RESPONSE TO THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS' CONSULTATION ON STREAMLINING REGULATORY AND COMPETITION APPEALS

1 INTRODUCTION AND EXECUTIVE SUMMARY

1.1 Berwin Leighton Paisner LLP ("**BLP**") welcomes the opportunity to submit comments on the Department for Business Innovation & Skills' ("**BIS**") consultation *"Streamlining Regulatory and Competition Appeals"* dated 19 June 2013 (the "**Consultation**"). BLP has considerable experience of representing clients in judicial review litigation, and in competition and regulatory appeals.

1.2 Our comments are confined to the issues in the Consultation that we believe are most significant, both to the economy generally and based on our specific sector knowledge. However, where our response relates to particular questions posed in the Consultation, these are referenced accordingly. We have also sought to answer the questions in the order set out in the Consultation where possible.

1.3 We welcome several of the proposals made in the Consultation. Nevertheless we are concerned by a number of significant shortcomings, in particular in relation to the following:

(a) **No clear case for change:** the Consultation fails to demonstrate that there is a problem with the current bases or procedures for regulatory and Competition Act 1998 appeals;

(b) **Failure to examine lost opportunity costs:** the Consultation does not adequately consider the negative impact of decisions that would go unchallenged as a result of the proposed streamlined avenues of appeal;

(c) **Unwarranted reduction in review rights:** the suggested shift in the standard of review, especially for those appeals currently heard on the merits and, in particular, appeals of decisions made under the Competition Act 1998, is unwarranted and contradicts recent policy;

(d) **Asymmetrical cost proposals:** the proposals relating to costs awards are asymmetrical as between regulators and appellants and are likely to deter meritorious appeals by limiting cost recovery from successful appeals; and

(e) **Reduction in procedural robustness:** a presumption that matters should be resolved on the papers wherever possible (for example for costs awards and straightforward matters), and that oral hearings should be kept to an absolute minimum risks undermining parties' rights.

1.4 The Consultation does not appear to focus on the importance of ensuring that initial regulatory decisions are robust, well-reasoned and clear as a means of reducing the number of alleged unmeritorious appeals. Improved processes at the regulatory level would likely have a greater impact on reducing the requirement for and incentive to appeal, which is one of the key aims of the Consultation.

1.5 Our comments are divided into the relevant sections of the Consultation document, namely:

(a) Standard of Review;

(b) Appeal Bodies and Routes of Appeal;

(c) Getting Decisions and Incentives Rights; and

(d) Minimising the Length and Cost of Cases.

1.6 We would be very pleased to provide further information in relation to this response should BIS require.

2 STANDARD OF REVIEW

No clear case for change

2.1 The Consultation appears to proceed from the premise that:

(a) there is a problem (that too many appeals are brought);

(b) this is caused by overly generous or pro-appellant rules; and

(c) therefore, the way to solve the "problem" is to amend the bases of appeal.

2.2 However, there are a number of difficulties with this approach.

2.3 First, the "problem" appears to be primarily in the communications sector only.[1] While there are more appeals within the communications sector, there is a higher proportion of appeals within the aviation sector, and a large number of appeals in each of the energy, rail and water sectors.[2] Moreover, even within the communications sector, only around 15% of Ofcom decisions are appealed.[3] These statistics do not suggest a pressing "problem".

2.4 Second, it is unclear that, even if there *is* an appeal "problem" in the communications sector, this justifies extensive legal and procedural reform of appeals *across* sectors.

2.5 Finally, the Consultation, in many respects, approaches the "problem" from the wrong side. There is no substantive analysis of the role of the initial regulatory decision as a catalyst for appeals. Nor is there any clear suggestion that in order to address a "problem" that manifests itself in appeals against decisions, it is important to ensure that those decisions are robust, well-reasoned and clear.

