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"Will no one rid me of this troublesome priest?" Independent regulation and accountability to the courts.

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Introduction

It will be recalled that when Thomas Becket was so foully murdered by four knights in Canterbury Cathedral on 29th December 1170, the instigation came from an allegedly throwaway remark by King Henry II approximating to the quotation in the heading of this talk. The reason for the King feeling this way was a festering dispute over the relative powers of church and state. Becket had previously been the King's Lord Chancellor, but on becoming Archbishop of Canterbury had transferred his loyalty to a higher calling, namely the church headed by the Pope in Rome, and had made himself, in the King's eyes, objectionable.[1]

There is a parallel between this story and that of the current festering disagreement about the relative powers of regulators and courts, in particular the Competition Appeal Tribunal (CAT)[2], although I would not want to push this parallel too far. It is true that courts can claim to be serving a higher purpose than implementing the wishes of the executive Government, and in applying EU law, they have a claim to supra-national status. It is also true that regulators, in common with the executive, do not always take kindly to being held to account by this higher order, and are prone from time to time to make throwaway remarks.

So far, however, no murder has been committed.

Against this background, I want to examine why it is important for regulators (in which I include economic regulators and competition authorities) to be subject to judicial oversight, why this has to be sufficiently rigorous to be effective, why oversight by a specialist tribunal has advantages, and dwell a little on the danger of making loose or misleading statements about what happens now. I want in particular to persuade you that the regulators and the specialist tribunal have a common interest in maintaining the independence of regulation from executive control. So first of all I want to pick up the theme of today and say something about the independence of regulators themselves.

[1] See T.S.Eliot, "Murder in the Cathedral" or Jean Anouilh, "Becket" for more dramatic accounts.

[2] The author is one of the CAT's Chairmen. All views expressed in this talk are personal and do not necessarily represent the views of the CAT or any other body.

Independent regulators

Appearing recently before the House of Lords Select Committee on Communications, the outgoing Chairman of Ofcom said this:-

> "Since I became the Chairman, I have become more and more aware of the importance of independent economic regulation".[3]

She described the benefits in terms of protecting and empowering consumers and promoting a stable climate for investment. On what constituted independence, however, she said rather less, concentrating on the need for a regulator (meaning the Chair of a regulatory body) to be appointed for a single, non-renewable term, long enough to "do the job really well".[4] She was surely right in this, and those Chairmen with shorter renewable terms may pause to think at this point, but clearly the independence of "regulators" (in the sense of regulatory authorities as a whole) must consist of more than the independence of the Chair, important though this is.

Let us first of all dispose of one myth. No regulator is completely independent of Government. Regulators are established by Government, their senior people are appointed by Government, their funding is wholly or partly provided by Government and they operate within a policy framework set by Government. No regulator could survive very long if the Government determined to curtail or abolish it. What we are talking about is a sufficient, operational independence so that regulatory decisions can be made without "fear or favour".

An important constituent of operational independence is a clear statement of objectives and a clear division of responsibilities between Government and regulator. The line could be drawn between, say, policy (clearly the province of the executive) and implementation (more likely one for regulators). These distinctions have become increasingly blurred as multiple objectives have been added to the regulators' portfolio and the line between policy and implementation is blurred anyway.

Looking at how this has worked in the field I know most about, competition enforcement, we had in 2002 a clear attempt, in the Enterprise Act, to distance Ministers from competition enforcement (ie implementation) and to leave that to newly "independent" competition authorities. Ministers retained control of policy. That worked for a while, but it soon became clear that by denying themselves any operational role, Ministers (and more importantly their staff of civil servants) risked losing touch with what policy should be. Moreover, the line between policy and competition doctrine proved to be a very fine one. This was particularly apparent in gatherings like the OECD or the European Competition Network[5] (established in 2003 to operate the devolved enforcement system under Regulation 1/2003) where discussions about competition doctrine could easily trip

[3] House of Lords Select Committee uncorrected transcript 4th March 2014, 4.35pm, p2, available at: http://www.parliament.uk/documents/lords-committees/communications/colette-bowe-140304/uccomms140304transcriptbowe.pdf

[4] Ibid., p3.

[5] Known as the ECN; the ICN (International Competition Network) was established as a network of competition authorities and agencies.

over into policy. Government (at least the UK Government) attended less and less, and became in danger of losing touch with the latest developments.

