Reforming Communications Act appeals: a new ERRA?

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Introduction

Barely an appeal hearing in the Competition Appeal Tribunal (CAT) seems to take place without someone raising the perennial argument as to what exactly is 'an appeal on the merits', the test set out by statute for such appeals. Originally encapsulated in paragraph 3(1) of Schedule 8 to the Competition Act 1998, the phrase was mirrored in section 195(2) of the Communications Act 2003. In this article, we discuss the Coalition Government's moves to reform the legal regime and what implications this might have for the communications sector.

Perhaps not surprisingly, regulators, like Ofcom, are keen to argue in the CAT that their decisions are ones of regulatory judgment and therefore should not be interfered with unless there is some clear error of law (rather like a judicial review of an administrative decision). Industry entities are less happy to have a restricted right of appeal when many millions of pounds can turn on that decision. That is particularly so when Ofcom has been given a power under sections 185-191 of the 2003 Act to resolve commercial disputes between parties, which has become seen by some as cheaper alternative to litigation (for example, High Court actions under s 104 of the 2003 Act).

Despite the number of times the point has been raised in the CAT, it has only been directly in issue once before the Court of Appeal in *BT v Ofcom* [2011] EWCA Civ 245, (the so called 08x numbers preliminary issue appeal). There the court indicated that an appeal on the merits was not synonymous with the merits of the decision before the regulator (see para 60 of the judgment) and it allowed the CAT to receive new evidence (not before the regulator) on which it would reach its own decision (see eg para 70 of the judgment). As noted 'the appeal body is concerned not merely with Ofcom's process of determination but with the merits'.

The precise meaning of an appeal on the merits has not been helped by obiter comments in other Court of Appeal cases. One example is *Telefonica & others v Ofcom* [2012] EWCA Civ 1002, (the appeal of the main hearing in the 08x numbers case, soon to be heard by the Supreme Court) where Lloyd LJ openly accepted that the court had not heard argument on the point and it was not the occasion to review the true nature of the relationship between the CAT and the regulator (see para 90 of the Judgment). However, this case is often cited as restricting the nature of the appeal: see for example *Telefonica v Ofcom* [2012] CAT 28 at paragraph 45. It is, though, clear that where the issue is one of proper regulatory judgment (eg whether there is a regulatory preference that calls to 080 numbers should be free to the caller) then the CAT must give a clear degree of deference to Ofcom's approach and the CAT should be slow to overturn Ofcom: see eg *BT v Ofcom* [2011] CAT 24 at paragraph 230 (not appealed on this point).

Against that background the Coalition has been consulting on the appeal process in the consultation document, *Streamlining Regulatory and Competition Appeals*[1]. This is not the first time the government has considered the issue. In 2010 it consulted on reforming section 195(2) of the 2003 Act to introduce essentially a 'flexible' judicial review test.[2] Somewhat disturbingly, the earlier consultation seemed to acknowledge that what exactly this flexible form of judicial review test actually involved would have to be worked out by the CAT and the courts and whether it would lead to a reduction in appeals was not clear.[3] That reform was dropped from the changes to the 2003 Act implemented in May 2011.

The arguments for a 'flexible' judicial review test have been resurrected in the present consultation. However, the Coalition's proposals are wider than just the 2003 Act. We, therefore, discuss them in the context of the changes to competition law enforcement under the Enterprise and Regulatory Reform Act 2013 (ERRA) which abolishes the separate UK Competition authorities of the Office of Fair Trading (OFT) and the Competition Commission (CC) and replaces them with a single competition authority from early 2014, the Competition and Market's Authority (CMA) (though it leaves unchanged Ofcom's competition law powers).

ERRA and the government's June 2013 consultation

The government's consultation of June 2013 covers reviews and appeals across regulated markets. It also covers appeals on the merits of competition enforcement decisions made by the OFT and CC merged as the new CMA, and other sectoral regulators exercising competition enforcement concurrently, including Ofcom in communications markets, and decisions made by Ofwat, Ofgem, the Civil Aviation Authority, and the Office of Rail Regulation.

The CMA itself will be based in the CC's former premises in Victoria House in London, and will employ elements of the CC's idiosyncratic 'gentlemen and players' decision-making process. As with the CC, senior unpaid lay 'members' or 'commissioners' drawn from industry and the professions will oversee decision-making in the CMA. This decision-making process is unique to competition law enforcement in the EU, and was retained by the government in the reform of the UK's principal competition authorities because of the credibility of these well-respected individuals with businesses and their perceived independence from OFT and CC staff. In addition to these institutional changes, the administrative and substantive legal framework of the appeal processes against competition enforcement could also be subject to change, which the government is consulting on.

The standard of review in the appeals process

A major element of the streamlining of procedures across regulated markets is the standard of review to be adopted by the appellate body. In communications, consideration of this has primarily been driven by the 2003 Act, because, unlike other areas, the EU legislation makes clear that appeals from the decisions of National Regulatory Authorities in the telecoms sector, must 'ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism'[4].

However, the view of the government in the consultation document is that the current UK legislation 'gold-plates the requirements of the Framework Directive'. It suggests that this has led to increased cost and delay in appeals, which in turn impacts on regulatory decision making. As an example, the government cites the appeals process following Ofcom's decision in 2009 on Local Loop Unbundling, which, it is said, delayed the next price control decision by a year.[5] Accordingly, the consultation document deplores the CAT litigation of recent years:

> *'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 – arguably slowing down regulatory decision-making and potentially increasing regulatory uncertainty.'*[6]

The consultation document examines a number of leading CAT precedents by length of time, and argues that, 'there may be benefits from being clearer at the outset on the degree of scrutiny that will be applied in appeals against different types of decisions.'[7]

However, as the consultation document itself acknowledges, appeals before the CAT are the main way of holding regulators to account by communications stakeholders adversely affected by decisions of Ofcom.[8] This is particularly true in appeals against decisions in the communications sector, as Ofcom's guaranteed independence from government means that its decisions are only reviewable in the CAT or other courts, and are not subject to any direct parliamentary oversight or significant input by political stakeholders.

