"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:

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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