COMPETITION APPEAL TRIBUNAL

RESPONSE TO BEIS CONSULTATION

REFORMING COMPETITION AND CONSUMER POLICY: DRIVING GROWTH AND DELIVERING COMPETITIVE MARKETS THAT WORK FOR CONSUMERS

Introduction and Summary

1. This is the response of the Competition Appeal Tribunal ("CAT") to the Consultation ("the Consultation") on *"Reforming Competition and Consumer Policy; Driving growth and delivering competitive markets that work for consumers"* published by the Department for Business, Energy and Industrial Strategy ("BEIS") in July 2021.

2. The CAT welcomes the re-affirmation of the government's commitment to competition (both law and policy) and also supports effective improvement to the system currently in operation. As the UK's specialist competition law tribunal, the CAT occupies a position that combines close involvement in and expert knowledge of the subject matter of the law together with the necessary detachment from enforcement bodies and policy makers that its judicial functions require. In short, the functions of the CAT – expressed in terms of separation of powers – render it a distinct, very much competition focussed, part of the judiciary.

3. In these circumstances, the CAT normally does not express views on matters of policy unless these have the potential of affecting, or are directly relevant, to the execution of the CAT's judicial function.

4. Since much of the Consultation in fact covers matters which are not directly within the purview of the CAT, we offer no comment on those matters.

5. Our comments are confined to the proposals regarding enforcement against illegal anti-competitive conduct. On the issue of standard of review on appeal and possible associated changes to the CAT's procedures, we are not convinced that the reasons for having a merits appeal have been correctly understood nor that there is any mischief to be corrected or any case made out for change. On the wider issue of overall speed of process, we believe that the issues, if they exist, lie elsewhere than at the appeal stages for which the CAT has responsibility.

6. We welcome specific changes of direct benefit to the CAT particularly giving the ability to grant declaratory relief in private enforcement actions.

Enforcement against illegal anti-competitive conduct

7. Our main concern is the content of the sections headed "Appeals before the Competition Appeal Tribunal" (paras 1.196-1.199), "Judicial scrutiny of CMA decisions" (Paras 1.200-1.208) and "Procedures in Competition Act Appeals" (paras 1.209-1.212). The first two sections can best be considered together.

8. The Consultation characterises competition appeals as "an exception", compared with appeals in respect of "most decisions taken by public authorities", in being subject to a full merits appeal standard (para 1.198). The Consultation correctly emphasises the importance of an

effective appeal system (para 1.196) but its explanation of why competition appeals are subject to full merits appeal (para 1.201) does not appear to be fully conversant with the reasons for this.

9. The decision in 1998 to confer direct enforcement power on the (then) Office of Fair Trading was a major departure for the UK and involved setting up a new administrative system completely different from the court based one it replaced[1]. The prime reason for providing a robust appeal system was because the extensive powers given to the Competition Authority to investigate, prosecute and determine infringements of competition law (and to impose fines to the unprecedented degree of up to ten percent of a business's worldwide turnover as well as take measures to cease business operations or modify contracts) which were modelled on and borrowed from the European competition enforcement system, were viewed by Parliament as a significant encroachment on business freedom. As such, it was considered that such extensive powers necessitated the safeguard of an effective system of appeal[2]. It is therefore the degree to which enforcement powers are concentrated in the hands of the Competition Authority which is the exceptional feature of the regime rather than the standard of review. This concentration of power (which could be ameliorated in other ways: for instance, turning the Competition Authority into a purely prosecuting agency, is compensated for by appropriately robust appellate scrutiny.

10. Furthermore, in parallel with the Competition Act 1998, the contemporaneous passage of the Human Rights Act 1998 required the UK to provide for a person subject to penal or quasi-penal measures to have "*a right to a fair trial… by an independent and impartial tribunal established by law*", as provided by Article 6(1) of the European Convention on Human Rights (ECHR). The extensive enforcement powers given to the Competition Authority in the new administrative system established by the Competition Act 1998 involved the imposition of exactly the penal or quasi-penal measures that invoke Article 6(1) of the ECHR.

11. The fundamental requirement of justice that a prohibition decision under the Competition Act with its attendant consequences of the stigma of wrongdoing or criminality, damage to reputation and loss of business, very considerable financial penalties for the undertaking concerned and severe personal consequences and loss of livelihood for individuals involved in that business (for example as a result of dismissal or consequential directors disqualification proceedings) must, be subject to full merits appeal, was reaffirmed most recently by the Court of Appeal (Green LJ) as follows:

> *"The conferral of a merits jurisdiction upon the (Competition Appeal) Tribunal flows from important legal considerations relating to the rights of defence and access to a Court, under fundamental rights such as Article 6 ECHR*." (see *Flynn and Pfizer v CMA*) [2020] EWCA Civ 339 at para 136.

