Independent Review of Administrative Law

Response to the call for evidence

Joint submission by BT, Centrica, Heathrow, Sky and Vodafone

19 October 2020

Executive summary

- As a group of major companies subject to economic regulation, we believe that judicial review in our sectors is overwhelmingly beneficial to the UK.
- Merits and judicial review mechanisms benefit consumers and create a stable and accountable environment for investment. The Panel should aim to protect the UK's reputation for having a stable, high-quality regulatory environment.
- While merits review options are preferable, judicial review remains an indispensable 'backstop'. The law of judicial review already poses significant hurdles to potential claimants – even in cases of clear error. Further substantive restrictions could have major and long-lasting implications and we urge the Panel to seek quantified and balanced evidence and proceed cautiously.
- We therefore urge the Panel not to restrict grounds of review or impose additional hurdles to seeking judicial review.
- We think it is important to consider whether judicial review could operate more efficiently and effectively in practice. We encourage the Panel to explore certain procedural changes which could make judicial review less burdensome to public authorities and claimants, without impeding on rule of law considerations.
- These could include reforming the permission stage; codifying how public authorities must discharge their duty of candour; and considering how public authorities could be encouraged to constructively engage with complaints and participate in ADR.

1. Introduction

1.1. This is a joint submission from BT, Centrica, Heathrow, Sky and Vodafone. We are all major companies operating in sectors which are subject to economic regulation in the UK, providing energy, broadband and other key services to millions of UK consumers. Our work is vital to the UK economy and the sectors we operate in underpin the UK's scope for economic growth and recovery from the COVID crisis.

1.2. Although most of us are only involved in judicial review rarely (and only when our hand is forced[1]), collectively, we have a body of experience with judicial review. Many of us have experience as applicants for judicial review; but equally many of us have been adversely affected by judicial reviews.[2] Despite our different experiences, and our experiences on both sides of judicial review, we have come together to make a common submission.

1.3. We have done this to emphasise to the Review panel that, in general, **judicial review in our sectors is overwhelmingly beneficial to the UK.** While merits review is more expert and focused, and leads to better decisions and superior outcomes for consumers,[3] judicial review is the vital backstop that underpins the quality of the UK's regulatory environment. Watering down judicial review would undermine confidence in the UK's regulatory environment, result in a lower quality of regulatory decision making and would damage the UK's standing as a destination for business and investment. The importance of maintaining incentives to invest in the UK is especially important now, given the UK is approaching the end of the post-Brexit transition period. In that context, the attractiveness of the UK as an investment destination requires a focus on regulatory stability, predictability and accountability.

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[1] Most of the time, being a party to a judicial review arises because (a) another person brings an appeal that engages a company's vital interests, meaning that it needs to intervene in those proceedings; or (b) an apparent error on the face of a decision has not been corrected, despite that point being raised and identified during the administrative phase. In our view, no substantial commercial organisation would undertake public law litigation if it had another credible option to resolve its concern.

[2] For example:
(i) Centrica was both a claimant (in *R (British Gas Trading Limited) v Gas and Electricity Markets Authority* [2019] EWHC 3048 (Admin) (13 November 2019)) and supported Ofgem (in *May-Lean & Co Ltd v The Gas and Electricity Markets Authority* [2017] EWHC 2307 (Admin) (15 September 2017)); (ii) Vodafone was both a claimant (in *Vodafone, Telefonica, EE and Three v Office of Communications* [2020] EWCA Civ 183) and supported Ofcom (in *R (Hutchison 3G UK Limited) v Office of Communications* [2017] EWHC 3376 (Admin)); and
(iii) Heathrow was the claimant in *Heathrow Airport Ltd v Office of Rail and Road* [2017] EWHC 1290 (Admin) (26 May 2017) but supported the public authority in *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214 (27 February 2020).

[3] One 2013 stakeholder response to a Government impact assessment established that merits review tends to lead to corrections of errors benefiting consumers of around £50m to £100m each case; a similar 2016 impact assessment considered the benefit to be £10m to £40m in each case. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535648/2016-05-24_Appeals_-_impact_assessment.pdf and https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/207702/bis-13-924-regulatory-and-competition-appeals-impact_assessment.pdf.

1.4. Furthermore, judicial review has developed in an incremental way in the UK over many hundreds of years. Many previous Government reviews have taken place, which have typically resulted in incremental procedural changes rather than attempting to fundamentally change the scope of judicial review. We think that remains the right approach. Judicial review plays a fundamental role to the rule of law and to good governance. Significant changes may well have far-reaching and unintended consequences.[4] Given the short time period the Panel has to conduct its review, we would urge the Panel to focus on identifying specific problems and considering carefully targeted and proportionate solutions.

1.5. With that in mind, we believe that a paramount concern of the Review should be to protect the UK's reputation as a stable, high-quality regulatory environment – an environment in which:

(i) decisions by public authorities which affect investment are made in a fair and clear way – regardless of whether these are decisions made by specialist economic regulators or decisions taken by central government which are, in effect, decisions of regulatory policy directly affecting investors or markets; [5]

(ii) the regulatory environment is stable and predictable;

(iii) the scope for inconsistent or arbitrary decisions is minimised;

(iv) public authorities and affected stakeholders can call on the courts to provide an authoritative clarification of the law where there is ambiguity or dispute – providing certainty and efficiency to all; and

(v) material errors can be corrected.

1.6. The UK regulatory environment is frequently described as 'world class'. That description reflects the fact that the quality of public-sector decision-making is very high and that decision makers are held to account by effective and transparent review through both merits review and judicial review. It follows that the health of those accountability mechanisms (including to merits appeal bodies and, ultimately, to the UK's courts, world-renowned for their integrity and independence) are necessary and important to maintain this reputation.

1.7. Occasional errors by public authorities are inevitable, not avoidable. There is also the potential, from time to time, for more fundamental abuses of power, especially if

[4] For example, as we explain further below, the risk of shortening the time period to bring a judicial review is that claimants will feel forced to bring 'placeholder' claims, simply to preserve their rights, rather than bring proceedings only after a careful assessment of the decision, the prospects of success, and an exploration of other options available to them; and the risk of relaxing requirements for procedural fairness is that decisions will be made which are less well-considered and therefore subject to challenge on substantive grounds.

[5] Secretaries of State (among others) may make decisions which profoundly affect commercial investments and would normally be made by economic regulators. For example, under the Energy Act 2008 s 88, the Secretary of State may impose licence conditions on energy suppliers such as Centrica, setting the extent to which they must rollout smart meters – an obligation with financial implications in the many billions of pounds.

accountability is lacking. Scrutiny through judicial review is the check-and-balance that applies to ensure that the exercise of public authority is done correctly and in line with the law. In the case of economic regulation specifically, **judicial review is the mechanism that connects the decisions made by Parliament about regulators' and central Government decision-makers' duties to decisions that regulators and central Government take that affect the interests of consumers**.

