a right of appeal"[9] (emphasis added). As such, we do not consider that a dilution to the standard of judicial review has a sound basis in EU law.

Appendix 1 - responses 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.

One of BIS' objectives is to "provide consistency...between appeal routes in different sectors"[10]. While there may be merit in some rationalisation, BIS only gives cursory consideration to all sectors other than communications, which renders its assertion arbitrary. Whilst it is true that there are differences in appeal regimes between sectors, such differences may be required. For instance, different regulatory regimes may be seeking to achieve different objectives, address different issues, or have different underpinnings in EU law. BIS has given little consideration to the specific legislative and industry background that explains why appeals regimes have evolved as they have, whether they work well, and whether any differences therefore need to be maintained.

In any case, and as set out in sections 2-4 above, introducing a JR standard as default would reduce the scrutiny to which regulatory and competition decisions are subject, thus (i) reducing incentives on regulators to make decisions that are sufficiently reasoned or evidenced in the first place, and (ii) reducing the opportunity to correct errors when they do occur.

As a result of the riskier environment, investors will be likely to require a greater return on their capital or simply seek more attractive destinations for their capital than the UK. This effect would be acutely felt in sectors like utilities, where investments are long term and involve very significant sunk costs, and where an even greater confidence in quality regulatory decisions is required. In order to achieve this level of confidence, Energy UK believes that merits-based appeals should be retained across the board.

BIS also expresses the concern that "appeals may sometimes be seen as a…chance to re-open regulatory decisions"[11], thus clogging the system and holding back decision making. As we have seen in paragraph 2.3 above, the evidence does not support this conclusion in respect of the energy sector, where the right of appeal is very rarely exercised. The prospect of appeal on the merits is an important reason for this, since it provides an incentive to the regulator to make sound decisions. Another factor that contributes to the lack of appeals against regulatory decisions, which BIS does not consider, is the licence modification process. In particular, we would encourage BIS to explore if and how more effective consultation with industry might be achieved.

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?

Not entirely.

As set out in sections 3.1 and 3.2, BIS' proposed "focused specified grounds" would be deficient when compared to the status quo in the energy sector because they do not include the ability to challenge decisions on the grounds that (a) modifications fail to achieve the intended effect, or (b)

[9] Electricity Directive, Article 37(17), Gas Directive, Article 41(17)
[10] BIS, "Streamlining Regulatory and Competition Appeals", June 2013, p. 4
[11] BIS consultation, p. 3

that the regulator failed to have regard to (or gave proper weight to) its statutory objectives and duties. For the reasons set out in 3.1 and 3.2, these grounds need to be retained.

However, Energy UK believes that BIS' proposed new appeal ground of whether a "decision was based on a judgement or a prediction which [the regulator] could not reasonably make" is worth exploring. This could help to ensure that regulators have applied sufficient rigorous economic analysis to a problem and, based on that analysis, drawn a reasonable conclusion about what might happen in the future.

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

As explained in 2.3 above, there is little evidence to suggest that a judicial review standard would impact on the length and cost of the appeals framework in the energy sector in either direction. However, the Government notes that introducing a more limited standard of review for energy sector appeals in Australia led to more appeals and higher prices[12]. In any case, it would make the framework less effective and impose greater regulatory risk on companies and their investors.

More generally, the CAT argues in its response to this consultation that "moving away from a full merits standard to something more restrictive is at least likely to generate additional and/or lengthier litigation as parties seek to establish the boundaries of the new regime, including whether it complies with Article 4 of the Framework Directive"[13].

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?

As a general principle, Energy UK believes that a merits standard best ensures high quality regulatory decision-making, so would oppose any shift away from that standard.

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?

As explained in 2.3 above, there is little evidence to suggest that a judicial review standard would impact on the length and cost of the appeals framework in the energy sector in either direction. However, the Government notes that introducing a more limited standard of review for energy sector appeals in Australia led to more appeals and higher prices[14]. In any case, as explained above, changing the standard to JR would make the framework less effective and impose greater regulatory risk on companies and their investors. We would draw a similar conclusion in respect of 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?

No.

As explained in sections 2-4 above, we consider that merits-based appeals should apply to all regulatory and competition decisions. BIS has provided no good justification for change from the merits-based standard that currently applies to Competition Act decisions.

We agree with BIS' conclusion that there should be no change to the standard for review for penalty-related decisions, where it is appropriate for the courts to retain unlimited jurisdiction.

[12] BIS consultation, p. 28
[13] CAT response, p. 12
[14] BIS consultation, p. 28

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.

As the CAT notes, "the finding of infringement of a competition law prohibition is a very serious matter with potentially drastic consequences for the undertaking concerned, and its executives. Such a finding is generally seen as quasi-criminal in nature. As such it has serious adverse reputational as well as financial implications. Basic 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"[15].

The CAT also argues that "Restricting the grounds on which a company can appeal against such a finding when made by an administrative body acting as investigator, prosecutor and judge, risks violating the fundamental requirements of Article 6"[16] of the European Convention on Human Rights.

The Government decided, in the context of competition law reform only 11 months ago, that there was no need to introduce a prosecutorial model in relation to competition investigations due to the existence of a robust appeal mechanism. There is no justification (and the consultation does not set out any such justification) as to why this position should have changed in such a short space of time.

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?

Please see answer 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 energy sector has already moved to a standard of review based on specific grounds outlined in 4.1. For the reasons explained above, we would not support any dilution of this standard of accountability, and believe that a full merits appeal would be more consistent with BIS' aim to improve regulatory decision making.

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?

Energy UK sees no distinction between price control and other regulatory decisions; all can involve complex legal, economic and technical issues, and all have the ability to significantly impact on the financial standing of businesses.

See answer 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?

No comment.

[15] CAT response, p. 12
[16] CAT response, p. 12

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 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?

Yes. There are many reasons why regulatory decisions should be heard on a merits appeal standard and not judicial review, none more important than the fact that the higher level of scrutiny exerted by merits standard increases incentives on regulators to make sound decisions.

For the reasons explained in sections 2-4, we believe that all regulatory and competition decisions in the energy sector should continue to be heard on a merits-based appeal standard.

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 answer to question 5.

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

Overall, we consider it vital that the time allowed for a body to consider an appeal should correspond to the complexity of the case; it would be damaging if artificial time limits meant that due consideration could not be given to all the arguments and evidence.

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.

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?

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.

Yes we agree judicial office holders should not be limited to a term of 8 years and with BIS' 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)?

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?

Please see answer to question 18 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?

What is more important is that the appeal body that hears enforcement appeals has the necessary expertise to robustly scrutinise and challenge the regulator's decisions.

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?

No comment

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

Please see answer to question 22 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?

Please see answer to question 23 above.

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?

No comment. Our members may respond individually.

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. Our members may respond individually.

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 comment. Our members may respond individually.

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 note that the CAA regime has not been fully tested so it would be premature to judge its effectiveness. We consider that there is not case for change, not least because the existing energy licence appeal process, which covers price controls, was introduced very recently, is untested, and, as such, there is simply no evidence to justify change with the inevitable further regulatory uncertainty that would bring.

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.

We agree with the CAT that this would be asymmetrical, unfair and at odds with the well-established approach in similar public law cases. The imbalance created in favour of the regulator in respect of cost awards would risk unduly discouraging the use of the appeals mechanism; this may have a particularly pronounced impact on smaller firms.

For regulated companies, the decision to appeal 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, Energy UK is unaware 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 treat regulators differently. In any event, 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.

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.

In theory, there may be benefits to the 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 would 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.

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.

See answer to question 34.

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"; being open with reasoning and evidence to parties at the administrative stage will assist in building this confidence.

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 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 are not appreciated until late in the process, with the result that appeals become more likely.

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?

No comment. Our members may respond individually.

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?

See answer to question 40.

Overall, we consider it vital that the time allowed for a body to consider appeal should correspond to the complexity of the case; it would be damaging if artificial time limits meant that due consideration could not be given to all the arguments and evidence.

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?

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 could be 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?

Particularly in the energy sector, we are not aware of material concerns over the speed of regulatory decision making or of appeals.

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.

ESRC Centre for Competition Policy

Department for Business Innovation and Skills

Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform.

Consultation response from the ESRC Centre for Competition Policy

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INTRODUCTION

We welcome a review of the current complex and confusing appeal system and applaud the aim of simplification and reduction of spurious cases. However, we are concerned that the consultation document fails to take sufficient account of the essential context of how decisions are made, by whom and with what evidence base in the first instance.

Appeals are fundamental to an effective system of regulation. They provide a vital safeguard against unfair or wrongful outcomes and allow the actions of regulators to be independently scrutinised and held to account. An effective appeals system is especially important in an administrative system of regulation, where the roles of investigator and arbiter in the first instance are assumed within the same organisation - albeit often by different sets of individuals. If firms are denied the adequate capacity to challenge spurious decisions, there is a danger that legitimate business activity may be stifled. An efficient system of appeals promotes confidence in the UK's regulatory and competition regime and helps firms understand how they will be treated in the future and the boundaries of lawful conduct. Indeed, alongside good decision making and streamlined procedures, certainty is one of the most important aspects of an effective competition and regulatory regime. It avoids unnecessary transaction costs in the form of regulatory action, enforcement and appeals.

Judicial Review and Full Merits appeals are better understood as two ends of a sliding scale, rather than as distinct systems. The central question posed by this consultation is whether the UK's system of regulatory and competition appeals should move away from Full Merits and closer to Judicial Review. The assumption is that Full Merits appeals provide a greater incentive for firms to challenge regulators and are more costly.

In this response we: (1) focus on the reasons why there may be a high volume of appeals; (2) discuss whether it is acceptable to move further away from Full Merits appeals; (3) consider the incentives of regulators and firms; (4) assess the extent to which the changes will reduce the number of cases, their length and cost.

Much of this discussion is general, but where appropriate each section of this response makes reference to the relevant questions set out in the consultation document.

UNCERTAINTY AS THE UNDERLYING CAUSE OF APPEALS

For the most part, the current rate of appeals does not appear to be due to bad decisions by regulators or the competition authority. Instead they are fuelled mainly by uncertainty and the complexities inherent in many regulatory decisions. In appeals relating to the Competition Act 1998, the uncertainty mainly relates to the way in which the competition authority calculates penalties and leniency (in

the context of cartels). The absence of a clear and predictable formula for calculating fines has made appeals almost routine in such cases, both within the UK and at the Community level. The discretion retained by competition authorities in calculating fines makes it inevitable that appeals will generally result in downward adjustments in fines. The *Construction Bid-Rigging* case illustrates just how receptive an appeals body can be to various arguments for downward adjustments. The CAT reduced penalties for six firms in this case by 90%.[1]

In the context of merger control, the number and length of appeals (taking into account the high number of cases compared to antitrust and regulation), are relatively low. This is partly due to the difficulty of putting a merger on hold during an appeal. However, it is also a reflection of a comparatively high level of certainty, with clear guidelines and the consistent application of merger rules, allowing firms to predict reliably whether a proposed merger is likely to raise serious competition concerns. Where issues do arise, firms are often willing to accept undertakings during Phase I, avoiding costly and unnecessary further action.

The problem of uncertainty appears to be most pronounced in the context of regulated industries. As the government acknowledges (para 1.8), regulators are tasked with making sophisticated judgements, often about how markets should operate in the future. They are faced with complex economic evidence and often have to balance conflicting policy objectives. Consequently, asking a different set of people to make the same judgement, faced with exactly the same evidence, may very well result in a different outcome. This makes a system of Full Merits appeals problematic as it will inevitably amount to a second guessing of the regulator, rather than simply a safeguard against spurious decisions.

IS A SHIFT AWAY FROM FULL MERITS TOWARDS JUDICIAL REVIEW ACCEPTABLE? (Consultation Questions 1, 2 and 6).

As the government states, "There is a balance to be struck between enabling parties to have appropriate rights of appeal and ensuring that the system as a whole functions efficiently and enables the regulator or authority to take decisions in an efficient and timely way" (para 4.3).

Any shift towards judicial review will involve reducing parties' ability to challenge the decisions of regulators and the competition authority. If appeals are high in number and regularly enjoy some success, this suggests that there are aspects of regulatory practice that do not stand up to scrutiny. The potential cost of shifting towards judicial review is therefore a firm's reduced ability to challenge poor or unfair decisions.

This cost of the proposed changes is significantly higher in the context of ex post infringement decisions than in ex ante regulation or merger control. Apart from

[1] *Kier Group PLC and others* v *Office of Fair Trading* [2011] CAT 3

there being significant implications for the firm, including loss of reputation, the penalties associated with competition powers are criminal in character if not in name. This necessitates a higher level of scrutiny and the need to comply carefully with the European Convention of Human Rights. In cartel cases, the use of leniency and settlements already risks punishing firms for exercising the right to defend themselves. Furthermore, it is not yet known how decision making in the new CMA will be taken. Indications are that the independence of decision makers in antitrust will continue to be at a lower level than that for mergers and market inquiries. Moves to reduce the scope for appeals in the context of Competition Act 1998 cases are therefore hard to justify. The solution would be to ensure much stronger independence of first instance decision making in CA98 cases, but a move towards Judicial Review cannot be supported without this.

In the context of regulation, the question is more complicated. One may query the wisdom of exercising regulatory powers where two sets of experts may arrive at very different conclusions from the same set of evidence.

However, regulation is an economic and political necessity given the various economic, social and environmental objectives at stake. The complexities involved clearly make Full Merits appeals problematic as it is undesirable that regulated firms should have an incentive to have a 'second shot' at appeal. If we have confidence in the expertise and decision making practice of the regulators, then it is right that any appeals system should focus only on whether the regulator erred in how it reached its decision.

The general rule in public law is that a public body's decision can only be challenged where it is unlawful, wrongly took factors into account, failed to take relevant factors into account, or the decision was totally unreasonable.[2] This can be extended through a flexible system of Judicial Review, to serve as a check on the economics reasoning applied in an individual case. The question would be: could a "reasonable" economist have come to the same conclusion? The appeals body would consider whether the regulator followed the correct procedure, carried out appropriate economic analysis and came to *reasonable* conclusions. This would necessitate the presence of economists (and possibly other relevant experts, such as accountants) on appeals bodies. Indeed, given the importance of economic evidence in competition cases, it is not appropriate that appeals decisions can currently be taken by the CAT without the requirement of an economist being a member of the panel.

There are two potential problems with a "reasonable" economist approach. The first is that judgements relating to reasonableness in law – the man on the Clapham omnibus – do not necessarily lend themselves to the more complicated judgments made in analysis of economic evidence. The second problem is that while we may be confident in the regulator's expertise and decision making

[2] *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* [1948] 1 KB 223 (at 229)

practice under the current regime, any relaxation of the scrutiny brought by appeals could cause a drop in quality among regulators.

On balance we believe that the most appropriate position is a move towards a Judicial Review approach, i.e. an appeal would need to challenge a specified error in the regulator's approach, procedure, analysis or reasoning.

GETTING THE INCENTIVES RIGHT FOR REGULATORS AND FIRMS (Consultation Questions 30-35)

The UK system is much closer to a model of inquisitorial agencies in search of the truth than it is to a prosecutorial system where the agency might focus on just one side of the evidence and present that to the court in the first instance, leaving the defence case to the regulated firms. Judicial Review is consistent with an inquisitorial approach to regulation, even if it restricts a firm's ability to challenge the regulator's decision. A Full Merits appeal forces the regulator to act in a less inquisitorial and a more prosecutorial manner before the appeal court or tribunal. This undermines the undoubted attractions of the inquisitorial system. Having weighed the evidence impartially in the first instance, the agency may have balanced extremes of evidence against each other, but during a Full Merits appeal, the agency may be required to emphasise one extreme because the firms will focus on the extremes of evidence in their favour. The shadow of a potential defence at a Full Merits appeal may exacerbate the difficulty for the agency to 'start in the middle' with a balanced view at its initial decision making.

The design of an appeals system also shapes the behaviour of the firms. It is important that firms have the incentive to be as open as possible with all relevant information and not to hold anything back. Although the government states there is no evidence that firms have done this in the past (para 3.23), there is a potential danger that regulators' decisions are viewed as a 'dress rehearsal' for the final determination at a Full Merits appeal. Where firms have held back information, they will hold a distinct advantage over the regulator, who will have given everything away at its initial decision. The firms in essence have two shots at getting their desired outcome.

For the same reasons, the government's proposals to allow only new evidence where there is good reason (Chapter 6) should be supported. In an area that hinges on complicated economic analysis that may be open to alternative interpretations, the ability to bring new evidence creates an incentive to hold back information or provide ever more expert opinions. This could amount to constantly moving the goal posts, thereby undermining the efficiency of the whole regulatory framework.

A move to Judicial Review makes it important that firms have adequate opportunities to present their arguments to the regulator, have access to all relevant information and can effectively challenge the regulator's data and/or

analysis. This, along with the danger already outlined of weakening quality in decision making practice, may necessitate additional internal safeguards.

Even under a pure Judicial Review system, the government should be mindful of firms using appeals strategically. In the context of merger control, market inquiries and regulation, a strong inventive to appeal may be created by a desire to delay the implementation of the regulator's decision (e.g. a divestiture) in the expectation of favourable changes to market conditions in the interim period, or the imposition of a more onerous regulatory constraint.

The concerns outlined above could be alleviated by strengthening the independence of the decision making process within the regulators. The Competition Commission provides a good model for this. Phase II mergers and market inquiries are undertaken by the CC's members. They are appointed by BIS and serve on a rotating basis. They are selected and appointed for their experience, ability and diversity of skills in competition economics, law, finance and industry. They include practitioners, academics and members of the business community. It is key that these individuals be independent of the regulator's management structure. An alternative option is to send the analysis to an external group of regulatory consultants (or possibly a single individual) for a second opinion. This would serve a similar role to the opinion of an Advocate General in the context of EU law.

WILL THE PROPOSED CHANGES REDUCE THE NUMBER OF APPEALS, THEIR COST AND LENGTH? (Consultation Question 3)

As we have reservations about the proposed reforms in relation to Competition Act 1998 cases, we focus on regulatory appeals for the purposes of this section.

The proposed changes are likely to reduce the number of appeals, their cost and length, but at the expense of eroding firms' ability to challenge regulators' decisions. Narrowing the grounds upon which appeals can take place should reduce their number. A form of 'flexible' Judicial Review, which includes appeals on specified grounds, could ease the abovementioned cost, but if these special grounds capture the areas where appeals tend to succeed, then the changes may fail to significantly reduce the number of cases. In terms of cost and length, the government's figures suggest that Judicial Review averages 4 months, while Full Merits appeals average 11 months (para 3.15). However, the former has hidden costs. In particular, quashed decisions will generally be remitted back to the regulator to remake the decision in the light of the court's or tribunal's findings, potentially leaving a period of limbo and requiring further effort to produce a new decision.

As has already been mentioned, it is right that restrictions be placed on the ability of parties to bring new evidence at appeal. Firms claim this is simply because there are pieces of information that only appear important after the regulator has

delivered its decision. However, this excuse seems weak so long as the firms were given adequate opportunity to engage with the regulator and challenge its data and analysis in the first instance. Sanction against a failure to follow this good procedure is the core of Judicial Review. Ex post analysis of a regulator's decision will always cause firms to re-evaluate how they formulated their case. As previously mentioned, allowing new evidence at appeal risks constantly moving the goal posts for regulation.

The proposed changes to costs should also be supported. It is right that regulators' exposure to costs be limited to where their conduct is characterised as having been unfair or unreasonable. A system in which the parties pay their own costs is more consistent with an inquisitorial model where the regulator is doing its best to make the right decisions. Regulators currently face huge cost exposure, especially in multi-party cases. This increases the scope for regulators to become overly risk averse and may make regulatory capture more likely. In appeals against economic regulatory decisions, where the regulator's costs are passed on to consumers through the license fees, there may be cases where it is appropriate for all consumers, not only those of the appealing company, to bear the costs. In this case the regulator may prefer to incur these expenses and pass them on to all license holders.

Minimising the length of cases is unlikely to have a significant impact on the quality or consistency of appeal outcomes.

CONCLUSIONS & RECOMMENDATIONS

1. Any discussion of streamlining regulatory and competition appeals needs to be considered alongside the question of certainty surrounding the law and regulatory practice. Greater certainty and consistency will always be the most effective way of reducing the volume and cost of appeals. This is true regardless of whether the system of appeal is Judicial Review or Full Merits.
2. A shift towards Judicial Review with a view to reducing the number of appeals will come at the cost of reducing firms' ability to challenge spurious decision making by regulators. While this cost is probably too high in the context of ex post infringement decisions, it is more acceptable in the context of ex ante regulatory decisions. The complexity inherent in these makes them less appropriate for Full Merits appeals. However, eliminating the right to appeal non-infringement decisions altogether (Question 39) would be a step too far.
3. Judicial Review of ex ante decisions is also consistent with the inquisitorial approach to regulation. It is important that all relevant information be addressed in the first instance and that the behaviour of the regulator or the firm is not shaped by the shadow of a possible Full Merits appeal. However, it is essential that firms have adequate opportunities to challenge

the regulator's data and analysis in the first instance. One possible way of meeting concerns about the quality of regulatory decisions, is to bolster the independence of decision makers, for example by employing independent experts similar to those convened by the Competition Commission. An alternative may be to get a second (published) opinion from an external expert or group of experts.

4. The proposed changes to the admittance of new evidence and to costs should be supported. These will encourage firms to engage fully with the regulator and not hold back evidence at initial decision. They will also encourage the regulator to be less risk averse.

EE Limited (Everything Everywhere)

EE RESPONSE TO THE CONSULATION "STREAMLINING REGULATORY AND COMPETITION APPEALS" BY THE DEPARTMENT FOR BUSINESS, INNOVATION & SKILLS

11 September 2013

EXECUTIVE SUMMARY

1. EE Limited ("EE") welcomes the opportunity to respond to the consultation "Streamlining Regulatory and Competition Appeals" ("Consultation") published by the Department for Business, Innovation & Skills ("BIS") on 19 June 2013 which deals with the options for reform of regulatory and competition appeals.

2. We broadly agree with the Government's stated objectives as set out in the Consultation. The effective and stable functioning of the UK regulatory regime is reliant on a system that encourages independent, reasoned, predictable, transparent and timely administrative decisions as well as an efficient appeals process. However, it is also important to ensure that this efficiency does not come at the expense of curtailing the effective rights of appeal of the parties affected by the regulators' decisions.

3. We support a number of important proposals in the Consultation, but we believe that the most productive route to improving the current regime is through incremental procedural changes many of which are envisaged in the Consultation document. We are keen to continue to work with BIS, Ofcom and other industry stakeholders to develop these proposals further.

4. In the section immediately below we have made some general comments on the matters raised by the Consultation that, in our view, are the most significant in terms of the operation of the regulatory regime as a whole. These comments deal with:

   (a) the practical changes we believe are capable of achieving BIS' main objectives[1], including minimising the end-to-end length and cost of decision-making;

   (b) the Consultation's stated need for reform and the question of whether a disruptive overhaul of the appeals system as proposed is necessary in the first place; and

   (c) the proposal to change the standard of review in the context of the communications sector.

5. Annex A to this document responds to the questions in Chapter 8 of the Consultation with a focus on the issues that have specific relevance to EE which have not been covered in the Executive Summary.

[1] Consultation, paragraph 1.13.

Practical changes capable of achieving BIS' objectives

6. In the forward to the Consultation document, the Minister for Employment Relations and Consumer Affairs comments that in reviewing the various options for reform the Government was "very conscious of the importance of maintaining and reinforcing regulatory certainty"[2], a position we wholeheartedly support. Such certainty is critical to the investment decisions of firms in telecommunications industry which, in turn, is vital for the UK economy as a whole.

7. We recognise that there are reasons why the Government needs to keep the question of whether regulatory and appeals reform is necessary under review. However, we believe that in order to maintain the regulatory certainty the Government clearly recognises as important, such reviews should not be conducted on a prolonged and continuous basis and any changes that are introduced must be done in the most proportionate and least disruptive way possible.

8. The Government has been reviewing the appeals process in the communications sector for some time now.[3] In a letter in March 2012, the Minister for Culture, Communications and Creative Industries stated that if practical steps designed to make decision-making and appeals more effective cannot achieve these objectives, changes to the standard of review would be implemented.[4] We supported this approach and, on the basis of this clear and unambiguous statement, we had the expectation that this strategy would be adopted by Government. However, no practical changes have been introduced since the Minister's letter last year and we are surprised that the Consultation now seeks to advance a case for drastic legislative reform in any event.

9. We continue to believe that practical changes can indeed achieve tangible improvement, particularly if they properly take into account the views of relevant stakeholders and, once implemented, are given sufficient time to develop so that their impact can be properly assessed. We are therefore supportive of a number of the changes suggested by the Consultation, including simplifying the price control procedure, improving early engagement between Ofcom and the parties as part of the administrative decision-making stage (eg through the use of confidentiality rings, meetings, etc) and, where necessary, providing the

[2] Consultation, at page 4.

[3] The fact that DCMS consulted on this previously has been mentioned in paragraph 3.31 and 4.26 of the Consultation, but the very unfavourable responses by a large number of stakeholders have not been mentioned in the Consultation document.

[4] Annex B to the response provides a letter by Ed Vaizey dated 6 March 2012 which states that "[i]f practical changes to process and ways of working cannot achieve the desired objectives then legislation will be required. I would like to see tangible improvement in the appeals process and my officials will be in touch with you to discuss this further".