2.6 We acknowledge that there may be some potential benefits to rationalising routes of appeal and minimising procedural duplication and uncertainty.[4] However, consistency for its own sake should not justify significant reforms of the appeal process across sectors of the economy. In particular, it is not clear that there are grounds for reduction of the legal basis for appeals across decision types *because* such reform would help to address complexity and/or investor uncertainty.[5]

2.7 Consequently, we do not consider that the Consultation has identified a substantial "problem" that would require the proposed legal and procedural reforms.

Standard of Review Across Different Regulatory Appeals (Question 1)

2.8 In relation to Question 1 of the Consultation, we do not agree with BIS that differences in the standard of review across sectors is driven by incidental factors.[6] We understand that there are

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1 See Consultation, Chapter 3 Summary., where the Consultation states "*there appear to be strong incentives on the parties to appeal decisions*".
2 See Consultation, paragraphs 3.6 and Figure 3.2. The Consultation acknowledges the higher proportion of appeals of Civil Aviation Authority decisions.
3 Ibid.
4 See Consultation paragraph 3.28 and Figure 3.5.
5 Ibid.
6 See Consultation, paragraph 4.5.

genuine policy reasons why different sectors use differing appeal routes.

2.9 In fact, we see no strong case for appeals in all regulated sectors to be dealt with in the same way, given the diverse regulatory regimes that apply and the varying issues that may be the subject of appeals. Harmonisation of appeals across all sectors, without a review of the impact for each sector, is not desirable.

Length, Cost and Effectiveness of Judicial Review (Questions 1 and 3)

2.10 A judicial review is likely to be quicker than a full merits review of a regulatory decision because both the legal grounds and procedural framework for judicial review are limited as compared to substantive reviews. For example, a judicial review in most cases will involve the use of fewer witnesses and provide less scope for introducing expert evidence than a merits review. In particular, judicial review is concerned primarily with the administration and procedure of decision-making, rather than the substance of those decisions.

2.11 However, while the introduction of judicial review as a default means of appeal for certain regulatory decisions may reduce direct *litigation* costs, it is unclear that it would materially reduce *total* costs for both the regulator and the affected party (or parties) when assessed against the total time and cost incurred in retaking any decision that is remitted to the relevant regulator. Any such remittal has two significant practical consequences:

(a) first, the relevant regulator must retake the decision, which requires the allocation of resources and time. The net reduction in cost and time for the regulator in retaking that decision as compared to defending a full merits review may be negligible or negative; and

(b) second, the appellant will likely engage heavily on those aspects of the second decision that it challenged. This may entail the appointment of expert advisers (for example, economists, forensic accountants etc.) to the same level, or in excess of, any such appointments made in the initial decision. Again, the net reduction in time and cost for the appellant as compared to bringing a full merits review before the court may therefore become negligible and/or negative.

2.12 Notwithstanding this practical concern, we do not consider that judicial review would always provide an adequate ground for reviewing regulatory decisions that frequently involve detailed consideration of complex legal and economic factors. While moving away from a merits review may in fact reduce the number of appeals, the Consultation fails to consider a direct correlative impact, namely an increased number of "wrong" decisions that may go unchallenged.

2.13 While it is possible for judicial review to adapt to changing legal practice and requirements,[7] judicial review is not the appropriate forum for detailed consideration of the merits of the decision. Consequently, absent the prospect of a full merits review, regulatory decisions may concentrate on administrative propriety rather than substance.

2.14 In particular, there is a risk that, absent substantive review on appeal, regulatory decisions taken by regulators within the same sector and in relation to similar issues may exhibit "confirmation bias". That is, investigators and decision makers faced with an issue on which they had previously made a decision and which had not been challenged by way of judicial or full merits review, may approach a new case through the prism of their previous decisions without focusing on the particular facts of the case to the degree that they may have when facing a possible full merits challenge.

[7] See Consultation, paragraph 4.19, quoting Lord Diplock's judgment in Council of Civil Service Unions.