1.8. **Public authorities make decisions with profound impacts on businesses and consumers which demand proper scrutiny –** for example:

(i) planning decisions about Heathrow's expansion impact whether a project costing over **£30 billion** can proceed or not;

(ii) the Government's decision to require energy suppliers to rollout smart meters is estimated by BEIS to cost the retail energy sector **£13.5 billion** to implement;

(iii) virtually the entire the water sector is regulated, with the last Ofwat price controls comprising a package of approximately **£51 billion**;[6] and

(iv) Ofcom's price cap decisions in telecoms can impact regulated companies' revenues to **many hundreds of millions of pounds and the viability of billions of pounds worth of planned investment**.

1.9. By any measure, these decisions are momentous – and their impacts are felt by every UK consumer. The responsibility of the public decision-makers is therefore immense. We do not think any rational case can be made for rolling back accountability and scrutiny, regardless of whether these decisions are taken by central Government as 'policy' decisions or by specialist regulators. Most people would correctly recoil at the idea of rolling back the checks-and-balances that apply to ensure that public money is being used correctly (and correcting the errors that inevitably occur). We urge the Review to emphasise that the same attitude applies to judicial review, which governs the exercise of public authority in an analogous way.

1.10. The specific benefits of having effective and strong judicial review (and other appeal rights) in relation to economic regulation include that:

(i) **It benefits consumers**: public authorities' errors have resulted in many hundreds of millions of pounds being charged to consumers. In the context of economic regulation, enabling errors to be corrected would result in hundreds of millions of pounds being returned to UK consumers through lower prices for essential services.

(ii) **It provides investment certainty**: the primacy of the rule of law and access to the UK's courts makes the UK an attractive place to invest. To maintain the UK's enviable reputation as a destination for investment in the regulated sectors, it is fundamentally important that the requirements placed on public authorities by

[6] https://www.ofwat.gov.uk/regulated-companies/price-review/2019-price-review/final-determinations/.

Parliament can be enforced in the courts. Importantly, judicial review also provides clarity to the market where the law or its application is unclear, ambiguous or disputed. This enables regulation to take place more efficiently and promotes a clear and stable basis for future investment.

(iii) It improves public decision-making: of course, no public authority actively seeks review of their decisions. But the principled way to analyse the role that judicial review plays is not by weighing the institutional interests of particular bodies, but by considering the overall effectiveness of the regulatory system. Judicial review helps to guarantee public authorities' rigour and independence. It obliges them to exercise public authority in ways that are not arbitrary, discriminatory, unreasonable or manifestly unfair. In common with merits review, the overall impact of judicial review is to raise the standard of public decision-making.

1.11. We therefore urge the Panel not to:

(i) restrict grounds of review; or

(ii) impose additional hurdles to seeking judicial review.

1.12. In our view, either step would be wrong in principle, as it would compromise the important role judicial review plays for the rule of law and in ensuring that decision-makers comply with the law laid down by Parliament. It would also create long-term damage to the UK's desirability as an investment environment and in the area of economic regulation, reducing the ability of the system to correct errors is likely to lead to higher prices for consumers for essential services such as water, energy and broadband.

1.13. There is, of course, scope to improve how judicial review operates in practice. In this submission we identify some procedural changes that could improve judicial review and make it more effective, efficient (for all concerned) and responsive.

1.14. Accordingly, we consider that the Panel has scope within its Terms of Reference to suggest ways in which judicial review could be made less burdensome and operate more effectively, without impeding on rule of law considerations.

1.15. Indeed, there is scope to make judicial review quicker. Although compared to other forms of litigation, most judicial review is quick (less than a year), some cases take longer – considerably longer if issues are raised that require consideration by the appellate courts). And of course, like any litigation, judicial review can be costly for all parties. This helps neither claimants nor public authorities. We would welcome the Panel considering in detail:

(i) Reforming the permission stage so it better performs its intended function of efficiently removing unmeritorious cases, without driving up expenses for meritorious cases. This could include reserving oral hearings only for cases that truly warrant it, and costs consequences for public authorities which inappropriately seek to resist permission;

(ii) **Clarifying how public authorities should discharge their duty of candour** at an early stage in proceedings; and

(iii) Considering how to **encourage public authorities to constructively engage with complaints** at an early stage and participate in ADR and settlement discussions.

1.16. In this submission, we firstly set out why the scope and availability of judicial review benefits consumers, and how it supports the principle of the 'rule of law' which is indispensable in attracting investment to the UK. We then address each of the questions asked in the call for evidence in turn.

1.17. Finally: as major companies in regulated sectors, we are affected by government decisions all the time. Only a *tiny* proportion of those decisions – even decisions we do not like – is ever challenged and, even when they are challenged, the limited grounds for judicial review mean that (absent a fundamental irregularity or egregious error) it is often only one part of an overall decision which needs to be reconsidered and remade. In this context, court action is only ever a last resort for companies. This is partly because going to court is expensive and distracting; but it is also because judicial reviews are already hard for claimants to win. This balance, we strongly believe, is about right – it meets conflicting needs effectively. We urge the panel to recognise that even minor adjustments to this balance may have major and long lasting implications.

2. The scope and availability of judicial review

The current scope of judicial review benefits consumers

2.1. Because it is the mechanism by which the judiciary protect against abuses of power by public authorities, **judicial review is the means by which stakeholders can be confident that public decision-makers will act in accordance with law as set down by Parliament and their common law duties**. It is fundamental to the rule of law.

2.2. As we have explained above, the current scope and availability of judicial review benefits UK consumers.

2.3. The first reason for this is simple: judicial reviews (and other appeal options) consistently identify legal errors by public decision-makers. That such errors arise is simply inevitable, and a matter of long-standing public record. Because public authorities are often determining issues that shape the prices of vital services, and because regulation is an imperfect science, public authorities' errors can directly conflict with consumers' interests. In the context of economic regulation, **enabling errors to be corrected through appeal mechanisms like judicial review has resulted in hundreds of millions of pounds being returned to UK consumers through lower prices for essential services**. Previous examples where appeals have directly benefited consumers include the mobile call

termination reviews in 2007 and 2011; and the electricity distribution price control appeal in 2015.[7]

2.4. This matters to consumers, especially in times of economic hardship. It would be wrong to force consumers to pay more than they have to, simply because a decision taken by a public decision-maker is not subject to scrutiny.

2.5. We note in this respect that **the barriers to judicial review are already formidable.** It is clear that public authorities making decisions about economic regulation or of regulatory policy can and do make errors which are adverse to consumer interests but which are never subject to appeal or review because of the barriers in doing so. The Annex shows that judicial reviews brought against economic regulators are rare and very often successful.