Competition Appeals Tribunal ("CAT") with further powers to assist its management of cases and the composition of its members.

10. Such changes can be implemented in a swifter and less disruptive fashion than a change in the standard of review, which will not only require a change in legislation, but will also need time before its implementation by the relevant appeals bodies has been clarified. In this context, we note the CAT's comment[5] (which we support) that any change to the existing standard is most likely to take "the best part of a decade" of increased litigation before its implementation is settled and therefore will result in longer and costlier regulatory appeals at least for that initial period.

11. In summary, we support the following practical changes suggested by the Consultation:

    (a) **Price control appeals** – we agree with BIS that the current appeals procedure in the communications sector, which starts at the CAT with price control matters then being referred to the Competition Commission ("CC"), is inefficient and can lead to delays in the overall process. We are therefore supportive of the proposal to simplify the price control procedure by involving only one of these appeal bodies. Our preference would be for such matters to be heard by the CAT because its processes are more conducive to these types of proceedings. If, however, for consistency reasons, BIS would instead prefer to allow such appeals to be brought directly to the CC (or the Competition and Markets Authority ("CMA"), once it has been established), we do not have major objections to this, provided that various procedural issues discussed in detail in response to Question 19 below are taken into account.

    (b) **More transparency during regulators' decision-making process** – increased transparency of the reasoning employed by Ofcom and the evidence relied upon as part of its decision-making process, together with better consultation with stakeholders more generally, can make a real difference to both the volume of appeals brought by affected parties and the speed of resolving the appeals that brought before the CAT.

    The use of confidentiality rings as part of the administrative stage of the proceedings will allow potential appellants (sometimes only through their external advisers) access to all the relevant information in deciding whether or not to lodge an appeal, rather than having to wait for the proceedings to begin. Such confidentiality rings can be supervised by the CAT. Alternatively, the parties can contractually set them up between themselves with or without Ofocm's oversight (this was done last year when appeals were threatened against

[5] CAT response to the BIS consultation on Streamlining Regulatory and Competition Appeals http://catribunal.org.uk/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html ("CAT Response") at paragraph 38.

Ofcom's decision to liberalise EE's 1800MHz spectrum for 4G LTE) and Ofcom could be encouraged to facilitate this more frequently, even without statutory powers.

We also believe that there is a significant opportunity for Ofcom to increase its engagement with disputing parties as part of the dispute resolution procedures. While Ofcom's existing guidance on determining disputes provides for face-to-face meetings in such contexts, we have not been involved in such a meeting with Ofcom in any of the disputes we have been involved in.

(c) **Limiting new evidence** – we agree with BIS that the possibility for appellants to introduce new evidence, which was not available to the regulator at the time of the disputed decision, can have the detrimental effect of causing appeals to take longer. However, in the communications sector such instances have not occurred frequently in the past and the CAT Rules and Guide to Proceedings[6] already provide it with discretion to admit, exclude or limit the evidence in an appeal. Accordingly, we do not think that there is a specific need to introduce legislation or provide further guidance to the CAT on this point, but we would be happy to workshop specific proposed amendments of the CAT's rules with key stakeholders,[7] if such amendments are considered as necessary.

(d) **Limiting number of expert witnesses** – we are not persuaded that the CAT Rules and Guide to Proceedings need to be amended to specify that the use of expert witnesses should normally be limited to a particular number. The CAT already has the power to regulate its own procedure and has a discretion to "direct the manner in which expert evidence is to be given"[8]. As mentioned above, we would be happy to consider proposals to amend the relevant rules to encourage the CAT to receive evidence, including expert evidence, in a more efficient way. This could potentially be achieved through the use of concurrent expert evidence or witness conferencing (also known as „hot tubbing'). This process is already part of UK court procedure and is very developed, for example, in competition cases in Australia (see more details in response to Question 42 below).

(e) **CAT Guide to Proceedings** – the CAT Guide to Proceedings was published eight years ago in 2005, so there is some scope for this to be reviewed and updated to encourage procedural improvements such as those achieved by the CC following the publication of

[6] Competition Appeal Tribunal Rules 2003, Rules 19 and 22, and Competition Appeal Tribunal Guide to Proceedings 2005, Part 12.

[7] We would suggest for these workshops to be held by the CAT.

[8] Competition Appeal Tribunal Rules 2003, in particular Rule 19(e) to (g), 19(l) and Rule 22 and Competition Appeal Tribunal Guide to Proceedings 2005 paragraphs 12.8 to 12.11.

its procedural guidance in April 2011. For example, we would suggest changes in the rules to encourage a wider and more frequent use of technology by the CAT as well as the disposal of unnecessary formality.

(f) **CAT Chairmen** – we support the proposals dealing with the selection of Chairmen for the CAT including (i) the introduction of legislation to enable the heads of the three judiciaries of the UK to nominate specific judges of the High Court to sit as Chairmen; (ii) the removal of the current eight year limit of eligibility for Chairmen of the CAT; and (iii) allowing the possibility in some cases for one judge only to sit at the CAT.

The stated need for reform

12. We are not convinced by the arguments advanced in the Consultation that there is concrete evidence demonstrating that the current appeals regime is not working properly. We would therefore suggest that the case for reform, and in particular the case for the highly disruptive proposal of changing the review standard, has not been made clearly.

Number of appeals

13. Chapter 3 of the Consultation sets out BIS' case for change and seeks to demonstrate that there are "too many appeals", particularly in the communications sector, and that such appeals are "taking too long" to come to an end. In coming to that conclusion, the Consultation seems to assume that **all** decisions by regulators (regardless of whether they are correct or not) have a consumer benefit and that appeals have a negative impact on consumer welfare. We do not agree with these assumptions.

14. Paragraph 3.6 of the Consultation points out that between 2008 and 2012 one in eight decisions by Ofcom have been appealed (we note that this figure appears to be relatively low). However, the Consultation does not consider what percentage of these cases have either not been taken though to conclusion for some reason or have been successfully appealed by communications providers.

15. In this context it is helpful to note the conclusions of research conducted by Towerhouse Consulting in 2010[9], which demonstrated that 38.7% of the appeals lodged by

[9] "Appeals from Ofcom decisions Time for reform?" Towerhouse Consulting, 2 December 2010 ("Towehouse Report"), http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf . Out of the 31 appeals lodged, 12 cases resulted in Ofcom's decision being overturned in one way or another and an additional 12 were withdrawn, not defended by Ofcom or had otherwise finished before the end of the appeals process, see Towehouse Report, page 11.

communications providers were withdrawn, not defended by Ofcom or had otherwise finished before the end of the appeals process and that an equal number of 38.7% were successfully appealed by the parties affected.[10] In our view, these statistics in fact suggest that the appeals system is working exactly as it should – cases for which an alternative solution is possible are successfully weeded out of the process by being withdrawn or settled, and cases where the regulators' decisions were erroneous are effectively corrected through the appeals process.

16. There is only a small volume of unsuccessful appeals against Ofcom's decisions (22.6%)[11] which also bring long terms benefits to the appeals process. Clearly, an unsuccessful appeal is not the same a unmeritorious one and even in cases where appellants are unsuccessful, the consideration of the issues by the CAT assists in clarifying important points of legal principle and improves the robustness and certainty of Ofcom's decision-making in future cases.

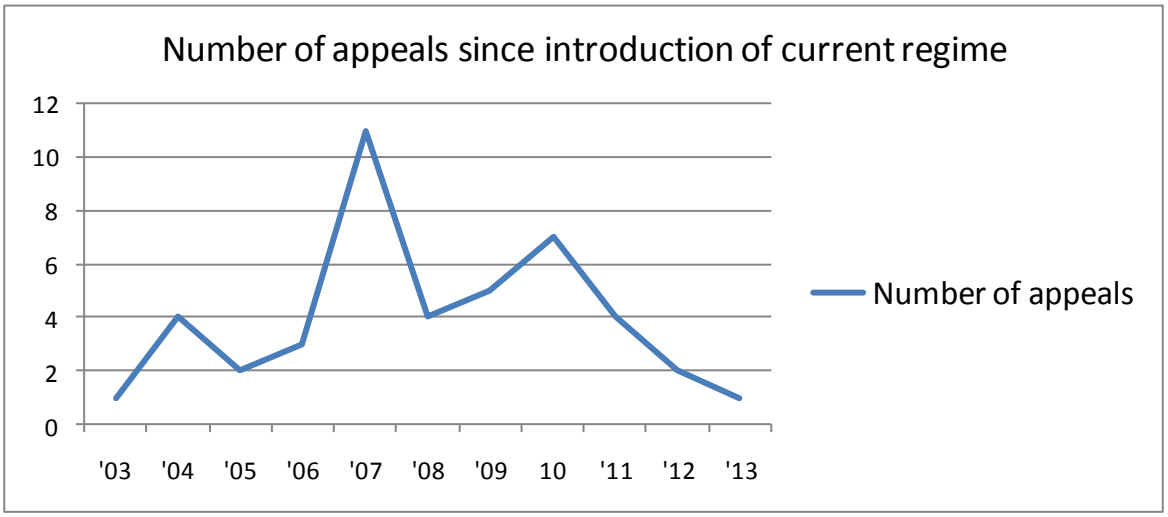
17. In addition to this, the small number of unsuccessful appeals in fact suggests an issue with the decision-making process at the administrative stage rather than with the appeals process itself. In our opinion, therefore, the best way to minimise appeals is to address the root causes of why appeals are brought by parties in the first place by encouraging regulators to make better decisions and improving their processes by early engagement with the affected parties. For this reason, we think BIS should focus its review on the practical ways in which the administrative decision-making stage can be improved in order to increase the quality of regulators' decisions and, conversely, reduce the volume of the decisions being appealed.

18. Indeed, it would be a key mistake, if, as part of this review process the Government decided instead to reduce the risks for regulators of being challenged on appeal – such an outcome would in reality reduce the incentives for regulators to make sound decisions in the first place. Not every regulatory decision will generate consumer benefit in and of itself and, therefore, appeals should not be seen as a means of frustrating a regulator's work, but rather as a means of holding the regulator accountable for decisions which have huge financial and economic impacts.

19. Finally, it is worth noting that on the basis of the number of appeal reports published on the CAT's website, the number of appeals by communications providers in fact show a decline in recent years following an initial increase after the 2003 regime was introduced (see Figure 1 below)[12]. We note that this statistic is missed out completely in the Consultation.

[10] These trends have continued since the Towerhouse report was published in December 2010.
[11] Ofcom decision was upheld in its entirety in only 7 out of the 31 appeals lodged, see Towehouse Report, page 11.
[12] The number of appeals heard by the CAT from 2003 to 2013 in the communications sector as listed on the CAT's website http://www.catribunal.org.uk/237/Cases.htm. Where multiple reports for the same appeal by several parties are issued by the CAT, these appear as the same appeal for present purposes).

Figure 1



20. Such a decline is consistent with a position where the jurisprudence in this area has now become established (having taken close to ten years to settle) and the current regime is well understood by all stakeholders. For the reasons set out in more detail below, we are concerned that any significant changes that may be introduced as part of the present consultation, such as a change to the standard of review, will mean that the developments over the past ten years will no longer be of any value and the new standard could itself take a similar amount of time to become settled.

Length of appeals

21. The evidence provided in the Consultation is not convincing in demonstrating that the length of appeals is either unreasonable or disproportionate to the length of the administrative phase performed by Ofcom.

22. The length of appeals depends on the complexity of the issues that need to be explored. In the interests of justice, both the regulator and the appellants must be allowed reasonable time to prepare their case and the CAT has the power to control the timetable for the proceedings to ensure this happens bearing in mind the circumstances of the case. In this context, we note a comment in the CAT's response to the Consultation that it frequently receives requests for extensions of the normal time limits, but that "[s]uch requests come at least as often from regulators as from other parties, and may be fully justified in the circumstances of the case"[13].

[13] See paragraph 47 of the CAT Response.

23. We do not believe that adopting a judicial review or a focused specified grounds standard will result in faster appeals. If, however, BIS decided that an alternative standard should be adopted, we firmly believe that the CAT's power to substitute its own decision for that of the regulator must be retained. Generally speaking under the proposed alternative standards, the appeal bodies only have the power to remit the appealed decision back to the regulator (rather than substitute it for their own decision) and this procedure inevitably results in a substantially longer end-to-end process.

24. While we recognise the need to encourage an efficient appeals procedure, we are not convinced that the processes of the appeals bodies need to be amended in a significant way to incentivise them to deliver decisions faster (practical suggestions on some incremental procedural improvements are included in response to Question 14 below).

Costs and incentives to appeal

25. Paragraphs 3.19 to 3.27 of the Consultation seek to make the case that the incentives to appeal are skewed in favour of regulatees and that companies generally see little downside in appealing. We do not think that the arguments presented are compelling.

26. As mentioned above, the Consultation states that only one in eight decisions by Ofcom is appealed.[14] This, in our view, clearly demonstrates that, contrary to the conclusions in the Consultation, the large majority of decisions are not in fact appealed. As mentioned in paragraph 18 above, if the incentives of companies to appeal are purposely reduced, this inevitably will have the converse effect of lowering the incentives on regulators to come to the correct decision at the administrative stage. This cannot be a good outcome for the companies themselves, for consumers or for society as a whole.

27. In our experience, the decision on whether to challenge an Ofcom decision is not taken lightly and litigation certainly does not present the only (or the preferred) option. Such matters are usually debated at senior stakeholder level within the company, most frequently with the benefit of experienced legal advice addressing questions such as prospects of success and the costs associated with proceeding with an appeal.

28. Clearly, if Ofcom's decision does not appear to be based on sound reasoning or the logic behind its conclusions is flawed, this increases the likelihood that it will be appealed for the obvious reason that this is the only way a party can get redress and correct the decision (assuming all non litigious avenues to persuade the regulator to change the decision have been exhausted). This, in turn, is in the interests of not only the appellant company, but consumers and the economy as a whole because the correct regulatory decision (however it

[14] Paragraph 3.6 of the Consultation.

is achieved) ultimately provides more consumer benefit than an incorrect decision that is not capable of being challenged. This is precisely the reason why parties affected by administrative decisions are provided with appeal rights in the first place, and the fact that such rights are exercised by regulatees shows that the system is structured properly and is working properly.

29. It is also true that the costs associated with appeals are significant in financial terms as well as in terms of resource and management time spent on dealing with them. This again demonstrates that companies do not go into litigation lightly. The well established "loser pays" principle in the UK court system means that a party would hesitate in starting proceedings if it believed its prospects for success are minimal and it therefore needs to cover the costs of the winning party to the dispute.

30. The significance of Ofcom's decision in terms of financial, reputational and precedent value also clearly has an impact on a company's decision on whether or not to appeal. The Consultation notes that "more appeals have been brought against the most significant decisions Ofcom has taken"[15], but this is not surprising. Given the costs involved in litigation and the uncertainty of court proceedings, senior decision-makers within a company are never keen to authorise the appeal of a decision which would not have a significant impact either directly on the company's bottom line or on its ability to compete effectively in the market in which it operates.

31. It is also worthwhile noting that at the beginning of 2013 Ofcom announced a significant increase of 28.5% in the administrative fees paid by communications providers and explained that some of the reasons for this increase include the rise in appeals litigation work performed by the regulator. Given that in essence regulatees are funding the appeals work performed by the regulator, logically speaking there is a real incentive for them to avoid litigation, wherever possible. The practical outcome of the specific arrangements in the communications sector clearly sits at odds with the comments in the Consultation that companies view appeal proceedings as a "one way bet".

32. Finally, we also note the recent consultation regarding the CMA's new powers to make costs orders to be able recover its costs in telecoms price control appeal cases. At this stage it is not possible to assess the impact of these very new powers on the appeals regime, but it is important for BIS to take these changes into account in deciding whether to proceed with proposals in the current Consultation.

[15] Paragraph 3.6 of the Consultation.

Need to streamline between sectors

33. There appears to be a weak logical link behind assertions in the Consultation that streamlining the appeals processes across various industry sectors will necessarily have the practical effect of assisting regulators to take decisions quicker and more efficiently, with the claimed consequence of ultimately providing greater certainty for firms.

34. Different appeals processes have developed differently across various industries for a number of reasons, including the fact that specific EU legal requirements apply to the sectors under review and the degree of competition varies between them eg the communications sector has been recognised as one of the more competitive, while in the water industry there are only a very limited number of providers. In such circumstances, we remain unconvinced that applying the same type of review standard across different sectors is necessary or that, if implemented, it would lead to a positive outcome. On the contrary, the current processes are different because they are specifically tailored to the sectors to which they apply and are well known and understood by both the regulator and the companies operating in those sectors.

35. We believe that if the result of the current effort to harmonise the appeals processes across various sectors leads to medium-term regulatory uncertainty, which we think it will, such an outcome would ultimately be damaging to industry players as well as consumers. Apart from general comments in the Consultation that "[i]mproving consistency across sectors would ensure that resources and expertise of appeal bodies are used in the most appropriate and cost-effective way"[16], we have been unable to find a specific assessment of how such consistency would make any real difference either to the ability of the appeal bodies to decide cases quicker or to any broader consumer benefits.

36. Figure 3.5 in the Consultation document shows a complex mix of appeal routes and we do agree that there is some scope for rationalisation, such as the proposal to simplify the price control procedure in communication cases. However, it is also worthwhile making the obvious point that significant changes should not be made just for the sake of consistency itself.

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37. Against this background, we are not persuaded by the arguments advanced in the Consultation document (or the evidence provided to support them) that indeed there is a significant problem in the appeals process. Even assuming such a problem does exist whereby there are "too many appeals that take too long", our view is that the proposals for radical reform suggested by the Consultation, such as the change in the standard of review or

[16] Paragraph 62 of the Impact Assessment of the Consultation.

the rules dealing with legal costs, are in no way proportionate to the problem identified. We are also not convinced by the contention that applying the same appeals standard across various regulated industries will necessarily lead to consumer benefits, particularly if there are good legal or practical reasons why the review standards have developed differently.

The proposed change to the standard of review

A change in the standard will cause uncertainty

38. The Consultation seeks to persuade that a change to the standard of review will have a positive impact on the length and complexity of the appeals as well as the parties' incentives in bringing an appeal.[17] We are not convinced by these arguments.

39. The Consultation suggests that the standard of review is the key reason why merits review cases last longer than judicial review cases.[18] As mentioned in paragraph 18 above, generally speaking in judicial review cases the relevant court needs to revert the appealed decision back to the regulator for a fresh decision and this process is actually likely to extend the overall time that it takes for a case to be concluded. Figure 3.4 of the Consultation as a raw statistic simply asserts that, taken overall, judicial review cases take longer, but it does not in any way take into account the specific circumstances of the cases considered, which may arise regardless of the standard used.[19]

40. We note the CAT's comments[20] that when it comes to points of law there is no real difference between on the merits and judicial review appeals because if the regulator has made a material error of law, then that would be corrected under whichever standard is used. Similarly, as far as factual errors are concerned, even in judicial review case the court is entitled to consider whether a material factual finding is adequately supported by evidence and will be able to examine factual questions around the way in which a regulator has used its powers/jurisdiction. This again demonstrates that the merits review standard cannot be the reason why such cases (potentially) last longer than judicial review cases, or that changing the standard will in itself have such a significant benefit in terms of the length of proceedings.

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[17] See paragraphs 3.13 to 3.27 of the Consultation.

[18] See paragraphs 3.15-3.16 of the Consultation and Figure 3.4 on page 23 of the Consultation.

[19] This can include the fact that sometimes the regulator or the appellants themselves may not want to proceed at full speed, see *Everything Everywhere Limited v Ofcom* (Stour Marine) Case 1167/3/3/10 and *Cable & Wireless UK & Ors v Ofcom* Case 1113/3/3/09 (Carrier Pre-Selection Charges) referred to at paragraph 4(2) of the CAT Response.

[20] See paragraphs 16 to 17 of the CAT Response.

41. The Government also suggests that it wishes to guard against the possibility whereby an appeal body in effect acts as a "second body reaching its own regulatory judgement".[21] This issue has specifically been considered by the CAT on multiple occasions in the past with the conclusion that this is definitely **not** the case:

> "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".[22]
>
> and
>
> "It is…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."[23]

42. We believe that the proposed changes to the standard of review will create significant regulatory and legal uncertainty, an outcome which is directly acknowledged by the Consultation.[24] Such uncertainty will inevitably increase costs for both regulators and industry participants (particularly those in the regulated sectors), while the appeal bodies determine how the new standard should be applied in practice. An increase in regulatory costs in turn will clearly have a negative impact on market players' ability to invest in the UK.

43. The question of legal uncertainty is closely related to the fact that the standard of review, in competition cases and in the regulated sectors which are the subject of this Consultation, is set by EU law. In the context of the communications sector, this means that the review standard must be compliant with Article 4 of the Framework Directive which requires that "the merits of the case are duly taken into account". The same principle applies to appeals in the

[21] See paragraph 4.18 of the Consultation.

[22] *British* Telecommunications *Plc v Ofcom* [2010] CAT 17.

[23] *T-Mobile (UK) Limited v Ofcom* (Termination Rate Disputes) [2008] CAT 12.

[24] See paragraph 3.2 and paragraphs 4.46-4.66 of the Consultation.

energy, aviation, post, water and rail sectors to which a number of other European Directives apply requiring a different specific review standard in each sector.[25]

44. If the standard was therefore changed to either juridical review or focused specified grounds, there is a real chance that this will result in satellite litigation between the relevant regulator and the parties affected in order to clarify whether the new standard is compliant with the applicable European legislation. Such a dispute may ultimately need to be considered by the European Court of Justice[26] risking that other relevant appeals are brought to a standstill (the reference period may take a number of years to complete). It is also quite possible that there will be more than one reference per industry sector on different questions relating to the application of whatever new standard is implemented.

45. We are also concerned that if the standard of review is amended as a result of this Consultation, this will mean that the legal clarifications and jurisprudence that has developed over the past ten years will no longer be of any value. The Consultation asserts that the long term benefits of the change of standard will be outweighed by the short term uncertainty[27] suggesting that the development of jurisprudence on the new standard will not take long to establish. No specific evidence to support this assertion is presented, perhaps because the evidence in fact points in the opposite direction.

46. As mentioned above, the current arrangements in the communication sector were introduced ten years ago in 2003 and have taken a long time to become settled. Jurisprudence has only recently become established and as late as 2012 key questions on the application of the existing standard and the CAT's ability to interfere with Ofcom's exercise of power were being considered in cases such as *Telefónica UK Limited v Ofcom*[28] and *BSkyB v Ofcom*[29].

47. Because the appeals process in the UK must operate within the framework set up by EU legislation, it is very likely that even if the review standard is changed, the approach of the appeals bodies in implementing that standard in practice is unlikely to change.[30] As stated

[25] See Annex I of the Consultation for details.

[26] Article 267 of the Treaty for the Functioning of the European Union.

[27] Paragraphs 4.46 to 4.66 of the Consultation.

[28] *Telefónica UK Limited v Ofcom* [2012] CAT 28 at paragraph 45 "…the weight to be attached to different considerations in forming a value judgment is a matter for OFCOM, as the NRA charged with the duty of resolving disputes, and in the absence of any misdirection by OFCOM the court will normally respect its determination, whether or not the court would itself have balanced the considerations in the same way and reached the same conclusion."

[29] *British Sky Broadcasting Limited & Ors v Ofcom* [2012] CAT at paragraph 84 "…the Tribunal should apply appropriate restraint and should not interfere with OFCOM" s exercise of a judgment unless satisfied that it was wrong."

[30] See paragraphs 16-17 and 37 of the CAT Response.

above, it seems that ultimately the change would simply create unnecessary and unwelcome uncertainty while at the same time not changing the modus operandi of the appeals bodies in any practical way.

48. It also is worth noting that the standard of review for communications cases, which requires that "the merits of the case are duly taken into account", allows for an in-depth review which would not necessarily be required in other sectors. If the Government proceeds to adopt a single standard across all regulated industries, that standard will either have to be broad enough to be susceptible to different interpretations in different sectors consistent with the relevant EU legislation, or the standard of review in other sectors could end up being elevated to the more detailed merits-review like standard applicable in communications cases because of the requirements of Article 4. In each instance, the case for consistency advanced by the Consultation appears to be weak because in reality the legal requirements and factual circumstances in each sector differ substantially so by imposing a one-size-fits-all standard across industries, the Government risks further legal uncertainty.

49. The Consultation[31] also seeks to demonstrate by reference to experience from other European jurisdictions that a lower standard, such as judicial review or specified grounds, would be sufficient to meet the requirements under Article 4. However, civil law jurisdictions in other EU member states typically have an initial administrative reconsideration stage that re-assesses the merits of the case at that stage of the proceedings. Without that initial stage, it is at least questionable whether the Article 4 requirement would be satisfied in those jurisdictions.

50. The approach in the UK is obviously different – the first time a regulator's decision is capable of being reviewed is in proceedings before the CAT and it is therefore necessary for the Tribunal to be able to review the facts around the regulator's decision at that stage. As pointed out in the Consultation response by the CAT:

> "Basic 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."[32]

51. We have reviewed the response to the Consultation by the CAT and we agree with the comments it makes on the broader questions dealing with appeals in the competition regime and the reasons why merits based review in competition infringement cases must be retained. These issues are therefore not specifically covered in our response. We would simply note

[31] Paragraph 5.5 of the Consultation.

