UK COMPETITION LAW ASSOCIATION

Consultation Response

BIS: Streamlining Regulatory and Competition Appeals

September 2013

1. Introduction and overview

1.1 This document is submitted on behalf of the UK Competition Law Association ("**CLA**") in response to the consultation launched on 19 June 2013 by the Department for Business Innovation and Skills ("**BIS**") on "Streamlining Regulatory and Competition Appeals".

1.2 The CLA is affiliated to the Ligue International du Droit de la Concurrence. The members of the CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of the CLA is to promote the freedom of competition and to combat unfair competition.[1]

1.3 The CLA welcomes the opportunity to respond to this Consultation on streamlining regulatory and competition appeals.

1.4 The CLA has a number of serious concerns with some of the proposals. In general, the CLA shares the concerns expressed by the Competition Appeal Tribunal ("**CAT**") in its response to the present Consultation. In particular, the CLA agrees with the CAT that there is no reason to suppose that a move to a "judicial review" standard of review in

[1] Further details on the CLA can be found on our website at http://www.competitionlawassociation.org.uk/.

either regulatory or antitrust appeals would reduce the number of appeals, the cost and length of appeals, or regulatory uncertainty; indeed, there are powerful reasons to suppose that such a change would have the opposite effect.

1.5 The CLA also shares the CAT's criticisms of much of the evidence relied on in support of the reforms suggested in the Consultation paper. Contrary to the thrust of the Consultation paper, the experience of the CLA's members before the CAT is that in general it deals with appeals, in cases that are often complex and of vital commercial importance to the parties, with as much speed and efficiency as is realistically possible. In particular:

(a) The experience of CLA members is that the CAT deals with cases as quickly as is consistent with parties having sufficient time to prepare their cases properly; and, far from appellants seeking to delay appeals in order to gain tactical advantage, the experience of CLA members is that it is regulators, as least as much as appellants, who seek to resist proposals that proceedings could be dealt with to a faster timetable.

(b) Although there was a period in the mid-2000s when there may have been legitimate scope for concern about sometimes lengthy delays by the CAT in giving judgment, since then the picture has considerably improved (the recent construction appeals being, for the reasons given by the CAT, a highly exceptional situation).

(c) In the experience of CLA members, the CAT generally strikes the right balance between written submissions and oral hearings (and the CLA shares the CAT's

view that oral hearings play a critical role in the fair resolution of appeals, and notes that a focused oral hearing is very frequently faster and more cost-effective than an exchange of detailed written submissions covering the same ground).

2. Specific Points on "Streamlining Regulatory and Competition Appeals"

2.1 This part of the response provides specific responses to the questions raised by the Consultation on "Streamlining Regulatory and Competition Appeals". The chapter and question numbering below follows the references used in the Consultation paper.

STANDARD OF REVIEW (CHAPTER 4)

Q1. Do you agree that there should be a presumption that appeals should be heard on a judicial review standard, unless there are particular legal or policy reasons for a wider standard of review?

2.2 No, we do not agree. The case for any such presumption has not been sufficiently established. The existing use of full merits appeals should be retained not least in light of the following considerations:

(a) The fact that the agency's substantive analysis will be reviewed is likely to result in better decision-making in the first place.

(b) Review on the merits of the substantive analysis is likely to reduce the risk of error and ensure greater consistency of decision-making, particularly where there would not otherwise be any independent review on the substance.

(c) There is little evidence to suggest that a move to a judicial review type system would result in faster and more efficient decision-making. On the contrary, any change to the standard of review is likely to result in additional litigation over the new standard (including consistency of the new standard with requirements of EU law), with preliminary rulings by the CAT on such issues themselves potentially being the subject of further appeals (and hence delay).

(d) Competition law proceedings, which are recognized as being quasi-criminal in nature owing in part to the significant financial penalties, would otherwise risk breaching the European Convention on Human Rights ("**ECHR**"). This is discussed in more detail in the response to question 6 below.

2.3 Finally, we strongly dispute that speed and efficiency should be promoted potentially at the expense of "getting it right" on appeal.

Q2. Do you agree with the Government's principles for non-judicial review appeals set out in Box 4.1? If you disagree, what would you propose?

2.4 No, we do not agree. The case for changing from the current standard of review has not been sufficiently established.