2.15 Furthermore, a merits review is designed to ensure that the "right" decision has been reached. This is the raison d'être of the appeal system and fundamentally important to ensure access to justice and appellants' rights. It is therefore not appropriate to change the standard of review merely to reduce the time or money spent on appeal, where the appeal is of a significant regulatory decision and demands a full review.

Focused and Specified Grounds of Appeal (Question 2)

2.16 We have a number of concerns in relation to the proposed "focused grounds of appeal".

2.17 First, we believe that the proposed specific grounds of appeal set out in the Consultation risk causing further uncertainty - and therefore disputes - if adopted. In respect of the proposed text set out in Box 4.2 of the Consultation, we envisage disputes arising in particular regarding the materiality threshold imposed in the draft legislation.

2.18 Second, the "focused" grounds outlined in the Consultation are, in many respects, broadly comparable to existing judicial review grounds. As such, it is not clear how the specific grounds of appeal would provide an effective review mechanism if they focus challenges on grounds of procedure rather than substance. This is even recognised in the Consultation itself when BIS states *"in some cases there may either be a legal requirement, or a policy rationale, for a more intensive standard of review than the traditional form of judicial review….which focuses on the process of decision making"*.[8] The specific grounds of review identified in the Consultation are similarly constrained.

2.19 The specified grounds therefore risk "falling between two stools" and neither providing enhanced grounds of appeal nor creating certainty in respect of their scope.

2.20 Consequently, for the reasons outlined in this document, we support strongly retaining the existing grounds of appeal for all regulatory decisions.

Competition Act 1998 Decisions (Questions 6 and 7)

2.21 We do not agree that the grounds of appeal for Competition Act 1998 decisions should be amended. In particular, given the shortcomings of the proposed imposition of judicial review or focused "specified grounds" outlined above, there is no merit to apply those grounds to Competition Act 1998 appeals.

2.22 It is essential to maintain an appeal system that is able to consider the merits of antitrust decisions. Unlike other forms of regulatory appeals, Competition Act 1998 infringement decisions provide clear grounds for follow-on damages actions. Regulatory decisions under the Competition Act 1998 cannot, therefore, be viewed in isolation. The natural correlation of any reduction in the grounds of Competition Act 1998 appeals would be to reduce the number of overturned decisions and strengthen the position of follow-on damages litigants as against the addressees of infringement decisions. Combined with the Government's proposed reform of the private damages regime to make bringing follow-on damages claims more accessible,[9] undertakings found to have infringed competition law would potentially face two disadvantages:

(a) reduced ability to appeal infringement decisions (even with meritorious claims); and

(b) increased liability under follow-on damages claims founded on Competition Act 1998

[8] Consultation, paragraph 4.20.
[9] See Draft Consumer Rights Bill 2013 (BIS/13/925), June 2013.

decisions that may, but for the proposed reforms set out in the Consultation, have been appealed and/or overturned.

2.23 In that regard, we support the Government's recent policy proposal to retain a full merits review for Competition Act 1998 appeals, as set out in its response to the consultation on the competition regime that led to the Enterprise and Regulatory Reform Act (the "**ERRA**"),[10] but which is inconsistent with the Government's approach in the current Consultation.

2.24 The level of scrutiny offered by the current appeal system has proved justified on a number of occasions. Even recently, in both *Dairy Products*[11] and *Tobacco*,[12] a large part of the OFT's decision and the entire decision respectively were overturned on appeal to the Competition Appeal Tribunal (the "**CAT**") on the merits, not just on procedural grounds.

2.25 Indeed, these cases have proved instrumental in helping to enhance the procedures of the OFT, which recently introduced number of changes to the review and decision processes.[13] The effect of the reforms on the standard of Competition Act 1998 decisions and appeals remains unclear, however, as the OFT has not yet completed any full Competition Act 1998 cases using these new procedures.