[32] See paragraph 25 of the CAT Response.

that in our view the standard of review in competition cases and communication cases should remain consistent and be retained as merits review.

52. In each of these two areas, EU legislation requires a more in-depth review of the facts than what is possible under judicial review, and the administrative nature of the decisions of the CMA and Ofcom is similar whereby in the first opportunity that parties have to challenge the factual assessment of the regulator is before the CAT. Fundamental principles of administrative law and basic justice (as well as Article 6 of the European Convention of Human Rights) require that when such decisions are appealed before an independent tribunal for the first time, the party affected must be able to challenge the facts surrounding the finding of the original decision-maker, in this case the CMA or Ofcom, as the case may be.

53. In this context, we also note that when the Government was consulting on the creation of the CMA, it decided to retain the existing administrative system and not to introduce a prosecutorial system. The decision to do this was partly based on the fact that appeals against infringement decisions by the CMA would continue to be subject to an appeal on the merits to the CAT. In its March 2012 response to a consultation paper the Government said:

> "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."

54. A change to the standard would now mean that the administrative system the Government decided on with regard to the set up of the CMA may not be the appropriate one.

Focused specified grounds as the proposed alternative standard

55. For the reasons set out in detail in paragraphs 12 to 37 above, we do not agree that the case for change in the standard of review has been made. If, however, the Government is intent on implementing an alternative standard we would suggest that for reasons of regulatory certainty this should be done through an amendment of the Communications Act 2003 ("Communications Act").

56. In this context, we would be supportive of the proposal set out in the Consultation[33] which suggests that a new section 195(2A) is inserted into the Communications Act. However, we believe that the proposed wording should be amended as follows:

[33] See proposed wording in Box 4.2 of the Consultation.

"The Tribunal may allow an appeal only to the extent that, **having had due regard to the merits of the case**, 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 a material error of~~ **wrong in law**;

(c) because of a material procedural irregularity;

(d~~) that the decision was outside the limit of what Ofcom could reasonably decide~~ **an error was made** in the exercise of a discretion;

(e) that the decision was based on **an unreasonable** judgment or a prediction ~~which Ofcom could not reasonably make~~

(f) there was some other illegality, including a lack of proportionality.

57. We believe that these amendments, and in particular the wording "having had due regard to the merits of the case", are necessary in order to ensure that the new provision is compliant with Article 4 of the Framework Directive. While there is always the potential for parties to challenge any amendment to the standard of review, using the exact words of Article 4, as suggested above, is likely to limit as much as possible the potential for satellite litigation on the point of compliance with the applicable EU legislation.

58. It would appeal that the wording in section 195(2A)(a) and (b) in the form proposed by the Consultation seeks to restate (in a different form) the existing law on this subject. However, the materiality threshold in relation to errors of fact and errors of law must be removed in order to limit additional points of argument around the CAT's jurisdiction. One can easily imagine argument in pleadings and as part of court hearings on what "materiality" actually means and whether the CAT has jurisdiction to decide on the appeal because the error of law or fact was in fact "immaterial".

59. As the CAT's response to the Consultation points out, its rules do not currently require the Tribunal to assess materiality because "no rational tribunal would allow an appeal based on an immaterial point, and no party would (for that reason) seek to run an immaterial point".[34] The existing procedure already deals with the issue in the most practical way possible, so there is no need to insert an additional requirement of materiality which would simply complicate matters unnecessarily without adding any value in terms of clarity.

60. On the point of procedural irregularity in the proposed section 195(2A)(c), we note the CAT's comments in their response to the Consultation, that the effect of including this provision

[34] See paragraph 35(1) of the CAT Response.

could be to preclude an "on the merits" appeal from curing a procedural defect in Ofcom's decision (as occurred in the *TalkTalk*[35] decision). In principle we do not have concerns with the inclusion of this requirement, but it would be helpful to understand whether this was indeed the reason for this provision.

61. Proposed sections 195(2A)(d) and (e) deal with discretion, judgement and prediction by the regulator so again this is an area where it is highly likely that the parties will dispute whether a given issue is a question of fact/law or a question of discretion/judgement/prediction because the CAT's ability to intervene is different in either of these cases. We have made some amendments to these sections in order to attempt to limit the potential for satellite litigation as much as reasonably possible.

62. The additional section 195(2A)(f)[36] has been included as a catch all provision which, we believe, is necessary in order to capture the caselaw on the subject as it currently stands.

63. We understand that the proposed wording for the new section 195(2A) was intended to encapsulate existing caselaw dealing with appeals in the communications sector. In this context, we would make the obvious point that the introduction of statutory text designed to ensure regulatory certainty should not be used to prevent the development of caselaw in this area from further evolving to ensure continued fair, just, effective and efficient appeals.

CONCLUSION

64. We are broadly supportive of the objectives the Government is seeking to achieve through the Consultation. However, we are not persuaded by the arguments advanced by BIS that there is a significant problem in the appeals process. Even assuming such a problem does exist, and there are "too many appeals that take too long", our view is that the proposals for radical reform suggested by the Consultation, such as the change in the standard of review or the rules dealing with legal costs, are in no way proportionate to the problem identified.

65. Some of the proposals could ultimately lead to significant regulatory uncertainty and a less robust decision-making by regulators, which in turn will undermine confidence in the UK regulatory regime and could lead to negative effects in terms of investment. For this reason,

[35] *TalkTalk Telecom Group plc v Ofcom* [2012] CAT 1 where the CAT was persuaded by Ofcom that although Ofcom's decision was procedurally flawed (and so was liable to be set aside on judicial review grounds) the re-hearing on the merits by the CAT which had occurred cured the procedural flaw, see paragraph 136(g) of the CAT's decision at page 125.

[36] Note that similar wording was considered as necessary by the Government in the context of the introduction in 1999 of section 46B of the Telecommunications Act 1984.

we would suggest that the Government retain the existing legislative framework and instead concentrate its work on the procedural and practical changes discussed in our response which can achieve tangible improvements, particularly if they properly take into account the views of relevant stakeholders.

11 September 2013

ANNEX A
RESPONSES TO CONSULTATION QUESTIONS

The section below responds to the questions in Chapter 8 of the Consultation with a focus on the issues that have specific relevance to EE which have not been covered in the Executive Summary above.

We have reviewed the response to the Consultation by the CAT[37] and we agree with the comments it makes on the broader questions dealing with appeals in the competition regime and the reasons why merits based review, particularly in competition infringement cases, must be retained. We agree with the arguments advanced by the CAT and these issues are therefore not specifically covered in our response.

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]?

66. The CAT Rules and Guide to Proceedings were published in 2003 and 2005 respectively, so there is some scope for these to be reviewed and updated to encourage procedural improvements such as those achieved by the CC following the publication of its Procedural Guidance in 2011.

67. We would suggest the following as potential areas for improvement:

- Amend Part 5 of the Guide to Proceedings dealing with the submission and use of evidence during the proceedings to encourage a wider and more frequent use of technology, including the potential to submit documents electronically (rather than being delivered in hard copy or by fax, as is currently the case) and the use of screens on which material can be displayed in the course of a hearing.

- Amend paragraph 12.8 of the Guide to Proceedings to state that the CAT should direct the parties to consider whether there is a possibility for expert evidence to be delivered through witness conferencing (see further comments on this process in response to Question 42).

- Amend the CAT rules dealing with case management to allow the parties the possibility to use agree on a "list of issues". Such lists are commonly used in factually or legally complex proceedings before the Construction Court and the Commercial Court and can

[37] See paragraph 47 of the CAT Response.

be useful in focusing the questions to be considered as part of the proceedings, including the evidence that needs to be submitted by the parties.

68. Finally, we note that in our experience the Chairmen of the CAT can be encouraged to be more hands on in the manner in which they use the existing rules. While some Chairmen, particularly those that sit as judges in High Court proceedings, are not afraid to exercise the powers provided to the CAT through the rules of procedure, others do not become as involved and this can have the effect of slowing down the process overall.

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?

69. The current appeals procedure in the communications sector, which starts at the CAT with price control matters then being referred to the CC, is inefficient and can lead to delays in the overall process.[38] We are supportive of the proposal to simplify the price control procedure by involving only one of these appeal bodies. Our preference would be for such matters to be heard by the CAT because its processes are more conducive to these types of proceedings. If, however, for consistency reasons, BIS would instead prefer to allow such appeals to be brought directly to the CC (or the CMA, once it has been established), we do not have major objections to this, provided that the procedural issues set out below are properly taken into account.

70. While we agree that the possibility of taking price control appeals directly to the CC has the potential to speed up the process, appeals that deal with both price control matters and non-price control matters would not necessarily benefit from this.

71. First, it should be noted that there is often disagreement between the parties as to whether an issue is or is not a price control matter, or as to the terms of the particular questions to be referred to the CC for determination. At the moment such issues are considered by the CAT and, if the new proposals are adopted and "price control" matters can be taken directly to the CC, the new regime must clearly indicate whether these aspects of the dispute should continue to be argued before the CAT (we would prefer this approach). The same applies to issues regarding the admissibility of evidence to the CC which are currently considered by the CAT.

[38] The CC requires additional pleadings in the form of core submissions and has not determined appeals in the allocated time. Our experience is that despite the expertise available to it this is not necessarily reflected in its decisions. There is also a lack of transparency in its decisions, with its thinking rarely evident until late in the process when a provisional determination is issued.

72. In addition to this, as part of the current arrangements, the CAT and the CC coordinate the process so that the CAT can consider whether one set of issues should be heard ahead of the other (eg the CAT's findings on non-price control matters, such as market definition and significant market power assessment, can be considered first and can be taken into account appropriately in the decision on price control matters by the CC). Alternatively the CAT can decide whether to hold parallel hearings in front of both the CAT and the CC and identify the appropriate procedural timetable (eg in the BCMR proceedings, two parallel sets of linked proceedings are being run by the CC and the CAT). This case management coordination between the CAT and the CC must be retained in cases which deal with both types of matters.

73. We note that a similar coordination issue appears to exist in the context of appeals under the Civil Aviation Act 2012, but this model has not been in place for very long and it is therefore untested. It is not particularly clear how this issue of coordination in particular has been addressed in practice. It would be helpful to participate in discussions with BIS and relevant industry stakeholders on how the proposals are intended to operate in practice in this context.

74. Other practical suggestions which could lead to a quicker consideration of the issues include retaining the current set up, but allowing the parties to send the reference questions at the start of the proceedings directly to the CMA for determination (currently this process does not occur until the end of pleadings before the CAT).

75. More generally, in our experience the CC is pro-active in attending case management conferences, utilising technology, disposing of unnecessary formality and arguing for a timetable which is quick but also practical. However, the CC's method of working would benefit from some improvements to allow its processes to be conducive to appeal proceedings so we would welcome some updates to the CC Procedural Guidance 2011.

76. For example, the existing strict timelines to which CC is subject do not allow it to complete the in-depth reviews it was initially intended to conduct, so we would suggest that there should be more flexibility on these (in our experience the CC frequently does not meet these timelines in any event). In addition, the CC would benefit from better case management powers, potentially similar to those available to the CAT. This should include the possibility of setting a clear, mandatory timetable for submissions and perhaps disclosure in appropriate cases where an urgent resolution is required. It would also be useful for the parties to have more visibility of the CC's decision-making process.

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

77. The CAT's existing jurisdiction in this area includes matters dealing with the communications sector (as well as a limited number of aviation, energy and postal services matters). It has therefore already developed significant experience and expertise in this context and we have

had a very positive experience in our dealings with the CAT. It is an established specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy, which in our view is well equipped to continue to hear and decide cases ex- ante regulatory decisions in the communications sector.

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?

78. Yes, see further response to Question 29 below.

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?

79. Many of the contentious decisions that are appealed (eg price controls) involve the use of data that is confidential and the parties are therefore unable to assess the precise basis of Ofcom's calculations. Giving Ofcom powers to set up and enforce confidentiality rings as part of its administrative process will allow potential appellants (sometimes only through their external advisers) access to all the relevant information in deciding whether or not to lodge an appeal, rather than having to wait for the proceedings to begin.

80. Such confidentiality rings can be supervised by the CAT. Alternatively, the parties can contractually set them up between themselves with or without Ofocm's oversight (this was done last year when appeals were threatened against Ofcom's decision to liberalise EE's 1800MHz spectrum for 4G LTE). Ofcom could be encouraged to facilitate this more frequently, even without statutory powers

81. The availability of confidentiality rings early also allows the parties the opportunity to frame the arguments in their pleadings correctly rather than having to seek permission to amend their pleadings before the CAT in light of information disclosed into a confidentiality ring later during the appeal phase.

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?

82. No, see response to Question 31 below.

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?

83. The possibility for appellants to introduce new evidence, which was not available to the regulator at the time of the disputed decision, can have the detrimental effect of causing appeals to take longer. However, in the communications sector such instances have not occurred frequently in the past – the only example that comes to mind is the BT v Ofcom 08x termination charges case.[39]

84. While we do not think that there is a specific need to introduce legislation or provide further guidance to the CAT on this point, we would be happy to workshop specific proposed amendments of the CAT's rules with key stakeholders, if such amendments are considered as necessary.

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?

85. There are no reasons why, whether or not a regulator's case is successful, their position should be favoured in terms of their liability to pay for the appellants' costs (unless there are exceptional circumstances). We find this proposal to be asymmetric and unfair, particularly given that the costs of appeals fall most heavily on appellants, as the Impact Assessment demonstrates.

86. We note the comments in the CAT's response that in its hearings the starting point is that the "loser pays" and that this principle tends to be applied whether the loser is a regulator or a privately funded party"[40], as is the case under the Civil Procedure Rules in High Court challenges to administrative decisions and in most other public law litigation as well as litigation between private parties in UK courts. We are of the view that this principle must be retained because the alternative will result in protecting the regulator from potential costs liability and discourage appellants from challenging incorrect or unlawful decisions by regulators. In short, setting up the incentives for appeal in this way essentially could risk the quality of the decision at the early administrative stage because the regulator would not feel that they are accountable (even if they make a "bad" decision).

[39] The CAT specifically addressed Ofcom's concerns regarding arguments around its broad discretion to admit evidence, which it considered were unfounded See paragraph 81, and paragraphs 82 to 86.

[40] See paragraph 88n of the CAT Response.

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

87. This issue has been considered in the costs hearing in *BT v Ofcom* (Mobile Call Termination)[41] where the CAT decided that an effectively operating costs regime means that each party can seek all its reasonable costs, including not only external costs but also internal costs. We note, however, that this principle should be applied equally and proportionally to all parties to the dispute in accordance with the general principles applicable to cost recovery.

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?

88. We acknowledge that the CAT deals with cases in an expedient manner, but in principle we would welcome BIS working with the CAT in order to decrease the time limits further, where this is appropriate. We agree that judicial discretion must be maintained in order to ensure that justice is done and that complex matters can be addressed properly without undue consideration for the time limits.

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?

89. We are not persuaded that the CAT Rules and Guide to Proceedings rules need to be amended to specify that the use of experts should normally be limited to a specified number

[41] *British Telecommunications plc v Ofcom* (Mobile Call Termination) [2012] CAT 30 at paragraph 39. In this case, the CAT decided how a „fair approach' as regards in-house lawyers costs should be adopted and we do not have concerns with this approach.

"(i) A realistic hourly rate for the lawyer in question. This involves assessing:

(a) the annual cost of that lawyer (taking account not merely the gross salary paid, but other costs, such as pension contributions, health insurance, etc); and

(b) the annual number of hours that the lawyer is contractually obliged to work (again, taking account of not merely the number of hours per week that are expected, but holiday entitlement, etc);

In this way, an average hourly rate can be obtained.

(ii) The number of hours actually worked on the case.

Recoverable costs will then be the hourly rate multiplied by the reasonable number of hours worked by the lawyer in question."

of expert witnesses. The CAT's already has the power to regulate its own procedure and discretion to "direct the manner in which expert evidence is to be given"[42].

90. The cases heard by the appeals authorities in the context of the communications sector are very complex and frequently require evidence from industry experts as well as a number of economics experts with experience in specific focused areas, such as cost modelling.

91. We would therefore suggest that limiting the number of experts is unduly restrictive and would suggest other ways in which such evidence can be presented more efficiently as part of an appeal, including through the use of concurrent expert evidence or witness conferencing (also known as "hot tubbing"). This process has already been included as part of UK court procedure[43] following the recommendations in the context of Lord Justice Jackson's review of Civil Litigation Costs[44].

92. The concurrent expert evidence procedure has been introduced because it is acknowledged that practically speaking it can be difficult for a court to assess the different views of experts if they do not share the same set of assumptions. This is because frequently an expert will not provide a view on particular matters, which, although entirely relevant to the dispute, do not fall neatly into the theory of the case of the particular party who has retained the expert. Giving concurrent expert evidence can, in appropriate cases, drive through this gap because the judge can ask the experts the same questions based on the same assumptions.

93. Of course, counsel at cross examination could achieve the same result, but perhaps not as efficiently because witness conferencing ensures that the relevant witnesses are all present at the same time and are able to be "cross examined" by individuals who most frequently understand the relevant theory upon which the arguments are based a lot more clearly than counsel or the judge.

94. Under this type of procedure all experts must explain their points of view to the judge at the risk of being immediately contradicted by the other expert witness. The possibility, therefore, of being made to look biased by reason of a more even-handed presentation from the other expert may help to focus experts' mind on their duties to the court. Ultimately, as part of the process, witnesses are subject to a form of contemporaneous peer criticism and are able

[42] Competition Appeal Tribunal Rules 2003, in particular Rule 19(e) to (g), 19(l) and Rule 22 and Competition Appeal Tribunal Guide to Proceedings 2005 paragraphs 12.8 to 12.11.

[43] See 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). The process has been part of a pilot scheme in the Manchester Technology and Construction Court and Mercantile Court.

[44] "Review of civil litigation costs", 21 December 2009, Lord Justice Rupert Jackson http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf.

convey their views in a forthright manner than if they feel that they need to defend their opinions under cross-examination. A judge's questions (as opposed to questions from counsel) may differ in focus in that they are more neutral and balanced, which represents an opportunity for the expert to put more of their own views forward.

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?

95. We acknowledge that the CC deals with cases in an expedient manner, but in principle we would welcome BIS working with the CC in order to decrease the time limits further, where this is appropriate. We agree that judicial discretion must be maintained in order to ensure that justice is done and that complex matters can be addressed properly without undue consideration for the time limits.

Freshfields Bruckhaus Deringer LLP

STREAMLINING REGULATORY AND COMPETITION APPEALS: CONSULTATION ON OPTIONS FOR REFORM (19 JUNE 2013)

RESPONSE OF FRESHFIELDS BRUCKHAUS DERINGER LLP

11 SEPTEMBER 2013

1. INTRODUCTION AND SUMMARY

1.1 Freshfields Bruckhaus Deringer LLP welcomes the opportunity to comment on the Government's important consultation on "Streamlining Regulatory and Competition Appeals" (the ***Consultation***).

1.2 Our comments are based on our experience representing clients in many key competition and regulatory appeals before the Competition Appeal Tribunal (***CAT***) and Competition Commission (***CC***). We have confined our comments to those areas that we feel are most significant in terms of the effective operation of the appeals regime for competition and regulatory cases. The comments in this Response are those of Freshfields Bruckhaus Deringer LLP and do not necessarily represent the views of any of our clients.

1.3 While we welcome the aim of streamlining and aligning certain aspects of the appeal processes across the various competition and regulatory regimes, we have a significant overriding concern that far-reaching proposals have been made to reduce fundamental appeal rights that are widely regarded as an essential feature of a robust, effective and fair competition and regulatory regime. These proposals have been made on the basis of no persuasive evidence suggesting either that the current regime does not operate effectively or that the proposals would be likely to improve it.

1.4 The competition and economic regulators in the UK have particularly extensive powers, including the power to impose heavy financial penalties and – even more significant in practice – to take decisions which have long-term effects on a business's commercial conduct. It is therefore essential that there is an effective appeal mechanism so parties have an opportunity to put their case to an independent tribunal and hold the regulators to account. In addition to ensuring respect for parties' rights of defence, an effective appeal regime incentivises the competition and economic regulators to take robust and well-founded decisions on the basis of reliable evidence and thus contributes to the credibility and reputation of the end-to-end decision-making process for competition and regulatory decisions in the UK. This feature of the appeal regime is particularly important at the current time when a newly created merged competition authority is about to assume new and enhanced powers.

1.5 The Government's position following the consultation leading to the recent reforms to the UK competition regime was that it "*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]. Notwithstanding this clear recent policy statement, and that the institutional reforms and improvements that were taken forward have not yet even come into effect, the Consultation does not explain what has led the Government to change its view just over one year later. Maintenance of the full merits appeal regime in competition cases was a key element enabling consensus to be achieved around the proposals for the consolidation and expansion of powers in the new Competition and Markets Authority (***CMA***). The Consultation's proposals to remove this right just a

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[1] "Growth, Competition and the Competition Regime: Government Response to Consultation", March 2012, para 6.18.

few months before the new regime comes into force has therefore caused significant concern amongst our business clients.

1.6 In our experience, the current appeal regime for competition cases works well. The CAT has gained the respect of business, regulators, the legal profession and the Court of Appeal. Although in most cases regulators' decisions survive appeals to the CAT, the fact that it has been necessary for the CAT to overturn certain decisions on appeal is not a sign of a problem with the appeal process. On the contrary, valuable lessons on the importance of carefully scrutinising evidence and testing legal and economic theories have been learned. Our clients' experience has been that too often in the past it has only been at the appeal stage, before the CAT, that evidence has been tested properly.

1.7 No case has been made to make significant reforms to the appeal regime for competition and communications decisions and there are significant objections to doing so. In particular, removing the right to a full merits appeals would be contrary to the interests of justice and may infringe Article 6 of the European Convention on Human Rights for competition decisions and Article 4 of the EU Electronic Communications Framework Directive for communications decisions. We strongly urge the Government to commit to retaining a full merits appeal regime in such cases. This is vital for ensuring that the UK competition and regulatory regime remains world-class and continues to support the Government's aims of attracting investment in UK businesses and driving economic growth.

1.8 The remainder of this Response sets out in more detail our comments on the Consultation's proposals. The Annex contains our responses to the specific questions posed by the Consultation.

2. NO CASE FOR CHANGE

2.1 For the reasons set out below, we do not consider that any case, far less a compelling one, has been made for the far-reaching changes proposed by the Consultation. Indeed, the Government's stated objectives for the appeals framework would be much better met by maintaining the status quo than enacting the proposed reforms.

(a) There is no compelling case for change

2.2 The Government's case for change essentially consists of three main points[2]:

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

- In some cases, particularly in the communications sector, there appear to be strong incentives on parties to bring unmeritorious appeals, supposedly arising from the applicable standard of review, with limited downsides to appealing.

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[2] Chapter 3 of the Consultation.

- In other sectors there appear to be fewer appeals and across most sectors there is scope for appeals to be wide-ranging, lengthy and costly.

2.3 However, the Consultation's position on these issues provides an insufficient basis for the extensive reforms it proposes.

Issue 1 – Regulatory appeals have evolved differently across different sectors and for different types of regulatory and competition decisions

2.4 We acknowledge that some variations in the appeal routes for different sectors exist more for reasons of history than principle and some alignment may be welcome[3]. However, we are unaware of these differences being a major source of concern amongst stakeholders or giving rise to undue difficulties in practice. Consistency can be beneficial but should not be viewed as an end in itself to the detriment of either (a) the effectiveness of the appeal mechanism, or (b) the appropriateness of the appeal process to deal with the particular issues under consideration. For example, the appropriate process and institution to consider appeals of price control decisions – often requiring detailed examination of economic models and evidence – may not be the same for competition cartel decisions requiring consideration of the credibility of witness testimony. Any reforms to achieve consistency must remain subject to these key considerations.

2.5 Furthermore, as the Consultation acknowledges[4], the specific characteristics of each sector may require tailored approaches. The merits of providing consistency between appeal routes in different sectors are discussed below[5].

Issue 2 – In some cases, particularly in the communications sector, there appear to be strong incentives on parties to bring unmeritorious appeals due to the standard of review and the limited downside to appealing

2.6 We consider this concern to be entirely unfounded. Firstly, such discussion as there is in the Consultation appears to be largely confined to the communications sector and yet the reform proposals range much further, covering decisions across all regulated sectors and under the Competition Act 1998.

2.7 Second, the Consultation does not explain how the availability of a full merits appeal creates an inappropriate incentive on parties to appeal. Regulators' decisions – particularly infringement findings under the Competition Act 1998 – have significant financial and reputational consequences for the business concerned. If the regulator's decision is wrong, or the evidence supporting it is weak, businesses will inevitably have a strong motivation to appeal, regardless of the standard of review. If decisions are appealed in these circumstances, this contributes to the health and strength of the overall system.

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[3] See Section 4 of this Response.

[4] Para 1.13 of the Consultation.

[5] Section 4 of this Response.

