RESPONSE OF THE JUDGES OF THE CHANCERY DIVISION TO THE BEIS CONSULTATION:

Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers

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 the Commercial Court.[1] 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 are accordingly involved in sitting in cases in the CAT.

2. The BEIS Consultation is wide ranging. Many of the questions raised concern the Competition and Markets Authority ("CMA") or matters of policy on which it is not appropriate for us to comment. This response is directed only at question 24 in the Consultation:

   > "What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?"

3. Currently, the CAT has to determine an appeal against a finding of infringement or imposition of a penalty for infringement under the Competition Act "on the merits": para 3(1) of Schedule 8 to the Competition Act. This contrasts with the standard of appeal applied to challenges before the CAT to CMA merger decisions, for example, which are determined in accordance with the principles of judicial review: s.120 (1) and (4) of the Enterprise Act 2002. The discussion in the Consultation preceding question 24 refers to some suggestions that on Competition Act infringement appeals, the standard of judicial scrutiny should be lowered to that of judicial review.

4. We note that the same question was raised in a consultation launched on 19 June 2013 by the then Department for Business Innovation and Skills: *Streamlining Regulatory and Competition Appeals* (the "2013 Consultation"). The judges then constituting the Chancery Division submitted a response to the 2013 Consultation (the "2013 Response") expressing the firm view that it would be inappropriate to reduce the standard of scrutiny to judicial review and pointing to the potential legal difficulties to which this may give rise. Although the composition of the Chancery judges has substantially changed since then, we see no basis to depart from the view expressed by the Chancery judges in 2013. If anything, the grounds to maintain a full merits appeal have become stronger since then.

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[1] Practice Direction: Competition Law Claims relating to the Application of Articles [101] and [102] of the [TFEU] and Chapters I and II of Part 1 of the Competition Act 1998, paras 2.1-2.4.

[2] Rule 30.8 of the Civil Procedure Rules.

5. Article 6 of the European Convention on Human Rights ("ECHR") provides, insofar as relevant:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
> …
> 3. everyone charged with a criminal offence has the following minimum rights:
> …
>
> > (d) to examine or have examined witnesses against him and to obtain the attendance and examination of the witnesses on his behalf under the same conditions as witnesses against him; …"

Although not criminal under UK law, it is well established that allegations of infringement of competition law which can carry substantial financial penalties constitute a criminal charge for the purposes of Article 6 ECHR. The CMA is an administrative agency which acts as both investigator and decision-maker as regards infringement decisions. In the 2013 Response, the Chancery judges stated:

> "… we share the concerns expressed about the compatibility of a judicial review test in appeals against Competition Act decisions with Article 6 ECHR. In light of the recent jurisprudence of the Court of Justice of the European Union ["CJEU"]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. Although the jurisprudence of the CJEU may now be less relevant, the English Court of Appeal recently reaffirmed the importance of a full merits appeal before the CAT in *CMA v Flynn Pharma Ltd and Pfizer Inc* [2020] EWCA Civ 339. Green LJ stated in the leading judgement (with which the Chancellor and Sir Stephen Richards agreed) at [136]:

> "…The conferral of a merits jurisdiction upon the Tribunal flows from important legal considerations relating to the rights of defence and access to a court, under fundamental rights such as Article 6 of the Convention. The starting point is that competition law is treated as a species of criminal law. There is a wealth of case law establishing this. The Tribunal recognised this in *Napp* (ibid) at paragraphs [99] – [100], applying the jurisprudence of the Court in Case C-235/92 P *Montecatini v EC Commission* [1999] ECR I-4575 at paragraphs [175] and [176]. This conclusion was subsequently confirmed by the European Court of Human Rights in *Menarini Diagnostica SRl v Italie* (27th September 2011) ("*Menarini*") in relation to Italian competition law and Article 6. In *Argos/Littlewoods v Office of Fair Trading* [2006] EWCA Civ 1318 at paragraph [18], on an appeal in relation to alleged price fixing, the Court of Appeal recognised the necessary connection between a full merits hearing and Article 6: "*The appeals to the Tribunal in the present cases were, in effect, full hearings with such relevant evidence as any party wished to adduce, witnesses being cross-examined if appropriate. That is necessary so as to ensure that Article 6 of the European Convention on Human Rights is satisfied.*"

After discussion of some of the cases, Green LJ continued at [140]:

> "… (i) for a (non-judicial) administrative body lawfully to be able to impose quasi-criminal sanctions there must be a right of challenge; (ii) that right must offer guarantees of a type required by Article 6; (iii) the subsequent review must be by a judicial body with "*full jurisdiction*"; (iv) the judicial body must have the power to quash the decision "*in all respects on questions of fact and law*"; (v) the judicial body must have the power to substitute its own appraisal for that of the decision maker; (vi) the judicial body must conduct its evaluation of the legality of the decision "*on the basis of the evidence adduced*" by the appellant; and (vii), the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an "*in depth review of the law and of the facts*" by the supervising judicial body."

7. We note that since 2013, the level of fines being imposed by the CMA has significantly increased. In the *Flynn/Pfizer* case, the CMA imposed a penalty of a little over £84 million on Pfizer. In the *Paroxetine* case, where the CAT dismissed all the appeals against liability but reduced the fines, the CMA had imposed a fine of £37.6 million on GSK. On 15 July 2021, the CMA imposed fines totalling over £260 million on a number of pharmaceutical companies for conduct concerning the supply of hydrocortisone tablets.

8. Furthermore, in 2013, private claims for damages in competition law were still relatively rare. Today, it is almost routine that any finding of infringement by the CMA (and by the European Commission for matters pre-dating Brexit) leads to damages claims before the High Court or the CAT. Pursuant to s.58A of the Competition Act, an infringement decision by the CMA, once the appeal process is exhausted or the time for an appeal has expired without there being an appeal, is binding in any subsequent civil damages claim. Pursuant to s.58 of the Competition Act, any finding of fact by the CMA which is relevant to an issue in the civil claim is similarly binding unless the court or tribunal otherwise directs. These provisions have undoubtedly helped to facilitate the bringing of claims for redress by victims of anti-competitive agreements or conduct. The justification for the binding effect is that the defendant to the civil claim had a full opportunity to challenge the CMA decision through an appeal on the merits to the CAT. However, that justification falls away if the standard of scrutiny on appeal is reduced. If the standard of review on appeal against the infringement decision was less than a full merits standard, we envisage that there may be challenges under Article 6 to the binding effect of infringement decisions in a civil damages case, and the court or CAT would be asked to exercise its discretion not to make findings of fact binding in civil cases.

9. In the 2013 Response, the Chancery judges also considered the practicability and implications of creating some new test for the standard of review. We repeat and adopt the views expressed by the Chancery judges at the time:

> "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 … and by analogous provisions in much other legislation.

11. We could 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 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.”

30 September 2021