Ironically, in the one area where Ministers did retain a role, namely public interest aspects of merger control, one is left with the feeling that they wished they hadn't. Cases such as *Lloyds/HBoS*, and *News Corporation/BSkyB* proved highly controversial.[6]

After a decade of this regime, the Government decided to recast the institutional structure, and the new CMA is the result. On paper this is no less "independent" than its two constituent parts, but there has been a clear if subtle change. First of all there is the overt acknowledgment (in the form of the "Ministerial steer"[7]) that Government will wish to influence in the broad sense what the authority does. That in itself is not particularly worrying, as it simply makes explicit what happened before – the Government from time to time expressed various wishes and dropped various hints, the authorities took notice if they wished but not otherwise.

More important however is the fact of the reform. Faced with a situation where (arguably) there was some dissatisfaction with cartel enforcement, atrophy in the market investigation regime and under-use by sectoral regulators of competition powers, the Government decided not to make operational changes but to abolish the authorities and reform them as a new body. Like it or not, that body derives its status and authority not from taking over the functions of its predecessors, but from its establishment as a new body by the Government. There has, I would argue, been a re-assertion of overall Government authority, not exactly a "murder in the cathedral" but a clear re-affirmation of who is in overall charge of the competition regime.

I will no doubt be accused of over-dramatisation and ascribing motives that are not there. But the CMA now has to establish its operational independence anew. In doing so it has many things going for it: it has a new and impressive board; it has kept the "independent" panel members (or some of them) from the CC; it has said very clearly, through its Chairman and Chief Executive, that it will not take orders from Government. But it will face considerable challenges; not only does it no longer have the option available to the OFT of referring difficult issues to the undoubtedly independent CC, but with an election approaching, hopeful politicians are already sounding forth about what they will "get the CMA to do", whether it is in retail banking or energy or whatever.

The battle lines for independent competition enforcement are already being drawn. But let me now turn to the counterpart of independence, which is accountability.

[6] Only in *BSkyB/ITV* did ministerial involvement run without any hitch.

[7] The draft Ministerial steer is available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245607/bis-13-1210-competition-regime-response-to-consultation-on-statement-of-strategic-priorities-for-the-cma.pdf

Accountability

It is important to remember first of all that economic regulators wield a great deal of power. Apart from the powers of questioning, entry and search, electronic eavesdropping and obtaining information under threat of penalty, their substantive decisions can have very significant economic and financial consequences. So it is hardly surprising that strong and effective means of holding regulators to account are generally thought to be necessary.

Accountability of regulators was the subject of a Report by the House of Lords Select Committee on the Constitution, some ten years ago.[8] It still makes good reading. The Committee saw a danger of permanent and increasing regulation becoming an end in itself, and saw accountability as a way to curb this tendency. It described three forms of accountability:- transparency of regulatory processes, scrutiny (mainly by Parliament), and effective rights of appeal. On the last of these, appeals, its conclusions remain highly relevant to current discussions:-

> "Our view is that the power of the regulatory state needs to be matched by effective rights of appeal based on the merits of the case. The only right of appeal open to many regulated bodies is the very restricted one of judicial review. This is normally expensive, time consuming and narrow...(W)e believe that there must be a more accessible and efficient appeals mechanism".[9]

Ten years on, it is fair to say there have been great strides in regulatory transparency; regulation by consultation is now well accepted practice. Parliamentary scrutiny has also been maintained, although the Constitution Committee's recommendation that a joint committee of both houses be established to oversee regulators was not followed.[10] And on effective appeals, appeals on the merits were introduced for Communications Act cases, but not as yet elsewhere. At the same time, judicial review has developed somewhat into a broader and more flexible instrument so that the Committee's view of it looks, with hindsight, to have been a little harsh.

Finally, the Committee's recommendation that a Regulatory Appeal Tribunal be established was not adopted either.

In its 2013 Consultation on "Streamlining Regulatory and Competition Appeals"[11] the Government re-opened this debate. Having acknowledged that regulatory decisions can involve making difficult judgments, and that the independence and expertise of regulators enable them to make such objective judgments, the Government went on to say that the system:- "needs to allow for the

[8] 6th Report 2003-4 "The Regulatory State: Ensuring its Accountability" HL Paper 68 I and II, 6th May 2004.

[9] 6th Report loc cit, para 14.

[10] Paragraph 1.30 of the subsequent House of Lords Report "UK Economic Regulators" published on 13 November 2007 and available at:
http://www.publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/189i.pdf

[11] Consultation on Options for Reform, 19 June 2013, available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf

proper exercise of independent judgement within a framework of overall regulatory accountability both to regulatory firms and to Government and Parliament". One can hardly disagree with that, but what is perhaps more interesting for present purposes is somewhat lacklustre reference to the importance of appeals:-

> "Appeals form a vital part of the regulatory decision-making framework.
>
> ...appeals are a way of holding regulators to account… [but] are not the only form of accountability. For example, effective consultation and sharing of information during decision-making plays an important role. Nevertheless, appeals are a key element"[12].

