REGULATORY JUDICIAL REVIEW:

THE IMPACT OF COMPETITION LAW

(i) Introduction

1. The focus of this afternoon's talk is regulatory judicial review. Whilst a term of uncertain ambit, for present purposes regulatory law probably has two primary dimensions:

   (1) Substantive regulation: what are the rules that the regulator adopts? May it adopt them?

   (2) Disciplinary law: what sanctions may the regulator impose on the regulated for the breach of its substantive rules? How may it impose them?

2. The latter topic is primarily one for another day. Disciplinary disputes (whether in judicial review or statutory appeal) tend to be about one of two things:

   (1) The fairness of the original disciplinary hearing - an issue ever since *Ridge v Baldwin* and before. Disciplinary disputes form the backbone of many of leading cases on natural justice.

   (2) The level of the sanction, a question increasingly seen through the lens of proportionality.

3. That is not to say that disciplinary disputes do not throw up wider issues, e.g. as to the scope of the regulator's powers (see e.g. *Council for the Regulation of Health Care Professionals v General Medical Council and Ruscillo* [2005] 1 WLR 717) or as to the interaction of disciplinary hearings with other forms of proceedings (e.g. *R. (Ranson) v Institute of Actuaries* [2004] EWHC 3087) or just straight questions of law, but by and large sanction is the key. However, even sanction cases can raise interesting questions of law and policy, as in the recent case of *Royal Mail Group Plc v Postal Services Commission* [2007] EWHC 1205.

4. Interesting as these topics are, I want to concentrate today upon the control of substantive regulation – that is the legal controls over the dissemination of rules, guidance, regulations and decisions governing what the regulated party may or may not do. I want to cover the basic topics of:

(1) when to sue?

(2) what to sue about?

(3) where to sue?

and to see how the conventional approach to those topics in judicial review may have changed as a result of the impact of recent competition law legislation.

(ii) When to sue?

5. One of the key factors to remember about regulatory cases is that both regulator and regulated are what Marc Galanter called "repeat players". This connotes not only an ongoing relationship, but also the potential to develop the applicable regulatory law in multiple stages through well-timed and judiciously selected test-case litigation. For the truly sophisticated operators (in particular the regulated) the prompt to go to law may not be because they can, and because they may win, but because they will win in the correct fashion. A case may be important more for the principles it establishes than the particular result it generates.

6. When to sue is thus a complex decision for a regulated party, depending upon:

(1) the particular stakes – i.e. the consequences of the particular piece of regulatory action if unchallenged.

(2) the wider costs of an unchallenged decision;

(3) the risks of losing – e.g. an emboldened regulator, wider regulatory discretion, a stand-off position by the Court, enhanced jurisdiction etc;

(4) the merits; and

(5) the impact of the decision on the regulatory relationship.

7. In many sectors it is becoming increasing important that disputes, when they arise, are presented on a sectoral basis – i.e. that all the affected parties try to join common cause, for reasons of: credibility; cost; maximum leverage (particularly with private regulators).

(iii) What to sue about?

a. The issues

8. The question of what to sue about is a basic one. In regulatory law there is always a basic question to be asked: *public or private law, or both*? Often, there may be little difference in applicable law, but telling differences in *forum*, and also potentially in terms of intensity of review.

9. Until the reform of our domestic competition law the options for control of regulatory power were relatively one-sided. The common law offered some parallel control in a disciplinary or restraint of trade context (see e.g. *Nagle v Fielden*, *Lee v Showman's Guild*) to that applied by the Courts in judicial review, but beyond those areas was relatively powerless to scrutinise the actions of private regulatory bodies.

10. Judicial review was thus the main show in town. The regulated scrambled to get into judicial review; and the potential regulators struggled to stay out. This is the backdrop to the notable "public v private" cases of the 1980s and 1990s.

11. Applying the classic *GCHQ* triumvirate the areas of control afforded by conventional public law are:

(1) Legality: has the regulator understood its own regulatory framework and operated within it? Increasingly, the role of EC law in this equation has increased. This is a function of the increasing reach of EC law into

regulatory law (think financial services, railways, competition law, pharmaceuticals) and of the often compromised nature of EC legislation (it is vague, unclear, a compromise etc) that offers real scope for legal dispute. Another area proving particularly fertile for litigation is confidentiality, involving as it largely does, straight questions of law, often of significant importance: see e.g. *R. v Department of Health Ex p. Source Informatics Ltd (No.1)* [2001] QB 424; *London Regional Transport & anr v Mayor of London & anr* [2001] EWCA Civ 1491, [2003] EMLR 88.