> *A clear example of an error which was never appealed by industry was the radical intervention Ofgem imposed on the retail energy sector in August 2013 after its Retail Market Review, which included for example, limiting the number of different tariffs any one supplier could offer.*
>
> *This intervention was ill-conceived and would limit consumer choices and competition. However, despite the profound impact on the market, no stakeholder appealed Ofgem's decision.*
>
> *In 2014, Ofgem referred the market to the CMA to conduct a market investigation in 2016. The CMA confirmed industry's views that Ofgem's rule 'limit[ed] the ability of suppliers to compete and innovate and provide products which may be beneficial to customers and competition' and 'dampen price competition'. Indeed, CMA found that Ofgem's rule contributed to an adverse effect on competition.*[8]
>
> *This example – where the CMA decided that Ofgem's rule was so erroneous that it had actually become part of the problem, and yet no stakeholder appealed it – demonstrates that the barriers to judicial review can be so high that a claim is not brought, even in a case of a manifest and far-reaching error.*
>
> *If the barriers to bringing judicial review had been lower, it is likely that consumers could have benefited from greater competition much sooner.*

2.6. The second reason why judicial review benefits consumers is that **economic regulation underpins investors' ability to make a fair return for funds invested in UK infrastructure**. UK law almost invariably provides a degree of protection – for example by requiring economic regulators to have regard to the need for regulated companies to remain

[7] The 2007 mobile call termination case resulted in benefits to consumers of £120m in 09/10 and £145m in 10/11; the 2011 case resulted in benefits to consumers of £47m in 12/13, £41m in 13/14 and £4m in 14/15. The 2015 CMA electricity distribution price control appeal resulted in £105m in reduced prices to suppliers over the period 2015-23; Centrica committed to pass on its price reductions to customers in full.

[8] See CMA, Energy Market Investigation: Final Report and Summary of Final Report, 24 June 2016.

financeable,[9] and by requiring a fair and open process before making a decision. In order to strike the right trade-off between investment certainty and risk, Parliament sets out duties in legislation that govern the decision-making by UK economic regulators. Judicial review is the mechanism by which those economic regulators are held accountable for the delivery of those duties as determined in statute. This assumes even greater importance in a post-Brexit environment where it is essential the UK remains an attractive investment destination. That attractiveness is linked to the knowledge that errors by economic regulators can be scrutinised effectively by the courts. Furthermore, judicial review also provides important clarity to public authorities and to the market where the law or its application is unclear, ambiguous or disputed. This enables regulation to take place more efficiently and promotes a clear and stable basis for future investment.[10]

2.7. These protections will only carry weight if investors are confident that the protections can (in the last resort) be enforced in the UK's judicial system. If judicial review is watered-down or removed altogether, the link between Parliamentary decisions about regulatory duties and the outcomes determined by public authorities will be weakened or even broken. Removal of such accountability mechanisms would undermine investors' confidence that decision-makers' decisions will be properly consulted on, evidenced, reasoned and apply the law correctly and consistently.

2.8. It is *likely* that reducing such oversight would – in the long-term – lead to public authorities feeling less constrained by the need to maintain high standards. But it is *undeniable* that reducing such oversight would increase *perceptions* of regulatory risk. This would lead to:

(i) less investment overall – leading to consumers benefiting less from industry innovation and competition – because other jurisdictions will be seen as relatively less risky; and

(ii) where investment in the UK does occur, such investment being perceived as riskier – meaning that investors will require higher returns to justify that risk,[11] and consumers will consequently pay higher prices.

[9] See, eg, Electricity Act 1989 s 3A(2)(b).

[10] For example, in the electronic communications sector, there was a long running dispute regarding whether, and at what rate, interest was payable when an Ofcom dispute process found that overpayments had been made between CPs. The appeals process helped finally determine this issue, providing certainty across the whole market and creating a principle which was consistently applied to future cases. See https://www.ofcom.org.uk/__data/assets/pdf_file/0022/101596/Ethernet-final-determinations.pdf.

[11] If investment is perceived as risky, investors will require higher expected commercial returns to justify making that investment (known as the 'cost of capital'), which means economic regulators will have to allow higher prices. This is a well-accepted and understood trade-off – e.g. Ofcom allowing higher revenues for BT on fibre investments in order to incentivise investment.

2.9. For these reasons, judicial oversight of public authority decisions is fundamental for consumers, regulated companies and investors. This has been acknowledged by the UK Government, which has stated that:

> *'Accountability is vital for ensuring an effective regulatory framework that delivers the desired outcome for consumers. It plays an extremely important role in establishing the legitimacy of decision makers. … sponsor departments should ensure relevant parties are able to challenge decisions taken by regulators through an appropriate and proportionate mechanism to an independent third party.'*[12]

2.10. The CBI has also recently observed that, in light of recent questions about whether economic regulation is sufficiently transparent and accountable:

> '*the government and regulators must work together to rebuild trust in economic regulation through increased transparency and scrutiny … Regulators should maintain a clear right of appeal, including clear dispute resolution mechanisms, and opportunities for businesses to raise concerns over the regulatory framework*'.[13]

Merits review is already being undermined

2.11. In this respect, potential limitations to judicial review need to be reviewed in the broader context of recent regulatory reform – where avenues to seek merits review of the decisions of economic regulators have been progressively limited and removed in recent years. Three recent examples are:

(i) the standard of review for telecoms appeals: such challenges are now heard by the CAT on a judicial review standard;

(ii) the entire exclusion of any merits review avenue at all in energy retail price caps;[14] and

(iii) the FCA's increasing focus on price regulation (rather than solely being a conduct regulator), for example its payday loans price cap[15] and its proposal for indirect price regulation of retail insurance pricing.[16] Merits review is not available to challenge any of these FCA interventions.

2.12. This is unprecedented – price caps are generally understood to be among the most intrusive regulatory interventions, which have very serious consequences for regulated companies, and, because of their complexity, especially well-suited to merits review (since the risk of error is correspondingly greater). It is right that all stakeholders have

[12] Department for Business, Innovation & Skills, 'Principles for Economic Regulation' (2011).
[13] CBI, 'Reimagining regulation: Creating a framework fit for the future' (August 2020).
[14] See Communications Act 2003 s 194A(2) and Domestic Gas and Electricity (Tariff Cap) Act 2018.
[15] Introduced in the Financial Services (Banking Reform) Act 2013 s 131 (amending the Financial Services and Markets Act 2000 s 137C).
[16] These proposals are set out in the FCA's 'General Insurance Pricing Practices: Final Report' (September 2020). One proposed remedy is that for home insurance and motor insurance services, customers can not be charged a renewal price higher than the equivalent new business price.

confidence that these caps are set at the right level, including through allowing these decisions to be scrutinised by appeals bodies.

2.13. Merits review avenues – such as the ability for the CMA to review price caps – were introduced to provide a cheaper, faster and more appropriate means of addressing errors, compared to judicial review. The specialist skills and expertise (including economic expertise) that a body like the CAT can bring in merits review is widely understood to be a better and more effective review mechanism than leaving such issues to be dealt with by the courts alone.

> *As an example of how merits review is quicker, CMA appeals on energy price controls are required by law to be decided within 6 months. End-to-end, then, the appeal phase could take 7 months, at which point there will be clarity for the market.*
>
> *Judicial reviews, by contrast, take (on average for the years 2006-2016) over 11 months to be completed. In complex cases – and price controls are very complex – they would be likely to take longer. For example, the recent retail energy price control judicial review took over 12 months. Furthermore, a successful judicial review will typically result in remittal, which can add many additional months to the process before a final result is known.*

2.14. The recent shift away from merits review is not part of the Review's remit, but it is relevant context because it demonstrates that the role played by judicial review in relation to economic regulation has been increasing, not decreasing, over time. As a result, any watering down of judicial review would have a larger destabilising impact than if most matters were dealt with via merits review.

2.15. We would urge the Panel to consider the trend of reduced access to merits review in light of the current suggestions that access to judicial review could be curtailed as well.

