JUDICIARY OF
ENGLAND AND WALES

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RESPONSE OF THE QUEEN'S BENCH DIVISION TO THE CONSULTATION

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

ISSUED BY THE DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS

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

General Observations

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

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

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

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

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

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

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

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

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

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

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

Challenges to ex post decisions

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

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

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

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

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

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

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

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

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

Challenges to ex ante decisions

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

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

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

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

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

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

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

Questions 15-17: Appointment of judges

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

Question 15

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

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

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

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

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

Question 16

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

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

Question 17

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

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

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

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

Question 30: New evidence

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

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

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

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