(2) Fairness: the *key* area for any regulator to get right, and the main area for judicial intervention if not got right. Some of the highest profile regulatory judicial review successes have arisen from procedural failings: see, for example, *R v National Lottery Commission, ex parte Camelot* [2001] EMLR 43; and *Interbrew SA v Competition Commission* [2001] EWHC Admin 367 [2001] UKCLR 954. But bringing fairness challenges is not necessarily easy. The Courts may suspect, rightly or wrongly, 'ramped up' claims and may give the regulator very considerable procedural latitude: see e.g. *R v Airport Co-ordination Limited, ex parte Aravco and others* [1999] EuLR 939 (CA).

(3) Irrationality/proportionality: Advancing irrationality challenges in a regulatory context is notoriously tough. It should not be assumed it is impossible, reasons given still have to "stack up". In *Parliamentary Commissioner for Administration ex p Balchin* [1996] 1 PLR 1 at page 13, E Sedley LJ put it as follows

> *"[Counsel for the Claimant] does not have to demonstrate, as [defendants] sometimes suggest is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term 'irrationality' generally means in this branch of the law is a decision which does not add up - in which, in other words, there is a error of reasoning which robs the decision of logic" (emphasis added).*

This was a formulation approved in *R(Norwich and Peterborough Building Society) v Financial Ombudsman Service Ltd* [2002] EWHC 2379, [2003] 1 All E.R. (Comm) 65 at [59].

(4) Even with the more structured proportionality approach the judicial review Court is likely to accord a very wide margin of appreciation. It is a nice question (and one to be explored again by the House of Lords in the second round of the Hunting Act litigation) how much more onerous are the demands of EC proportionality compared to HRA proportionality. However, given the comprehensive nature/thoroughness of most regulatory exercises the Court should, I suggest, be especially tough on "after the event" reasons that appear to have no grounding in the decision itself.

12. However, today this classic tussle has changed in three notable ways for regulatory disputes:

(1) First, the grounds of judicial review have been markedly enhanced by the HRA 1998. In a regulatory context, this means that Articles 6, 7, 8, 10, 14 and A1P1 may be in play, adding complexity to the existing regulatory map.

(2) Secondly, the Competition Act 1998 has created the Chapter I and II duties, and Regulation 1/2003 has "domesticised" Articles 81 and 82 EC.

(3) Thirdly, the Competition Act 1998 and a string of related Acts has entrusted a number of sectoral/regulatory appeals to the CAT and Competition Commission. Such appeals have either been entrusted on something akin to a judicial review basis, or something closer to a merits basis.

13. In crude terms, the first two factors mean that the 'cost' of being amenable to judicial review has gone up somewhat (though its extent should not be overemphasised, HRA arguments (perhaps other than Article 6 ones) being

generally weak in a regulatory context) whilst the cost of being outside judicial review has gone up markedly.

14. The third factor is, where it applies, a potentially significant qualifier of the deference usually enjoyed by regulators. There is a crude equation: review of experts by generalists - wide margin of appreciation; review of experts by other experts (potentially even 'more expert experts') - narrow margin. This is the story of expert tribunals wherever they arise. For instance, the increasing scope of the expert and specialist VAT & Duties Tribunal to hear what are in effect judicial reviews to decisions by HMRC (under the Finance Act 1994) has undoubtedly led to far closer scrutiny of the merits of individual administrative decisions, because of the expertise of the regulator is increasing matched by the expertise of the Tribunal.

15. These three factors will lead, I believe, to two key changes:

    (1) First, they will lead to a re-evaluation of the law/legal analysis applicable to some types of regulatory disputes.

    (2) Secondly, they will lead to some changes in the approach to control over substantive merits.

b. *Applicable law*

16. As for the first point, I think these changes call into question a variety of older decisions about how regulatory power was to be controlled.

17. My thesis is quite simply that a lot of *Datafin* is old hat and that many decisions that certain regulatory bodies, particularly those that are self-styled "self-regulatory" bodies, are amenable to judicial review are:

    (1) *Bad in law* - being the right result (i.e. legal control) reached by the wrong route (i.e. public law); and

(2) *In need of revision* – not just for reasons of purist principle but because the correct analysis, i.e. control via private/competition law, in fact reveals appreciably different terrain.

18. In short, there are bodies that are labelled as "public law" bodies or bodies "amenable to judicial review" that should not be. There increasing incentives for private parties to contest that label; meanwhile there are increasing incentives for regulatory bodies to keep it.

19. What the problem area? It is this. Regulatory Body X exercises considerable power and sway over its members. Members join through a contract where they agree to be bound by Body X's rules. Body X may sanction them for breach of the rules – it may impose fines, suspend the person or even expel them. Such sanctions carry real weight. A member, Y ,might need to be a member of body X in order to:

(1) pursue their profession (e.g. LSE, LME, Professional Bodies such as the RChA, FA);

(2) raise finance (LSE and other exchanges);

(3) to have credibility in the eyes of customers or consumers (e.g. ABTA);

(4) to avoid regulation as opposed to self-regulation (e.g. PMCoPA v MHRA; ASA v OFT);

(5) to have the benefits of membership (lobbying, common insurance, reputation etc).