It is surely right that appeals are a key element of regulatory accountability. Certainly in competition, since Ministers stepped aside from direct operational involvement, the primary route of accountability for competition authorities has been to the courts. No-one seriously disputes the need to be able to challenge regulators' decisions, although there is room for disagreement about the nature of that challenge. And it is the ability to challenge regulatory decisions in the courts that offers in my view the best guarantee of legal accountability.

This places a great responsibility on the courts, and it is to that we must now turn.

The courts

In the discussion that followed the Government's Consultation on regulatory appeals, most of the emphasis was on how great a degree of scrutiny was appropriate, how speedily could scrutiny be applied, and which appeal bodies should be doing what. There was no significant challenge to the principle, which was re-assuring. What was less so was the fact that in considering the relative merits of specialised tribunals and the general courts, the arguments were all about knowledge, expertise and speed. There was virtually no mention of the need for the court or tribunal to be "independent". Now as regards the general courts that may not be surprising. No-one could easily sustain the argument that the courts and judiciary of this country are not independent of Government.

But with a specialist tribunal it is less straightforward. In the case of the CAT, although its President and senior judges are appointed by the Lord Chancellor, the tribunal itself, being a creature of statute, is administered and sponsored by the Department for Business, Innovation and Skills. This puts a qualification at least on the overall independence of the CAT, not only because the Department, through Parliament, promotes legislation about what the CAT's role and jurisdiction should be, but also because the Secretary of State for Business makes the CAT's rules of procedure[13]. So far, at least, that is no more of a qualification than would apply to the CMA or a sectoral regulator, all of which after all are creatures of statute also. And we told ourselves earlier that it was "operational independence" that mattered. So how independent operationally is the CAT?

[12] Consultation, paras 1.9-1.10.

[13] Enterprise Act 2002 section 15. The Secretary of State must first consult the CAT President and "such other persons as he considers appropriate".

There should not really be much doubt about its independence. The CAT is answerable to the Court of Appeal, so is not in any sense free to roam untamed over the regulatory expanse; and there is absolutely no sign in any of its decision-making practice of any Government attempt to interfere with the course or result of actual cases.

But we should not forget Thomas Becket and the danger of throwaway remarks. It is no secret that some regulators, and Ofcom in particular, have felt that the appeal regime that is applied to them is harsher than is needed. Ofcom's response to the Government's Consultation (although I am not suggesting that was a throwaway remark) said as much.[14] That is something Ofcom is perfectly entitled to hold as an opinion, and to express it if asked. But it is necessary that such views should be based on evidence, and this is where a view can start to move from being reasonable and justified to something more nebulous.

It is one thing to say that subjecting Communications Act appeals to "full merits" rather than "judicial" review is anomalous; that it is a mis-application of the EU regulatory requirement, and that no other regulatory sector is subject to such a regime. Those seem to be things one can have a rational discussion about. But when it is said that "there is a concern that the appeal body could act as a second regulator 'waiting in the wings' or "the risk is that the appeal body may become a de facto second regulator"[15], or that the CAT will "supplant Ofcom's decision"[16] we are much nearer the situation of King Henry and the turbulent priest. To be fair, the Government did not expressly endorse those views in its Consultation, but it did give them perhaps more of an airing than they deserved.

The overwhelming burden of the responses to the Consultation, including the CAT's own, was that such views were quite unfounded and that the real issue was how to apply an appropriate level of judicial scrutiny within a reasonable time frame to encourage better decision making and proper accountability. But where does that leave us on independence? Better off than before this issue blew up? I think not. There is an argument at least that we are worse off.

This is for two reasons. Although the Government's response to the Consultation has not yet been published, the Government is pressing ahead with a review of the CAT's governance and rules of procedure. The latter exercise is in part because of the need to adopt new rules for private actions; but in part also because amongst the issues raised in the Consultation were the complaints that the CAT was allowing too much "new" evidence to be introduced on appeal, was not sufficiently rigorous in dismissing unmeritorious claims and was not being fair to regulators in costs awards. It was said that such matters could be addressed by adapting the CAT Rules, on which the Government said it would "work with" the CAT to make necessary changes. At the same time, everything could be

[14] Ofcom's response is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/252842/regulatory-and-competition-appeals-consultation-responses-i-z.pdf

[15] Consultation para 5.4

[16] Paragraph 2.34 of the National Audit Office report entitled "The effectiveness of converged regulation", HC 490, November 2010, available at: http://www.nao.org.uk/wp-content/uploads/2010/11/1011490.pdf

speeded up and timetables shortened. So here we have the Government, for what it no doubt believes to be genuine and laudable motives, in effect telling the CAT how it should run its affairs.