2.5 Introducing statutory grounds of appeal will cause uncertainty and litigation on additional points, not least around how far the grounds are intended to be a departure from prior judicial statements on the standard of review. The proposed statutory grounds do not necessarily capture all the nuances of the existing case law and there will be question marks over how far this is or is not intentional. We see no benefit in providing a gloss

where the standards of review are now reasonably well settled and where, at least in most respects, the proposed specific grounds do not appear to be substantially different from those that have already been established by the courts (at least in Communications Act appeals).

2.6 To the extent there is a narrowing of the permissible grounds of appeal, we would repeat that we do not believe that the case for this has been sufficiently established. It is likely to defeat the Government's objectives by leading to lower quality decision-making and risk breaching the ECHR at a time when fundamental rights are receiving increased scrutiny within the EU legal system. We also note that a switch from full-merits appeal would be inconsistent with the Government's statement last year in the context of consulting on changes to the UK competition law regime that it intended to retain the full-merits appeal system.[2] Please see further our response to question 6 below.

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

2.7 A move to a judicial review standard is likely to extend the time taken before decisions become final as well as the cost involved in challenges. This is because:

(a) There will, at least initially, be additional litigation over the meaning of any new standard that will itself cause delays and extra cost.

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

(b) As is the case in judicial review, witness statements will still be submitted by all parties. Further, if there were any reduction in the volume of witness statements and expert evidence, it would have a limited impact on timing as all the appellant's evidence already has to be filed with the Notice of Appeal anyway where the appeal is currently to the CAT.

(c) There is unlikely to be much saving in terms of disclosure because there is no formal disclosure stage before the CAT anyway.

(d) Crucially, judicial review implies that it will not typically be appropriate for the CAT to reach its own view on the right answer where it finds a flaw in the process. There is always a remittal for the original decision maker to reconsider its decision unless the facts show there could only ever be one lawful answer. Paradoxically and entirely inconsistent with the aspirations that the Government has for faster decision-making, this may mean there will be more adverse findings against regulators because the CAT will need to allow an appeal where it finds a process error even if it might, at present, have agreed with the ultimate conclusion.[3] There will also be less finality because the original decision-maker will have to go through the process of reaching a new decision, which may itself then be challenged again. The process of remittal to the original decision-maker can lead to considerable delays in the proceedings as can be seen, for example, in the *Soda Ash* case before the European Commission and Courts – the European

[3] Under the appeal on the merits system, the CAT has the potential to let a decision stand even where there has been, for example, a procedural flaw. In *TalkTalk Telecom Group plc v Ofcom* [2012] CAT 1, the CAT held that a decision by Ofcom was procedurally flawed but that the rehearing on the merits cured the procedural flaw.

Commission's initial decisions were adopted in December 1990 and quashed in June 1995, and then the European Commission's re-adopted decisions were quashed by the European Court of Justice in October 2011, over 20 years after the initial decisions.[4] While the current process in Communications Act appeals does require remittal to Ofcom, it is typically with directions to take a particular decision on which there is little or no scope to consult or be challenged.

2.8 The appeals framework would be less effective both because of the requirement for reconsideration delaying finality and because the process will be less successful at remedying substantive errors (and will find errors on process grounds where the substantive decision is right).

Q4. For decisions in the communications sector, do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a more focused 'specified grounds' approach, or something different?

2.9 No, we do not agree for the reasons stated in response to questions 1 and 2 above. Additionally:

[4] The European Commission adopted initial infringement decisions against Solvay in December 1990 for breaches of Articles 101 (market sharing) and 102 TFEU (agreements with customers aimed at foreclosing competitors). These decisions were quashed by the General Court in June 1995 owing to violation of an essential procedural requirement (since the text of the decisions had not been authenticated before it was notified), with the European Court of Justice upholding the General Court's judgment in April 2000. The European Commission re-adopted both decisions in December 2000. Solvay appealed these new decisions. The General Court largely upheld the decisions in judgments handed down in December 2009, although it did find that the European Commission had erred in its assessment of the duration of the Article 101 infringement and in its assessment of the gravity of the Article 102 infringement. On further appeal by Solvay, the European Court of Justice held in October 2011 that Solvay's rights of defence arising from access to the European Commission's file and its right to be heard had been breached in the Article 101 and 102 cases and therefore quashed both European Commission re-adopted decisions. Although this may not be a typical example, it certainly shows the extent to which proceedings can drag out where cases are remitted to the administrative decision-maker.