2.8 Third, the Consultation suggests that "*in some cases there appear to be few downsides to appealing, even if the appellant does not stand a good chance of winning*".[6] This suggests that the Government perceives a significant problem with unmeritorious appeals being brought before the CAT. Reasons cited for this are the allegedly low costs relative to the benefits[7] and the apparent incentive to delay the impact of a decision[8]. However, the Consultation presents no evidence for this behaviour and it is contrary to our experience of the system as advisers. The Consultation:

- acknowledges that "*the number of decisions appealed is a relatively small proportion of the absolute number of decisions*"[9];
- does not take sufficient account of the existing ability the CAT already enjoys to strike out any appeals that have no prospect of success[10]; and
- understates the costs to businesses of bringing an appeal, which include (i) irrecoverable costs: if the appellant loses the appeal, they will be exposed to the respondent's costs – and even if the appeal is successful, an appellant cannot expect to recover all of its costs from the other side; (ii) liability to pay interest payments on amounts due; and (iii) significant indirect costs in the form of management and employee time.

2.9 In our experience, businesses do not take a decision to appeal a regulatory finding lightly – on the contrary, this is often a Board-level decision following detailed legal advice and executive briefings on the potential merits and drawbacks.

Issue 3 – In other sectors there appear to be fewer appeals and across most sectors there is scope for appeals to be wide-ranging, lengthy and costly

2.10 Again, the expressed concern about the number of appeals brought appears to be largely confined to the communications sector and would not, even if correct, support a case for wider reform of the Competition Act regime or in other sectors. This is particularly true for Competition Act decisions, as Figure 3.2 – which purports to show the number of decisions appealed compared with the total number of decisions for each regulator – does not actually include decisions of the principal competition regulators: the OFT and CC[11]. Even in relation to Communications Act cases, the Consultation's observations on the number of appeals do not suggest that there is currently any real problem with the functioning of the appeals regime. The Consultation acknowledges that "*the lack of consistency… may be driven in part by the nature of the different markets*"[12]. We consider that a key determining factor in a

6 Para 3.20 of the Consultation.

7 Para 3.21 of the Consultation.

8 Para 3.24 of the Consultation.

9 Para 3.6 of the Consultation.

10 Rule 10 of the Competition Appeal Tribunal Rules 2003.

11 Para 3.5 of the Consultation.

12 Para 3.7 of the Consultation.

number of appeals, which is not addressed in the Consultation, is the robustness of the regulator's decisions: a high proportion of successful appeals (if it exists) is more likely to suggest a problem with regulatory decision-making rather than inappropriate incentives and mechanisms to appeal.

2.11 The Consultation does not present any evidence showing that appeals are taking too long or are too costly[13]. Indeed, the Consultation acknowledges that the available evidence suggests that the UK performs well against most international comparators, including the EU[14]. Although the Consultation suggests that the standard of review is a major factor in the length of an appeal[15], little evidence is presented to support this. In our view, the duration of an appeal is likely to be materially affected by the complexity of the issues in the case.

2.12 It is important to recall that an appeal is only one part of the overall end-to-end regulatory process: a fair comparison between full merits appeals and judicial reviews would need to take account of the fact that the CAT can generally substitute its own decision for an unsound regulatory decision on a full merits appeal, while on a judicial review the CAT or court must remit the case back to the regulator for a new decision to be taken. This may result in the overall regulatory process being considerably longer under a judicial review system, which requires fresh decisions to be re-taken by the regulator if quashed, likely requiring further consultation of potentially affected parties and additional rounds of evidence gathering and submissions.

(b) The proposals will not achieve the stated objectives for the appeals framework

2.13 The Consultation sets out the Government's five overarching objectives for the appeals framework[16]. These are that it:

- Supports independent, robust, predictable decision-making, minimising uncertainty.
- 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.
- Provides consistency, as far as possible, between appeal routes in different sectors.

2.14 These objectives are laudable and we support them. However, for the reasons set out below, we do not consider that the reforms proposed by the Consultation will

[13] We share the CAT's concerns about the accuracy and completeness of the data presented in the Consultation on appeal length: pages 24-25 & 61-62 of the CAT's response to the Consultation.

[14] Para 7.9 of the Consultation.

[15] Para 7.7 of the Consultation.

[16] Para 1.13 of the Consultation.

achieve these objectives. Indeed, in our view a number of the proposals are likely to undermine them.

(i) Supporting independent, robust, predictable decision-making, minimising uncertainty

2.15 We agree that an effective appeals framework should support independent, robust and predictable decision-making. A "robust" decision is one based on good evidence and sound legal and economic reasoning. The current system of merits appeals under the Competition Act 1998 and the Communications Act 2003 supports this objective, encouraging robust decision-making that can withstand challenge[17]. In our view, reducing the scope of judicial oversight weakens the incentive of regulators to make robust and well-supported decisions and is therefore likely to lead to decisions that are *less* robust. Any reduction in the quality of regulators' decisions is also likely to harm predictability and confidence in the regulatory regime. This in turn is likely to result in a reduction in investment[18].

2.16 Furthermore, the Consultation confirms the Government's commitment to "*encouraging stable and predictable regulatory frameworks to facilitate efficient investment and sustainable growth*"[19]. However, fundamental changes to the appeals system, such as those proposed by the Consultation, are likely to lead to a long period of considerable uncertainty as the boundaries of the new regime are tested. This would be particularly unwelcome at a time of considerable change in the wider competition regime and has the potential to hamper economic growth and deter investment in regulated industries.

(ii) Providing proportionate regulatory accountability

2.17 The Consultation acknowledges that appeals are a key element of holding regulators to account[20]. We agree: an effective right of appeal is an essential element of regulatory accountability. However, we are concerned with the use of the terminology "proportionate" accountability. The implication is that regulators should only be accountable up to a point, beyond which they should have freedom to wield their extensive powers unaccountably. In particular, the Consultation implies that regulators' accountability should be limited in order to allow them "*to set a clear direction over time*"[21].

2.18 Firstly, the decisions taken, and directions set, by regulators must be lawful. This includes adhering to accepted standards of procedural propriety as well as compliance with statutory duties and existing case law. The greater the power of the

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[17] See further Section 3 of this Response.

[18] In a recent price determination case, the CC concluded that "*the evidence that [it] received… suggested that the stability, predictability and transparency of the regulatory regime was important to investors*": Phoenix Natural Gas Limited price determination (28 November 2012), para 8.85.

[19] Para 1.5 of the Consultation.

[20] Para 1.10 of the Consultation.

[21] Para 1.13 of the Consultation.

regulator, the more important is it for that regulator to be accountable. The competition and economic regulators in the UK have particularly extensive powers. Their decisions can have significant adverse consequences for the finances, reputation and commercial conduct of business over the long-term. Only full merits appeals, which allow the evidence and basis of the decision to be tested, allow for an appropriate level of scrutiny. Any diminution in the standard of review, especially in Competition Act cases, would seriously undermine the objective of regulatory accountability.

2.19 Second, we agree with the concern expressed in the Consultation that a move to a judicial review standard may lead to regulators focusing unduly on procedural aspects of their investigations, rather than the economic soundness and evidential support for their decisions, in order to "*JR-proof*" their eventual decisions[22]. We believe that, over time, this would be likely to weaken the standing of UK regulators and their decisions internationally.

2.20 Third, there is no evidence that regulators have been unable to set a clear direction as a result of the current appeals system. The Consultation cites an unsubstantiated concern that Ofcom has "*become reluctant to make significant pro-competition decisions as a result of the proliferation of litigation in the sector*"[23]. Even if this were the case, the appropriate response should be to seek to reduce litigation by improving the quality of decision-making, not by restricting the ability to appeal. If this concern were justified one would expect the Consultation to have pointed to a significant body of cases in which Ofcom has failed in attempts to strike out unmeritorious appeals. However, there is no evidence that the CAT or the courts are entertaining – still less upholding – unmeritorious claims.

2.21 Indeed, a balanced consideration of the evidence would have acknowledged that there are examples of the CAT having *strengthened* the regulatory outcome compared with Ofcom's initial decision following appeal[24]. This evidence is not consistent with Ofcom being unable to make "pro-competition" decisions as a result of appeal rights. In any event, in the communications sector, the applicable Directives and legislation require Ofcom to undertake periodic market review decisions and/or resolve disputes between operators – Ofcom is therefore *obliged* to set a direction over time under the relevant legal regime, regardless of the appeal routes.

(iii) Minimising the end-to-end length and cost of decision-making

2.22 Seeking to minimise the length and cost of decision-making is clearly to be welcomed in principle. However, it is not evident that the Consultation's proposals would lead to shorter or less costly end-to-end decision-making processes. Firstly, it is simply not the case that appeals on judicial review grounds are consistently quicker than full merits appeals. Given that cases that are successfully appealed under judicial review must be remitted to the regulator for a fresh decision, with further consultation of the parties and, potentially, evidence-gathering, the end-to-end length of these

[22] Para 3.17 of the Consultation.

[23] Para 3.31 of the Consultation.

[24] *TalkTalk v Ofcom* [2012] CAT 1; *BT & Ors v OFCOM (Mobile Call Termination)* [2012] CAT 11.

cases, and their overall cost for both the regulator and business, may far exceed those involving a merits-based appeal standard.

2.23 Second, moving from full merits appeals to judicial review or defined grounds of appeal would undoubtedly lead to considerable delays as parties litigate the boundaries of the new regime. The Consultation acknowledges that precedent-setting litigation to test new standards may lead to "*short-term uncertainty*"[25]. Based on our experience with the current regime, it is only now that jurisdictional questions such as the extent of "*appealable decisions*" and the boundary of jurisdiction between the CAT and Administrative Court have become settled. Introducing new standards and procedural requirements has the potential to re-open issues that have been resolved by existing precedents and to introduce further scope for considerable amounts of "satellite litigation" concerning the scope of the new regime. It is obvious, for example, that regulators as well as parties may wish to test the scope of provisions seeking to define specified grounds of appeal. A large part of the initial stages of a case under those proposals may be devoted to the (solely legal) issue of whether the appeal properly falls within one or other of the stated grounds. This preliminary issue may need to be reviewed by the appellate courts before it is possible for issues of substance to be properly considered. As will be apparent, far from minimising the length and cost of decision-making, there is a significant risk that the proposals will introduce new uncertainty that *increases* the length and cost of appeals.

2.24 In our experience, we doubt this uncertainty will only be in the "short term". The scope of provisions introduced in 2000 has only been authoritatively tested in recent years. Given their novelty, and the potential for some of the proposals to raise issues of compliance with the European Convention on Human Rights, an even longer period of uncertain litigation can be expected. Indeed, provisions that seek to regulate matters such as grounds of appeal or the ability to introduce evidence to the case have the potential to be raise issues that are case-specific. An appellate decision on whether evidence is properly introduced in one case may not be relevant to the circumstances of another case. There can be no confidence that the uncertainty created would be in the short term only: on the contrary, continuing, if not systemic, uncertainty appears a more likely result.

2.25 In any event, any reduction in the length and cost of appeals should not come at the expense of the *quality* of decision-making. One of the Government's key objectives for reform of the competition regime was "*improving the robustness of decisions*"[26]. However, as discussed above[27], removing full merits appeals is likely to lead to *less* robust decisions. A reduction in the quality of regulatory decision-making has the potential to cause far greater losses to businesses – and consequent harm to the economy – than the relatively modest cost of appeals.

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[25] Para 4.45 of the Consultation.

[26] "Growth, Competition and the Competition Regime – Government Response to Consultation", March 2012, para 1.2.

[27] Para 2.15 of this Response.

(iv) Ensuring access to justice is available to all firms and affected parties

2.26 We agree that ensuring access to justice is a key feature of any fair appeals regime. However, it is unclear how *reducing* the scope of appeals helps to meet this objective.

2.27 Furthermore, the proposals to limit regulators' exposure to costs are likely to act as a powerful disincentive for small and medium-sized businesses to appeal. This would be contrary to the Consultation's stated intention that the way costs are awarded "*should not penalise […] those who may have less resource to bring an appeal…*"[28]

(v) Providing consistency, as far as possible, between appeal routes in different sectors

2.28 As noted above, some alignment between the appeal routes in different sectors may be welcome. However, as the Consultation acknowledges[29], the specific characteristics of each sector may require tailored approaches.

2.29 Also, there is no value in seeking consistency for its own sake. The Consultation suggests that "*investors across sectors may have less certainty about how the regime operates because of differences in appeal routes*"[30]. However, it seems unlikely that an entity of the size and sophistication required to make significant investments across multiple sectors would have difficulty understanding the operation of appeal routes under different regimes.

3. STANDARD OF REVIEW

3.1 The Consultation proposes moving to a judicial review standard, or introducing more focused grounds of appeal, for both Competition Act appeals and regulatory appeals. As discussed above, we believe there is no compelling case for changing the standard of review and doing so would be likely to undermine a number of the Government's objectives for the appeals framework[31]. Furthermore, any such change – in particular in relation to Competition Act appeals – would be objectionable for the reasons set out below.

(a) Judicial review or the introduction of defined grounds of appeal would be entirely inappropriate for Competition Act appeals

3.2 The Consultation proposes reducing the standard of review for appeals against infringement decisions under the Competition Act 1998 from a full merits review standard to a judicial review standard or introducing defined grounds of appeal[32]. However, the Consultation fails to explain why such a fundamental change is either

[28] Para 6.21 of the Consultation.

[29] Para 1.13 of the Consultation.

[30] Para 3.30 of the Consultation.

[31] Section 2 of this Response.

[32] Para 4.46ff of the Consultation.

necessary or desirable. Any reduction in the scope of judicial scrutiny in such cases would be unjustified, contrary to the interests of justice and would infringe parties' rights to a fair trial. It would also be likely to undermine confidence in the decisions of the new competition regulator, the CMA, at the outset of the regime.

(i) There is no case for changing the standard of appeal for Competition Act decisions

3.3 The Consultation provides no evidence of shortcomings in the current appeal regime for Competition Act cases that need to be addressed. As noted in section 2 above, the case for change in the Consultation is focused on Communications Act cases and does not give sufficient consideration to the Competition Act regime.

3.4 The stated aim of moving to a judicial review standard would be "*to produce more focused and shorter appeals*"[33]. However, for the reasons set out above[34], this is unlikely to be the result of such a change. Indeed, any change in the standard of appeal would lead to a period of intense and protracted litigation.

3.5 The stated aim of moving to defined grounds of appeal is to "*discourage parties from adducing evidence of limited relevance to the key issues in a case*" and to "*ensure that appeals identify where the decision is materially wrong or unreasonable, rather than simply challenging the decision because appellants take a different view of the 'right answer'*"[35]. Those issues are, however, not features of the current appeal process. We note that no evidence is cited to support even potential concerns in this regard. Indeed, the CAT has extensive powers to control the admissibility of evidence and to exclude any evidence that is not relevant to the issues on appeal[36]. It is not in any party's interests to adduce evidence that is of limited relevance to the issues. That would be a waste of time and a distraction to the court and the parties. Parties to most cases before the CAT are represented by highly experienced and professional counsel and solicitors who ensure that the evidence presented is relevant. In our experience, where necessary the CAT is very effective at controlling evidence. Second, appellants are already required by the CAT's existing rules to specify the grounds on which they are appealing the regulator's decision[37] and failure to do so would lead to the appeal being struck out[38]. Third, a party advancing any unmeritorious points can expect to be penalised on costs[39].

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33 Para 4.55 of the Consultation.

34 Paras 2.22 – 2.25 of this Response.

35 Para 4.63 of the Consultation.

36 Rule 22 of the Competition Appeal Tribunal Rules 2003.

37 Rule 8 of the Competition Appeal Tribunal Rules 2003.

38 Rule 10 of the Competition Appeal Tribunal Rules 2003.

39 See, for example, the CAT's decision to penalise National Grid for pursuing unmeritorious points in *National Grid PLC v Ofcom (Ruling on Costs)* [2009] CAT 24, para 13.

3.6 One unusual case – *Albion Water*[40] – is cited in the consultation as an example for the proposition that the current appeal process is unnecessarily long and complex[41]. However, this appeal was exceptional, successful and, if properly understood, in fact *supports* the maintenance of a full merits review standard.

Case Study: *Albion Water*

This case involved an appeal by Albion Water against Ofwat's decision that certain common carriage charges imposed by Welsh Water were not abusive. This cannot be considered a typical Competition Act appeal:

- The appellant was a small micro-business – effectively a litigant in person for large parts of the procedure – with less experience in framing an appeal case.
- Albion was the first new statutory water undertaker since the privatisation of the water industry in England and Wales and the outcome of the case had important implications for the development of competition in the water sector as a whole. The appeal therefore involved major issues of policy that were being tested for first time.
- A substantial portion of the total time taken to resolve this case was attributable to Ofwat: the authority took just over three years to conduct its initial investigation and another two years to report on the various issues requested of it by the CAT during the appeal.
- Far from being "unmeritorious", the appeal was wholly successful. Ofwat concluded *twice* that there had been no abuse: once in its initial decision and once in its report to the CAT during proceedings. The CAT – finding an infringement had in fact occurred – reversed Ofwat's non-infringement decision. Albion was subsequently awarded damages.

Under a system of judicial review, it is unlikely that Albion – particularly as a small business – would have been able to secure any effective redress.

(ii) Reducing the standard of appeal for Competition Act cases would be contrary to the interests of justice

3.7 As the Government recognises, ex-post infringement decisions have different features to ex-ante regulatory decisions[42]. An infringement finding has very serious adverse consequences for the business, potentially including fines, reputational damage, liability for damages and long-term impact on its commercial conduct. It is

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[40] Cases 1046/2/4/04 and 1166/5/7/10, *Albion Water Limited & Or v WRSA*; *Albion Water Limited v Dwr Cymru Cyfyngedig*.

[41] BIS Press Release, "Streamlined appeals system to support growth", 19 June 2013; Annex E to the Consultation, Case Study 5.

[42] Para 4.65 of the Consultation.

essential for entities subject to a quasi-criminal process to be accorded full rights of appeal on the merits.

3.8 The proposal to restrict the grounds of appeal in Competition Act cases also undermines one of the key premises on which the Government justified maintaining an administrative – rather than prosecutorial – model under the combined CMA[43]. A full and robust review on appeal is a crucial safeguard for parties' rights in a system where the powers of investigator, prosecutor and decision-maker are concentrated within the same institution. In its response to the consultation on reform, the Government stated that it "*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*"[44]. The Government's proposed change of view just over a year later is therefore troubling, as it undermines the basis on which consensus for reform of the competition regime was reached.

(iii) Reducing the standard of appeal for Competition Act cases may infringe Article 6 ECHR

3.9 The Consultation recognises that decisions determining whether competition law has been infringed must comply with Article 6 of the European Convention on Human Rights (***ECHR***)[45]. Article 6 entitles the subject of the decision to a fair hearing before an independent and impartial tribunal established by law. It is doubtful that a competition enforcement framework that provided affected parties with only judicial review or defined grounds of appeal would be compliant with Article 6.

3.10 In our view, the Consultation does not fully recognise recent and ongoing developments in Europe in relation to Article 6. The Consultation appears to cite *Menarini*[46] as authority for the proposition that a system of judicial review would meet the requirements of Article 6. However, the powers of the Italian administrative courts considered in *Menarini* exceeded judicial review: the European Court of Human Rights (***ECtHR***) confirmed that they had "*full jurisdiction*" and were not limited to a simple control of legality[47]. The ECtHR noted that the courts had examined elements of both fact and law, confirmed whether the choices of the competition authority were well-founded and proportionate, and verified the authority's technical evaluations[48].

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43 "A Competition Regime for Growth: A Consultation on Options for Reform", March 2011.

44 "Growth, Competition and the Competition Regime: Government Response to Consultation", March 2012, para 6.18.

45 Para 4.48 of the Consultation.

46 Case 43509/08, *A Menarini Diagnostics SRL v Italy*, 27 September 2011.

47 *Ibid*, paras 64 & 65.

48 *Ibid*, paras 63 & 64.

3.11 The Consultation also cites *KME*[49] and *Chalkor*[50] as evidence that appeal standards less than full merits may still comply with Article 6. However, the EU General Court's powers are not restricted to those of judicial review. Furthermore, a debate is currently taking place over the adequacy of the European appeal regime for antitrust cases at European level[51]. It would be particularly unwelcome if the UK moved to restrict competition appeals at a time of demand for greater scrutiny of equivalent decisions by the EU courts.

(b) There is no justification for moving to judicial review or defined grounds for regulatory appeals

3.12 The Consultation proposes introducing a judicial review standard or defined grounds of appeal for various regulatory decisions, including decisions under the Communications Act 2003[52]. The case for such a change has not been made and risks infringing the UK's obligations under EU law.

(i) There is no case for changing the standard of appeal for telecoms decisions

3.13 The Consultation suggests that a merits-based appeal may "*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'…*"[53] However, there is clear and consistent authority that the CAT's role is not that of a "second regulator": in the decision from which this quote was taken, the Court of Appeal held that it was "*inconceivable*" that the relevant EU telecoms legislation required a "*duplicate regulatory body waiting in the wings just for appeals*"[54]. Therefore, this potential concern does not, in fact, arise in practice as it is well-understood that the CAT's role is not to act as a second regulator. On the contrary, weakening the appeals system has the potential to lead to less robust decisions which itself may reduce credibility of the regulator.

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49 Case C-272/09 P, *KME Germany & Ors v Commission* [2012] 4 CMLR 275.

50 Case C-386/10 P, *Chalkor AE Epexergasias Metallon v Commission*.

51 M Jaeger, "The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of Marginal Review?", *Journal of European Competition Law & Practice* (2011), Vol 2(4); Merola & Derenne (eds), "The Role of the Court of Justice of the EU in Competition Law Cases", *GCLC Annual Conference Series, Bruylant* (2012); I Forrester, "A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'", *European Competition Law Annual 2009*; *The Evaluation of Evidence and its Judicial Review in Competition Cases* (2011); W Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", (2004) 27(2) *World Competition: Law and Economics Review*.

52 Paras 4.29ff of the Consultation.

53 Para 3.18 of the Consultation.

54 *T-Mobile (UK) Limited & Or v Ofcom (Termination Rate Disputes)* [2008] EWCA Civ 1373, para 31. See also: *BT v Ofcom (080 calls – admissibility of evidence)* [2010] CAT 17, paras 76-77; *BSkyB & Ors v Ofcom (Pay TV)* [2012] CAT 20, paras 78 & 84; Case 1111/3/3/09, *The Carphone Warehouse Group plc v Ofcom (Local Loop Unbundling)* – CC Determination 2010, paras 1.34, 1.62-1.65 & 1.72; Cases 1193/3/3/12 & 1192/3/3/12, *BT v Ofcom & BSkyB/TalkTalk v Ofcom (LLU / WLR Charge Control)* – CC Determination 2013, paras 1.32ff.

3.14 Second, the Government has stated its commitment to "*stable and predictable regulatory frameworks… [that] avoid undue uncertainty to the business environment*"[55]. However, the Consultation's proposals will undermine the stability of the existing regulatory framework and may deter future investment in the telecoms sector.

(ii) Reducing the standard of appeal for telecoms decisions may infringe the Electronic Communications Framework Directive

3.15 In relation to telecoms appeals, Article 4 of the EU Electronic Communications Framework Directive[56] requires the UK to "*ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism*". The proposals to reduce the standard of appeal are likely to challenged on the basis that they do not comply with the requirements of Article 4.

3.16 The Consultation expresses a concern that appeals – or even the threat of appeals – can have a negative impact on the speed of decision-making and create regulatory uncertainty[57]. To the extent this is true, it would appear counterproductive to introduce a change that is likely itself to lead to greater uncertainty on the scope of the regime and to be challenged. The period of regulatory uncertainty may be particularly long if a reference is made to the European Court of Justice for a preliminary ruling on the compatibility of the new appeal regime with the relevant Directive[58].

4. APPEAL BODIES AND ROUTES OF APPEAL

4.1 We fully agree with the Government that there is a strong case for retaining specialised appeal bodies[59]. We also see some merit in streamlining certain appeal routes. Specifically, in relation to the changes envisaged, we agree with the following proposals:

(a) The proposal to extend the power of the CAT to sit with a single judge in certain appropriate cases[60]. Rather than setting out the scenarios in which this power may be exercised, we would recommend leaving this to the discretion of the CAT.

(b) The ability to bring appeals against Ofcom price control decisions directly before the CC (rather than via the CAT)[61].

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55 Executive Summary of the Consultation, p.6.

56 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (as amended).

57 Paras 4.27 & 4.28 of the Consultation.

58 References for preliminary rulings may be made by a national court of a Member State under Article 267 of the Treaty on the Functioning of the European Union.

59 Para 5.6 of the Consultation.

60 Para 5.16 of the Consultation.

61 Para 5.29 of the Consultation.

(c) The ability for the CAT to hear judicial review applications in respect of Competition Act cases in relation to decisions that are subject to judicial review in the Administrative Court today[62].

5. GETTING DECISIONS AND INCENTIVES RIGHT

5.1 We agree that the competition and regulatory regime should focus on enabling the regulator to reach "*robust and well-informed decisions*"[63]. We also agree that the regime should aim to create the right incentives. However, the Consultation only focuses on the parties' incentives; it is equally important for the regime to consider the *regulator's* incentives. The current full merits appeal regime for decisions under the Competition Act and Communications Act is a key element in ensuring that the regulator has appropriate incentives to make robust and well-informed decisions.