12. In this regard at least, the ECHR reflects the thinking behind the establishment of a merits appeal, though the establishment of a merits appeal arose independently of human rights considerations: namely the considerations articulated in paragraph 9 above.

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[1] Under the Restrictive Trade Practices Acts 1956-76, the Director General of Fair Trading referred registered agreements to the Restrictive Practices Court for adjudication.

[2] See, for example, the debate on the Competition Bill in Standing Committee G on 18 June 1998 where John Redwood MP for the Opposition, indicated that they were keen to see *"the widest possible range of grounds on which an applicant can appeal."*

13. There are other considerations that speak strongly in favour of an appeal on the merits, not least the fact that, unless challenged on appeal, any finding of fact made by the competition authority in support of its decision will be binding (see section 58 of the Competition Act 1998). The lack of any possibility to take issue with the CMA's findings of fact will inevitably have a detrimental effect on the ability of businesses to defend themselves in civil proceedings that invariably follow on from an infringement decision and which could expose them to liabilities in damages that might easily dwarf any administrative fine imposed by the Competition Authority. This would, therefore, be likely to generate challenges under Article 6 ECHR.

14. Arguments in favour of moving to a judicial review standard have been rehearsed on many occasions over the past dozen years, and generally attracted a hostile response from those subject to competition regulation, who see benefit in robustly being able to challenge regulatory oversight. The move away from a merits standard was considered in detail, and rejected, in the consultations prior to the enactment of the Enterprise and Regulatory Reform Act 2013, and in the course of the Government's largely abortive Regulatory Appeal Review later in the same year. In relation to the latter, paragraph 1.204 of the Consultation notes that the CAT submitted a detailed response which was supported by many other respondents with knowledge of the subject matter.

15. The Consultation refers to a 2016 report of the National Audit Office (NAO) suggesting that the appeal system provided strong incentives to business to litigate and hence led to risk-aversion in the authorities (para 1.203). The passage quoted, however, is taken completely out of context. The NAO Report in question was focused on the CMA: see the Report at para 5, explaining its focus, and Appendix 1, explaining its approach. Accordingly, it did not deal in any respect with the appeal stage and the NAO did not seek evidence from stakeholders on the appeal system nor did it consult the CAT. The NAO Report cannot seriously be relied on to support a change to the standard of review on appeals.

16. The subsequent proposals to change the standard of review made by Lord Tyrie when he was chairman of the CMA, and by the Furman Review in the context of the digital economy, do not appear to take account of the factors mentioned in this response, are not convincing[3] and are, in the CAT's view, a regrettable distraction from the need to consider possible improvements in other parts of the enforcement system. The Penrose Review aired these points but without taking any firm view on their relative merits.

17. Overall, these proposals to change the standard of review have been coupled with a desire to speed up the end-to-end process of competition enforcement[4]. There is no proper evidential basis for suggesting that a move to a judicial review standard would shorten the end-to-end process at all. Indeed, another reason for the present standard of review was that, in the specific area of competition law infringement decisions, involving issues of entwined complex law and fact, an ability to consider the merits at the appeal stage can (where a decision would otherwise be remitted after judicial review) result in the decision being "repaired" at the appellate level, thus saving time. The alternative of cases proceeding subject only to judicial review, with the principal remedy of remittal, ran the risk of considerable delay in end-to-end enforcement. That is why during the passage of the 1998 Act through Parliament the Minister noted:

[3] The CAT pointed out at the time in a detailed submission to the then Secretary of State, the numerous and regrettable errors in Lord Tyrie's account of the way the appeal system worked.

[4] Ie the total time taken for a case from its inception at the CMA to the final conclusion of any appeal process.

"*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".*[5]

18. The relatively recent judgment of the CAT in *Paroxetine* provides an illustration: the CAT considered that the approach taken in the CMA's decision to abuse of dominance was flawed because it failed to have regard to proper considerations when defining the market: *Generics (UK) Ltd and ors v CMA* [2018] CAT 4 at paras 399-401. Had the decision been subject only to judicial review, the CAT would probably have had to quash that part of the decision, either altogether or remitting back to the CMA to be considered again. Since the CMA's investigative process had taken 4½ years, this would have been unfortunate. However, because it was a merits appeal with fresh evidence, the CMA was able to put in an expert's report from a distinguished economist and after hearing his evidence and taking account of other factual evidence, the CAT was able to uphold the finding of abuse on a different basis: judgment at paras 402-407.

19. The Consultation correctly states that *"Businesses and their advisers appear, in general, to remain supportive of the current system, which they consider to be well established and understood."* (para 1.204). The Consultation also indicates some awareness that any change should not be introduced lightly (para 1.206). We welcome this recognition of the dangers of change, particularly when this exact "reform" has been mooted and rejected, for good reason, in the past. It would be a welcome development if the opportunity was now taken by the Government to put this particular issue firmly to bed.