20. The question is how are body Y's powers to be controlled.

21. <u>*Datafin*</u> and the subsequent case-law propose in effect a "hodge podge" test. What are the body's functions? What is the source of its power? What is the nature of its functions? If it did not exist, would Pt be obliged to create something similar? Has it a requisite degree of statutory recognition/underpinning to

transmute it into a public body? Function and underpinning tend to be the key criteria.

22. The result in my view is a highly impressionistic set of decisions:

(1) The GMC is amenable to control by JR, as is the Institute of Actuaries, and the Institute of Chartered Accountants, but not the FA or the Jockey Club or the NJC for the Craft of Dental Technicians or the Showman's Guild Appeal Tribunal.

(2) The BCC is amenable to JR but not the IBA, whilst the BBC continues its Willo the Wisp dance on the fence and no one decides about the PCC.

(3) Amongst the self-regulators, the ASA and the PMCoPA (a division of the ABPI) are amenable to JR, but ABTA is not.

(4) The LME is amenable to JR even though it is regulated by the FSA, but Lloyds of London is not.

23. This case-law, looked as a whole, is I would suggest one of the less impressive areas of case-law development. There is little in the way of guiding principle and complete inconsistency between similar areas. One could be forgiven for thinking two things.

(1) First, that in many of the cases incomplete consideration has been given to the extent of controls extant at private law; and

(2) Secondly, that the reasoning in many of these cases is *instrumental* – these bodies have such extensive power over so many individuals that they *should* be amenable to some form of control. Private law controls are thought insufficient. So we must use public law.

24. There was some truth in the latter assertion. And in my view such instrumentality was and is the true explanation of many of these cases. But is it

one we should persist with now that we have the Competition Act? The simple fact is that all of these problematic bodies have their power based upon:

(1) collective action (notionally/actually consensual);

(2) underpinned by contract, such as to be a "club", "association", "commission" etc. The really grand ones go whole hog and get themselves some form of special statutory status, whether as a body corporate etc.

The complication, that often leads to the erroneous conclusion of amenability to judicial review, is that such arrangements may receive some degree of governmental blessing, whether as approved or supported "self-regulation" (e.g. in EC Directives) or in statutory provisions that cross-refer to such bodies with approval.

25. The second key fact is that far from pursuing the public interest unalloyed, many of these bodies in fact pursue self interest. Take a few obvious examples:

(1) The LME/LSE are exchanges, with shareholders, geared to make profit. They do. Maintenance of public confidence in the exchange is part of their business.

(2) The FA is a body dedicated to returning the very substantial profits it generates back to its members (or some of them, at least). Certainly, it is run in the perceived interest of its members and not, say, those of football agents, broadcasters etc.

(3) The PCC, ABTA, ASA and other self-regulators are created in order to stave off arms length regulation. Their aim is to regulate in their member's interests, so that the state does not come in and apply ill-informed/excessive regulation. Such bodies frequently lobby on behalf of the industry they represent.

These are the hallmarks of an "undertaking". Compare and contrast true public law bodies which are not "undertakings" under the *FENIN* test, e.g. collective, publicly established national insurance schemes; public sector broadcasting etc etc.

26. My simple thesis is that where truly undertakings, such bodies are properly regulated through competition law, either under Article 81 (collective agreements, trading associations etc) or as bodies in a position of joint/collective dominance. Four features are strong indicia that bodies are "undertakings":

    (1) The grounding of powers in contract, and the use of contractual tools (such as arbitration).

    (2) The fact that the body in question is itself regulated - e.g. LME by the FSA; and/or

    (3) The fact that there is dual regulation: e.g. the ABPI/PMCoPA by the MHRA; the ASA by the OFT; and/or

    (4) The strong links that may exist between the body and the profession it regulates - the very rationale for "self-regulation" but also the very feature that may lead to "capture".

27. This competition law analysis is powerful; it is precisely the analysis that the CFI used to analyse FIFA, in many ways one of the apogees of such regulatory bodies, and one with real rule-making and extensive regulatory pretension, in the *Piau* case.

28. Such a regime of control leads in many cases to a very similar conclusions:

    (1) Statutory duties, if applied to such bodies, can be enforced by private law (e.g. duties owed to the FSA) - i.e. conventional judicial review "legality" under the *GCHQ* test.

(2) Exceeding ones powers/areas of competence (e.g. arrogating a power under your rules/constitution that is not there) is likely to be an abuse of dominance and/or outwith your powers under contract.

(3) Imposing new rules that are objectionable because of partiality, discrimination etc will fall foul of A.81/82 EC.

(4) Legislating for anything other than a legitimate purpose and in a proportionate fashion will also be a breach of Article 81/82 EC.