5.2 Furthermore, we do not agree with the assumptions concerning parties' incentives that apparently underlie the Consultation and are not aware of any evidential support for these assumptions. Parties do not currently have "*undue incentives to appeal*"[64]. As noted above, there are significant downsides to making an appeal and this decision is not taken lightly[65]. Second, it is difficult to envisage a scenario in which it would be to a party's advantage to withhold decisive relevant evidence at the administrative stage only as a tactic in order to be able to deploy it on appeal. We have not encountered this tactic in practice and do not believe there is any evidence of it having been used. Third, there is no evidence that the current costs regime is incentivising (or failing to disincentivise) unmeritorious appeals.

(a) Adducing evidence on appeal

5.3 We note that the Government has seen "*no evidence that parties are purposely holding back evidence until the appeal stage*"[66]. This is in line with our experience. It would make no commercial or economic sense for a party deliberately to withhold important relevant evidence from the regulator in order "save" it for an appeal. It is clearly in parties' interests to try to persuade the regulator – in both *ex post* competition cases and *ex ante* regulatory matters – to make the right decision in the first place, thereby avoiding the considerable direct and indirect costs of an appeal. Given the implications of an adverse decision, which include adverse publicity and exposure to potential damages actions, it is unlikely that parties would deliberately withhold evidence at the investigation stage.

5.4 The Consultation also acknowledges that the CAT rules "*already provide the CAT with wide powers to control the admission and use of evidence*" [67]. The Consultation presents no evidence that the CAT is failing to exercise these powers

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62 Para 5.44 of the Consultation.

63 Introduction to Chapter 6 of the Consultation.

64 Para 6.1 of the Consultation.

65 Para 2.8 of this Response.

66 Para 3.23 of the Consultation.

67 Para 6.12 of the Consultation.

appropriately by admitting evidence that should properly be excluded. Again, we do not believe this is a feature of the current regime.

5.5 As the first instance judicial authority for competition and regulatory cases, it is entirely appropriate for the CAT to be able to hear evidence relevant to the findings made by the regulator. Fettering the CAT's discretion by imposing statutory limitations on the admission of evidence would undermine its independence and effectiveness and its ability to reach fully informed judgments.

5.6 Imposing statutory constraints on the CAT's ability to admit evidence would also undoubtedly lead to satellite litigation and further appeals over whether the CAT had properly admitted or excluded evidence in the appeal proceedings. This is a further feature of the proposals that would run contrary to the Consultation's stated intention of minimising the end-to-end length and cost of decision-making[68].

(b) Appeal costs

5.7 The Consultation proposes to limit regulators' costs exposure by legislating that (i) where the regulator is successful on appeal, it should be awarded its costs from the parties (expect in exceptional circumstances) but (ii) where the regulator is unsuccessful, costs should not be awarded against it unless its conduct can be characterised as unfair or unreasonable (or there are exceptional circumstances)[69]. This proposal is unbalanced and unfair and there are strong reasons not to introduce such a rule:

(a) The Government's intention behind introducing such a rule appears to be to ensure that costs "*create a real disincentive on parties to appeal where there is no merit in the arguments being brought, or where the objective of the appeal is to delay a decision*"[70]. We agree with this aim, but the existing costs rules already allow the CAT to take account of the parties' conduct when awarding costs[71]. The CAT already makes use of these powers to penalise parties pursuing any unmeritorious points on appeal[72]. There is also no evidence that parties are bringing unmeritorious appeals merely to delay decisions.

(b) Costs decisions are best made by the court that hears the case and consideration of how to treat conduct in the litigation should not be subject to a blanket rule that assumes that appellants make unmeritorious points but that the regulators never do so.

(c) The principle of "loser pays" should remain. This supports the aim of disincentivising unmeritorious appeals but also helps to achieve the at least

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68 Para 1.13 of the Consultation.

69 Para 6.22 of the Consultation.

70 Para 6.21 of the Consultation.

71 Rule 55(2) of the Competition Appeal Tribunal Rules 2003.

72 See, for example, the CAT's decision to penalise National Grid for pursuing unmeritorious points in *National Grid PLC v Ofcom (Ruling on Costs)* [2009] CAT 24, para 13.

equally important aim of incentivising the regulator to make robust and well-reasoned decisions in the first place.

(d) There is no justification for protecting regulators from the consequences of losing a case. In order to preserve the rights of the defence and the principle of equality of arms, all parties to an appeal should be subject to the same costs rules.

(e) Limiting regulators' costs exposure is likely to disincentive not just unmeritorious appeals but also *meritorious* ones, particularly if the potential appellant is a small or medium-sized business. When deciding whether to appeal a decision, parties would need to factor in the possibility of not being able to recover their costs even if they win.

(f) Such a rule would also undermine one of the Government's key objectives for the appeals framework of ensuring access to justice is available to all affected parties – not just to the largest firms. SMEs are likely to be disproportionately affected, as they will be disincentivised from appealing for costs reasons even in circumstances where they are advised that they have a good case.

6. MINIMISING THE LENGTH AND COST OF CASES

6.1 We agree with the Government's aim that "*appeals are carried out in the most efficient way, so that robust decisions are reached as swiftly as possible with minimum cost*"[73]. The reference to "robust" decisions is important: speed must not come as the expense of the quality of the decision-making.

6.2 Appeals raise different issues and should be managed in accordance with their size and complexity. An appeal involving one party on a point of law will not require the same approach or case management as a complex appeal involving several parties in which there are significant disputed issues of fact. A "one size fits all" approach would not be appropriate. We would therefore not support the introduction of target timescales for cases before the CAT. Again, the CAT already has extensive case management powers and the length of its proceedings compare favourably with timescales internationally and for other complex litigation in the United Kingdom.

6.3 The Consultation acknowledges that the CAT "*already [has] a good record in carrying out cases efficiently*"[74] and that appeal lengths are "*broadly in line with international comparators*"[75]. In these circumstances, it is not clear why it should be necessary to further prescribe detailed timings for appeal proceedings. To seek to do so risks undermining the CAT's ability to make case management decisions in the interests of justice.

6.4 Lastly, the proposal to introduce new powers for the CAT to limit evidence and witnesses is unnecessary. As discussed above, the CAT already has wide-ranging

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[73] Introduction to Chapter 7 of the Consultation.

[74] Executive Summary of the Consultation, p.6.

[75] Para 3.11 of the Consultation.

case management powers, which include the power to control the admissibility of evidence and witness testimony[76]. These decisions should be taken in the interests of justice by the CAT as an independent tribunal.

7. CONCLUSION

7.1 Whilst we agree with many of the Government's objectives for the appeals regime, we consider that maintaining the current regime is more likely to meet these objectives than introducing many of the Consultation's most significant proposals. We are particularly concerned by the proposal to dispense with the full merits review standard in competition and communications appeals. This would be unjustified, contrary to the interests of justice and would undermine nearly all of the Government's stated aims for the appeal framework.

7.2 There may be some scope for minor improvements to the appeals regime, such as re-routing appeals against Ofcom price control decisions directly to the CC. However, the framework is fundamentally sound, operates well and in the interests of justice, and is supported and respected by stakeholders. In the absence of a clearly articulated case for change, supported by evidence, no changes to the regime should be made that risk introducing uncertainty and complexity to the regime and undermining the robustness of the end-to-end regulatory decision making process.

7.3 We would be very happy to discuss any points raised in this Response if that would be helpful.

Freshfields Bruckhaus Deringer LLP

11 September 2013

[76] Rules 19 – 22 of the Competition Appeal Tribunal Rules 2003.

ANNEX – RESPONSES TO CONSULTATION QUESTIONS

CHAPTER 4: STANDARD OF REVIEW

	Question	Response
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 – see Section 3 of this Response.
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?	No – see Section 3 of this Response.
3	How would moving to a judicial review standard impact the length, cost and effectiveness of the appeals framework?	Moving to a judicial review standard would likely lead to the end-to-end decision-making process becoming longer, more costly and less effective. See Sections 2(b) & 3 of this Response.
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?	No – see Section 3(b) of this Response.
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?	Moving to a judicial review standard or specified grounds of appeal would likely lead to the end-to-end decision-making process in the communications sector becoming longer, more costly and less effective – see Sections 2(b) & 3(b) of this Response.

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?	No – see Section 3(a) of this Response.
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?	Moving to a judicial review standard or specified grounds of appeal would likely lead to Competition Act appeals becoming longer, more costly and less effective – see Sections 2(b) & 3(a) of this Response.
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?	No – these regulatory regimes have recently undergone significant changes and further changes would not be appropriate at this time.
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?	There is a risk that moving to a judicial review standard or specified grounds of appeal would lead to the price control appeals becoming longer, more costly and less effective.
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?	Yes – in many cases a judicial review standard would not be appropriate. See section 3 of this Response.
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?	There is a risk that moving to a judicial review standard or specified grounds of appeal would lead to other regulatory appeals becoming longer, more costly and less effective.

CHAPTER 5: APPEAL BODIES AND ROUTES OF APPEAL

	Question	**Response**
14	Are there any reforms of the CAT's Rules the Government should make to achieve its objectives set out in paragraph [5.9]?	In general, the CAT's Rules already enable the CAT to achieve the objectives set out in paragraph 5.9 – see Sections 5 & 6 of this Response. We note that the CAT's Rules will be subject to a separate consultation; we reserve our comments on any proposed reforms until this later consultation.
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.
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.	Yes – this limit is unusual, if not unique, to CAT judges. We are not aware of any justification or need for imposing such a limit.

17	Do you agree that the CAT should be permitted to sit with a single judge (without panel members)?	Yes, in appropriate cases – see para 4.1(a) of this Response.
18	Do you agree that the Competition Commission should continue to hear appeals against price control and licence modification decisions?	Yes – the CC has the most experience in these areas.
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?	Yes – see para 4.1(b) of this Response.
20	Do you agree that the CAT is the most appropriate appeal body to hear appeals against ex-ante regulatory decisions?	Yes (except for appeals against price controls and licence modification decisions) – the CAT has the relevant expertise and experience to hear such appeals.
21	Do you agree that Energy Code modification appeals should be heard by the CAT rather than the Competition Commission?	Yes – these appeals are adversarial in nature and it may be more appropriate for the CAT to hear them.
22	Do you agree that there should be a single appeal body hearing enforcement appeals?	Yes.
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?	The CAT would be the most appropriate appeal body to hear enforcement appeals, as it has the most relevant expertise and experience.

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?	Yes.
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?	The CAT would be the most appropriate appeal body to hear dispute resolution appeals, as it has the most relevant expertise and experience.
27	Do you agree that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998?	Yes – see para 4.1(c) of this Response.

CHAPTER 6: GETTING DECISIONS AND INCENTIVES RIGHT

	Question	**Response**
28	Do you agree with the proposal to increase the use of confidentiality rings at the administrative stage of decision-making?	Yes – we welcome this proposal.

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?	Serious consideration should be given to permitting in-house as well as external counsel to be part of confidentiality rings. However, we recognise that this may lead to some complexity, particularly in multi-party cases, where it may not always be possible to secure the cooperation of one party to disclose to the in-house legal team of another. It may well be that other aspects of the OFT's standard practices on confidentiality redactions would need further consideration if confidentiality rings were introduced. We consider the CAT would be well-placed to supervise such rings.
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?	No – see Section 5(a) of this Response.
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 do not consider that the current rules on the admission of evidence are in need of change. Furthermore, the Civil Aviation Act regime is too new and untested to be used as a model for further reform.
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?	No – see Section 5(b) of this Response.

33	Do you agree regulators should be encouraged to claim their full costs, including internal legal costs?	The same costs rules should apply to all parties, including regulators. To the extent that regulators are permitted to claim internal legal costs, other parties should likewise be permitted to do so on the same basis.
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?	There is no reason for regulators not to challenge unmeritorious appeals, if made. However, we are not aware any problems with the current system in this regard – see paras 2.6 to 2.9 of this Response.
35	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.	If one of the parties applies to have an appeal struck out, the CAT should consider this application. The existing CAT Rules already allow the CAT to strike out appeals that have no prospect of success – see para 2.8 of this Response. There is therefore no need to change the existing rules in this regard. There is no need for any additional process of pre-screening by the CAT at the outset of appeals.

36	Do you consider that the principles proposed for decision-making in antitrust changes should be applied in any way to regulatory decision-making?	Ex-post antitrust decisions are inherently different from ex-ante regulatory decisions. However, many of the principles that we would support for antitrust decision-making are equally applicable to regulatory decision-making, including: • improved access to key decision-makers for the parties; • collective judgment on key decisions by senior members of staff; • improved checks and balances, including more senior oversight from an early stage and a regular review of the economic and legal propositions; • more transparency throughout the process, including clearer administrative timetables and better communication of the key issues; and • improvements to procedural rights of defence.
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?	Better consultation with affected parties and greater transparency are likely to lead to improved decision-making. This in turn should lead to fewer appeals.
38	Do the regulators need more investigatory powers, such as a power to ask questions?	The Consultation does not explain why it would be necessary to introduce additional investigatory powers for regulators. We agree with the Consultation's position that "*it is not clear that a power to require individuals to answer questions should be part of the regulatory framework*" (para 6.34 of the Consultation). As a general principle, regulators should not be granted additional powers without a clear rationale and justification.

39	Do you have any views on whether non-infringement decisions should continue to be appealable decisions? Why do you take this view?	Non-infringement decisions should continue to be appealable. These are likely to be rare in practice, but can have significant effects on affected parties.

CHAPTER 7: MINIMISING THE LENGTH AND COST OF CASES

	Question	**Response**
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?	No – see Section 6 of this Response.
41	Do you agree with the proposal to introduce target time limits for all other regulatory appeals heard at the CAT, of 12 months?	No – see Section 6 of this Response.
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?	The CAT already has these powers – see para 6.4 of this Response. No further steps are necessary in this regard.
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?	No comment.
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?	No comment.

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?	No comment.
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?	No comment.
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?	No comment.

Gatwick Airport

YOUR LONDON AIRPORT Gatwick

HM Government consultation on streamlining regulatory and competition appeals: Response from Gatwick Airport

Date of issue: 11 September 2013

Introduction

Gatwick Airport welcomes the opportunity to comment on the Government's proposed reforms of the regulatory and competition appeals framework in the UK. See below our responses to the questions set out in the consultation document. We are happy for our response to be published.

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?
A1 Gatwick encourages the Government to be cautious in diluting the appeal rights available to persons affected by the decisions of regulatory and competition authorities. Any such dilution, and/or reduction in the standard of review to which decisions are held, will, by definition, increase the risk that inappropriate decisions made by these authorities are implemented, rather than being withdrawn. Conversely, merit based appeals may 'save' regulatory decisions, which judicial review appeals would quash. These potential adverse outcomes will have associated costs to industry, efficiency, competition and consumers. This is not a theoretical risk. Regulatory and competition authorities do reach erroneous conclusions, as demonstrated by experience. We query the underlying assumption that merits based appeals take longer than judicial review standard appeals. We also have serious concerns about any change to the right of appeal against ex post regulatory decisions. As with a criminal conviction, a finding of unlawful anti-competitive behaviour should, on appeal, be subject to a full merits based appraisal.

YOUR LONDON AIRPORT Gatwick

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?
A2 The principles in Box4.1 reflect the principles set out for aviation in the Civil Aviation Act 2012. However, we are concerned with the use of the word "material" in the principles and any corresponding legislative changes. This proposal introduces uncertainty and the potential for confusion as regards existing case law where such qualifying language has not been present. Courts have demonstrated their ability to discriminate between important errors without reference to "material" in the legislation. In addition, what may not be a material error or irregularity in one case may be material in another and vice versa. However, a case will create precedent which may have unwelcome and unforeseen implications for future cases. We also believe uncertainty will inevitably be created by setting new grounds of appeal which in itself will lead to further litigation.

Q3 How would moving to a judicial review standard impact the length, cost and effectiveness of the appeals framework?
A3 We are unconvinced that this will have any material impact.

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?
A4 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?
A5 No comment.

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?
A6 Gatwick does not agree that there should be any change in the standard of review of Competition Act 1998 decisions. A decision that concludes there has been anti-competitive behaviour is of itself very serious and may lead to future damages actions against a firm. Likewise, if a decision is that there has been no breach and this is erroneous, then potentially detrimental behaviours will go unchecked. Therefore, it is imperative as a matter of basic justice that such a finding should be subject to a full merits based appeal. In addition, we are concerned that if there are more restricted grounds of review than compared to, for example analogous cases undertaken under European competition law, this could lead to a divergence of case law, increasing uncertainty for firms, risking inefficient outcomes.

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?
A7 We question whether there would be any noticeable impact and believe focused specific grounds may themselves lead to jurisdictional disputes.

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?
A8 Gatwick does not agree that there should be a change in the standard of review for the aviation sector, particularly in view of the recent change implemented by the Civil Aviation Act 2012. However, if there is a change, it should not be to judicial review. The existing grounds envisage wider grounds of appeal than judicial review. Any change should continue to allow the regulator's decisions to be challenged on grounds more than judicial review for the reasons provided at A1 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?
A9 See response at A7 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?
A10 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?
A11 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?
A12 See response at A1 above. Gatwick considers it imperative that decisions relating to whether an airport has substantial market power are subject to the widest standards of review, consistent with those available for competition law cases. A decision that an airport has substantial market power, equivalent to the competition law concept of dominance, will have significant legal, commercial, and regulatory implications. Therefore, such decisions should be held to the same standard of review for Competition Act 1998 and Articles 101 and 102 of the TFEU. This will also help avoid outcomes where a firm is found, without justification, to be dominant under general competition law, but not to have substantial market power under sectoral regulation, or vice versa.

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?
A13 See response at A7 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?
A14 Gatwick believes the current rules work well and we are concerned at proposals which might impact on judicial independence.

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?
A15 Gatwick agrees with this proposal.

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.
A16 Gatwick agrees with this proposal.

Q17 Do you agree that the CAT should be permitted to sit with a single judge (without panel members)?
A17 This should be at the CAT's discretion in view of the subject matter of the appeal.

Q18 Do you agree that the Competition Commission should continue to hear appeals against price control and licence modification decisions?
A18 Gatwick agrees with this proposal.

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?
A19 Gatwick does not have a view on this proposal but it should be noted that the Civil Aviation Act 2012 appeals regime is, as yet, untested.

Q20 Do you agree that the CAT is the most appropriate appeal body to hear appeals against ex-ante regulatory decisions?
A20 Gatwick agrees with this proposal. In our view it is imperative that appeals against these decisions are heard in a specialist tribunal such as the CAT to ensure consistency with general competition law precedents.

Q21 Do you agree that Energy Code modification appeals should be heard by the CAT rather than the Competition Commission?
A21 No comment.

Q22 Do you agree that there should be a single appeal body hearing enforcement appeals?
A22 Gatwick believes consistency of approach is important whatever the logistical mechanism to achieve such.

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?
A23 See response to A22.

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?
A24 No comment.

Q25 Do you agree that there should be a single appeal body hearing dispute resolution appeals?
A25 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?
A26 No comment.

Q27 Do you agree that the CAT should have jurisdiction to hear judicial reviews under the Competition Act 1998?
A27 Gatwick agrees with this proposal.

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?
A28 Gatwick considers that regulators and competition authorities should continue to make their administrative decisions, redacting confidential information where necessary, with confidentiality rings being used where the redacted information is of criticality to the regulatory decision.

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?
A29 Gatwick believes giving the CAT a supervisory role would help demonstrate the importance attached to compliance with the terms of such arrangements.

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?
A30 Gatwick queries whether there is anything in the current position in need of remedy.

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?
A31 This is untested, as of yet.

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?
A32 We do not agree that the regulator should be awarded its costs as default. This will likely dampen the incentives on firms to appeal regulatory decisions, leading to an increase in the number of inappropriate decisions, which are detrimental to competition and consumers, being introduced. There should be no asymmetry on cost awards. We are unconvinced that the current position, with a wide discretion left to the CAT on costs, should be altered.

Q33 Do you agree regulators should be encouraged to claim their full costs, including internal legal costs?
A33 Costs should be subject to a reasonableness assessment by the CAT or court as present.

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?
A34 Gatwick sees merit in this proposal but is uncertain that this process is not already carried out by the parties' legal representatives.

Q35 Do you agree that the CAT rules should provide for the CAT to review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success.
A35 Gatwick believes that the CAT's procedure rules already provide for this.

Q36 Do you consider that the principles proposed for decision-making in antitrust cases should be applied in any way to regulatory decision-making?
A36 Gatwick agrees that such changes would be beneficial.

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?
A37 No comment.

Q38 Do the regulators need more investigatory powers, such as a power to ask questions?
A38 Regulators already have substantial powers to request data and information.

Q39 Do you have any views on whether non-infringement decisions should continue to be appealable decisions? Why do you take this view?
A39 Gatwick does not agree that non-infringement decisions should be subject to appeal. The availability of private actions provides an arena for any such further examination.

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?
A40 Gatwick agrees with this proposal.

Q41 Do you agree with the proposal to introduce target time limits for all other regulatory appeals heard at the CAT, of 12 months?
A41 The Government should be cautious about introducing such a target. A consequence of such a change could be that more urgent cases are delayed in order that less urgent cases are determined within the 12 month target. It may be more appropriate to leave the scheduling of cases at the discretion of the specialist body, the CAT.

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?
A42 Gatwick agrees that the CAT should have the discretion to limit the amount of evidence and expert witnesses. However, we do not agree there should be a hard limit. This should be considered on a case by case basis by the CAT. There may be cases where a relatively large amount of evidence and number of expert witnesses are required.

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?
A43 Gatwick considers this could be a sensible innovation.

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?
A44 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?
A 45 No comment. This is, as yet, untested.

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?
A46 No comment.

Q47 Could the CAT's and/or the Competition Commission's case management procedures be improved and if so, how?
A46 No comment.

Q48 Are there any other measures Government or others could take to achieve robust decisions more swiftly?
A48 No comment.

Heathrow Airport

Streamlining Regulatory and Competition Appeals

A response to the BIS consultation

Date: 11th September 2013

Status: Final

Reference: BIS/0001

Heathrow
Making every journey better

Contents

A Summary

1. Heathrow has serious concerns about the proposal to change the regime for appeals of CAA decisions, which was created by the Civil Aviation Act 2012 ("the Act"). These concerns stem from two key issues:

    - Changing the appeals regime now, before it has even been used, creates significant regulatory instability and undermines the end-to-end regulatory regime established (with some care) by the Act. Heathrow is surprised that the government would consider destabilising the regulatory regime in this way.
    - The proposed change to the standard of review[1] is ill thought-out and there is a significant risk it will undermine proper scrutiny of regulatory decisions. This, in turn, would damage the UK as an investment environment and harm the interests of passengers.

2. The government has put forward no positive case for change in our sector. Indeed, given the current regime was only put in place last year it would be hard to see how such a case could be made. Given this, the proposals, if implemented, are highly likely to be susceptible to legal challenge.

3. This response is not primarily concerned by the procedural changes suggested in the consultation, many of which are sensible and were inspired by the aviation sector; our main concern is with the proposal to change the standard of review.

[1] By introducing a Judicial Review or "focussed specified grounds" approach as set out in section 4 of the consultation.

B Introduction

4. This is a response by Heathrow Airport Limited ("Heathrow") to BIS's consultation "Streamlining Regulatory and Competition Appeals".

5. Heathrow is the UK's hub airport – one of an elite group of six genuinely world-class hubs.

6. Our sector is a key driver of the economic prosperity in the UK. Not only is Heathrow the largest private investor in UK infrastructure, and one of the largest capital investors globally[2]; we also play a crucial role in connecting the UK to the world, underpinning the UK's place as an international economic force.

7. This unique role was noted by the Airports Commission in March 2013:

> *Heathrow… plays a unique role in supporting the UK's and London's overall connectivity. It is by far our largest airport in terms of overall passenger numbers and accounts for around 70 per cent of passengers travelling to long-haul destinations.*

8. In 2012, Parliament passed a new Civil Aviation Act. The purpose of the Act was to create a new, modern regime for economic regulation in the aviation sector. In acting to bring the regime for economic regulation up to date, the government recognised the special challenges facing our aviation sector: capacity is constrained at Heathrow, which has been operating at capacity for over a decade. In contrast, other major European hubs – Frankfurt, Paris, Amsterdam – have spare capacity and concrete plans for growth. In the global race for jobs and investment, it is essential that the UK remains better-connected to future growth markets than our European competitors.

9. Regulation plays a key part in that. The Civil Aviation Act 2012 ("the Act") was crafted with enormous care. We, and other stakeholders, worked constructively with DfT and Parliamentarians. The result was an Act which was, on the whole, balanced and well thought through. Although some reservations remain, we considered that the Act created a sound statutory structure for future investment in UK Airports.

10. The keystone of that structure was a robust end-to-end process for reaching regulatory decisions. This process recognised that regulators may not always get it right and incorporated a modern appeals regime. This regime provides for appropriate checks and balances on the power of the regulator: it provides certainty that makes if mistakes occur they can be corrected. Even the best regulators make mistakes and the consequences of those mistakes can be very serious indeed.

11. In this context, the government's proposal to change the new regulatory regime before it has even been applied is genuinely astonishing. Investors and airports rely on regulatory stability. The UK has, historically, been a stable, predictable regulatory environment. These proposals will seriously undermine that.

[2] Since 2003, Heathrow has invested £11 billion in the airport.

12. We therefore strongly urge the government to think again. Whatever the position in other regulated sectors[3], change is categorically not required in the aviation sector. This is not the time to be changing the regime in aviation.