(a) the risk of error is arguably greater for regulatory decisions by Ofcom than competition decisions by the CMA because there it uses a one-stage process without second-stage review;

(b) the full merits standard is clearly consistent with EU law, in particular Article 4 of the Framework Directive. While a flexible standard of judicial review might also satisfy the requirements of Article 4, it is less certain and has never been tested before the European Courts. Any attempt to constrain the flexibility with specified grounds will increase the risk of inconsistency and will certainly result in more litigation, including references to the European Courts and/or infringement proceedings against the United Kingdom; and

(c) there is no good reason why the existing standard of review should be seen as a cause of delay in the implementation of Ofcom decisions. Decisions are not suspended during appeals and, in any event, the CAT has shown itself well able to resolve appeals quickly when required.

Q5. What would the impacts be on the length, cost and effectiveness of the appeals framework if the standard were changed to: i). judicial review; ii) focused specified grounds?

2.10 We refer to our responses to questions 2 and 3 above. Neither option is likely to reduce length or cost and may very well increase both. Both options would reduce the effectiveness of the appeals framework, at least to the extent that they narrow the existing grounds for challenge.

Q6. For decisions under the Competition Act 1998 (which do not involve setting the level of penalties) do you agree that there should be a change in the standard of review? If so, should this be to a judicial review, a focused 'specified grounds' approach, or something different?

2.11 No, we do not agree. In addition to points already made in response to questions 1-3 above, we would highlight further the risk of incompatibility with fundamental human rights through not having an appeal on the merits. Competition law violations in the UK can lead to draconian penalties for implicated companies and individuals, including heavy fines, private damages actions, divestiture orders, and director disqualification orders. It is widely recognized – and indeed this is recognized in the BIS Consultation itself – that competition law proceedings as a result have a quasi-criminal nature and are subject to the safeguards set out in Article 6 ECHR.[5] There is concern that, when the initial decision in competition law cases is taken by a body acting as investigator, prosecutor, and judge, it is necessary to have an appeal on the merits to ensure compliance with Article 6 ECHR.[6]

[5] *See*, for example, *Aberdeen Journals Limited v Director General of Fair Trading* [2002] CAT 4, para. 176 "We bear in mind, in that connection, that the Act involves the imposition of severe penalties and that proceedings under the Act are "criminal" for the purposes of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms." Equally, in the context of cartel proceedings under Article 101 TFEU, see, for example, the comments of Judge Vesterdorf in the *Polypropylene* case where he opined that, since fines imposed pursuant to Article 15 of Regulation 17/62 "*have a criminal law character, it is vitally important that the Court should seek to bring about a state of affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights*" (Opinion of Advocate General, Case T-1/89 *Rhône Poulenc SA v. Commission* [1991] ECR II 867).

[6] In *A. Menarini Diagnostics S.R.L. v Italy*, case no. 43509/08, judgment of the European Court of Human Rights ("ECtHR") of 27 September 2011, paras. 28-45 and 59, the ECtHR found that a fine imposed by the Italian antitrust authority for cartel activity involved a criminal charge and that it was not incompatible with Article 6(1) ECHR for a competition law sanction to be imposed by an administrative authority provided that the decision was subject to control by a court with full jurisdiction. Such a court should have the power to decide on all aspects of law and fact and, if necessary, to reformulate the decision on both facts and law.

2.12 When the UK Government was consulting on changes to the UK competition law regime in 2011, many stakeholders advocated moving to a prosecutorial system so as to ensure robust decision-making. The UK Government rejected a shift to a prosecutorial regime but noted that it would be wrong to reduce parties' rights and that it therefore intended that full-merits appeal would be maintained in the new regime.[7] It is hard to fathom why the UK Government has changed its viewed on this and particularly within such a short period of time.

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

2.13 We refer to our responses to questions 2 and 3 above. Neither option is likely to reduce length or cost and may very well increase both. Both options would reduce the effectiveness of the appeals framework, at least to the extent that they narrow the existing grounds for challenge.

Q.8 For price control decisions in the communications, aviation, energy and postal services sectors, do you agree that there should be a change in the standard of review? If so, should this be to judicial review, a focused and consistent 'specified grounds' approach, or something different?

2.14 We do not consider that a sufficient case has been established for changing the standard of review for price control decisions.

