

1. INTRODUCTION

- 1.1 The area of regulatory appeals is one which involves an important and delicate balancing of interests. On the one hand, those who are subject to the decision of a regulator must in the interest of justice have the right to challenge, if not the merits of the decision, at least the process by means of which the decision was reached. On the other hand, better regulation is not well served by a cumbersome many-layered appellate system capable of being used by disgruntled stakeholders to defer the implementation of essential decisions.
- 1.2 The Competition Authority does not intend to respond to every one of the questions posed by the Consultation Paper, many of which are outside its area of competence or experience. The Competition Authority has many functions which require the making of a decision, such as determining whether a proposed merger should be permitted or blocked; whether to grant a category declaration that a particular category of agreements, decisions or concerted practices does not infringe the competition rules; whether to initiate proceedings following an investigation; whether to refer a case to the DPP; whether to accept commitments in lieu of proceedings, etc. However, although each of these different functions may be subject to judicial review, only decisions relating to mergers and category declarations are subject to a statutory right of appeal. No such appeal has yet been taken.¹ Accordingly, the Competition Authority will not address any of the issues raised under the heading "*Evaluation of Current Appeals Mechanisms*." Instead, the Competition Authority will suggest one particular model for the consideration of the Department of the Taoiseach, and will also attempt to address the constitutional issue that might arise in Ireland in relation to that model.

¹ For a summary of the appeals procedures under the Competition Act, see the Consultation Paper on Regulatory Appeals, para 2.28 ff.

2. FINDING AN ALTERNATIVE TO THE CURRENT APPEALS MECHANISMS

- 2.1 The Consultation Paper describes a variety of appeals mechanisms for regulatory appeals. The Competition Authority suggests, however, that it might be possible to design a “one-size-fits-all” model.
- 2.2 The essential elements of a good appeals body in the area of regulation are (a) expertise in the relevant area; (b) efficiency; (c) finality.
- 2.3 It is clear that *expertise* can be provided by ensuring that the membership of any appeals body comprises persons who are expert in the areas of finance, energy, communications, competition, aviation and transport.
- 2.4 *Efficiency* can be ensured by robust procedures, good case management and tight time-limits.
- 2.5 *Finality* poses a difficulty, particularly in the context of any appeals body that is not a court. Because all citizens have a constitutional right of access to the courts, anyone affected by a decision of an administrative body has the right to seek judicial review. In the context of regulation, this can arise in two cases: first, the decision of the regulator itself can be reviewed; second, the decision of the appeals body, if it is not a court, is also capable of being reviewed.
- 2.6 It is clear therefore that an appellate body composed of experts would be capable of delivering a decision on appeal efficiently and with expertise, but the implementation of the decision would be open to being delayed by judicial review both at the point of the original decision and at the point of the decision on appeal. This difficulty would be greatly ameliorated if the appellate body was a court.
- 2.7 A good example of an appeals body which satisfies the three requirements of expertise, efficiency and finality is the UK Competition Appeal Tribunal (“CAT”). This body is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy. Its function is to hear and decide appeals and other applications or claims involving competition or economic regulatory issues.
- 2.8 The CAT combines the function of a tribunal with that of a panel of experts, choosing appropriate experts from its panel to hear each appeal. It is thus in a position to make judicial decisions that are nevertheless informed by persons who are expert in the relevant regulatory areas. In this way it satisfies the requirement of *expertise*
- 2.9 The requirement of *efficiency* is satisfied by robust and rigorously enforced procedures and case-management rules, which combine procedural fairness with strict time limits for the various stages of the appeal.²

² For further information, see *The Competition Appeal Tribunal Rules* (statutory instrument 2003 No. 1372) at www.catribunal.org.uk.

2.10 The requirement of *finality* is satisfied in two ways. First, the CAT can deal, not only with appeals on the merits, but also with appeals on the process by which the original decision was made, thus satisfying judicial review requirements. Second, although decisions of the CAT may themselves be appealed to a higher court,³ the right of appeal may only be made on a point of law or on the amount of a penalty, and the appeal can only be made with the permission of the CAT itself.

³ In England and Wales the appeal lies to the Court of Appeal; in Scotland, to the Court of Sessions and in Northern Ireland, to the Court of Appeal in Northern Ireland.

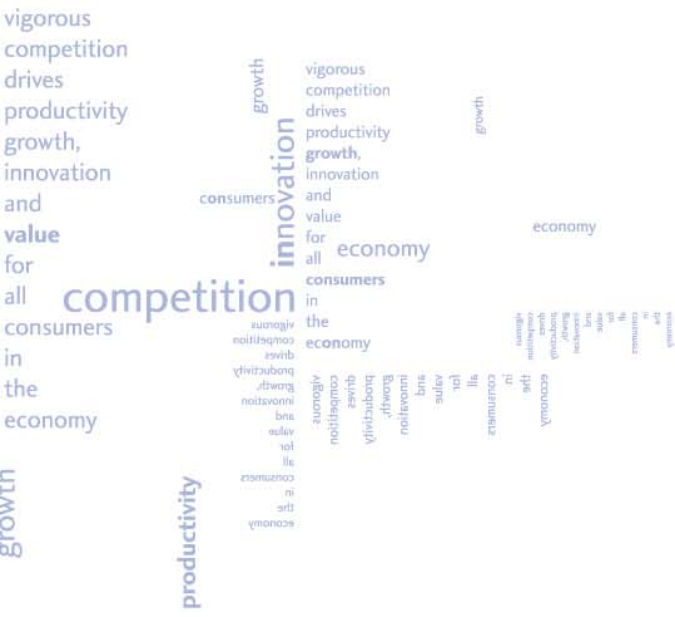
3. A POSSIBLE SOLUTION

- 3.1 Article 34.1 of Bunreacht na hEireann (the Irish Constitution) provides in part as follows:

Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution [...]

- 3.2 A body such as the CAT, composed of non-judicial experts, would be likely to fall foul of this provision, even if it were presided over by a judge, because in so far as it purported to administer justice, that justice would be administered not only by a judge but also by persons other than judges. Furthermore, the CAT itself is a tribunal rather than a division of the High Court and so might not be considered to be “a court established by law”.
- 3.3 To satisfy the requirements of Irish constitutional law it would be necessary first of all to create by law a specialist court.
- 3.4 The second problem – justice being administered by non-judges – might then be addressed by an arrangement analogous to the recent introduction of assessors in competition law cases, as provided for by the Rules of the Superior Courts.⁴ Order 63B, rule 23 now permits the Court when hearing competition cases to appoint an expert to assist the Court in clarifying matters in respect of which the expert has skill and experience. The expert may attend as much of the hearing as the Court requires, and may also be available afterwards to assist the judge.
- 3.5 It is important to note that the expert does not make any decision in the case. He is an adviser to the Court in areas where the Court itself lacks knowledge, skill or expertise.
- 3.6 Consideration might be given therefore to the creation of a court presided over by a constitutionally appointed High Court judge (a different judge might be drawn from time to time from among those currently dealing with the commercial and competition lists, according to availability). This court would then have available to it a body of persons who were expert in the relevant areas of regulation. These experts would not participate in the decision-making process of the appeals body: that would be the sole function of the judge. They would, however, attend the entirety of the appeal and would advise the judge in accordance with their areas of expertise. This suggestion would seem to have the merits of the CAT model (expertise, efficiency, finality) while at the same time avoiding the constitutional difficulties that such a model might give rise to.

⁴ The Rules of the Superior Courts (Competition Proceedings) 2005 (S.I. No. 130 of 2005)



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