13. The rest of this response is structured as follows:

- Part C: the practical effect of the proposals.
- Part D: the impact of the proposals on UK investment.
- Part E: is this intervention necessary?
- Part F: answers to consultation questions.
- Part G: Other issues

[3] In fact, we note that the Competition Appeal Tribunal itself has cast serious doubts on the supposed factual analysis underpinning the consultation (http://catribunal.org.uk/files/Streamlining_Regulatory_and_%20Competition_Appeals_Response_220813.pdf)

C The effect of the proposals

14. The effect of the proposals is potentially very radical. We note the comments of the CAT to the effect that they do not take a mechanistic approach to their work and are likely to subject regulatory decisions to a varying (and appropriate) level of scrutiny on a case by case basis.

15. However there must be a chance – and it might be quite a good chance – that the proposals will result in a substantial weakening of the checks and balances which appeals quite properly exert in the regulatory scheme.

16. The reason for this is explained in the rest of this section.

17. This is what the Act currently says:

> *The Competition Appeal Tribunal may allow an appeal under paragraph 1 only to the extent that it is satisfied that the market power determination or operator determination appealed against was wrong on one or more of the following grounds—*
> *(a) that the determination was based on an error of fact;*
> *(b) that the determination was wrong in law;*
> *(c) that an error was made in the exercise of a discretion.*

18. This is the new proposal:

> *The Tribunal may allow an appeal only to the extent that it is satisfied that the decision appealed against is wrong on one or more of the following grounds:*
> *(a) that the decision was based on a material error of fact;*
> *(b) that the decision was based on a material error of law;*
> *(c) because of a material procedural irregularity;*
> *(d) that the decision was outside the limit of what [the regulator] could reasonably decide in the exercise of a discretion;*
> *(e) that the decision was based on a judgment or a prediction which [the regulator] could not reasonably make.*

19. The underlined phrases indicate some key differences which are explained below.

What do the differences mean in practice?

20. The two clauses look quite similar. In fact, the underlined points mean that their effect might actually be very different (particularly in relation to 5. (d) and (e) above).

21. The reason for the difference is that 5. (d) and (e) very closely reflect the judicial review standard of review; in fact it is close to being a long-hand codification of Judicial Review. Although this is not necessarily clear from the long-hand formulation, judicial review is in fact very restrictive. It affords regulators a very significant amount of freedom in how they carry out their functions.

22. The reason for this turns (as with any legal formulation) on how the courts interpret it in practice. The courts have used a variety of phrases to describe the scrutiny that regulatory decisions will be subject to under this standard (and the law is genuinely difficult to apply in each case). However, overwhelmingly the trend is to interpret the test at 5(d) and (e) to allow decision-making bodies very great freedom indeed.

23. Some examples include:

- "**Not an appeal**": in R (Malik) v. Manchester Crown Court [2008], the Court said that a judicial review "is not an appeal. The decision… cannot be quashed unless [the body that made it] erred in law in one or more of the respects in which a decision can be impugned on public law grounds."
- "**It is not for the [appeal body] to consider whether the… decisions were right or wrong**" (R v Chief Registry of Friendly Societies ex p New Cross Budling Society [1984])
- "**The Courts judge the lawfulness not the wisdom of the… decision**" (R v Cumbria county Council ex p NB [1996])
- "**A decision can be lawful without being correct**" (Sutton London Borough Council v Davis [1994])
- A decision is only to be overturned if it is "**so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it**." [AA (Uganda) v SoS for the Home Department [2008])
- The claimant "**has a mountain to climb**" (R v Lord Chancellor ex p Maxwell [1997]
- The decision maker must have "**taken leave of his senses**" (R v SoS for the Environment ex p Nottinghamshire) [1986]

24. These later characterisations are quite extreme. But the main criticism of the proposed new standard can be captured in the early bullets – this JR-type formulation is "not an appeal" and <u>is not concerned with whether a decision is right or wrong</u>.

25. There must be a material risk, then, that the proposed new standard would mean that this approach would be carried over into appeals from CAA decisions. Decisions which are "wrong" could then stand. For reasons explained in the next section, this would be extremely dangerous.

D The appeals regime will directly impact on UK investment incentives

26. The civil aviation sector is very important for the UK economy[4]. Not only is it a very substantial sector in its own right; by enabling international travel it also underpins the UK's international competitiveness.

27. The decisions taken by the CAA – particularly in setting price controls – are fundamental to the success or failure of our sector. Because of the singe till structure, and the design of the price controls in practice, the CAA effectively sets the returns on our entire business.

28. The CAA has recently been engaged in setting the price control for Heathrow for the next 5 years (known as Q6). As part of this, it must decide the returns Heathrow may make on its investment. This is based on its view on Heathrow's weighted average cost of capital (or "WACC").

29. The CAA has taken a very different view from Heathrow as to the level of the WACC indicating its preference for a significantly lower WACC.

30. This paper is not directly concerned with that disagreement. The important thing to note for these purposes is that Heathrow had intended to make a substantial investment over the period of the Q6 price control. At the WACC suggested by the CAA, that figure will be materially reduced because the CAA is not sufficiently incentivising investment. Part of the reason for this is that Heathrow's investors are major international investors; they have a global choice of markets in which to invest. If returns are set at the wrong level relative to the risk they face, capital will flow to other markets.

31. The question for the purposes of this consultation is this: to what level of scrutiny should the CAA's decision be subject? Unless you believe that regulators will always get things absolutely correct, Heathrow considers that this type of decision ought to be subject to very thorough scrutiny. To put it another way - bearing in mind that a very large amount of investment in the UK is at stake – the savings from having a (supposedly) leaner appeals regime would have to be inconceivably large to be justified. Heathrow does not accept that this is the correct appeals regime for such decisions, given the amount of investment at stake. A regime which is not fundamentally concerned with whether the decision is right or wrong would be wholly inappropriate.

[4] Airports Commission March 2013

E Is this intervention necessary?

32. The consultation document suggests that the proposals are necessary in order to *increase regulatory certainty, giving firms greater confidence to invest or innovate.* For the reasons outlined above, the proposals are very likely to have the opposite effect.

33. Notwithstanding the general comment that the Government's proposal will not improve investor confidence, why would the Government intervene to change the appeals standard in the aviation sector (or in any other regulated sector) at this time? Remarkably, the genesis of the proposals in the consultation is not really discussed except in passive terms: "Concerns have been expressed… It has been argued that…"

34. The Impact Assessment is no real help. It appears to be focussed largely on experiences from the communications sector.

35. The impact assessment is largely silent on the appeals regime in the aviation sector. In fact, we do not see how it would be possible to carry out an impact assessment on an appeals regime which has not yet been used.

36. The Coalition Government's policy document, "Reducing regulation made simple: better regulation, less regulation and regulation as a last resort" (December 2010) tells us that the first question before taking new measures must be "What exactly is the problem?"

37. It is clear that, in the aviation sector at least, the government has not actually identified a problem which needs solving. The aviation sector is barely mentioned in the Government's impact assessment and, to the extent that it is covered, it is lumped together with other sectors. This approach is extraordinary. No serious argument is put forward as to why all sectors should be treated the same; and Heathrow simply does not accept this sweeping assumption[5].

38. For these reasons the impact assessment also falls short as an evidential tool. It is not possible to quantify the benefit in the aviation sector (including passengers) even on the terms of the IA as it stands. The impact assessment does not grapple at all with the very real danger that, under the new standard, decisions which are "wrong", "unwise" or "incorrect"[6] will be left to stand. As demonstrated in section 0 above, the costs associated with this risk are very significant indeed.

39. The absence of a clear basis for establishing a benefit in the aviation sector is a clear flaw in the government's decision-making process.

40. This could result in the government's intended decision, were it to proceed on the current basis, to be vulnerable to legal challenge by way of judicial review.

[5] We note the statement that investors might prefer it (3.30). This suggestion – for which no evidence is offered – seriously misunderstands the investment community. Investors are more than capable of understanding the different sectors might have different appeals regimes.

[6] These words are taken directly from relevant case law and represent perfectly plausible practical formulations of the new proposed standard.

F Consultation Questions and answers

Standard of Review

Question	Answer
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
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?	Heathrow does not agree with Box 4.1. For the reasons outlined above this significantly alters the balance struck in the CAA Act 2012 and introduces the serious risk that the wrong regulatory decision will stand.
Q3 How would moving to a judicial review standard impact the length, cost and effectiveness of the appeals framework?	In practice Heathrow considers appeals would not be any quicker or less costly under a JR-type approach
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?	For the reasons outlined in this paper Heathrow does not believe the standard of review should be changed without a clear articulation of the problem and a robust impact assessment. These concerns apply equally to the communications sector, however given Heathrow's position outside the sector we are not in a position to provide specific comments.
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?	See question 3. 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?	Heathrow does not agree.

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 question 3. 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?	Heathrow strongly disagrees with this proposal. In addition, Heathrow considers that it is not appropriate for the government to consider all these sectors together. Any decision on the appeals regime must take account of the characteristics of each 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?	See question 3 above.
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 ?	Having reviewed the CAT's rules in detail as the Civil Aviation Act was developed Heathrow does not believe there are specific reforms required at this time.
It would be worth considering allowing price control appeals to proceed directly to the CC.	This is already implemented under the Civil Aviation Act 2012.
Q18 Do you agree that the Competition Commission should continue to hear appeals against price control and licence modification decisions?	Yes
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?	Having a single appeal body dealing with enforcement proceedings is preferred – as is currently set out in the Civil Aviation Act 2012.
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	The CAT.

most appropriate appeal body to hear enforcement appeals?	
Q25 Do you agree that there should be a single appeal body hearing dispute resolution appeals?	It would appear appropriate to have a single appeal body to deal with dispute resolution appeals as long as it was suitably equipped to deal with the wide variety of issues laid before it.
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
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?	While confidentiality rings may provide an avenue for improving decision making it is impossible to comment in general terms without greater detail of how these would be applied
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?	Heathrow does not offer views on this section.
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?	Yes – indeed this is a key mechanism for ensuring vexatious or marginal appeals are not brought forward. This was an issue considered in detail when the Civil Aviation Act 2012 was developed.
Q33 Do you agree regulators should be encouraged to claim their full costs, including internal legal costs?	No – internal costs are covered by licence fees already levied on regulated companies.

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?	We would expect them to do this already; the CAT already has the power to dispose of unmeritorious appeals at an early stage.
Q35 Do you agree that the CAT to review appeals to identify and in appropriate cases reject those appeals or aspects of an appeal which stand little chance of success.	The CAT already has this power.
Q36 Do you consider that the principles proposed for decision-making in antitrust changes should be applied in any way to regulatory decision-making?	No.
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?	Yes. For example by setting out clearer expectations particularly earlier in the process with regard to regulatory building blocks.
Q38 Do the regulators need more investigatory powers, such as a power to ask questions?	No, Heathrow believes s50 of the Civil Aviation Act 2012 already gives the CAA sufficient powers to investigate.
Q39 Do you have any views on whether non-infringement decisions should continue to be appealable decisions? Why do you take this view?	In accordance with our general comments in this submission regulators do get decisions wrong. It is therefore important that any regulatory decision can be tested and challenged
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?	Yes
Q42 Do you agree with the proposal to provide the CAT with the power to limit the amount of evidence and expert witnesses,	Yes

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?	Heathrow would be happy with this proposal though it may not be easily workable in practice. Further, given the process set out in the Civil Aviation Act 2012 we do not believe fast-track is necessarily required given the time limits already in place.
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.	This approach was an appropriate solution for the aviation sector and may be an appropriate approach to consider further in other sectors.
Q45 If so, do you agree with the proposal to use the Civil aviation Act 2012 as a model to ensure CC has the relevant case management powers.	Heathrow does not have a view on the application the processes set out in the Civil Aviation Act 2012 in other sectors.
Q46 Do you agree with the proposal to reduce the extension available for regulatory references in the water, rail and aviation sectors from 6 to 2 months	Although an expedited process may be warranted in some cases two months does not appear to be sufficient time to consider the often detailed and complex issues in a regulatory reference.
Q47 Could the CAT's and/or CC case management procedures be improved, and if so why	The procedures supported by the timeframes set out in the CAA 2012 are sufficient in Heathrow's view.
Q48 Are there any other measures Governments or others could take to achieve robust decisions more swiftly	Amongst other things, robust and timely decisions rely on sufficient resources combined with effective programme management. Review of best practice across regulators could provide an opportunity to improve processes generally.

G Appeal Standing

41. Notwithstanding the points raised above, should the Government still be minded to reopen and amend the Civil Aviation Act 2012 („the Act') appeals process it should further consider amendments which would limit the possibility of vexatious or unsubstantiated appeals by providers of air transport services not substantially or particularly (when compared with other providers of air transport service in a similar position) impacted by the a decision taken by the Civil Aviation Authority (CAA) under the Act.

42. For example, currently Section 24 (2)(b) of the Act allows any provider of air transport services whose interests are "materially affected" by a decision of the CAA to appeal new licence conditions. HAL regards this appeal right as being too wide and intrusive in a licensing process that should primarily concern the licensor's duties and the conditions imposed on the licensee. An amendment of this kind should be considered for all appeal rights under the Act as it would streamline the appeals process and limit air transport service provider appeals to those with the most chance of success which in turn will avoid uncertainty in the licencing and regulation process.

Herbert Smith Freehills LLP

HERBERT SMITH FREEHILLS

"Streamlining Regulatory and Competition Appeals"

Response of Herbert Smith Freehills LLP

INTRODUCTION

1. Herbert Smith Freehills LLP is grateful for the opportunity to respond to the Department for Business, Innovation & Skills ("**BIS**") in respect of its consultation document *Streamlining Regulatory and Competition Appeals* ("**Consultation Document**").

2. We would welcome the further opportunity to comment on any more detailed proposals in due course.

3. Herbert Smith Freehills has represented various clients in a wide range cases before the Competition Appeal Tribunal ("**CAT**"), including in cases under the Competition Act 1998, the Communications Act 2003, and the Enterprise Act 2002, and in a wide range of price control references (in various sectors) before the Competition Commission ("**CC**"). Herbert Smith Freehills has also represented various clients in the context of the administrative proceedings of the Office of Fair Trading ("**OFT**") and the various sectoral regulators. We also have substantial experience of dealing with judicial reviews in the Administrative Court including in the context of competition and regulatory cases. In addition, Herbert Smith Freehills has extensive experience of the appeals regime at the EU level, regularly acting for clients in the context of appeals of decisions of the European Commission. As a result of this extensive experience, which includes a significant number of the cases discussed in the Consultation Document, we believe that we are well placed to respond to the Consultation Document (and any future consultation in this area).

4. The comments contained in this response are those of Herbert Smith Freehills and do not represent the views of our individual clients.

OVERALL COMMENTS

5. In summary, whilst we welcome some of the proposals set out within the Consultation Document, we have very serious concerns about a number of the other proposals. In addition, we have concerns that: (i) the assumption which appears to underlie the Consultation Document is that there are fundamental problems with the existing appeals regime, which require far-reaching reforms; and (ii) a number of the proposals are premised on an assumption that there are "too many" appeals and that this in itself is inherently problematic. We disagree and consider that the regime is effective and works well. We consider that the number of appeals brought is not indicative of any defect in the

system, and is as expected given in particular the very serious consequences which flow from administrative decisions in this area.

6. As background to our comments in response to the specific questions raised in the Consultation Document, we highlight here the key principles and objectives which we consider should guide BIS in considering any reform in this area, namely promoting sound and effective decision making by the administrative decision makers, protecting the rights of defence of the undertakings subject to these decisions, through the ability to hold regulators to account, whilst at the same time avoiding incentivising unmeritorious challenges. We agree with BIS that the appeal process should be as efficient and streamlined as is possible whilst meeting these objectives, and that expertise across the various review bodies should be organised and applied in the most appropriate way.

7. Against the background of these principles and objectives, we note that an effective appeals regime encourages investment and growth, which is particularly important in the current economic climate. In this respect the stability of the regime, including as to the framework for appeals and the standard of review, is very important.

8. This is essential in the price control context in particular, in order to attract private sector investment in the regulated sectors. Network businesses subject to price control regulation – such as those in the water and energy sectors – are required by their regulators to deliver very substantial capital investment programmes to maintain and upgrade their networks. Such businesses 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 they are subject. The availability of an effective right of review of the sectoral regulator's decisions by an expert body is an essential component of a stable regulatory regime. Any change to the regulatory environment which is perceived by investors as damaging regulatory stability or increasing regulatory risk is likely to result in an increase to the cost of capital of such businesses. 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 consumers for no additional benefit. This creates a strong presumption against modifying the regulatory regime applicable to such businesses in the absence of a clear case for change supported by persuasive evidence.

9. In relation to the stability of the appeals regime more generally, we note our concern that BIS is seeking to open up a number of issues and/or legislation for potential change which have been considered and/or implemented/revised only very recently, and prior to the new Competition and Markets Authority ("**CMA**") having commenced operations and 'bedded down' its procedures and priorities.[1]

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[1] We are particularly concerned in this context by the apparent reversal in position in relation to Competition Act 1998 appeals since March 2012 when BIS accepted that "*it would be wrong to reduce parties' rights*" and that

10. Overall we consider that the current appeal and review regime is working well as tested against the above objectives. In relation to appeals in the CAT, we believe that the CAT deals efficiently and expeditiously with complex matters. In relation to matters falling within the scope of the Competition Act 1998 the appeals regime has been the undoubted success story of the competition regime.

11. We accept that undertakings have brought and continue to bring a material number of appeals, and initiate some reviews by the CC, under the various legislative provisions. However, we do not consider that this number is inappropriately high, and we note that none of the evidence put forward in the Consultation Document indicates that this is the case. The number of challenges being brought is, in our view, reflective of the very serious consequences of the types of decisions being made, and in some cases evident and serious flaws in administrative decision making, rather than any defect in the appeal system. BIS has not put forward any evidence of unmeritorious appeals being brought, despite an apparent concern about this, and this is simply not something which is seen in practice. Similarly, there is no evidence that the appeal/review regime is chilling regulatory decision making.

12. In terms of the potential changes canvassed in the consultation document, we consider that these include a number of welcome proposals, for example those aimed at improving the transparency of decision making at the administrative phase, which should accordingly reduce the number and scope of appeals against such decisions.

13. However, as noted above, we believe that other changes being proposed are concerning and will undermine the objectives articulated above, whilst not achieving the key outcome which BIS appears to be aiming for, i.e. fewer and shorter appeals. These include:

    - The proposed changes to the standard of review.
    - The asymmetrical costs proposals.
    - Limitations on rights of parties to introduce evidence on appeal and other prescriptions as to procedure and timing and the CAT.

14. In terms of the driver for these proposals we have serious misgivings about the focus on reducing the number of appeals and the time period for appeals (and hearings) as the end in itself.

    - In our view there is insufficient focus within the Consultation Document on holding regulators to account and promoting good decision making.

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maintenance of a full-merits appeal by the CAT was the quid pro quo for maintenance of an administrative rather than prosecutorial enforcement model. See further below.

- There is no consideration of the number of wrong decisions which may be immune from proper challenge under the proposed revisions to the regime, and the impact of this on the interests of justice.

- The unstated assumption underlying the proposals must be that some mistakes would not be brought to account as a result of the changes, if aims of reducing number of appeals and time of appeals is to be met. This is a real threat to the valuable check on decision-making the regime currently provides.

15. Moreover, we believe that seeking to treat all types of review together is misplaced. Although some consistency may be beneficial, the key questions, such as the standard of review and appeal route, need to be considered sector by sector in context. Where the appeals system in individual sectors is well established and understood a strong case needs to be made for change (which we do not believe has been done), given the importance that participants and investors place on stability. In our view that outweighs the desire for consistency for consistency's sake.

16. We note our concerns about some of the evidence which BIS seeks to rely on as the basis for some of the far-reaching changes proposed. In particular, we do not find convincing the comparisons between the timing for different appeals and different appeals/review processes, ignoring the context of the relevant cases. We also consider that reliance on cases which may be regarded as "outliers" is misplaced. For example, including the multiple separate appeals against the OFT's *Construction*[2] decision as one appeal for statistical purposes is in our view misleading. The appeals in the *Tobacco*[3] and *Pay TV*[4] cases, also involving multiple separate appeals and/or cross-appeals, are equally not "typical" cases useful for the purposes of comparison. Similarly, we are not clear why BIS focuses on *Albion Water*[5], which is by any definition an unusual case, as an example for the purpose of the case studies set out in Annex E of the Consultation Document. This type of analysis and evidence does not support a case for change.

17. Finally, although this is not a question raised within the Consultation Document, we highlight our firm view that if any changes to the appeals regime in any sector/type of case are made, these should apply prospectively only, including that the existing regime should apply to any

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2 Cases 1114-15/1/1/09 and 1117-1138/1/1/09.

3 Cases 1160-1165/1/1/10.

4 Cases 1170/8/3/10, 1179/8/3/11 and 1156-1159/3/3/10.

5 Case 1046/2/4/04. We are also not clear why this case study includes details of the subsequent follow-on damages action brought by Albion Water against Dŵr Cymru (Case 1166/5/7/10), which clearly did not concern an appeal from a competition or regulatory decision.

issues/decisions/investigations already under consideration/underway, notwithstanding that a final decision is only issued following the introduction of any such changes.

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** ☒ **No** ☐ **Not sure**

Comments:

In summary:

1. We strongly oppose such a presumption, and support the maintenance of a full merits standard review where this is currently the case, and maintenance of the existing specified grounds of review where this is currently the case.
2. In particular, it is essential, both in terms of the parties' rights of defence and in order to ensure the effectiveness of the administrative decision making process, that on appeal there can be proper scrutiny of both the decision maker's findings and assessment of the facts, and the exercise of its judgement and discretion (not limited to a "*Wednesbury*" irrationality review).[6] This would not be possible under a judicial review standard.
3. We do not consider that BIS has identified any issues with the current standard of review which warrants such a change, and believe that this is clearly unnecessary.
4. We also do not believe that changing the standard of review will result in the outcome BIS appears to desire, i.e. significantly fewer appeals and shorter end-to-end cases. We also note that the Consultation Document does not contain any real analysis of whether this would be the case extending beyond superficial comparisons of non-like-for-like cases.
5. The reason for the number, length and complexity of appeals in this area is in our view largely not the standard of review, but rather the very significant consequences of decisions - including huge penalties in Competition Act 1998 cases and the very significant commercial and economic impact in regulatory cases - involved on the one hand, and the inherent complexity of the issues involved on the other. For example, in the EU competition law regime, which BIS seeks to point to as an

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[6] If a regulator adopted an approach which could not be said to be *Wednesbury* unreasonable (given the high threshold this requires), but fails to adopt a clearly superior approach, this should in our view clearly be challengeable. We refer in this context to the approach of the CC within its Communications Act 2003 price control determination in Case 1111/3/3/09 *The Carphone Warehouse Group plc v Office of Communications* where in the context of the standard of review it noted that if, out of a series of alternative solutions to a regulatory problem, "*some clearly had more merit than others, it may more easily be said that Ofcom erred if it chose an inferior solution*". To not permit review in such circumstances would be to promote poor decision making.

alternative to the current full-merits review, appeals are routinely brought against Commission infringement decisions.

In more detail:

6. Whilst the Government's objectives of streamlining appeals, and introducing greater consistency across sectors, where appropriate, are understandable, the primary objective must always remain to ensure regulatory accountability, and access to meaningful justice for those affected by regulatory decisions (which may impose quasi-criminal penalties or otherwise have a very significant impact on an undertaking's business and finances) in terms of allowing them the opportunity to have mistakes corrected. BIS recognises within the Consultation Document in this regard that appeals provide a "*valuable check*".

7. A shift to allowing appeals to be heard on a judicial review standard only, with limited opportunity for consideration of the merits and substance of regulatory decisions and the evidence stated to underlie them, effectively removes this accountability. The assertions throughout the Consultation Document that a reduction in the standard of review will not reduce the accountability of the regulator are simply incorrect. If BIS believes that a change to the standard of review will reduce the incidence, content, time and costs of appeals (which as noted above we do not agree will necessarily be the case), by necessity this must be through a reduction in the ability of parties to challenge decisions which may be incorrect or flawed. We are also concerned that a stated intention underlying any reform of reducing the level of scrutiny of regulators' decisions will send a clear message to regulators that their decisions need not be as robust, and the quality of decision-making is likely to be reduced as a result. This cannot be a desirable outcome. In contrast the current approach of subjecting administrative decisions to "*profound and rigorous scrutiny*"[7] incentivises decision makers to ensure that their decisions are "*adequately and soundly reasoned and supported in fact*".[8]

8. In particular, the ability of undertakings to hold to account the regulator's assessment of primary facts on appeal is essential, as previous successful appeals have demonstrated (for example the *Tobacco* and *Dairy* appeals of decisions of the OFT in the Competition Act 1998 context[9] and the *Pay TV* appeals in the Communications Act 2003 context.[10] It is far from clear that this would be possible under a judicial review standard, which would raise serious issues of justice.

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7 See *Hutchinson 3G UK Ltd v Ofcom* [2008] CAT 11 in the Communications Act 2003 context for example.

8 See for example *Freeserve v Director General of Telecommunications* [2003] CAT 5 in the Competition Act 1998 context.

9 [2011] CAT 41; [2012] CAT 31.

10 [2012] CAT 20.

9. Allied to this is the ability in the CAT to test the evidence and assumptions relied on by the regulator by way of cross-examination[11], which is not normally a feature of judicial review. We would be fundamentally opposed to any reform to the standard of review or otherwise which led to this being inappropriately curtailed.