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

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

2.15 We refer to our responses to questions 2 and 3 above.

Q.10 Bearing in mind the proposals that the NI Executive has already consulted upon in relation to electricity and gas; to what extent should the changes proposed in this consultation be extended to Northern Ireland?

2.16 The CLA does not have any comment on this question.

Q.11 What do you think the costs and benefits might be of moving to a direct appeal approach in the rail sector with either i) a judicial review standard or ii) a specified grounds approach?

2.17 The CLA does not have any comment on this question.

Q.12 Are there any legal or other reasons why other regulatory decisions should be heard on an appeal standard other than judicial review? If so, which decisions and why?

2.18 For the reasons provided above, the CLA disagrees entirely with the Government's proposal to move from a full-merits appeal system to judicial review.

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

2.19 For the reasons provided above, the CLA does not believe there is any evidence for concluding that appeal cases heard under judicial review or "consistent specified grounds" standards would be quicker than appeal cases heard on a full-merits basis. Indeed, it seems more likely that changing to a judicial review or "consistent specified grounds" standard would increase the overall length of cases. We refer to our responses to questions 2 and 3 above.

APPEAL BODIES AND ROUTES OF APPEAL (CHAPTER 5)

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

2.20 The CLA considers that flexibility already exists in the CAT's Rules to deal with cases fairly and in a timely manner and that the CAT utilises its Rules accordingly. Although improvements could be made to certain of the CAT's rules (*e.g.*, those relating to payments in), the CLA does not believe that wholesale reform of the CAT's Rule is warranted or desirable.

Q.15 Do you agree that the relevant Chief Justice should be able to deploy judges at the level of the High Court or their equivalents in Scotland and Northern Ireland to sit as a Chairman of the CAT?

2.21 We agree.

Q.16 Do you agree that these judicial office holders should not be limited to a term of 8 years? Please include any views you may have concerning the 8 year term limit and CAT Chairman that do not hold another judicial office.

2.22 We agree.

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

2.23 We agree, but consider that it should be the exception rather than the norm as one of the unique advantages of the CAT is its ability to bring to bear economic, business and/or sectoral expertise as well as legal expertise. We would propose that the CAT should only be permitted to sit with a single judge:

(a) where the parties agree; or

(b) where directed by the President on a case-by-case basis; or

(c) possibly in a narrow range of pre-specified cases, such as those requiring expedited treatment and/or involving pure questions of law.

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

2.24 Yes, we do agree that it is appropriate for appeals against price controls and licence modification decisions to be heard by the Competition Commission and its successor body, the Competition and Markets Authority ("CMA") as opposed to the CAT. The CLA assumes that this is something the Government will examine further when

establishing the CMA and the new UK competition regime. We hope that efforts will be made to ensure that the Competition Commission's experience in these types of appeal cases transfer seamlessly to the CMA.

Q.19 Do you agree that the process for bringing appeals against price control decisions in the communications sector should be simplified so that these appeals go directly to the Competition Commission? If so, would the Civil Aviation Act 2012 be an appropriate model to follow?

2.25 There could be merit in price control decisions being appealed directly to the Competition Commission (and its successor body, the CMA). The current process is anomalous and results in considerable delay and extra costs, including both at the start of the process before a reference is made to the Competition Commission and at the end of the process where the CAT always conducts a review of the Competition Commission's determination. There can also be delay and extra cost in seeking rulings from the CAT on points that arise during the Competition Commission process. At the same time, though, the Competition Commission currently only has jurisdiction over "specified price control matters". This means that it is not uncommon for a single price control decision to result in grounds of appeal that need to be determined by both the CAT and Competition Commission simultaneously. For a direct appeal to the Competition Commission (and its successor, the CMA) to work effectively, we would suggest that either all communications price control appeals need to go to the Competition Commission/the CMA or there needs to be a process for co-ordinating appeals simultaneously progressing in the Competition Commission/the CMA and CAT and for transferring matters between the two. There may otherwise be an increase in appeals to

ensure that there is no risk of an appeal being dismissed for being brought in the wrong forum.

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

2.26 Yes (subject to our responses to questions 17 and 19 above).

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

2.27 The CLA does not have any strong view on this question, although it may well be appropriate to have Energy Code modification appeals to be heard by the CAT in the interests of consistency and streamlining.

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

Q.23 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate appeal body to hear enforcement appeals?