2.16. It is worth noting, in relation to the retail energy price cap, that Ofgem's Chief Executive has previously recognised that where merits review was removed, it is in the public interest to have a pathway for judicial review:

> '*We recognise that there is a public interest in having a route for parties to scrutinise our decision in relation to the level of the cap … In this case, a judicial review, scrutinising whether we had properly implemented the will of Parliament and had proper regard to the matters Parliament had required us to consider when setting the cap, seems to us to be an* ***entirely reasonable way for our decision to be assessed****.'*[17]

2.17. Similarly, in the process of Parliament passing legislation to make Ofcom decisions challengeable only on a judicial review standard, Ofcom said:

> *'Ofcom absolutely welcomes its decisions being challenged.* ***It is actually vital, for an independent regulator, that that happens, because it goes to the very heart of our credibility*** *… we believe that it is entirely appropriate for us to be held accountable to*

[17] Letter from Dermot Nolan, Chief Executive of Ofgem to the Chair, Business, Energy and Industrial Strategy Committee, 22 January 2018.

the same standards as almost every other public authority … We want to have an appeal standard that absolutely enables any bad decisions or wrong decisions we take to be overturned …'[18]

2.18. Judicial review has become indispensable in areas where merits review is being made more difficult or being removed entirely. In this context, a further loss of accountability will lead to perceptions (and the reality) of the regulatory environment becoming less predictable, consistent, and rigorous.

Judicial review does not need to be frequent to provide effective accountability

2.19. Finally, we note that judicial review in the sphere of economic regulation is rare. Judicial review cases already face formidable challenges for potential applicants, and commercial organisations in particular will always take a clear-eyed view of the costs and risks. In the economically regulated sectors, there is no plausible case that judicial review has been 'over-used' or that frivolous cases are regularly being brought – individual economic regulators face no more than a handful of judicial review cases each year. What matters is that judicial review is available in the cases where it is needed, and that public authorities are aware (especially in a context without an independent merits review procedure) that their decisions may be judicially reviewed. **Judicial review in the regulated sectors is exceptional but indispensable.**

3. Questionnaire to Government Departments

Q1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

3.1. The call for evidence sets out a proposed questionnaire for Government Departments, asking whether:

(i) aspects of judicial review 'seriously impede the proper or effective discharge of ... governmental functions'. It asks Government Departments to answer 'making full allowance for the importance of maintaining the rule of law'; and

(ii) judicial review improves or compromises decision-making (and other comments on the impact of judicial review).

The Panel should balance all stakeholders' views

3.2. While it is right that the Panel seeks evidence from Government Departments, the interests of those affected by public decisions are equally important. As we explain elsewhere in this submission, regulated companies do not bring judicial review as anything but a last resort. No regulated company is 'in the business' of bringing judicial

[18] Oral evidence given by Lindsey Fussell, Consumer Group Director, Ofcom, to the Public Bill Committee, 13 October 2016 (https://hansard.parliament.uk/Commons/2016-10-13/debates/bd1cfe5f-c1b6-4431-ac85-2fdccbaed442/DigitalEconomyBill(ThirdSitting)#).

review: they are expensive, lengthy and the outcome is always uncertain. But regulated companies nevertheless rely on the availability of judicial review to ensure that public authorities remain accountable and that errors can be corrected where necessary. Restricting access to judicial review would come at an enormous cost.

3.3. Ultimately, the Panel will need to assess how effectively judicial review operates not by focusing on concerns by individual Government Departments, but by balancing the views of all stakeholders and respecting the role that judicial review plays in the overall regulatory environment. This must take into account that judicial review:

(i) Has long-term institutional impacts on decision-makers' rigour and objectivity. This accountability instils confidence in the UK's system of economic regulation and encourages investment, delivering cheaper and higher-quality essential services for UK consumers. Of course, decision-makers will insist that they will remain rigorous without judicial review. But the institutional effects of scrutiny are not necessarily conscious – and this accountability is essential to help counteract the understandable pressure decision-makers also face to make decisions quickly.

(ii) Is necessary because decision-makers still can and do make mistakes – even with the discipline imposed by review mechanisms, no decision-maker is infallible. These mistakes very often harm UK consumers – leading to higher prices, often amounting to tens or hundreds of millions of pounds.[19]

(iii) Perception matters: judicial review is an essential part of the UK's perception as a stable place to invest in the regulated sectors.

The Panel should consider whether the evidence supports the case for change

3.4. Balancing these interests means that the Panel should not start with a presumption that change is necessary. It is important the Panel solicits evidence from all stakeholders – including both quantitative and qualitative evidence – to objectively identify whether there is a problem; if so, its scale and scope; and then to properly identify the costs and risks associated with changes and how such changes can be targeted to the problem.

3.5. For this process to have maximum legitimacy to all stakeholders, it is therefore important that the Panel gathers hard evidence – such as statistics on the number of appeals in the context of the number of decisions, not just commentary from Government Department on where they think there are issues.

3.6. We set out in the Annex the quantitative evidence we have collected in relation to judicial reviews of economic regulators. In our view, this evidence clearly demonstrates that there is no fundamental problem requiring the restriction of judicial review: cases

[19] The CMA found that errors by Ofgem resulted in an adverse effect on competition in energy markets, costing consumers billions of pounds in higher energy bills over many years. See CMA, Energy Market Investigation (2016), e.g. paras 188 – 202.

are brought rarely, and the high proportion that are successful indicates that they are rarely if ever brought without a real prospect of success.

The questionnaire should seek quantitative data

3.7. We would urge the Panel to require Government Departments to provide raw data rather than solely qualitative responses – so that the broader context can be understood. For example, they should be asked to provide:

(i) The number of decisions they made over a prescribed time period (e.g. 2014-19).

(ii) In each year, for what proportion of those decisions an independent merits review avenue was available.

(iii) In each year, the number of those decisions where an applicant applied for merits review, and the number where an applicant applied for judicial review.

(iv) In each year, the average costs incurred to defend any decision where an applicant applied for merits review, and the average costs incurred to defend any decision where an applicant applied for judicial review.

(v) The number of each of those cases which was:

a. settled;

b. withdrawn by the applicant without settlement;

c. lost at the permission stage (for judicial review);

d. lost at final hearing; or

e. subject to some other outcome.

3.8. We have provided in the Annex an example of the type of quantifiable evidence that the Panel might rely on in relation to the economic regulators.

Specific concerns about the questions

3.9. We question whether it is helpful to focus on particular grounds of review rather than procedural changes.

3.10. Broad attempts to change fundamental parts of judicial review – such as the grounds of review – could have far-reaching consequences, and that it will be difficult for the Panel to fully assess the potential impacts, including any unintended impact. For example, efforts to reduce the requirements of procedural fairness, in order to reduce judicial review on procedural grounds, may simply reduce the overall quality of decisions – leading to an increase in challenges on substantive grounds. In reality, the concerns which Government Departments are likely to have will reflect their specific statutory context. We are not convinced that the scope of the Panel's review is well suited to address these types of heavily context-specific concerns, rather than concerns which are common to judicial review generally. This is, in part, why we encourage the Panel to focus on procedural changes.