2.26 Additionally, the ERRA introduces significant structural and procedural reforms to the UK competition regime. The Competition and Markets Authority ("**CMA**") will take over the OFT's role in Competition Act 1998 cases and is expected to improve further administrative procedures in order to ensure that Competition Act 1998 decisions are as robust as possible. The CMA will have access to a deeper pool of investigators and decision makers, including CMA Panel members. This is likely to increase the quality of cases and decisions and improved decisions will likely reduce both the grounds and incentives for appeals.

2.27 Concurrent regulators will also be required to comply with the minimum decision making requirements of the ERRA (including separation between the investigation team/officers and decision makers) designed to increase internal scrutiny and decision quality. Concurrent regulators will also have greater access to expert support from the CMA and other regulators through secondments and enhanced opportunities for cooperative working. These reforms will help to create greater consistency of decisional process as between concurrent regulators and the primary competition authority and, once implemented, may impact both the grounds and incentives for appeals of Competition Act 1998 decisions.

2.28 Consequently, we believe it is premature to take action to amend rights of appeal before the reforms of investigation and decision making procedures introduced by the OFT, and bolstered by the ERRA, are implemented and tested in practice and, where necessary, tested in the courts.

2.29 Moreover, we agree with BIS that *"the standard of review to which regulatory decisions are subjected, are central to achieving [the] balance between appeal rights and effective regulatory decision-making"*.[14] In particular in the case of appeals of decisions taken under the Competition Act 1998, this balance is not achieved by moving away from a merits based review.

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[10] See, for example, *Growth, Competition and the Competition Regime: Government Response to Consultation,* March 2012: "The Government has no plans to amend appeal rights" (p.9).
[11] Case 1188/1/1/11 Tesco Stores Ltd v OFT [2012] CAT 31.
[12] Cases 1160/1/1/10 Imperial Tobacco Ltd v OFT [2011] CAT 41.
[13] See *Review of the OFT's investigation procedures in competition cases – a consultation paper* (OFT1263con2), 28 March 2012; and *Guide to the OFT's investigation procedures in competition cases* (OFT1263), 16 October 2012.
[14] Consultation, paragraph 4.4

Price Control Decisions in Communications, Aviation, Energy, and Postal Services

2.30 In principle, the ability to appeal *aspects* of price control decisions (rather than having to refer the entire decision) would likely be attractive, and would reduce uncertainty and costs, and increase efficiency.

2.31 However, it is crucial that, irrespective of the mechanism of price control reviews (i.e., whether based on appeal of part or inquisitorial reference of whole decision), price control decisions remain subject to full merits review. This is in part because:

(a) as recognised at paragraph 4.73 of the Consultation, these decisions require a substantial and detailed analysis of economic and legal issues. As such, they warrant the expertise of the CMA Panel to review the detailed analysis that stands behind the regulator's initial decision;

(b) regulated businesses cannot determine how much money they will make/recover without a price control, and that business will remain bound by that price control (subject to interim determinations) for between 5 and 8 years. If the regulator errs in its analysis, it can threaten the commercial viability of the business concerned;

(c) it is vital that any regulated business is in a position to finance its functions, and without a full merits review the resultant uncertainty may cause a dip in investor confidence;

(d) the right of appeal with respect to the specific consumer, economic and legal issues entailed in a price control decision would be lost without a review on the merits;

(e) the ERRA reforms establishing the CMA should benefit from continuity with the existing expertise and experience of the Competition Commission (the "**CC**"). Combined with the likely administrative efficiencies of the new CMA, the price control appeal process should benefit from even more effective review under the CMA than the CC;

(f) replacing the CC/CMA review with a judicial appeal to the CAT would risk undermining access to the breadth and depth of expertise of the CC/CMA Panel, economists and other specialists able to ensure that the price control decision taken is correct; and

(g) as set out at paragraphs 2.16 to 2.19 above, the "specific grounds of appeal" do not sufficiently permit the full complexities of the issues to be addressed.