2.28 We respond to questions 22 and 23 together.

2.29 We agree that there are advantages in having a single appeal body hearing appeals against enforcement decisions given the similarity of the issues that are likely to arise. We consider that it is likely to be best for the CAT to hear appeals against enforcement decisions since there will often also be overlaps with issues raised in appeals against ex

ante regulatory decisions. The CAT will also have useful prior knowledge of the relevant industries and regulatory regimes.

Q.24 Bearing in mind the proposals already agreed by the NI Executive and the legislative process which is underway covering enforcement appeals relating to financial penalties, are any further changes required in Northern Ireland?

2.30 The CLA does not have any comment on this question.

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

Q.26 Do you think the High Court (or Court of Session in Scotland or High Court of Northern Ireland) or the CAT would be the most appropriate appeal body to hear dispute resolution appeals?

2.31 We respond to questions 25 and 26 together.

2.32 We agree that there are advantages in having a single appeal body hearing dispute resolution appeals given the similarity of the issues that are likely to arise. We consider that it is likely to be best for the CAT to hear dispute resolution appeals since there will often also be overlaps with issues raised in appeals against ex ante regulatory decisions. Indeed, there are numerous such examples in the communications sector. For example, there have been simultaneous dispute resolution appeals and ex ante regulatory decision appeals in relation to both mobile termination rates and partial private circuits. The CAT will also have useful prior knowledge of the relevant industries and regulatory regimes.

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

2.33 We agree that the CAT should have general jurisdiction over all decisions under the Competition Act. Given that the CAT is to have power to grant warrants, it is anomalous that decision-making in the middle of an investigation (*e.g.*, the terms of a section 26 notice) requires review by the High Court, while decision-making at the beginning and end of cases is subject to the CAT's review. Moreover, in those cases where it is unclear whether the regulator has in fact taken a final decision on the merits (*e.g.*, the *Cityhook* case), it is unsatisfactory that a challenger has to hedge their bets by bringing parallel challenges before the CAT and the High Court.

GETTING DECISIONS AND INCENTIVES RIGHT (CHAPTER 6)

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

Q.29 If so, how do you see such rings operating? Should there be a role for the CAT in supervising them? Who should they be extended to and what sanctions should be available for the breach of such rings?

2.34 We respond to questions 28 and 29 together.

2.35 We would support the relevant agencies at the administrative stage having the option of using confidentiality rings in appropriate cases. The existing process means that those appealing regulatory decisions often do so based on incomplete information. When further information becomes available in the appeal it can result in substantial changes in

the appeal. Further, the parties appealing might not have appealed in some cases if they had seen the information beforehand.

2.36 However, confidentiality rings are by no means appropriate in all cases and there are practical and legal issues with creating confidentiality rings at the administrative stage – indeed, such rings can create more issues than they resolve. In certain cases, administrative decisions may need to be adopted on the basis of information that cannot be shared among the parties. Due process concerns can arise where decisions are taken that significantly affect the interests of a particular party on the basis of information only seen by that party's external advisor. Equally, sharing certain information among external advisors may simply be redundant where only the parties to the proceedings are in a position to interpret and/or to comment on the information being shared. Regulators may also be concerned that disclosure in the absence of a court order may breach statutory restrictions on the use of information obtained with compulsory powers. For these (and other) reasons, we consider that it would be beneficial for the CAT to be responsible for supervising confidentiality rings at the administrative stage.

2.37 We appreciate that there may be concerns about the ability to impose effective sanctions if confidentiality restrictions are not respected. It would nevertheless be possible to introduce statutory provisions so that breaches of confidentiality rings are subject to financial penalties. This is an area that merits further consideration and consultation.

Q.30 Do you agree that the factors the CAT should take into account in exercising its discretion to admit new evidence in antitrust and Communications Act cases should be set out in statute along the lines proposed?

2.38 We do not agree. The Consultation suggests an analogy between "new evidence" in this context and "new evidence" in the context of an appeal from a court of first instance to a court of appeal. Such an analogy is inapposite in the circumstances of an appeal from a regulator. Information may be adduced for the first time on appeal simply because the parties did not and could not understand its relevance and/or importance until the regulator published its decision. To deny parties the ability to adduce such evidence on appeal, in response to the decision made (or in response to an appeal against the decision), could be self-evidently unjust.