3.11. There is also a fundamental constitutional consideration. It is for the Courts to determine whether an error of law has occurred. The courts have continuously interpreted privative clauses in a narrow way. We are concerned that **attempts to engage in a broad exclusion of judicial review (or particular grounds of review) are unlikely to be productive – leading to ongoing uncertainty** about whether (and to what extent) such exclusions are actually effective, and further destabilising the regulatory environment. This contrasts to the current situation, where judicial review can actually bring helpful clarity to the market in areas where the law is unclear, ambiguous or disputed.

3.12. We trust that the Panel will publish the views of Government Departments and provide the opportunity for other stakeholders to comment on these views.

Q2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

3.13. Yes. We have suggested a number of changes (in response to the questions below) which might minimise the need for judicial review proceedings and, where they are nevertheless necessary, contribute to them being run in an efficient and proportionate manner. We also wish to draw the Panel's attention to two other areas of potential reform: (i) the permission stage; and (ii) disclosure and the duty of candour.

Permission stage

3.14. The permission stage was introduced to eliminate at an early stage inappropriate claims; reducing costs, removing uncertainty and saving the courts' and parties' resources. The process which eventually became today's permission stage was intended to:

> *… prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers would be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.*[20]

3.15. Accordingly, a court will normally refuse permission to apply for judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success.[21]

3.16. **In our view, it is worth considering whether the permission stage is serving its intended purpose in its current form.**

3.17. To deliver its intended purpose, the permission stage must:

[20] *IRC v National Federation of the Self-Employed and Small Businesses* [1982] AC 617, 643–644 (Lord Diplock).
[21] *Sharma v Deputy Director of Public Prosecutions (Trinidad and Tobago)* [2006] UKPC 57 (30 November 2006).

(i) quickly and efficiently dispose of cases with no prospect of success; and

(ii) in doing so, deliver benefits which outweigh the costs of adding additional steps to prosecuting claims that do have reasonable prospects of success.

3.18. We have concerns that these requirements might not be consistently met:

(i) Permission is commonly determined at an oral hearing rather than 'on the papers'. This entails very significant expense and resources, including to prepare detailed written submissions (including a 'summary grounds of resistance'), the appearance of counsel, and preparing of hearing bundles. These costs can often approach the costs of a full final hearing, undermining the very purpose of allowing quick and efficient dismissal of unmeritorious cases.

(ii) Our experience is that many public authorities seek to challenge judicial review at every stage, and essentially see the permission stage as an 'extra opportunity' to have claims excluded. Given the costs of the permission stage, it can only function effectively if public authorities behave in a realistic manner – only challenging permission where the case truly warrants it.

3.19. We would invite the Panel to consider ways in which the permission stage can better serve its functions. This could include:

(i) reserving oral hearings only for cases that truly warrant it, with the judge having the ability, and being encouraged where possible, to grant permission even in contested cases 'on the papers'; and

(ii) cost consequences if a judge finds that the public authority has inappropriately sought to resist permission in a case where such resistance was unwarranted.

A 2012 judicial review by Albion Water against Ofwat[22] provides an example of how merely applying for permission can become a disproportionately expensive and complex exercise. The initial judge refused permission on the papers. Albion Water renewed their application for permission, and a permission hearing of two full days was required with the judge commenting on the 'considerable amount of pre-reading' which was required.

The judge granted permission in part. However, it is clear that this is an illustrative case where significant court resources, and considerable time and expenses for all of the parties, was incurred merely to obtain permission. This does not appear to have been a proportionate outcome.

Disclosure and the duty of candour

3.20. The courts have imposed on public authorities a 'duty of candour', requiring them to ensure that all relevant information and facts are put before the Court.[23] The courts have made clear that this is a continuing duty on all parties, including at the permission

[22] *R (Albion Water Ltd) v Water Services Regulation Authority* [2012] EWHC 2259 (Admin) (16 August 2012).
[23] *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin).

stage; and that 'a claimant must reassess the viability and propriety of a challenge in light of the defendant's Acknowledgement of Service and summary grounds'.[24]

3.21. The duty of candour is fundamentally important to judicial review: the court's role is to review the lawfulness of decisions made by public authorities. This means that the court must be apprised of all relevant material and facts and be able to see the 'full picture'. Proper and timely candour is necessary so that the claimant can fully understand the circumstances and how to plead its case. It is especially important in a context where public authorities are not commonly subject to specific disclosure obligations and where witnesses are rarely cross-examined, and in this way helps ensure judicial review cases are run efficiently.

3.22. **Unfortunately, in our view, public authorities do not always comply with this duty in a manner conducive to the efficient conduct of judicial review proceedings.** Some of us have experience in cases where disclosure has been 'drip fed' at various points in proceedings, and in cases where the public authority has refused to concede that the duty of candour applies prior to permission being granted.

3.23. As the Administrative Court has recognised in its Judicial Review Guide, claimants do need to reassess their challenge once a public authority has provided full documentation. This may result in the claimant withdrawing the challenge; it might increase the prospects of the public authority being prepared to settle the matter at an early stage; or it may result in the claimant needing to revise their challenge. In any of these cases, there would be enormous benefit in this occurring earlier rather than later in the proceedings.

3.24. We recognise that such discovery takes time and engages resources. We would therefore welcome the Panel's engagement with how public authorities must discharge the duty of candour. This could include, for example, formalising the point in proceedings where full disclosure must be produced. In our view, enormous efficiencies could be realised if the duty of candour was codified, and if public authorities were required to undertake a comprehensive discovery exercise at an early stage.

A recent example of a dispute about disclosure in judicial review is Jet2.com's 2018 judicial review of the CAA.[25] Although the court did not make a formal finding about whether the CAA had complied with its duty of candour, the court noted that there was 'substance in the Claimant's criticisms, first, that the Defendant was slow in its response [providing disclosure] (for example, failing to address [certain] issues … at any time before its Detailed Grounds) and secondly that aspects of [the CAA witness statement] may be less than full'. Jet2.com was forced to seek (and it successfully obtained) an order requiring the CAA to provide significant further disclosure.

[24] Administrative Court, Judicial Review Guide 2020, para 14.1.7.

[25] *R (on the application of Jet2.com Ltd) v Civil Aviation Authority* [2018] EWHC 3364 (Admin) (10 December 2018).

4. Codification and clarity

Q3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

4.1. We do not see a compelling case for further codifying judicial review, given that:

(i) Firstly, judicial review in the UK has been simplified and modernised in recent years through common law developments[26] and statutory interventions (described below). In other jurisdictions such as Australia, codification took place because there was a demonstrated need to reduce the significant technical complexity associated with seeking various constitutional remedies. That same problem has been addressed more organically in the UK already.