20. If, despite these considerations, the Government were to consider the present system to be in need of reform, in our respectful view a bolder course, which actually addresses the problem of delay and the danger of potential confirmation bias, should be considered. That would be to examine and assess the benefits of a prosecutorial model, under which the CMA would no longer take prohibition decisions, but would instead prosecute cases before the CAT. We discuss this below (see paras27-29).

Interim measures

21. In relation to the CMA's use of interim measures (paras 1.165-1.169)), we do not understand why it is thought that an obstacle to their use at present is the standard of review on appeal (para 1.168).

22. So far as the CAT is aware, no interim measures have been adopted by the CMA and consequently no appeal has even been filed with, let alone heard by, the CAT. There is therefore no evidence to suggest that it is the possible weight of the appeal process that is inhibiting the CMA. Interim measures are, in nature, only a public enforcement equivalent of a civil law interlocutory injunction. These remedies are obtained on a daily basis by private litigants in civil courts throughout the UK, usually (because of their urgency) at considerable speed. Such interim injunctions have been granted in competition cases: see e.g. *Preventx Ltd v Royal Mail Group Ltd* [2020] EHC 2276 (Ch). Injunctions granted in this way are the subject of normal, appellate (i.e., on the merits) review, not judicial review. So far as we are aware, there is no suggestion that this regime slows things down or is otherwise ineffective.

23. The imposition of interim measures, ahead of any substantive finding, is a substantial intrusion into business freedom. Any consideration by the CAT or any other court would struggle to

[5] Nigel Griffiths MP, Standing Committee G, 18 June 1998

achieve a fair and just outcome without some consideration of the facts, and hence by implication the merits, of the CMA's decision. It is therefore difficult to see how, in practice, let alone in law, the standard of review in relation to interim measures can be lowered.

Procedures in Competition Act Appeals

24. The Consultation (paras 1.209-1.212) sets out a number of considerations in relation to the procedure adopted by the CAT in competition cases. The figures quoted for duration of appeals are, as admitted, distorted by one or two exceptionally complex appeals. Although not stated in the Consultation, the norm remains extremely favourable by comparison with overseas jurisdictions,[6] with the UK court system generally and with the CMA's own procedures. Nor is it demonstrated that case duration depends on the amount or the nature of the evidence considered. Although these undoubtedly are factors, other factors are also in play, not least the number of appellants and the complexity of the issues under consideration.

25. The Department has already initiated a review of the CAT's Rules of Procedure, and the invitation to comment was framed in broad terms. The response to that review has yet to be published but we understand that the small number of responses concentrated largely on possible changes to the CAT's rules for private actions. Only the CMA suggested that further changes should be introduced to restrict the introduction of evidence on appeal. The Consultation is essentially a repeat of the call for evidence issued earlier this year and we do not see that there are any potential further changes, specifically concerning Competition Act appeals that were not already covered by the existing review of the CAT's Rules of Procedure.

Declaratory relief

26. The Consultation envisages enabling the CAT to issue declaratory judgments in private enforcement cases. We very much welcome this suggestion, which will enhance the CAT's ability to deal appropriately with collective proceedings and, more generally, provide an important element of flexibility currently not available to us.

Prosecutorial system

27. The Consultation does not propose consideration of moving competition enforcement to a so-called "prosecutorial model", under which the CMA would act as prosecutor before the CAT, which would decide whether the infringement was established and what should be the amount of any penalty. This was considered in 2010-2012 but rejected in favour of enhanced procedures within the new CMA.

28. The proposal was referred to in the Penrose Report, but not considered in any detail, although John Penrose wanted this possibility to be included in the further procedural review that he recommended should take place.[7]

29. It is not appropriate for us to argue in favour of this proposal. We note, however, that the prosecutorial model represents, as we indicated, a realistic alternative to the present system which – if reform is seriously considered necessary – deserves to be fully examined and considered on its merits. If incremental reforms are not thought sufficient to address perceived

[6] See the EU Justice Scoreboard 2019, Figure 16, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en#scoreboards [UK data is not included in the 2020 Scoreboard].

[7] See paragraph 2.7 of the Penrose Report.

delays in the CMA's administrative procedures, the prosecutorial model offers a realistic chance of shortening the length of the end-to-end process by replacing the current CMA administrative decision and possible subsequent appeal before the CAT with a single CAT process. We believe that it is the process used effectively for infringement of the penal prohibitions under antitrust law in the US and for infringement of the equivalent of the Chapter I and Chapter II prohibitions in Austria. It is also the prevailing system in other common law jurisdictions.

30 September 2021