2.39 We note that it is proposed that parties should be able to adduce new evidence where it could not reasonably have been expected to have been adduced at the administrative stage, but also note that that test will in practice generate considerable litigation and draw the CAT into an (otherwise unnecessary) enquiry into the details of the conduct of the administrative procedure in order, for example, to resolve claims that the party concerned could not have been expected to realise at that stage that particular evidence was likely to be relevant. We further note that there is very little, if any, evidence that parties have sought to gain a tactical advantage by deliberately withholding relevant evidence until the appeal stage.

2.40 In general, we note that the CAT's existing approach to new evidence has been endorsed by the Court of Appeal in *British Telecommunications Plc v Ofcom*[8] and we see no justification for adopting a different approach.

[8] *British Telecommunications Plc v OFCOM* [2011] EWCA Civ 245.

Q.31 Do you agree that the approach to new evidence in Schedule 2 to the Civil Aviation Act 2012 should be applied to other price control appeals?

2.41 We do not agree. The approach in the Civil Aviation Act 2012 is untested and there is no particular reason to suppose that it will work better than the existing approach. Further, the price control process adopted by the CAA arguably involves more intensive engagement than is the case with some regulators, such that the approach in the Civil Aviation Act 2012 may be more appropriate for aviation.

Q.32 Do you agree that when successful the regulator should be awarded its costs unless the regulator's conduct can be characterised as being unreasonable or there are exceptional circumstances; and that when unsuccessful, costs should not be awarded against it unless the regulator's conduct can be characterised as having been unreasonable, unless there are exceptional circumstances?

2.42 We do not agree. The right to recover costs should be symmetric. A successful appellant should not be penalised by having to bear its own costs. Further, one-way costs shifting would create inappropriate incentives for the conduct of appeals. For example, the regulator would have an incentive to put the appellant to as much cost as possible, which is liable to extend the appeal process. If regulators are concerned that the costs bills that they have to pay are excessive, then the appropriate course is for them to challenge the amount of such bills; we do not believe that the CAT would be anything other than sympathetic to a regulator confronted with an excessive costs claim.

2.43 We also share the CAT's concern that the principal effect of an asymmetric costs rule of the type proposed would be to deter smaller businesses from exercising their right to

appeal. In contrast, changes to the costs rules will not deter very large companies from appealing in cases of great commercial value to them.

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

2.44 The CLA sees no reason why regulators should not claim their costs (including internal legal costs) as they deem appropriate. The CAT's rules are flexible and can deal with such claims. We presume that the CAT would deal in the same way with a claim for internal legal costs by either a regulator or a private business.

Q.34 Do you agree that the administrative bodies should be more active in scrutinising appeal grounds and should where appropriate challenge them at the CAT at an early stage?

2.45 We have no reason to believe that the administrative bodies are failing to scrutinise appeal grounds at an early stage. Further, additional challenges at an early stage are at least as likely to delay and extend proceedings as bring them to an early end. Indeed, the success rate of appeals before the CAT is quite high, which suggests that there is not a problem with obviously weak appeals being brought.

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

2.46 We do not consider that it would be appropriate for the CAT to act of its own initiative where the respondent has not itself considered it appropriate to seek a strike-out. To do so would risk creating an impression of a partial CAT unless there were a preliminary

assessment or permission hearing in every case, which would undoubtedly extend and delay the progress of most appeals. The CAT already has sufficiently flexible rules that enable it to indicate to parties if it considers that there is no merit in particular grounds of appeal. Moreover, we believe that businesses bringing appeals before the CAT are typically well advised by reputable and serious-minded external lawyers and therefore the risk of hopeless or frivolous cases being brought is small or non-existent.

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

2.47 We generally support the principles proposed for decision-making in antitrust cases. The more akin regulatory cases are to antitrust cases, the more likely it would be appropriate to apply the same principles to such regulatory cases.

Q.37 Are there other ways in which regulators could consult more effectively and transparently at an earlier stage, and could such moves be expected to reduce the number of appeals?

2.48 More transparent consultation could reduce the number of appeals. The publication of draft decisions in appropriate cases can be helpful and the extension of confidentiality rings would be beneficial.

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

2.49 We are not convinced that any compelling need has been identified. Regulators already have extensive powers that are not necessarily used as effectively as they could be. We note, for example, that Ofcom has historically made relatively little use of its powers to

demand information under section 135 of the Communications Act 2003 and has imposed very few penalties for failure to comply even though it has suggested in some appeals that it has received less than full cooperation.