10. Moreover, effective appeals improve the robustness of administrative decision making, which BIS states is one of the objectives of the appeals system. In turn, better decisions should reduce the number of appeals, and in particular successful appeals. In the antitrust context this was recognised by BIS within its March 2012 response to its consultation on Growth, Competition and the Competition Regime ("**Competition Regime Response**")[12], and has been recognised by the OFT.[13]

11. If the standard of review is lowered in the manner proposed this is likely to lead to less rigour in regulatory decision making, in circumstances where the number of successful appeals in this area, in particular of Competition Act 1998 and Communications Act 2003 decisions demonstrate that improvements in the rigour of regulatory decision making is required.

12. A move to a judicial review standard is likely to instead lead to a focus on processes merely to "JR-proof" decisions, rather than improving their quality from a substantive point of view, a risk which is recognised in the Consultation Document.

13. Furthermore, as discussed further in our responses to Questions 4 and 6 below in the context of the Competition Act 1998 and Communications Act 2003 respectively, notwithstanding the possibility for the intensity of the judicial review standard to be "flexed" depending on the circumstances, we do not consider that a judicial review standard is legitimate in light of the requirements of the European Convention on Human Rights ("**ECHR**") and of Directive 2002/21/EC (the "**Framework Directive**") as applicable.

14. In relation to price control appeals, price control (and licence modification) decisions are central to the way in which regulated entities operate and their business models. Price control decisions are complex and require a substantial degree of economic and technical analysis, and the exercise of considerable judgement and discretion. A judicial review standard would not provide a sufficient level of scrutiny. A merits review should be retained where this is currently the case, and otherwise the established grounds of review maintained, to ensure an appropriate level of accountability and also

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[11] A clear benefit of the UK competition regime over that at EU level (where the absence of rigorous testing by either the Commission or the European Courts of the evidence of leniency applicants in particular has been much criticised) in terms of ensuring the robustness of decision making at the administrative level.

[12] See for example paragraph 6.29.

[13] See the comments made by the former Chief Executive of the OFT in his speeches *UK Competition Policy: the first decade*, 11 May 2011, and *The future of the competition regime: increasing consumer welfare and economic growth*, 25 May 2011.

the stability of the regime as understood by market participants and investors. In any event, there is no evidence that a large number of appeals are being brought in such cases.

15. We note BIS's stated concern as set out in the Consultation Document, which appears to underlie its proposals for a change to the applicable standard of review, that a merits appeal involves a "*second body* [reaching] *its own regulatory judgement*", and the repeated references to parties appealing simply because they take a different view of the right answer or value judgment. This simply does not reflect the standard of review applied by the CAT and the CC in competition and regulatory appeals on the merits in practice. These (leaving aside those price control decision in which are subject to the "regulatory reference model") are not *de novo* re-trials in which the CAT or the CC acting as second regulators "waiting in the wings" to substitute their own view for that of the applicable administrative decision-maker.

    - Firstly, in relation to Competition Act 1998 and Communications Act 2003 appeals, the CAT considers only whether there have been material errors in relation to those issues which have been raised by the appellant: appeals are on specific points only.
    - Secondly, the CAT has made it clear that, despite its full merits jurisdiction and ability to substitute its own judgment for that of the OFT or concurrent regulator in Competition Act 1998 cases, it will only do so when appropriate, stating for example "*We are conscious, however, that in determining the lawfulness of an access price, there may be a number of different approaches which a regulator…could reasonably adopt in arriving at its decision. There may well be no single "right price"… To that extent, the Tribunal will, whilst still carrying out an assessment of the merits of the case, give due weight to a finding which is arrived at by an appropriate and reliable methodology, even if a dissatisfied party could suggest other ways of approaching the issue which would also have been reasonable…*".[14]
    - Equally, in appeals under section 192 Communications Act 2003 the CAT has made it clear that it will be "*slower to overturn certain decisions where…there may be a number of different approaches which OFCOM could reasonably adopt*".[15]
    - The CC has also made it clear[16] that in section 193 Communications Act 2003 price control reviews it will take into account the fact that Ofcom is a specialist regulator and will not readily dismiss its judgement, in particular in relation to the exercise of a discretion, and that "*where there are a number of alternative solutions to a regulatory problem with little to*

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14 Paragraph 70 onwards of *Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31.

15 See for example paragraph 46 onwards of *Vodafone & others v Ofcom* [2008] CAT 22.

16 See for example paragraph 1.32 onwards within its determinations of 27 March 2013 under section 193 of the Communications Act 2003 (*British Telecommunications Plc v Office of Communications* Case 1193/3/3/12; *British Sky Broadcasting Limited and TalkTalk Telecom Group Plc v Office of Communications* Case 1192/3/3/12).

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."

16. In addition, adopting a judicial review standard may well lead to lengthier overall appeal processes, as remittal to the regulator will be required (the fresh decision of which may also be subject to appeal), rather than the current position whereby the CAT or CC can substitute its own decision for that of the decision maker or issue directions, as applicable. Applying a merits review may also allow a decision which would need to be quashed under a judicial review standard to be maintained as the merits appeal may "cure" a procedural defect at the administrative phase.[17]

17. From an appellant's perspective, judicial review grounds are such that, even if an appeal is successful and it is demonstrated that the regulator erred, the appellant will not necessarily achieve any practical benefit, for example if the decision is simply quashed and re-taken because of procedural deficiencies. Significant time and costs will have therefore been expended in litigation without the successful appellant being satisfied with the outcome.

18. Moreover, in terms of the Government's objectives of reducing litigation and end-to-end timelines, we believe that if there was a shift away from the existing standards of review, which are now well understood, to an uncertain "flexible" judicial review standard, this would lead to extensive and lengthy litigation as to the appropriate standard of review and its application in the case at hand, as parties seek to establish the boundaries of the new test. We do not agree with the assumption in the Consultation Document that this will be "*short-term*" uncertainty only.[18] Such litigation may well include appeals to the Supreme Court and/or references to the European Court of Justice, which would have a very significant impact on the timing for the cases in question, and also for those raising similar issues. In the Competition Act 1998 context in particular, challenges at the European Court of Human Rights level could not be excluded.

19. As exemplified by the series of appeals over the last decade in Competition Act 1998 and Communications Act 2003 it takes significant time for uncertainties in a new regime to be identified, litigated, and resolved. The current proposals risk "losing" the progress made in this time and re-starting this process.

20. This is not to say that a judicial review standard will never be appropriate, and there are already some forms of regulatory appeal where this is the applicable standard (for example reviews of OFT/CC decisions in mergers and markets cases under the Enterprise Act 2002, and reviews of CC price control decisions in the water and rail sectors).

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17 See for example *TalkTalk Telecom Group v Ofcom* [2012] CAT 1.

18 We note in relation to Communications Act 2003 appeals for example that it is only relatively recently that a position of clarity has been reached on the scope and standard of review. See for example *Competition Litigation: Practical Thoughts in Developing times* Helen Davies QC, Comp Law 274.

21. In our view the Government's drive towards consistency should not prevent specific situations being considered and different rules being used for different contexts where that is appropriate.

22. Finally, we note that the Government's objectives in terms of reducing the number, time and costs of appeals can be achieved more effectively by other more proportionate measures, in particular improvements in the transparency of decision making at the administrative stage (as discussed further below).

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** ☒ **No** ☐ **Not sure**

Comments:

1. It is not clear to us that the principles set out in Box 4.1 differ to any significant extent to those generally applied in judicial review cases.

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

3. Appeals on the ground of unreasonable exercises of discretion, or unreasonable judgements or predictions are stated to be possible only where the regulator has acted in a way that no reasonable regulator would act, which is of course the normal *Wednesbury* standard of unreasonableness applied in judicial review to substantive irrationality grounds of challenge. As outlined in our response to Question 1 above, we believe that this is manifestly inappropriate.

4. The principles set out in Box 4.1 do include material errors of fact as a ground for review, which appears be the main distinguishing factor from a judicial review standard.[19] As noted above in response to Question 1, the ability of undertakings to hold to account the regulator's assessment of primary facts on appeal is essential, as previous successful appeals have demonstrated.

5. Taken as a whole we do not consider the principles outlined in Box 4.1 to be an acceptable "compromise" between an appeal on the merits or full reassessment (where this is currently possible) and a move to a judicial review standard, nor as appropriate grounds of appeal when compared with those which currently exist in the appeals regimes within various of the regulated sectors.

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[19] Although there are limited situations where judicial review can be brought for mistakes of established facts following *E v Secretary of State for the Home Department* [2004] EWCA Civ 49.

6. If such a compromise is to be sought - which, for the reasons outlined above and within our responses to Questions 3-13 below, we do not consider to be either necessary or appropriate - the proposed specified grounds of appeal would need to be reconsidered.

7. In particular, it must be possible for appellants to seek a rigorous and independent review of the facts, methodologies and assessments used in the decision making process in order to identify material errors, to a greater extent than that envisaged by the current *Wednesbury* unreasonableness approach, which is an inappropriately high hurdle in relation to the cases which are the subject of this consultation.

8. The principles proposed within Box 4.1 provide for a lesser standard of review than is currently the case within those appeals regimes in the regulated sectors (gas and electricity) which are currently based on specified grounds of appeal. The existing grounds allow a consideration of the merits of the case, in particular to scrutinise effectively whether the regulator in question has erred in the exercise of its judgement and discretion. In summary, those grounds[20] are 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;
    - the regulator failed to give appropriate weight to any such matter;
    - the decision was based, wholly or partly, on an error of fact;
    - (in the case of licence modifications) 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
    - the decision was wrong in law.

9. Taken as a whole, these existing specific grounds of appeal in our view better achieve the objective of providing an effective right of appeal than those proposed in Box 4.1. 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.

10. As outlined in our response to Question 1 above, we reiterate that if BIS proceeds with this approach, any shift away from the existing and well understood standards of review is likely to lead to extensive litigation as to the meaning of the new grounds and their application in the case at hand. We do not agree with the assumption in the Consultation Document that this will be "*short-term*" uncertainty only.

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[20] See for example section 11E(4) of the Electricity Act 1989.

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

Comments:

1. In relation to effectiveness, please see our response to Question 1 above; this would not lead to improvements in effectiveness.
2. In relation to length and costs, we do not believe that, end-to-end, a move to a judicial review standard will result in a significant reduction in the time taken in the majority of cases (although in some cases, the hearing time, for example, may be shorter), or ultimately in lower costs.
3. In particular we note the risk in relation to appeals on a judicial review standard of extension of the overall timeline (and costs) when taking into account remittal back of the case to the administrative decision maker, and the fact that a procedural defect could not be "cured" on appeal.
4. We also note in this context that the time taken for appeals in the CAT, including the time taken for a case to proceed to a hearing, whether under a judicial review standard or merits standard, is a product of a wide variety of factors, including requests by the parties (including in many cases the regulator) for extensions of time or for postponements in order to ensure that they have sufficient time to produce pleadings and evidence, and/or that their counsel or other advisors are available for hearing dates.
5. As set out in our overall comments, we further note that the comparisons of timings in different types of cases which BIS seeks to undertake in the Consultation Document do not compare 'like with like', and include a number of "outlier" cases which bundled various separate appeals or which were unusually complex. This comparison fails to recognise that there are a number of reasons why different types of case take different lengths of time, irrespective of the standard of review. For example, in relation to appeals of merger decisions under the Enterprise Act 2002, these are heard on an expedited basis due to their nature and content (including the very significant commercial imperatives for expedition, generally recognised by merging parties, complainants, regulators and the CAT in such cases), rather than as a result of the standard of review being a judicial review standard.
6. In addition, as noted above, if there was a shift away from the existing standards of review, which are now well understood, this would be likely to lead to extensive litigation as to the appropriate standard of review and its application in the case at hand, which in our view would not be in the "*short-term*" only.
7. As a matter of principle, we would also note that shorter and cheaper appeals do not mean more effective appeals, and shorter and cheaper appeals should not be an end in itself.
8. Finally, we note that where access to justice requires, for example, lengthy cross examination of witnesses and expert evidence to consider the complex economic issues raised by a regulator's decision, then such cross examination should not be removed or cut short simply in the interests of

saving time and costs. Faster and cheaper appeals will be worthless if they do not achieve regulatory accountability and the robustness of decision making.

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** ☒ **No** ☐ **Not sure**

Comments:

1. For the reasons outlined in our response to Questions 1 and 2, we believe that it is unnecessary and inappropriate for any move away from the current, well-established and understood, standard of review in respect of appeals to the CAT, or price control references to the CC, in the communications sector and oppose any such move.

2. Moreover, we believe that there is a real risk that a move to either a judicial review standard or an approach based on "specified grounds" such as those set out in Box 4.2 would be inconsistent with Article 4 of the Framework Directive.

    - The specified grounds are similar to those within former section 46B Telecommunications Act 1984; as a result of the adoption of the Framework Directive, the UK decided it was necessary to move instead to an appeal on the merits.

    - We agree that this was required, and that section 192 Communications Act 2003 does not 'gold plate' the Framework Directive's requirements.

3. We also consider that the concern outlined within the Consultation Document that the threat of appeal is having an impact on Ofcom's speed of decision making is overstated. In any event, it is not clear that, to the extent this is a genuine concern, this would be removed by the revisions proposed.

4. We note BIS's implication that parties adduce evidence of "*limited relevance to the key issues in the case*" (despite not putting forward any example where it alleges this has occurred), and our fundamental disagreement with this assessment: this is not in our experience a feature of appeals in the communications sector (or elsewhere), and it is not in the parties' interests to do so. Rather, parties currently do "*focus on the real issues that could have a material impact on the decision*". Indeed, in our experience, parties recognise that (under the existing system) only material issues are likely to succeed and are careful to limit their grounds of appeal accordingly.[21] In some cases, this

[21] One of many example where this is evident from the public record is in the CC's determinations of 27 March 2013 under section 193 Communications Act 2003 (Case 1193/3/3/12 *British Telecommunications Plc v Office of Communications*; Case 1192/3/3/12 *British Sky Broadcasting Limited and TalkTalk Telecom Group Plc v Office of Communications*); see paragraph 1.57. Additionally, on occasion parties have withdrawn certain

does involve extensive evidence and argument; this reflects the complex character of the decision which is the subject of the appeal. This should not be seen, contrary to the position outlined in the Consultation Document, as problematic in itself, if this is necessary to enable the parties to hold the regulator effectively to account and uphold their rights of defence.

5. If, contrary to the position outlined above, BIS decides to adopt a "specified grounds" of appeal approach, the grounds as currently proposed in Box 4.2 are not fit for purpose, for the reasons outlined in our response to Question 2 above, and would require substantial reconsideration, in particular in light of the requirements under the Framework Directive.

6. We have real concerns that the grounds as formulated will not allow the parties to hold Ofcom accountable for an error in assessment, methodology or judgement which, whilst potentially not reaching the very high standard of irrationality in a *Wednesbury* sense, led to the wrong decision being adopted in objective terms, for example by adopting an inferior approach or solution.[22]

7. Finally, as noted above, a move to such a standard would be likely to lead to extensive litigation as to the appropriate standard of review and its application in the case at hand, as well as to its compatibility with EU law, which would not be "*short-term*" uncertainty only.

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?

Comments:

1. See our response to Question 3 above. We do not believe that there will be any significant benefits and that such changes would be counter-productive for the reasons outlined above.

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grounds of appeal after having obtained information in the course of an appeal which was previously unavailable (for example due to confidentiality restrictions) which may indicate that an issue may not have been as material as previously thought.

[22] See for example the approach of the CC as set out within paragraph 1.32 onwards of its determinations of 27 March 2013 under section 193 Communications Act 2003 (Case1193/3/3/12 *British Telecommunications Plc v Office of Communications*; Case1192/3/3/12 *British Sky Broadcasting Limited and TalkTalk Telecom Group Plc v Office of Communications*).

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** ☒ **No** ☐ **Not sure**

Comments:

1. For the reasons outlined in our responses to Question 1 and 2 above, we firmly oppose such a move in this context, and do not consider that there is any case for reform. We note that the Consultation Document does not put forward any evidence that the standard of review in Competition Act 1998 appeals has an adverse impact on the regime.

2. As long as the UK antitrust enforcement regime remains an administrative rather than prosecutorial system, with undertakings investigated, judged and sanctioned by the same body, with the inherent susceptibility to confirmation bias of such a system, it is crucial that the availability of a full merits based appeal remains intact. Parties must be able to seek a thorough review of the administrative decisions of the OFT (and the new CMA in due course) and the concurrent regulators in Competition Act 1998 cases, enabling undertakings to safeguard the rights of defence and challenge administrative decisions which are not robust.

3. This was explicitly recognised by BIS itself as recently as March 2012, within the Competition Regime Response (at paragraph 6.18) when rejecting a prosecutorial model for the antitrust regime: "*The Government accepts the strong consensus…that **it would be wrong to reduce parties' rights** and, therefore, **intends that full-merits appeal would be maintained** in any strengthened administrative system*" (emphasis added).[23]

4. We do not understand why the Government appears to have reversed its decision and a different approach is now being canvassed[24], in particular given there is no evidence whatsoever of parties bringing unmeritorious appeals (to the detriment of the efficiency of the competition regime as a whole and the resourcing of the CAT).

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[23] Within the Consultation Document BIS appears to attempt to recharacterise this very clear statement by referring to this as an acceptance of the need to retain an appeal "*which could consider the merits of antitrust decisions*" rather than the actual commitment to maintain a "*full-merits appeal*", which would clearly not be the case under the proposed move to a "flexible" judicial review or specified grounds of appeal standard.

[24] We note that the reference within the Consultation Document to achieving "*greater consistency across sectors*" does not make sense in this context. Moreover, consistency as an end in itself does not in our view give rise to benefits and rather creates uncertainty as a result of the changes necessary to bring about consistency to what are currently well established and understood regimes.

5. On the contrary, the series of antitrust cases in which the CAT has annulled or partially annulled a decision of the OFT or sectoral regulator on either substance or penalty (or both) in recent years has highlighted significant deficiencies in the administrative decision process and/or the evidence relied upon. Successful appeals are not a sign that the CAT's review function is not working, but rather a sign that it is working as it should and as is necessary in the interests of justice to provide sufficient checks and balances on the OFT and the concurrent regulators.

6. If the approach now changes and a merits appeal is removed, this would necessitate reconsideration of the decision to continue with an administrative rather than prosecutorial model.

7. This is particularly the case in light of the UK's ECHR obligations, given the very severe penalties which can be imposed following Competition Act 1998 proceedings, which are incontrovertibly "criminal" in nature for the purposes of Article 6 ECHR (as per the decisions of the CAT in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*[25] and *Tesco Stores Limited v Office of Fair Trading*[26], and of the European Court of Human Rights in *A. Menarini Diagnostics SRL v Italy*[27]), and the other very significant consequences of an infringement finding.

8. As well as the very high fines, these consequences include the potential for higher fines in any future cases due to being found to be a "recidivist", exposure to significant damages actions (including the potential for exemplary damages)[28], and the potential to deprive an individual of his or her livelihood through the means of the directors' disqualification order which can flow from an infringement finding. This is even before considering the significant reputational impact.

9. In this context we submit that a full merits review is in our view necessary to meet the requirements of Article 6 ECHR. The ruling of the European Court of Human Rights in Case 43509/08 A. *Menarini Diagnostics SRL v Italy* emphasised the need for the ability of a court with full jurisdiction and the ability to examine all questions of fact and law, including matters in relation to which the competition authority enjoys a discretion.

10. We do not believe that the proposal to retain unlimited jurisdiction to challenge the level of penalty removes these concerns, given the other very significant consequences which can follow an infringement finding outlined above. A merits appeal is often more important to enable flaws in decisions on the substance to be identified than in relation to challenges to the level of the penalty. Moreover, many issues are relevant both to the substance of the decision and the level of penalty,

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25 [2002] CAT 1.

26 [2012] CAT 6.

27 Case 43509/08.

28 See *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

for example the duration of an infringement, the classification of its seriousness, and whether a particular party was a "ringleader" or "instigator" of the infringement.

11. We note the references within the Consultation Document to the grounds of review set out in the Treaty on the Functioning of the European Union ("**TFEU**") as to appeals of antitrust decisions of the European Commission and to the judgments of the European Court of Justice in *KME and Others v Commission* (Case C-272/09); *Chalkor v Commission* (Case C-386/10) and *KME and Others v Commission* (Case C-389/10), and the implication that the approach under the TFEU justifies the proposals being consulted upon.

12. However, this does not take account of either the very significant criticisms of the scope of review carried out by the General Court in the past[29], and the current attention being paid by the EU courts as to the scrutiny which they apply in practice.[30] It appears a retrograde step for the UK to be contemplating reducing the level of judicial scrutiny over competition law decisions in circumstances where at EU level a higher level of scrutiny is being pressed for.

13. We also note that the changes being consulted upon do not appear to take into account the current drive to increase the private enforcement of competition law and the inconsistencies and unfairness that a change to the standard of review will create in the private actions context. A finding of infringement by the OFT or a concurrent regulator is binding for the purposes of follow-on actions for damages. However, under the proposals set out in the Consultation Document, an undertaking would only be able to challenge these findings on limited grounds. In contrast, in stand-alone actions, there would be a full consideration of the merits by an independent judicial body.

14. Finally, we note that the OFT has now adopted new investigation procedures in competition cases (as set out in its Guidance of October 2012)[31], including a series of measures to improve the decision making process. It is in our view necessary to wait until these reforms, and those contained within the Enterprise and Regulatory Reform Act (such as the enhanced powers of interview for the CMA), to be "bedded down" within the OFT/CMA, and to measure their impact on the number and

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29 We, along with many commentators (including for example the former President of the CAT Sir Christopher Bellamy (see *ECHR and competition law post Menarini: An overview of EU and national case law*, e-Competitions No47946, 5 July 2012)), consider that serious doubts remain about the compatibility of the EU regime with the ECHR in light of the level of judicial review provided for by the TFEU and exercised by the General Court in practice.

30 See for example *The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of Marginal Review?* Marc Jaeger Journal of European Competition Law & Practice, 2011 Vol 2(4).

31 *A guide to the OFT's investigation procedures in competition cases* OFT1263rev.

type of appeals being brought, before seeking to make any changes to the appeals regime in this area.

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?

Comments:

1. See our response to Question 3 above. We do not believe that there will be any significant benefits and that such changes would be counter-productive for the reasons outlined 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?

☐ **Yes** ☒ **No** ☐ **Not sure**

Comments:

1. We repeat our comments set out in response to Questions 1 and 2 above: we can see no basis for changing the current and well understood applicable standards of review, and consider that there would be significant negative consequences, including in terms of impact on investment incentives, were the position to be changed. For price regulated businesses, a change in the regulatory environment may well be perceived by investors as damaging to regulatory stability and increasing regulatory risk. That in turn is likely to lead to an increase in the cost of capital of such businesses, and therefore an unnecessary increase in costs ultimately borne by consumers.

2. In relation to aviation, given that the current legislation has only very recently been introduced and has not yet been tested, it does not appear appropriate to make any changes to the grounds of review until this has been bedded down and assessed (in particular in a manner which would appear to reduce the scope of appeals, for example by reference to a *Wednesbury* unreasonable exercise of discretion, rather than simply an error in the exercise of the discretion as is currently the case).

3. We reiterate our comment above that consistency as an end in itself does not give rise to benefits and rather creates uncertainty as a result of the changes necessary to bring about consistency to what are currently well established and understood regimes.

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?

Comments:

1. See our response to Question 3 above. We do not believe that there will be any significant benefits and that such changes would be counter-productive for the reasons outlined 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?

Comments:

1. The concerns we have expressed above in our response to Questions 1, 2 and 8 with respect to the impact of the changes proposed in the Consultation Document are of equal application to the regulatory regime 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?

Comments:

1. Please see our response to Questions 1 and 2 above. We do not believe that there will be any significant benefits and that such changes would be counter-productive for the reasons outlined 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?

Comments:

1. We refer to our responses to Questions 1 to 4 above: we do not consider that there should be any presumption that judicial review is the appropriate standard of review.

2. We note in addition that we do not consider that this issue should be determined on a generalised basis. Each such decision should be considered in context.

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?

Comments:

1. See our response to Question 3 above. We do not believe that there will be any significant benefits and that such changes would be counter-productive for the reasons outlined above.

HERBERT SMITH FREEHILLS

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?

Comments:

1. We do not consider that any such reforms are necessary at this stage, given the ability of the CAT under its existing Rules to, for example, exercise case management powers and control the nature, type and extent of evidence (which are exercised effectively in practice).

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** ☐ **No** ☐ **Not sure**

Comments:

1. We agree that this is a sensible change.

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** ☐ **No** ☐ **Not sure**

Comments:

1. We agree that this is a sensible change.

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

☐ **Yes** ☐ **No** ☒ **Not sure**

Comments:

1. The CAT is already able to sit with a single judge, without "wing" members, in relation to interim relief and case management matters.

2. In relation to other matters, we are not opposed in principle to an extension of this power (rather than an obligation) to certain other matters, but this would need to be limited to appropriate matters, for example those involving wholly questions of law, or with the consent of the parties.

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

☒ **Yes** ☐ **No** ☐ **Not sure**

Comments:

1. We note that our response assumes that the CC continues to hold its current powers of review, and there is no move to a judicial review only standard of review or to the specified grounds of appeal proposed. We reiterate our above comments on this point, and highlight that the UK's well respected regulated sector is based on the ability to seek expert review in the CC.