3 APPEAL BODIES AND ROUTES OF APPEAL

CAT Governance (Questions 16 and 17)

3.1 We welcome some of the proposals made in the Consultation in respect of amendments to CAT governance.

3.2 With regard to Question 16, we agree that the CAT Chairman should not be limited to a tenure of eight years. Judicial office holders in the CAT acquire a significant amount of sector specific expertise and it is disappointing that this expertise must be lost at the end of an eight year term.

3.3 In respect of Question 17, we believe that there may be circumstances in which it could be appropriate for the CAT to sit with a single judge. However, this would require further consideration and clear guidance would need to be drafted to provide certainty in this area.

Price Control and Licence Modification Decisions (Question 18)

3.4 We agree with BIS that the CC is best placed to continue to hear all appeals on price control and licence modification decisions.

3.5 The conditions of a company's licence will affect that company's ability to finance itself on capital markets. It is vitally therefore important to have a consistent and effective appeal mechanism in respect of licence amendments. The CC – through its well established process, including oral hearings – has to date ensured this effective appeal mechanism. To shift jurisdiction from the CC may have a detrimental impact on the attractiveness of investment in UK utilities.

3.6 Further, as pointed out in the Consultation itself, *"the Competition Commission is well-placed to undertake [the] complex economic, legal and financial analysis required"* in such cases.[15]

3.7 Any concerns about the length of appeals made to the CC in respect of licence modification or price control decisions could also be addressed by more targeted reforms, including revised timetable requirements.

3.8 In addition, there may be merit in providing the CC with an ability to review common themes and issues that arise across different regulated sectors. For example, it may be efficient for the CC to review and set out general "guidelines" or "position papers" (which may be subject to rebuttal in individual cases) on issues such as:

(a) calculation of the Weighted Average Cost of Capital;

(b) how to determine "financeability" when determining the ability of a regulated company to "finance its functions"; and

(c) calculation of financing costs.

Price Control Decisions in the Communications Sector (Question 19)

3.9 We are generally supportive of the proposal in Question 19 that appeals against price control decisions in the communications sector should be simplified so that such appeals go directly to the CC, rather than via the CAT.

3.10 However, BIS needs to consider carefully how to manage any jurisdictional issues, for example where an appeal relates to both price control and non-price control matters. If an appeal were forced to be split and brought in two parts, the first brought to the CC and the second to the CAT, this may in fact increase complexity and therefore the length and cost of the appeal process, which would not be desirable.

Ex Ante Regulatory Decisions (Question 21)

3.11 In respect of Question 21, we consider that appeals to the CAT would be appropriate in respect of Energy Code modification decisions.

[15] Consultation, paragraph 5.25

4 GETTING DECISIONS AND INCENTIVES RIGHT

Confidentiality Rings (Question 28)

4.1 BIS explicitly recognises that *"decisions made by competition authorities and economic regulators may go to the heart of how a business is run…They are significant for those directly affected by the decisions, and for the wider economy and public"*.[16] We agree with this assessment.

4.2 It is therefore essential that all possible steps are taken to ensure the efficiency and quality of regulatory decision making. As such, the increased use of confidentiality rings as a means of providing access to confidential documents at the administrative stage of decision making may be justified.

4.3 However, such measures would have to be carefully considered – and appropriate rules devised – in order to ensure that individuals integral to the appeal process are within the confidentiality ring. If only external legal advisers may be part of the confidentiality ring, this could cause considerable difficulty, specifically in relation to:

(a) external legal advisers being able to provide suitable legal advice within the bounds of the confidentiality ring; and

(b) obtaining instructions to act from a client outside of the confidentiality ring.

4.4 We would therefore propose that in-house counsel should be within the confidentiality ring as a general principle. In addition, price control, licence modification, licence breach and Competition Act 1998 decisions typically involve the close analysis of detailed economic, financial and technical information. As such, it is important that those individuals (either external advisers such as economists or accountants, or internal representatives) who need access to the information in order to be able to understand and respond to the regulator's case are also within the confidentiality ring where appropriate.