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

2.50 In practice, regulators adopt very few non-infringement decisions – indeed, the OFT tends to close investigations on grounds of priority. In the rare instances where a regulator does adopt a non-infringement decision, it will because the regulator considered the case to have sufficient importance and precedential value (so that it is likely to be an appropriate use of the CAT's resources to correct any errors made in that decision). The CLA considers that it would be anomalous to permit full merits appeals for infringement decisions but not for such non-infringement decisions. In the *Burgess* case, a finding by the OFT that there had been no abuse of dominance was overturned by the CAT on the grounds that the OFT's analysis of the relevant geographic market and the issue of abuse was inadequately supported by the evidence and contained errors of fact and law.[9] It is vital that there remains a check on incorrect decisions in future.

2.51 The Consultation paper argues that, where a regulator has issued a non-infringement or no grounds for action decision, interested parties would nevertheless remain free to challenge the agreement or conduct in court. However, such interested parties may well face challenges in establishing their substantive case in court in the face of a decision to the contrary by the relevant regulator. Further, particularly where the complainant is a

[9] *Burgess v OFT* [2005] CAT 25. The CAT also found procedural deficiencies with the decision.

small business (such as Burgess), it is wholly unrealistic to expect it to incur the expense and risk of stand-alone competition litigation in order to establish that a regulator's decision was incorrect.

MINIMISING THE LENGTH AND COST OF CASES (CHAPTER 7)

Q.40 Do you agree with the proposal that straightforward cases heard by the CAT should have a target time limit of 6 months, instead of the existing 9 months?

2.52 We do not see a need to reduce the target. As we have said in the introductory section to this response, the experience of CLA members is that majority of cases are already dealt with as quickly as is realistic and consistent with proper preparation of the parties' cases, and there could be disadvantages to imposing excessively tight targets, such as incentives to refer decisions back to regulators for reconsideration rather than reaching a final view on the first appeal. We also note that imposing tighter timetables would likely have a significant impact on regulators' resources so that, for example, regulators would need to be in a position to throw considerable resources into a case at very short notice, including at times of the year when staff generally expect to be allowed time off (such as the summer[10] and Christmas). We suspect that, given the increasing constraints on regulators' resources, this is unlikely to be realistic in many cases. It is also worth noting that delays in cases are often beyond the power of the CAT, for example, in relation to timetabling issues.

[10] We note, for example, that in the present *Eurotunnel* appeal, the Competition Commission resisted an application for a hearing in August on the basis, *inter alia*, of staff absence during that period.

2.53 More generally, we would note that the CAT does move very quickly when needed as, for example, in the case of merger appeals. In non-urgent appeals, the CAT has improved its performance following a period of longer appeal procedures in the mid-2000s and is now generally regarded as striking the right balance between speed and allowing the proper time for preparation of the parties' cases.

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

2.54 No, for the same reasons expressed in response to question 40.

Q.42 Do you agree with the proposal to provide the CAT with the power to limit the amount of evidence and expert witnesses, including in public law cases?

2.55 We do not believe the CAT needs any additional powers in this respect. It already has sufficient case management powers and does exercise them, for example, to limit the number of experts called. Parties must be given some flexibility in how they construct their cases or else justice will be denied. Moreover, overly rigid rules could be counterproductive. Thus, for example, a strict limit on the number of factual witnesses to be allowed could result in more second-hand, less well-informed evidence.

Q.43 What are your views on a voluntary fast-track procedure where parties themselves agree to limit the amount of evidence including from witnesses, and potentially capping costs?

2.56 We have no objection but we suspect it will rarely be used in appeals, not least since the matters in issue are often highly significant for the businesses concerned. We note that

parties already have considerable scope to limit the issues raised when they frame their notices of appeal.

Q.44 Do you agree with the proposal to amend the time limit for price control appeals in the communications sector to 6 months with the possibility of a 2 month extension?

2.57 We have seen little to suggest that the Competition Commission is dilatory in progressing appeals and, in our experience, it sets firm deadlines for parties that it rarely ever extends. Shorter time limits risk damaging the quality of the Competition Commission's decisions.

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

2.58 We are not convinced that the Competition Commission needs further case management powers, although there may be a stronger case for giving more powers if appeals are to be made direct to the Competition Commission.

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The CLA would be happy to discuss any of the comments provided above in more detail if it would be of assistance to BIS.