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** ☐ **No** ☒ **Not sure**

Comments:

1. We agree that there may be some advantages from revising the appeal process so that appeals of price control decisions in the communications sector are made directly to the CC (the CMA in due course). However, we also believe that there would be a number of downsides in doing so, given that the CAT performs a useful preliminary function, including identifying the terms of reference before the CC and any preliminary contested issues (such as those as to interventions), and putting in place confidentiality rings. The CAT's involvement also tends to encourage rigour in the parties' pleadings. Without such a role, it is likely that the CC would require a longer time period for its review, and therefore it is not clear that change in this area would lead to a more streamlined appeal process in practice.

2. Moreover, it is not always easy to determine which issues are price control issues and which are not, and some appeals concern a combination of price control and other issues. Where such appeals involve non-price control issues, the current initial CAT stage allows for these to be identified and dealt with in a manner which is appropriate having regard to the referral of the price control matters to the CC, in order that all issues on appeal can be dealt with in the most efficient manner possible under the overall case management supervision of the CAT.

3. We note that should this change be made, it would need to be ensured that a mechanism was built into the system to allow for rapid and efficient review of the CC's decision by the CAT on judicial review principles, if such a challenge were brought, as is possible under the current system. Similarly, there should be a mechanism for the CAT to review any case management or procedural issues rapidly and efficiently, should they arise.

4. Moreover, very careful consideration would need to given as to whether any regime which removed the role of the CAT would be consistent with the requirement of the Framework Directive.

5. In relation to the Civil Aviation Act 2012 model, as this is untested, and therefore it is unclear that this would be an appropriate model to follow.

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

☒ **Yes** ☐ **No** ☐ **Not sure**

Comments:

1. We have no further comments.

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

☐ **Yes** ☐ **No** ☒ **Not sure**

Comments:

1. We have no strong view on this question. We see advantages in the CAT hearing such appeals (given the nature of those appeals), but also see advantages in the CC doing so, given its greater sector knowledge and expertise.

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

☐ **Yes** ☐ **No** ☒ **Not sure**

Comments:

1. In principle, we consider that there would be some benefits in all such appeals being heard by the CAT, given its knowledge and expertise. However, we believe that any such change would need to be considered carefully, given in particular that such a revision could rise to uncertainties about the borders of this jurisdiction.

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** ☐ **No** ☐ **Not sure** NB NOT APPLICABLE

Comments:

1. See our response to Question 22 above which deals with this point.

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?

Comments:

1. We have no comments at this stage.

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

☐ **Yes** ☐ **No** ☒ **Not sure**

Comments:

1. In principle, we consider that there would be some benefits in all such appeals being heard by the CAT, given its knowledge and expertise. However, we believe that any such change would need to be considered carefully, given in particular that such a revision could rise to uncertainties about the borders of this jurisdiction.

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?

Comments:

1. See our response to Question 25 above, which deals with this point.

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

☒ **Yes** ☐ **No** ☐ **Not sure**

Comments:

1. We agree with the principle of the CAT having jurisdiction to hear judicial reviews under the Competition Act 1998, and therefore to address issues of both substance and process, consistent with the position under the Enterprise Act 2002.

2. Currently the inability of the CAT to hear such challenges causes inconvenience, cost and delay to parties, and the potential need to commence precautionary applications in multiple fora. This is

demonstrated by the *Cityhook* litigation[32] discussed in the Consultation Document, and by the *Construction* litigation, where the challenge by Crest Nicolson to the OFT's "fast track" leniency process had to be brought before the High Court, whereas its appeal of the penalty imposed (and the various other parties' appeals) was brought in the CAT.[33]

3. It is not clear whether BIS envisages that CAT jurisdiction would be concurrent with that of the High Court or whether it envisages a single review body. We consider that it would be preferable for the High Court to have concurrent jurisdiction, which should avoid potential disputes about the borders of the jurisdiction and any need to file multiple claims where cases raise wider issues.

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32 [2007] CAT 18; [2009] EWHC 57.

33 [2009] EWHC 1875 (Admin); [2011] CAT 10.

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** ☐ **No** ☐ **Not sure**

Comments:

1. We agree that earlier and improved disclosure to the parties of the regulator's case and the evidence it relies on throughout the administrative process would be likely to improve decision making, and consequently is likely to reduce the need for appeals.

2. Currently a party often does not have a sufficiently clear understanding of the case against it (or the decision in which it has an interest, as the case may be) and the quality of the evidence relied on, given the general lack of transparency in the administrative process, even once the decision has been issued.

3. If the relevant administrative authority were to better articulate its case and the evidence relied upon at an earlier stage – in Competition Act 1998 cases prior to the Statement of Objections ("**SO**") being issued[34], and in connection with ex-ante regulatory decisions at the consultation stage - this would likely lead to improved engagement with the company(ies) under investigation, reduce the likelihood of new evidence being put forward in the event of an appeal, and may reduce the number of appeals themselves.

4. In some cases it has been necessary for an undertaking to bring an appeal to properly understand the basis for the decision made and the evidence relied upon. There are also instances of grounds of appeal being dropped, once sufficient information has been disclosed as a result of the appeal. Increased transparency and disclosure during the administrative stage of decision-making would obviate the need for appeals on such grounds in those circumstances.

5. We also note that there is a real issue, in particular in Communications Act 2003 cases, in obtaining access to third party information, which is often crucial to assess the regulator's case, due to confidentiality concerns, and in particular concerns that contractual confidentiality rings are not sufficient to ensure that the regulator is in not in breach of its statutory duties to protect the confidentiality of information provided to it.

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[34] This is not the current practice. This is illustrated for example by the decision of the OFT's Procedural Adjudicator (dated 30 November 2012) to reject a request for disclosure of the documents on which the OFT relies as the basis for its "reasonable suspicion" that the Chapter I prohibition has been infringed prior to the SO stage.

6. We agree that the increased use of confidentiality rings – and other mechanisms such as data rooms – as part of the administrative process is one method which can assist in increasing such transparency. We note the OFT's Guidance of October 2012[35] proposes increased use of confidentiality rings and similar procedures, as does the CMA's consultation document *Transparency and Disclosure: Statement of the CMA's policy and approach* of July 2013. We note that this will only be effective in doing so if the disclosure within the confidentiality ring is meaningful (for example including provision of the relevant economic models in the case of regulatory decisions).

7. However, given the very sensitive information which can be involved in such proceedings (in particular in price control matters, where this will include forward-looking information and plans) a balance has to be reached between increasing transparency and maintaining protection for business secrets and other confidential information.

8. We therefore consider that a power to impose such arrangements (as opposed to agreeing these with the parties and third parties) would need to be tightly circumscribed, and include appropriate rights of review.

9. We also agree that sanctions should be available for breach of the terms of such arrangements.

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?

Comments:

1. In many cases a confidentiality ring could be limited to external advisers such as lawyers and economists.

2. However, in others this may constrain the ability of the undertakings, who may be best placed to assess the relevant information, to sufficiently understand the case against them (or the proposed decision which affects their interests) in order to make informed decisions, including as to appeal. This is particularly important in the early stages of an investigation or consultation where the issues are at large and not limited to specified grounds of appeal.

3. In some instances a potential solution may be extend the confidentiality ring to include specified decision-makers within the undertaking, who would be ring-fenced from others who could benefit commercially from access to the information.

4. We agree that the CAT could usefully play a role in relation to such arrangements (given for example its experience with such arrangements and its powers to sanction breach of an order imposing a confidentiality ring), where necessary, for example in relation to a dispute as to whether such an

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35 *A guide to the OFT's investigation procedures in competition cases* OFT1263rev.

arrangement should be imposed. This would also resolve concerns on the part of regulators as to the interplay between confidentiality rings and their statutory duties. In accordance with our comments above, it may, in our view, be necessary in some instances to include internal individuals as well as external advisers, which is currently rare.

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** ☒ **No** ☐ **Not sure**

Comments:

1. As a first point, we note that, contrary to the statements in the Consultation Document, there is no incentive currently for parties not to "*put their best foot forward and engage full during the administrative phase*". It is in the parties' interests to put forward all necessary evidence and argument at the administrative stage to persuade the regulator of their case, and avoid an adverse decision with the significant financial and reputational consequences which follow.

2. We also note that instances where parties seek to put forward genuinely new evidence are relatively rare[36]; generally all that occurs is that parties seek to elaborate on arguments made in earlier submissions, answer points in the decision which respond to those submissions but which were not previously put to the parties, provide background and context for the CAT, and/or to "repackage" evidence or present this in a way which can be more conveniently provided to the CAT and understood in relation to the grounds of appeal. This clearly should not be prevented. The introduction of evidence on appeal is rarely challenged, despite the clear ability for the regulator or other parties to do so under the current CAT rules. Overall the concern expressed as to this issue within the Consultation Document appears significantly overstated.

3. We also note that there is no evidence whatsoever put forward that parties have withheld evidence deliberately at the administrative stage to utilise this at the appeal stage to "*game the system*", as

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[36] We note in this context that, if the comments regarding the *Pay TV* litigation in paragraph 7.16 of the Consultation Document are intended to imply that the 35,000 pages of submissions referred to (which included those of Ofcom, and included for example copies of the various consultation documents and decisions in question (the main decision of Ofcom under appeal being itself around 1,000 pages) as well as the documents relied upon by Ofcom in reaching the decision) or the expert evidence referred to constituted entirely new evidence (rather than a development of elaboration of points made during the consultation phases), then this was not the case. Generally in relation to the volume of submission and evidence in this case, we note that the case was atypical, involving many parties and separate appeals and interventions. It should not be taken as exemplifying the amount of evidence generally involved in Communications Act 2003 cases or other regulatory or competition appeals.

recognised within the Consultation Document itself. We do not consider that there is any evidence of parties gaming the system in any way, and we are unclear as to why this terminology is utilised within the Consultation Document at all. Bringing an appeal is cost, resource and time heavy for undertakings, and it is therefore highly unlikely that parties would deliberately hold back evidence at the administrative stage with the intention of using this on appeal following an infringement decision, rather than using this to demonstrate that no infringement had occurred or to otherwise support its position.

4. The key reasons in our view for any genuinely new evidence being raised on appeal which was not presented at the administrative stage are not the parties failing to "*be open in their engagement with the administrative authorities*" but, on the contrary, as follows:

    - A party not considering it necessary to adduce a certain piece of evidence at the administrative stage, for example because the party had assumed that the relevant part of the case could be sufficiently disposed of by other evidence provided, and it only becoming clear at the point of the infringement decision that this had been rejected. In the interests of time, resources and best presentation of its arguments, a party may legitimately choose not to put forward each and every argument and therefore each and every piece of potential evidence within the administrative process.

    - A party not having a sufficiently clear understanding of the case against it at the stage at which the relevant information is being sought, given the general lack of transparency in the administrative process, as discussed above, in particular at the pre-SO stage in Competition Act 1998 cases[37], and the consultation or draft determination stage in regulatory cases[38], and therefore of what evidence it needs to put forward to rebut this. If the decision maker were to better articulate its case and make available the evidence relied upon at an earlier stage - potentially through the increased use of confidentiality rings and similar arrangements - this would likely lead to a better direct engagement with the company(ies) under investigation, and reduce the likelihood of new evidence being put forward in the event of an appeal (if the authority proceeded to an infringement decision).

    - We note in this context the *British Telecommunications plc v Ofcom* case in which due to a misstatement by Ofcom of the scope of its investigation, BT was unaware until a very late

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37 This is illustrated for example by the decision of the OFT's Procedural Adjudicator (dated 30 November 2012) to reject a request for disclosure of the documents on which the OFT relies as the basis for its "reasonable suspicion" that the Chapter I prohibition has been infringed prior to the SO stage.

38 Another feature of such cases is that the subject of the regulatory case may not have the opportunity to engage with the submissions made by third parties in response to a draft determination in parallel with the subject's own response, which may however influence the final decision.

stage of the evidence which it would need to adduce at the administrative stage in order to seek to rebut Ofcom's case (a factor influencing the decision to allow certain new evidence to be admitted on appeal).[39]

- Lack of time to gather all potentially relevant evidence at the administrative stage given the very tight deadlines, for example those imposed by the OFT for responding to an SO (a matter of weeks, compared to the period taken to conduct its investigation and prepare an SO which is typically over a year).

5. As BIS notes within the Consultation Document, against this background, the interests of justice may require fresh evidence to be admitted on appeal, in particular in Competition Act 1998 cases given the very significant consequences of an adverse decision.

6. Again as BIS notes within the Consultation Document, the CAT within its existing Rules already has wide powers to control the admission and use of evidence, including that not adduced prior to the appeal, and it applies these powers in practice. These powers, and the developing case law on the admission of fresh evidence, are clearly sufficiently rigorous to enable the CAT to ensure that the interests of justice are maintained, whilst preventing any abuses of the system and ensuring that the material before it on appeal is manageable in scope.

7. In our view it is inappropriate and unnecessary to alter the current system to introduce a default presumption against the introduction of new evidence; regulators can, and do, challenge the introduction of new evidence under the current regime. It is appropriate for the CAT to retain its discretion in deciding on such challenges, to ensure the interests of justice are served.

8. In addition, if circumstances did arise where it became clear on appeal that a party had deliberately withheld evidence at the administrative stage in order to "game" the system (of which there is no evidence whatsoever), then, as recognised in the Consultation Document, the CAT has a wide discretion when it comes to awarding costs, and could take this into account at this stage (and/or when considering whether to increase a penalty on appeal where an infringement finding is made out in Competition Act 1998 cases). Where such new evidence is compelling there is no requirement on the regulator to continue its defence of the appeal; it can simply withdraw its decision subject to the costs sanction against the appellant.

9. Finally, we note that if default restrictions against the introduction of new evidence on appeal were introduced then this may have the unintended and undesirable consequence of parties submitting each and every piece of theoretically relevant evidence to the regulator in order to preserve the position for the future.

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[39] [2010] CAT 17, [2011] EWCA Civ 245.

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?

☐ **Yes** ☒ **No** ☐ **Not sure**

Comments:

1. We believe that this should be dealt with on a case by case basis, and there should be no default presumption against the introduction of new evidence (we refer in general terms to comments in response to Question 30 above on this point where applicable). Indeed, the investigatory processes before the CC (and due in course the CMA) mean that that body will call for new evidence where it would find it helpful to its decision.

2. In respect of the Civil Aviation Act 2012, we note that this model is not tested and it is not clear that this would be an appropriate model to take for other regimes.

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?

☐ **Yes** ☒ **No** ☐ **Not sure**

Comments:

1. We assume that this Question relates to appeals (whether on a merits or judicial review basis) of regulatory decisions to the CAT (given costs awards are not a feature of the other processes which are the subject of the Consultation Document).

2. We consider it to be manifestly inappropriate that the costs position should be weighted in favour of the regulator in the manner proposed.

3. The purpose behind appeals is to offer protection to private organisations subject to the considerable power of the state. In such situations it is vital in the interests of justice that the highest standards of fairness are upheld, including the principle of equal treatment. Whilst costs rules should create a "*disincentive on parties to appeal where there is no merit in the arguments being brought*", there should similarly be a disincentive for regulators to make decisions lacking merit (and incentives on regulators to settle appeals if and when it becomes apparent that the grounds are compelling). If one party is effectively at no costs risk, simply by virtue of being a regulator, that creates an unacceptable imbalance in the position of the parties and therefore unfairness in the appeals process. Where a regulator has made a mistake or acted in an impermissible manner a prospective appellant may find it is left with an impossible choice – accept the decision despite its flaws and the

significant damage that would be done to the appellant's business, or commence appeal proceedings knowing that, even if successful, it will not be able to recover its costs.

4. This would prevent parties exercising their rights of defence to hold regulators to account, and would also undermine the beneficial impact appeals have on rigorous and robust decision making.

5. This would also have a particularly adverse impact on access to justice for SMEs, who would be clearly deterred from bringing appeals if such a rule were introduced.

6. It is notable that defendants in judicial review proceedings, also public bodies making decisions in the public interest, are not free from costs risks but are expected to be held account for making bad decisions, including by having to pay the costs of proceedings against them.

7. There is no reason why the same principle should not apply in the context of regulatory and competition appeals, regardless of the public or private nature of the parties.[40] If a meritless appeal has been brought, then the appellant will suffer the costs consequences.

8. We therefore believe it would be unnecessary, inappropriate and unfair to make changes to the current regime, under which the CAT has flexibility as to the award of costs, operating from a "loser pays" starting point, whether that loser is the regulator or the undertaking concerned.[41]

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

☐ **Yes** ☐ **No** ☒ **Not sure**

Comments:

1. We do not see any reason why regulators should not claim these costs (subject to the points raised below).

2. However, for the reasons set out in response to Question 32 above, it is vital to ensure equal treatment is applied as between the regulator and undertakings in respect of costs rules. If regulators are to be permitted to recover their internal costs, then, in the interests of fairness and justice and improving decision-making, appellants should also be able to claim for their internal costs (which are often significant) where they are successful.

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40 We note that such an approach in the communications context would not involve any burden on the state or the taxpayer, given that Ofcom is funded via industry levy.

41 In relation to dispute resolution cases under the Communications Act 2003 we note that if Ofcom chooses not to defend its position and contest an appeal then this would be a factor militating against it being ordered to pay costs (if the appeal is successful), but that if Ofcom chooses to defend its decision on appeal the starting point should remain "loser pays".

3. We can see that the issue of calculation of internal costs may be complex and may therefore be difficult to apply in practice. We assume that, in order to distinguish those internal costs which can properly said to be equivalent to external advisory costs, such costs would be confined to the costs of internal legal and economic resource, and to those responsible for the running of the litigation, not extending to those involved by virtue of their involvement in the underlying decision only. This approach would reflect the principles taken into account by the High Court in dealing with internal costs, including in the judicial review context.

4. It would need to be determined whether recovery of internal costs should be on the basis of cost recovery only, or based on notional "charge out rates".

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** ☒ **No** ☐ **Not sure**

Comments:

1. As a first point we note that, given the costs and resources involved in an appeal, and the cost consequences of an unsuccessful appeal, and in light of the advice they receive, undertakings are already incentivised to focus on those aspects of a decision "*where the appeal stands an arguable chance of success*" (in relation to those forms of appeal where it is possible to appeal specific elements of the decision only). There is no evidence that unmeritorious appeals are being brought.

2. As noted in the Consultation Document, the CAT already has the power under Rule 10 to reject an appeal, in whole or in part, including on the basis that the notice of appeal discloses no valid ground of appeal. Regulators can already scrutinise appeal grounds and challenge these before the CAT under Rule 10; if they are not doing so, then this would seem to apply that the appeals and grounds of appeal being brought do indeed stand an arguable chance of success.

3. We therefore do not believe that there is any case for change in this area.

4. We note that in accordance with the principle of equal treatment, regulators should be willing to settle or withdraw all or part of their defence to an appeal where and when it is apparent that the appeal is compelling.

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** ☒ **No** ☐ **Not sure**

Comments:

1. See generally our response to Question 34 above – we consider that the CAT has appropriate powers in this regards and that this is not necessary.

2. In addition, we note that, should any CAT assessment stage be introduced over and above the CAT's existing powers and the ability of the regulator or other parties to raise challenges on these grounds in specific cases, this is likely to prolong the appeals process. This is because parties would need to present arguments and evidence in support of their various positions at such a preliminary stage and, if challenges are maintained, further time would be taken to deal with arguments and reach a decision (which may, itself, then be the subject of further appeal, further prolonging the process before any part of the substantive appeal is even heard).

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

☐ **Yes** ☐ **No** ☒ **Not sure**

Comments:

1. As a first point, we reiterate our comments above that the different types of regime need to be considered in their context on a case by case basis.

2. We agree that regulators should do "*all they can to open up their reasoning and evidence to the parties at the administrative stage*" and that this will help reduce the need for appeals in appropriate cases.

3. As outlined in our response to the OFT's previous consultation on this issue, we support the changes to the OFT/CMA decision making process designed to improve the administrative system and reduce confirmation bias in Competition Act 1998 cases (noting that their effectiveness in practice is not yet clear at this stage). As outlined above, however, we do not consider that this obviates the requirement for a full merits appeal.

4. Where appropriate and practical, we are in principle in favour of relevant aspects of these measures being applied to other forms of investigation, to create a more transparent and meaningful dialogue between the parties and the decision maker, and to reduce the risks of confirmation bias. This is particularly the case in investigations where the consequence can be the imposition of a penalty, or the requirement to make changes to business practices, or even to divest assets lawfully acquired and held.

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?

Comments:

1. We have no further comments at this stage.

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

☐ **Yes** ☒ **No** ☐ **Not sure**

Comments:

1. It is not clear that there is any need for additional powers similar to those provided by the Enterprise and Regulatory Reform Act 2013 in respect of Competition Act 1998 cases to be available in other forms of investigation.

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

Comments:

1. We consider that either non-infringement decisions, which can have a significant impact on the business of the complainant and which are equally susceptible to flaws as infringement decisions, should remain appealable decisions, or that the legislation would need to provide specifically that non-infringement decisions are not binding.

2. We note that this latter approach would mirror the position where the OFT/CMA is applying Articles 101/102 TFEU, due to the prohibition under EU law on national competition authorities taking decisions that Articles 101/102 TFEU have not been infringed.[42]

[42] Case C375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. Zoo.*

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** ☒ **No** ☐ **Not sure**

Comments:

1. As noted in our overall comments, we believe that the CAT already operates its case management powers effectively, balancing, in what are often very complex cases, the interests of the parties in having the key issues heard with the public interest in efficient and expeditious administration of justice and use of its limited resources.

2. We also note that it is rarely in the interests of the parties to extend proceedings unnecessarily.

3. We finally note that the time required to dispose of cases will vary from case to case, and will depend on a variety of factors, including the needs of the parties – both the regulator and the appellant(s).

4. Accordingly, we believe that the CAT's proceedings currently do not take more time than is reasonably necessary, and that there is no justification for introducing further targets.

5. We reiterate our comments above that shorter and cheaper appeals do not mean more effective appeals, and that achieving shorter and cheaper appeals should not be an end in itself.

6. We further note that shorter deadlines (and therefore a reduction in the flexibility of the CAT's procedures and timetabling) are in fact in many cases likely to lead to higher costs for all parties, including the regulators, and to all parties facing timetables which do not allow them to, for example, utilise preferred counsel. Shorter deadlines may also have an impact on the quality of pleadings, which may undermine the efficiency and efficacy of the appeals process for all concerned.

7. We also note that it would detrimental to overall timetables if an overly short target timeframe led to the CAT choosing to increase the number of occasions on which it remits issues back to the administrative decision maker, rather than deciding on the issue itself.

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** ☒ **No** ☐ **Not sure**

Comments:

1. We do not consider this to be necessary or appropriate, for the reasons set out in our response to Question 40 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?

☐ **Yes** ☒ **No** ☐ **Not sure**

Comments:

1. The CAT already has powers within its Rules to limit the amount and form of evidence, including expert evidence. As noted in above, we believe that the CAT already operates its powers in this regard, as part of its overall case management powers, on an effective basis.

2. We would also note the importance of the ability of the parties (both those challenging an administrative decisions, and the decision-maker) to put forward evidence, including expert evidence, which supports their case. This is required in the interests of justice, and is likely to assist the CAT in reaching a more informed decision, particularly given such evidence is subject to cross-examination by other parties and interrogation by the CAT itself during the hearing.

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?

Comments:

1. We can see the merits in principle in such a voluntary procedure being available with the consent of all parties, although it is not clear how often this would be used.

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?

Comments:

1. As a first point we note that is not clear whether this proposals is predicated on an assumption that the role of the CAT will be retained, or that this will be removed and such appeals go directly to the

CC (on which see our response to Question 19 above). This will clearly be an important factor in determining what time limit is appropriate.

2. Generally we note that, although CC has 4 months to determine a price control review under the current rules, it typically asks the CAT for a longer period. It therefore makes sense to increase the time.

3. If CAT's role is removed from the process, the CC would in our view require more than 6 months to allow time for the pleadings and other preliminary steps (which may include for example the setting up of confidentiality rings and consequential amendments of pleadings) which currently take place before the reference to the CC.

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?

Comments:

1. As this regime is untested it does not appear to be an appropriate model to adopt. Appropriate case management powers would need to be developed depending on what regime is ultimately adopted (i.e. including or excluding the CAT stage), paying due regard to the existing CAT and CC rules and guidance and their application in practice (as well as the requirements of the Framework Directive).

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?

Comments:

1. We do not agree with this proposal. Appeals against price control decision in particular can be exceedingly complex and involve a wide range of issues. There should be discretion for an extension of longer than 2 months in circumstances where the interests of justice require that additional time be taken in order to ensure a thorough investigation of the issues raised by the reference.

2. BIS should be aware that on 20 August 2013 the CC obtained a 6 month extension in relation to Northern Ireland Electricity's price control reference. This would not have been possible had BIS's proposals been put into effect.

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

Comments:

1. We have no further comments at this stage, save to note in relation to the CC that the creation of the CMA will involve in due course a review of all of its rules and guidance, and this will be an appropriate forum for considering this issue.

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

Comments:

1. We have no further comments at this stage.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

1. We have no further comments.

Herbert Smith Freehills LLP

11 September 2013