4.5 We consider that the principle of fair access to information would favour a wider extension of access to confidential information in certain regulatory decisions. We further consider that there is unlikely to be a material increase in risk of unlawful disclosure of confidential information in such circumstances, provided that there are clear undertakings in place that outline the limits of use of the information, coupled with appropriate sanctions for breach of confidentiality.

New Evidence (Question 30)

4.6 BIS states in the Consultation that:

> *"To…avoid excessive incentives to appeal, as well as limiting the material before the appeal body so that the appeal is more manageable for it and the parties, in the Government's view appeal bodies should not admit on appeal evidence that was not considered by the administrative authority prior to its decision unless it can be shown that it is significant and relevant to the aspect of the decision which is being appealed and good reasons why the evidence was not produced at the administrative phase are provided."* [17]

[16] Consultation, paragraph 4.1
[17] Consultation, paragraph 6.10

4.7 However, as explicitly recognised by BIS, some cases will require new evidence to be considered on appeal, and furthermore *"the Government has seen no evidence that parties are purposely holding back evidence until the appeal stage"*.[18] We therefore believe that the current rules for adducing new evidence on appeal are appropriate and fair. In our experience, the current rules generally permit pertinent evidence to be adduced and provide sufficient clarity on admissibility.

4.8 As noted in paragraph 2.24, there have been a number of cases in which the new or restated evidence has proved central to the outcome of an appeal. The existing rules are, we believe, appropriate and help to facilitate the rights of defence.

4.9 Furthermore, the evidence that change is required in this area is founded upon extreme examples of case-law. The *BT v Ofcom* [19] case cited in the Consultation involved the proposed admission of extensive new evidence. As such it is not a typical example of how most cases proceed with respect to adducing new evidence on appeal.

Costs (Questions 32 and 33)

4.10 We do not agree that a regulator, where successful on appeal, should be awarded its costs as the norm but only have costs awarded against it when its conduct can be characterised as unreasonable or there are other exceptional circumstances.

4.11 Regulators must be held to account for wrong decisions (or decisions taken on the wrong bases). The risk of being unable to claim costs is likely to act as a significant disincentive for those subject to a decision from bringing what may in fact be a meritorious claim.

4.12 This disincentive may be particularly acute for parties in low-profit margin industries, or for small or medium sized enterprises. For example, within the water sector, licensed suppliers typically operate a low-margin business model. This is likely to heighten commercial sensitivity to changes in regulatory and legal costs rules. The introduction of a costs model that favours the regulator is likely to disincentivise small competitors from bringing well-founded appeals of regulatory decisions that affect them (for example price control, licence modification or bulk supply determinations) if they face a real risk of doubling their legal costs. The impact on incentives is likely to be compounded when considered in the context of new legal bases for appeal (e.g., judicial review) that make appeals more difficult to bring. Any such outcome would not appear to be consistent with the Government's support for increased competition in the retail and wholesale water sector.[20]

4.13 As BIS appreciates, the cost burden of bringing an appeal can be significant. Abiding by the general civil litigation principle that the "loser pays" would ensure that the interests of justice are best served by fairly allocating this burden.

4.14 Similarly, although costs recovery should be generally available for the successful party on appeal, we believe that only the reasonable costs of litigation should be recoverable. A regulator should not be allowed to claim its full costs, including internal legal costs, without detailed investigation.

4.15 Where the costs incurred by a regulator are similar in nature to those that would be incurred by external legal advisers to the other party, then these costs could be assessed and awarded. However, the value attributed to that work would have to be carefully scrutinised.

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[18] Consultation, paragraph 3.23.
[19] [2011] EWCA Civ 245.
[20] See Water White Paper, 8 December 2011 and the current Water Bill 2013.