(ii) Secondly, large parts of the law of judicial review are already codified – for example, in the Senior Courts Act, the Civil Procedure Rules, and relevant Practice Directions. For example, these clearly set out:

a. the requirement to obtain permission to apply for judicial review;[27]

b. time limits on applying for judicial review;[28]

c. the remedies available, including the circumstances in which a declaration or injunction may be granted[29] and the circumstances where the court can substitute its own decision (rather than remit the matter);[30]

d. rules requiring the courts to refuse relief if it 'appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred'.[31]

(iii) Thirdly, codification inevitably results in a period of legal uncertainty, which is quite likely to result in more cases as affected parties 'test' what the new law means. This was demonstrated in the electronic communications sector – following the Communications Act 2003 being implemented, Ofcom (and its predecessors) saw a 'one-off bulge' in appeal cases over the period 2007-10[32] as stakeholders brought cases to try to settle the law in this area, followed by a downward trend. The strong implication is that a codification of judicial review is

[26] See *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 (15 May 2019) para 60 per Lord Carnwath (Lady Hale and Lord Kerr agreeing).
[27] Senior Courts Act s 31(3).
[28] Senior Courts Act s 31(6) and CPR Part 54.
[29] Senior Courts Act s 31(1) and 31(2).
[30] Senior Courts Act s 31(5).
[31] Senior Courts Act s 31(2A).
[32] There were 5 appeals in 2007, 3 in each of 2008 and 2009, and then 6 in 2010 (excluding withdrawn appeals).

likely to increase the number of cases being brought – effectively, triggering a fresh round of cases incurring needless and avoidable cost.

4.2. If it does occur, we do not think any codification should attempt to decrease the scope of judicial review by excluding particular grounds of review or precluding a court from quashing a decision affected by an error of law. In Australia, it was clear that the codification did not (and, at least arguably, could not) exclude common law judicial review. The decisions of UK courts indicate too that it will be difficult – and, arguably, not possible – for many grounds of review to be excluded.[33] Therefore, any codification that purported to do so would simply generate confusion and uncertainty.

Q4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decisions not be subject to judicial review? If so, which?

4.3. We recognise the Panel may need to engage in the question of whether certain powers (such as those considered 'political') ought to be subject to judicial review.

4.4. We simply note that decisions which affect consumers and regulated companies, including impacting property rights or the conditions for investment more generally, clearly ought not fall into this category – they ideally ought to be subject to merits review, but in any event, must always be subject to judicial review as a 'backstop'.

4.5. This applies not only to decisions of economic regulators (and the UK's system of economic regulation has been *specifically designed* to provide assurance that regulators will exercise their functions independently rather than politically) but also to decisions of Secretaries of State and others whose decisions (e.g. on issues such as planning or their ability to directly impose regulatory obligations on companies in a market) can profoundly affect consumers, businesses and investment. These are, in effect, decisions of regulatory policy. As we have set out above, a good example is the Secretary of State's power to impose licence conditions on energy suppliers, setting out their obligations to rollout smart meters to their customers. The smart meter rollout program is estimated by BEIS to cost the retail energy sector £13.5 billion to implement. Such decisions – with direct and momentous financial impacts on suppliers and consumers – must be subject to appropriate scrutiny if investors are to have confidence that policy is set using a fair process and that errors can be corrected. They cannot be immune to review on the basis that they are 'policy decisions' or 'political questions'.

Q5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

[33] See *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 (15 May 2019).

4.6. From our perspective, there is no lack of clarity in how to make or respond to an application for judicial review; or how to appeal a judicial review decision. The Administrative Court publishes a Judicial Review guide which is continuously kept up to date (the most recent update being July 2020) and addresses these matters in a concise and clear way. The guide is an invaluable resource setting out the process and the court's expectations of parties in respect of 'the wider public interest in the fair and efficient disposal of claims'.[34]

5. Process and procedure

Q6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

5.1. We recognise that the Government may be tempted to shorten the period for bringing judicial review proceedings, which is a maximum of three months (and in some cases shorter).[35]

5.2. There may be specific contexts (e.g. urgent immigration decisions and public procurement) where a shorter period can be justified. However, as a general matter, **allowing a full three month period to file a claim helps to minimise the number of judicial review claims being brought**, and we assume Government would want to protect this outcome. Three months is the minimum period required for the following reasons:

(i) Firstly, claimants need to understand the decision and its implications (in economic regulation, decisions can be long and complex), obtain legal advice, assess the prospects of success on judicial review and any other available (commercial or legal) options, and prepare the relevant papers. **This is a fundamental consideration in the regulated sectors, because many decisions are highly complex and run to many hundreds or even thousands of pages.[36] It is simply not possible to understand and analyse these decisions quickly.** This ensures that claimants are more likely to file for judicial review only when it is genuinely the only option available and the merits of doing so have been properly considered.

(ii) Secondly, claimants need to engage with the public authority and try to constructively agree a path forward that will avoid the need for judicial review. In

[34] See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/913526/HMCTS_Admin_Court_JRG_2020_Final_Web.pdf p 2.

[35] CPR para 54.5.

[36] As just one example, in 2019 Ofcom published its most recent decision about the regulation of the business connectivity market (which included price controls on certain BT products). This decision included an introduction, three separate volumes and 26 annexes. This amounted to **1,294 pages**, plus a number of supporting spreadsheets.

particular, shortening the time period could preclude claimants from complying with the Pre-Action Protocol, which is aimed at resolving disputes without formally commencing proceedings.

5.3. While the period for appeals can be shorter in the case of merits review, or for appeals to the CAT, this situation is already suboptimal and very challenging for all parties; and the situation would be even more difficult in the case of judicial review given the more difficult and detailed formal requirements for bringing such a claim. There is a real risk that shortening the 3-month period for judicial reviews would achieve very little and, in fact, has a real chance of backfiring – encouraging claimants to file 'protective' judicial review applications simply to avoid missing the deadline, even if such applications turn out to be unnecessary or (once all options have been considered) not the best path forward. This outcome would drive up costs for both the claimant and the public authority for no purpose.

5.4. There is an overriding requirement that the claim form be filed promptly (i.e. that claimants should not wait until the full three month period has expired to file their claim). In our experience, this requirement is taken very seriously, and we are not aware that claimants in the regulated sectors are delaying bringing applications, and deliberately using up the full three-month period, without good cause.

5.5. We note in this respect that judicial review does not generally delay the implementation of decisions, which are currently assumed to be lawful until and unless they are quashed in judicial review proceedings. This gives claimants strong incentives to act quickly. The real concern, we think, ought to be to ensure judicial review proceedings can progress quickly, rather than to force claimants to meet unrealistic deadlines.

Q7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

5.6. In our experience, the risk of adverse costs orders is a significant deterrent to bringing a judicial review application and is always among the most serious considerations for a large company considering bringing judicial review.

5.7. We note that, in economic regulation, this risk is not symmetrical because unsuccessful claimants will generally face adverse costs orders; but they may not be able to recover their costs from the regulator if they win. This appears to be true in telecoms appeals to the CAT (which are now heard on a judicial review standard). For example, the Court of Appeal decided in 2018 that '*if Ofcom has acted purely in its regulatory capacity in prosecuting or resisting a claim before the CAT and its actions are reasonable and in the public interest, it is hard to see why one would start with a predisposition to award costs against it, even if it were unsuccessful*'.[37]

[37] *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542.

5.8. Accordingly, in our view costs can often be tilted in favour of public authorities, providing a significant disincentive to bring a claim – even, sometimes, when the prospects of success are high. We do not consider there is any case for making the rules regarding costs even less favourable to claimants.

Q8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

5.9. Costs of judicial review can, in our experience, be high. This can be a serious barrier for potential claimants. We welcome the Panel investigating the underlying causes.