(5) Standards of fairness, especially in the disciplinary context, will be routinely read in and enforced and if flouted will be an abuse.

(6) Moroever, the independence of the disciplinary decision-maker/allocator of scarce resources owned by the regulator may be part of a solution to avoid abuse c.f. the position of Airport Co-ordination Limited under the airport slots regulations, the Ombudsman to the Supplier of Choice scheme imposed by the Commission upon De Beers, and the various bodies required by the Rail Directive. It is those controlling/regulating bodies required by statute that are the public body, *not the regulated body*.

b. *Control over merits*

29. So if the standards of control are much the same, what is the point? Isn't this just legal nit-picking? Isn't this completely irrelevant for the classic statutory regulator – the Ofcoms, ORRs, Ofgems or FSAs of this world?

30. Not so for the following reasons I would suggest.

31. First of all for the self-regulator there are differences in control for three key reasons

(1) Deference: There is a different starting point for considerations of deference/margin of appreciation/legitimacy in a competition case. The starting point for public bodies is the notion of democratic accountability.

However, much they may protest to the contrary, self-regulatory bodies do not have a similar call to credibility/respect. This has a very significant impact on the Courts powers of intervention. Just think for a moment of the historic interventionist approach to restraint of trade and extend that approach to anti-competitive, restrictive behaviour more generally (even restrictive behaviour premised upon disciplinary sanctions). Self-regulatory bodies undoubtedly have expertise, but they also have non-statutory agendas, agendas that can be partial or self-serving.

(2) Remedies: There is equally a different starting point for remedies, particularly monetary remedies, but also injunctions etc. Consider the difficulties of a claim for breach of statutory in public law – contrast a claim for breach of Article 81/82 EC. Or consider the special rules for public enforcement bodies on injunctions and cross-undertakings; or being made subject to injunctions. Those rules do not extend to self-regulatory bodies.

(3) Procedure: one is outside the confines (often artificial) of CPR Part 54. There is much greater flexibility, particularly when takes the possibility of Part 8 proceedings into account for those cases where appropriate. Other tussles may require disclosure, the use of experts (something that can be positively counter-productive in JR), cross-examination etc. And why not?

32. To conclude, for self-regulatory bodies public lawyers should not so readily assume that judicial review provides the solutions. My experience is that whenever one asks "is this body amenable to JR" one should follow it up with two other questions "might it also be amenable to control through private/competition law" and "which is better for my client".

(iv) Where to sue?

33. But I suspect these effects are not confined to self-regulatory bodies, particularly when not combined with the third change, namely increased use of specialist bodies. In fact, one sees a situation in which:

(1) It is reasonable to anticipate self-regulatory bodies will be put through an increasingly structured analysis and investigation of regulatory rules under the lens of competition law (a good example is the recent *Meca-Medina* case). Judges will approach rationality/proportionality questions in such context against the backdrop of disclosure, evidence and expert evidence.

(2) For conventional regulatory bodies engaging in competition law disputes such a "private litigation model" may be to a degree carried over into the CAT and other specialist tribunals, particularly those with a full merits jurisdiction, but equally those with a "statutory JR" appellate function.

(3) Where such rationality arguments constitute the essential core of the regulatory dispute, and where recourse to arguments of "legality" or "procedural unfairness" is neither plausible nor available, then parties will attempt to shoe-horn such disputes into either: (a) private litigation (e.g. if dealing with a self-regulator formerly said to be or thought to be amenable to JR); or (b) an existing statutory appeal process wider than JR; or (c) an alternative form of dispute resolution, such as the statutory arbitration remedy provided in a number of different contexts. Point (b) is of especial importance. It may not be difficult, with a bit of imagination, to repackage or reframe a dispute (or to trigger one) that falls outside a statutory appeal before Specialist Body X and into judicial review (or a statutory appeal before the High Court). In many regulated fields even this enterprise will be unnecessary. Instead there will be the simple comparison between control through private competition law litigation for Self-Regulator A compared with the standard of control for

Statutory Regulator B. The temptation will be to avoid great disparities in standards of control, particularly if there is more exchange of judicial staff and expertise between the Chancery Division and the CAT.

34. In short, there are now more remedial/appellate options than before, and, as such, greater choice over where to sue and how to do so. The result, I suspect, is yet further reason for the *regulated* to avoid judicial review wherever possible, and for the *regulated* (particularly those who spent so long fighting their amenability to judicial review - the BBC springs to mind) to push for the protection of judicial review by arguing against the application of competition law (in the case of self-regulators) and in favour of narrower interpretations of statutory appeal and other alternative dispute mechanisms. If this is so, perhaps *O'Reilly v Mackman* threatens to reappear in a form morphed for our age.

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Blackstone Chambers, 25 June 2007