Scrutinising Grounds of Appeal (Questions 34 and 35)

4.16 We do not agree that it would be appropriate for the CAT to reject appeals which stand little chance of success without first reviewing appropriate evidence and submissions by each of the parties, in a manner similar to a summary judgment application in civil litigation.

4.17 The result of the proposal outlined in this section of the Consultation, when combined with a potential reduction in the standard of review, appears likely disproportionately to affect appellant companies rather than regulators or competition authorities. In particular, appellants would face a more difficult threshold to establish a good, arguable case.

4.18 As the Consultation acknowledges, "*in price control cases, it is also often the case that parties are unable to see much of the information that regulators take into account when making their decisions*". Consequently, appellants may be unable to adduce sufficient evidence to maintain a case "on the papers" alone, as compared with an ability to seek later disclosure of, and therefore be able to adduce at a later stage in the case, more detailed and relevant evidence.

4.19 We would urge BIS to consider carefully how such a proposal would operate in practice.

Competition and Regulatory Decision Making (Questions 26 to 38)

4.20 The changes in process provided in the ERRA are welcome and we anticipate will bring effective improvements to the administrative decision making when the CMA is active.

4.21 Of course, and as mentioned at paragraph 2.25 to 2.27 above, these changes are as yet untested. Therefore, we believe it would be premature to apply the reforms of the ERRA to other aspects of regulatory decision making.

4.22 However, the effect of the ERRA reforms should be kept under close supervision, with a view to determining whether the principles could be usefully applied elsewhere.[21] In particular, we consider that a change in decision maker between investigatory/research based work and providing recommendations and actually taking a decision about whether or not to implement those recommendations could instil increased robustness, even in ex ante decision making.

Non-Infringement Decisions (Question 39)

4.23 We think it is important for non-infringement decisions to remain appealable. Non-infringement decisions are "active" rather than "passive" decisions; they have substantial legal and practical consequences and cannot be categorised as less important than an infringement decision. Indeed, as the Consultation notes,, *"as legal and economic findings they can give certainty as to the lawfulness of the conduct and this can have wider value than just in relation to the particular agreement or activity…concerned"*.[22]

4.24 Furthermore, a non-infringement decision may have a significant detrimental impact on the operations of third parties. Our experience indicates that third parties would be unlikely, after undertaking a cost-benefit analysis, to bring a standalone claim to challenge a potentially anticompetitive agreement or conduct given the significant burden involved.

4.25 It is inappropriate to compare as like-for-like bringing an appeal against a non-infringement

[21] See section 46 of the ERRA, which requires a review of the operation of Part 1 of the Competition Act 1998 within 5 years of the transfer of functions from the OFT to the CMA.

[22] Consultation, paragraph 6.37.

decision and bringing a standalone claim against potentially anti-competitive behaviour. In fact, pursuing a standalone claim would be particularly burdensome if, in the background, there was an unchallenged (and unchallengeable) non-infringement decision of a competition authority.

4.26 Consequently, we believe it is important that only those non-infringement decisions of sound reasoning and quality be relied upon by other market participants when determining their future behaviour.

5 MINIMISING THE LENGTH AND COST OF CASES

Oral Hearings

5.1 In the Consultation, BIS states that:

> *"The Government's view is that there should be a presumption that matters should be resolved on the papers wherever possible, for example for cost awards and straightforward matters, and that oral hearings should be kept to an absolute minimum to minimise the length and cost of appeals for all parties."* [23]

5.2 We fundamentally disagree with this statement. We also query whether the reduced right to an oral hearing may offend principles of due process.

5.3 Oral hearings are a vital aspect of any parties' right to be heard, and provide a key opportunity for an appellant to present their case. The time and cost associated with preparation for attending such hearings are commensurate with the benefit achieved by the opportunity for parties to advocate and have the opportunity to discuss their concerns directly before the decision maker.

Berwin Leighton Paisner LLP
11 September 2013

[23] Consultation, paragraph 7.18