5.10. We have set out elsewhere in this submission a number of areas of reform which would likely address this by reducing inefficiency, including:

(i) ensuring that a suitable merits review avenue is available, which is typically more efficient and better equipped to deal with the complexity of issues in economic regulation;

(ii) reforming the permission stage;

(iii) requiring public authorities to disclose all relevant materials as early as possible, to avoid the need to revise the claim later; and

(iv) encouraging public authorities to constructively engage in settlement discussions.

Q9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

5.11. The primary constraint on a court's remedies is that, if it quashes a decision, its only power is normally to remit the matter to the original decision-maker. The court may only substitute its own decision if the original decision was made by a court or tribunal, the decision was quashed for error of law, and 'without the error, there would have been only one decision which the court or tribunal could have reached'.[38]

5.12. Remittal processes inevitably involve further time and expense and there will be cases where the requirement to quash a decision may be inappropriate (for example, where stakeholders generally agree that a decision needs to be in place, albeit there is disagreement about whether the original decision-maker's decision is the right one).

5.13. This is a good reason why merits review ought to be available in the regulated sectors. Merits review is generally undertaken by specialist bodies who are in a better position than a court to impose an appropriate remedy (rather than merely ordering quashing and remittal). This helps avoid a further remittal process – avoiding additional time,

[38] Senior Courts Act 1981 s 31(5A)(c).

expense and regulatory resources; providing regulatory certainty more quickly; and avoiding the risk of a 'regulatory lacuna' where no decision is in place.

5.14. Where judicial review proceedings are required, the Panel may wish to consider whether granting courts a more flexible approach to remedies might be warranted. We would ask the Panel to consider whether the court should have more flexible remedies in appropriate cases, for example:

(i) if the court considers that only one decision can lawfully be taken, simply taking that decision rather than requiring the original decision-maker to take it;

(ii) allowing the court to impose a 'temporary' decision, which would be intended to help preserve the status quo, while the remittal process is underway (to avoid situations where quashing a decision would create a lacuna or irreparably damage a relevant interest); and

(iii) where remittal is ordered, giving the court express flexibility to direct the original decision-maker as to how to conduct the remittal process (for example, by requiring the original decision-maker to make a new decision by a specific date).

Q10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

5.15. To address Q10, it is perhaps useful to split the question into:

(i) Steps that public authorities can take prior to and in the lead-up to their decisions, that will reduce the need for judicial review. There are many such steps, and they are important and helpful – and a recipe for poor decision-making when those corners are cut.

(ii) Steps that a public authority or claimant can take after a decision has been taken, but prior to a claim for judicial review being filed with the court. Here, there are already important protections in place.

5.16. In terms of the steps a public decision-maker can take to minimise the risk of judicial review before a decision is taken, the obvious and fundamental step is for a public authority to adopt a careful decision-making process – to understand its legal duties; undertake a full and proper consultation process; diligently and faithfully consider evidence and submissions with a genuinely open mind; have internal processes for peer review of proposed decisions; and make a decision uninfected by irrelevant considerations or improper purposes.

5.17. Our research in the Annex indicates that some economic regulators are subjected to judicial review far more often than other regulators. While this may reflect a number of different factors (such as the number of stakeholders affected and the degree to which economic regulation impacts competition between stakeholders), we nevertheless believe that some of the economic regulators least likely to be subjected to judicial review consistently demonstrate the highest degree of rigour. For example, despite the

FCA making decisions which affect a significant industry with very large players, it is known for undertaking full consultations which generally strike a good balance between competing interests, genuinely take into account stakeholder feedback, and aim at achieving the right long-term changes to the market.

5.18. Conversely, we see the highest risk of challenge arise when regulators take decisions without having been given the opportunity to consider the relevant trade-offs and evidence or are perceived to be impacted by political considerations. A good example is the energy retail price cap (introduced by the Domestic Gas & Electricity (Tariff Cap) Act 2018). Government had made it very clear to Ofgem that it expected Ofgem to implement the cap with effect from 1 January 2019. This led to Ofgem consulting on and designing the cap in a 6-month period. This is an extraordinarily short period of time to design an entirely new intervention – by comparison, the regular updates of *existing* price controls in energy distribution and transmission usually take place over a number of *years*. It is regrettable but in this context unsurprising, given the extraordinary pressure Ofgem felt under to deliver results quickly, that legally essential processes that are designed to prevent bad decision-making were not followed, and subsequently a part of Ofgem's resulting decision was unlawful (and for that reason, overturned on judicial review).[39] In relation to steps after a decision is taken, the Judicial Review Pre-Action Protocol already requires claimants, so far as reasonably possible, to try to resolve the claim without litigation. We are not aware of concerns in the regulated sectors of claimants failing to comply with the protocol where compliance is reasonably possible, or not doing so in a good faith effort to settle the dispute.

5.19. In our view, claimants have good incentives to find ways to proceed without judicial review – judicial review can be expensive, diverts management time and company resources, creates ongoing uncertainty (often for more than a year) while the proceedings and any remittal process progresses, and the ultimate outcome can be uncertain even in cases where the public authority has clearly erred. No regulated company wants to bring a judicial review if it can possibly be avoided.

5.20. We address in response to question 11 and 12 below the steps public authorities can take after a decision has been made.

Q11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?
Q12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

5.21. We consider that the Panel's attention ought to be focused on whether public authorities have appropriate incentives to genuinely attempt to settle disputes – both leading up to

[39] *R (British Gas Trading Limited) v Gas and Electricity Markets Authority* [2019] EWHC 3048 (Admin) (13 November 2019).

a decision and where the Pre-Action Protocol is invoked. In our experience, public authorities may after reaching a decision (and in some cases before that stage) simply refuse to constructively engage any further and instead focus solely on defending their decision right up until a court judgment is delivered. This is so even when the steps to address an error would be relatively straightforward and much cheaper and quicker for both parties than continuing the judicial review proceedings. Accordingly, in our experience, settlement prior to trial is rare.

5.22. To be clear, we understand that where a public authority believes it has undertaken a fair and open consultation process and made a lawful decision, it may feel that it has no choice but defend its conduct. And we understand that public authorities are afraid of a 'floodgates' effect, whereby being responsive to complaints by stakeholders will lead to a flood of future complaints. We also acknowledge that the nature of public decision-making – especially where it involves balancing competing interests from different stakeholders – may make it challenging to adopt a 'private settlement'. However, this leads to a situation where claimants may feel that public authorities are indiscriminately refusing to engage, even when genuine and evidenced complaints about a decision are made. The Panel should seek to understand the structural and institutional features that make settlement uncommon and whether some of these can be addressed.