Secondly there is the fact of the review itself. By raising for discussion the question whether retaining a specialist appeal tribunal was a good thing, even though it rapidly agreed that it was, the Government has issued a not too thinly disguised reminder that the CAT, like all statutory bodies, can be abolished, just as it was created. We all know this of course, so you may say "so what"? But the reminder is there all the same. And those observing or taking part in this review will no doubt have concluded that the CAT as an institution could be attacked, and that its survival as an institution cannot be guaranteed.

Has this changed the climate of activity? Is the CAT throwing out appeals against regulators' decisions for fear of losing its future funding? Of course not; that is not how these things work. But the principle of judicial independence as applied in this highly specialised and expert dominated field has been definitely if slightly weakened. The CAT, like Thomas Becket, has been reminded of its own mortality.

The standard of review

I cannot leave this discussion without touching briefly on the standard of review that the avowedly independent appeal system applies to avowedly independent regulators. This issue was at the centre of the Government's Consultation, For example:-

> "The standard of review will have a significant impact on the scope of the appeal body to re-examine a decision, the length and cost of an appeal" (para 3.13)

and:-

> "In the communications sector, where most appeals are on the merits, there have been a number of long running, in-depth cases which range over a wide number of issues (para 4.7).[17]

Leaving aside the examples of protracted delay quoted, and the apportionment of responsibility between the parties, the CAT and the Court of Appeal for these delays, what comes through is the clear assertion that judicial review is a lower standard of review than "full merits" and that lowering the standard in this way will streamline cases and shorten timescales.

The CAT's response to the Consultation amassed a great deal of evidence to cast doubt on the truth of that assertion[18]. I will not trouble you with it now, but it is there for all to read, and has not, so far as I am aware, been contradicted.

[17] This view was strongly supported by Ofcom's Response (see fn 13) and in the former Ofcom Chairman's evidence to the House of Lords Select Committee already referred to in footnote 3.

[18] CAT Response to Consultation Part I paras 11-22 and Part II paras 4-9.

Nor am I going to go into the question of whether the full merits appeal is a gold plating of the EU requirement[19], or what the legal consequences of an amendment now would be. Again, all that is in the CAT's response.[20]

Instead I want to leave this thought. In the Government's Consultation (and in Ofcom's response to it) reference is made to a statement by Lord Justice Jacob in the *T-Mobile* case[21] to the effect that judicial review could and if necessary must adapt to fulfil the requirements of Article 4 of the Common Framework Directive, which provides that on appeal, 'the merits are duly taken into account'. One of the parties had initially argued that judicial review was not enough to meet this requirement, but counsel for Ofcom and the learned judge disagreed. That case was referred to during the Consultation to show that judicial review was flexible and powerful enough to give a sufficient degree of scrutiny, at least for appeals under the Communications Act.

But that point can be turned on its head. If judicial review is indeed so flexible and powerful, then will it not simply adapt to fill the gap left by the abolition of full merits review? One does wonder whether the implications of this new-found official enthusiasm for judicial review have been fully thought through.

Conclusion

So, with apologies to Lady Bracknell[22], "Independence is a delicate bloom, touch it and it fades". The need for proper, operational, institutional independence from the power of executive Government applies to regulators and appeal bodies alike. The citizens and subjects to whom these far-reaching laws and regulations are applied need to have the confidence that regulators will come to decisions without fear or favour, and that if those decisions are challenged, the challenge can be made before a court or tribunal that is similarly fear and favour free. Recent reviews and disagreements have left the system looking slightly more fragile than before. The CMA has to establish its reputation from, if not a standing start, then at least from a slow canter. And the CAT has to show that the recent and sustained attack on the way it handles communications appeals has not affected its competence, confidence and independence of judgment. In short, we need to make sure that there has been no "Murder in the Cathedral" and that the turbulent priest can go about his business in peace.

[19] Consultation para 4.26.

[20] Nor do I discuss how on a merits review, the CAT can shorten proceedings by correcting a wrong decision rather than remitting it back to the authority – see *TalkTalk Telecom Group Plc v Ofcom* [2012] CAT 1 at [126]-[130].

[21] See footnote 14 (above).

[22] Oscar Wilde, "The Importance of Being Earnest".