> *A recent example is Centrica's judicial review of Ofgem's energy retail price cap.*[40] *In this case, Ofgem made erroneous assumptions about the costs energy suppliers incur to run their businesses – costs that Ofgem said it wanted to ensure suppliers could cover on average. These erroneous assumptions were only revealed at decision stage, and were never revealed in consultation.*
>
> *In this case, Centrica repeatedly invited Ofgem to simply ask suppliers for the relevant information about their costs, and revisit its decision based on the information it obtained. This could have been done within a few weeks. However, Ofgem preferred to defend the proceedings at every stage. This ultimately meant higher costs were incurred and resources were tied up on both sides, and a resolution of the proceedings took far longer than was necessary.*
>
> *The decision in this case was made on 6 November 2018, and the court's final judgment was handed down on 13 November 2019 – over a year later. Ofgem did not complete the remittal process, so that stakeholders understood how the error would ultimately be corrected, until 5 August 2020 –* ***21 months*** *after the error was made. A merits review option would have resolved this matter within 6-7 months.*

5.23. **We would therefore welcome the Panel's focus on means to ensure that public authorities constructively engage with claimants or potential claimants, while still respecting the nature of public decision-making.** Such means may include, for example:

[40] *R (British Gas Trading Limited) v Gas and Electricity Markets Authority* [2019] EWHC 3048 (Admin) (13 November 2019).

(i) costs consequences for public authorities who unreasonably refuse engage in alternative dispute resolution; and

(ii) encouraging or mandating public authorities to adhere to a form of ADR such as arbitration.

Q13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

5.24. In the context of economic regulation, issues of standing do not commonly arise (unlike in certain other areas involving broader public policy). It is clear which companies are affected by economic regulation and, given the huge impacts on their business, important that those companies have the opportunity to intervene (either in support of the claimant or to support the public authority). We are not aware of any concerns with issues of standing in this context.

Annex: Quantitative evidence of judicial reviews of the economic regulators

The following table sets out all of the judicial reviews against the most significant 'first instance' economic regulators where a final and public court judgment[41] was handed down in the period 2010 to 16 October 2020.

The table provides quantifiable evidence that there is no widespread or systemic problem with the volume of judicial reviews in the regulated sectors or with the types of claims being brought:

- **Judicial review against economic regulators is rare:** Ofcom has been subject to the most judicial reviews – and even for Ofcom, the number is only approximately one per year on average.
- **Judicial reviews against many of the economic regulators have reasonable success rates:** 50% of the judicial reviews against Ofgem and Ofwat were successful. This does not indicate that large numbers of judicial reviews are being brought against economic regulators in cases with no real prospect of success.
- **Some economic regulators have been considerably more successful in defending judicial reviews than others:** for example, Ofcom has been very successful in defending its decisions on judicial review. This reflects the widely-held perception of Ofcom as generally being a thorough, evidence-based and independent regulator.
- **Merits review avenues improve decision-making and significantly reduce the need for judicial review:** it is well known that Ofcom has (until recently) been more often subject to merits review than some other economic regulators.[42] But this table suggest that Ofcom's decision-making processes have been improved as a result of merits review, as illustrated by its success rate in defending decisions before the courts. This clearly illustrates that merits review avenues help minimise the need to bring judicial review challenges.

	Case	*Outcome*
Ofgem		
1.	R (Infinis Plc (Re-Gen) Ltd) v Gas and Electricity Markets Authority [2011] EWHC 1873 (Admin)	**Successful**
2.	R (RWE Generation UK PLC) v Gas and Electricity Markets Authority [2015] EWHC 2164 (Admin)	**Unsuccessful**
3.	May-Lean & Co Limited v Gas and Electricity Markets Authority [2017] EWHC 2307 (Admin)	**Unsuccessful**
4.	R (UK Power Networks (Operations) Ltd) v Gas and Electricity Markets Authority [2017] EWHC 1175 (Admin)	**Successful**
5.	Pigeon Top Windfarm Limited v Gas and Electricity Markets Authority [2017] NIQB 119	**Unsuccessful**
6.	R (Peak Gen Top Co Ltd) v Gas and Electricity Markets Authority [2018] EWHC 1583	**Unsuccessful**
7.	R (Npower) v Gas and Electricity Market Authority [2018] EWHC 3576	**Unsuccessful**

[41] I.e. either a decision to refuse permission or an outcome at a final hearing. We have excluded interim judgments, such as decisions to grant permission.

[42] Although we note that there are some decisions which cannot be challenged to the CAT which are set out in Schedule 8 of the Communications Act 2003 – and these are subject only to judicial review.

	Case	*Outcome*
8.	R (Gwynt-y-Mor Offshore Wind Farm Ltd) v Gas and Electricity Market Authority [2019] EWHC 654 (Admin)	Successful
9.	R (British Gas Trading Limited) v Gas and Electricity Market Authority [2019] EWHC 3048 (Admin)	Successful
Ofwat		
10.	R (Thames Water Utilities Ltd) v Water Services Regulation Authority [2010] EWHC 3331 (Admin)	Unsuccessful
11.	R (Albion Water Ltd) v Water Services Regulation Authority [2012] EWHC 2259 (Admin)	Successful
Civil Aviation Authority		
12.	R (Easyjet Airline Co Ltd) v Civil Aviation Authority [2010] ACD 19	Unsuccessful
13.	R (Martin Barraud) v Civil Aviation Authority CO/1063/2015	Unsuccessful
14.	R (Oxford Aviation Services (T/A London Oxford Airport) and Biggin Hill Airport Ltd) v Secretary of State for Defence, Civil Aviation Authority, Secretary of State for Transport and Civil Aviation Authority [2015] EWHC 24 (Admin)	Unsuccessful
15.	R (Lasham Gliding Society Limited) v Civil Aviation Authority [2019] EWHC 2118 (Admin)	Unsuccessful
Office of Rail and Road		
16.	R (Heathrow Airport Limited) v Office of Rail and Road [2017] EWHC 1290 (Admin)	Unsuccessful
Phone Paid Service Authority		
17.	R (Ordanduu GmbH) v Phonepayplus Ltd [2015] EWHC 50 (Admin)	Successful
Ofcom		
18.	R (Data Broadcasting International Ltd) v Office of Communications [2010] EWHC 1243 (Admin)	Unsuccessful
19.	R (ICO Satellite Ltd) v Office of Communications [2010] EWHC 2010 (Admin) (appealed in [2011] EWCA Civ 1121)	Unsuccessful
20.	R (Gaunt) v Office of Communications [2010] EWHC 1756 (QB) (appealed in [2011] EWCA Civ 692)	Unsuccessful
21.	R (DM Digital Television Ltd) v Office of Communications [2014] EWHC 961 (Admin	Unsuccessful
22.	Traveller Movement v Ofcom [2015] EWHC 406 (Admin)	Unsuccessful
23.	R (DHL International (UK) Ltd) v Office of Communications [2016] EWHC 938 (Admin)	Unsuccessful
24.	R (EE Limited v Office of Communications [2016] EWHC 2134 (Admin)	Unsuccessful
25.	R (Hutchison 3G UK Ltd) v Office of Communications and R (British Telecommunications plc) v Office of Communications [2017] EWHC 3376 (Admin)	Unsuccessful
26.	R (Avaaz Foundation) v Office of Communications [2018] EWHC 1973 (Admin)	Unsuccessful
27.	Virgin Media v Office of Communications [2020] CAT 5	Unsuccessful (CAT appeal on JR standard)
28.	TalkTalk Telecom Group plc and Vodafone Limited v Office of Communications [2020] CAT 8	Unsuccessful (CAT appeal on JR standard)
29.	R (Autonomous Non-Profit Organisation TV Novosti) v Office of Communications [2020] EWHC 689 (Admin)	Unsuccessful