Such appeals include not only *ex post* dispute resolution under sections 185-191 of the 2003 Act, but also Ofcom's forward looking *ex ante* regulation, including licence modification and charge control appeals (as well as to the CC under s. 193[9]). Extremely large sums running to hundreds of millions can be involved in the precise regulation that Ofcom decides to impose. Moreover, Ofcom has, on a significant number of occasions and in respect of various regulatory decisions, been held to have erred in its approach. It is not, therefore, surprising that communications providers are keen to challenge what they consider to be errors in Ofcom's assessment.

The key change envisaged in the government's proposals in the June consultation concerns the standard of review in communications appeals. The government is proposing to change the standard of appeal to either (a) *'a flexible judicial review'*[10] (option 1) or (b) 'where any appeal is not heard on a judicial review basis, the standard of review should be determined on clear grounds of appeal which are focussed on identifying material errors or unreasonable judgments on the part of the regulator…'[11](option 2). The government appears to believe that there should be 'a presumption that appeals should be heard on a judicial review standard unless there are specific legal or policy reasons for a different approach.[12]

The consultation document proposes inserting a new section 195 (2A) to the Communications Act, which would restrict the grounds on which such an appeal may be allowed only where there is (a) a material error of fact; (b) a material error of law; (c) a material procedural irregularity; (d) the decision was outside the limit of what Ofcom could reasonably decide in the exercise of a discretion; or (e) the decision was based on a judgment or a prediction which Ofcom could not reasonably make.[13] These five grounds are obviously intended to restrict the substantive standards of review that the CAT can apply to an appeal arising under section 192 of the Communications Act 2003.

The government proposes further to adopt a similar type of test for other areas. The standard of review for appeals under the Competition Act 1998 will be aligned with the changed standard under the Communications Act 2003 (save for decisions relating to the level of a penalty imposed for an infringement of the law).[14] Similarly, price control appeals, currently referred to the CC, are considered separately[15] but essentially the same options are suggested for these appeals[16], though it is recognised that 'there may be a stronger argument for retaining a standard of review for price control decisions which allows for greater scrutiny than the traditional judicial review. Price control decisions are central to the way regulated businesses are operated…..'[17]

Other proposed changes

The other changes suggested in the consultation document relate to the process for hearing appeals. This includes changes to the present procedure of the CAT and the CC in price or charge control appeals, which occur on a reference from the CAT during an appeal. Whilst acknowledging the merits for the existence of specialised courts or tribunals in providing greater certainty, flexibility and consistency for courts within their experience, the consultation document proposes reviewing the CAT's procedural rules to ensure that appeals focus on material errors and that any

incentives to game the system are minimised.[18]

The government also intends to streamline the actual hearing of an appeal. The example of the *Sky* litigation concerning conditional access modules, which involved 35,000 pages of submissions and evidence, 41 witnesses (including 14 experts) of whom 25 gave oral evidence, is cited in the consultation document as an example of the perceived burden of an appeal.[19] The consultation document also proposes aligning costs awards when a party challenges a regulator: and that these should be awarded against the appealing party, 'unless there are exceptional circumstances.'[20]

Further, the government encourages the regulator to claim their full costs from appealing parties, including their in-house legal costs, when successful in an appeal.[21] The question of the regulator's costs in a communications appeal was recently considered by CAT in an application by the CC for costs in relation to a price control matter in a reference under section 193 of the Communications Act.[22] Although this application was not allowed by the CAT (see *Mobile Call Termination (Costs)* [2012] CAT 30), that this application was heard shows that regulators are getting more aggressive at defending the resources used in appeals.

The CAT's response to the proposals

Judges have expressed concern following the publication of the Government's proposals. The retiring President of the CAT, Mr Justice Barling, in the David Vaughan QC/ Clifford Chance Annual Lecture on Antitrust Litigation commented that it was 'puzzling' why the government, after stating in its March 2012 response on the CMA that it accepted 'it would be wrong to reduce the parties rights and therefore intends that a full merits appeal would be maintained', had produced a different view in the consultation only just over a year later.[23]

As the specialist appeal forum, the CAT submitted its own response to the government's consultation, which is publicly available on its website.[24] The CAT is understandably reluctant to concede that the current practice in competition and regulatory litigation is unduly costly or lengthy. It emphasises that any changes to substantive standard of review applied by the CAT in Communications Act cases could risk generating 'additional and/or lengthier litigation as parties seek to establish the boundaries of the new regime', such as what appealable matters fall within Article 4 of the Framework Directive.[25] The CAT response emphasises that the government's consultation document does not even mention 'the almost universally unfavourable reaction of the two earlier extensive consultations on changing the standard of review in communications appeals.'[26] The CAT also takes exception to the consultation's belief that the CAT's current procedures encourage too much 'new' evidence, to the regulator's disadvantage.[27] The CAT regards this proposed change as a serious cause for concern, noting that the Court of Appeal in 2011 endorsed the CAT's approach to the admission of such 'new' evidence.[28]

The CAT response is pessimistic of the 'solutions' proposed by the government's consultation to addressing the 'problems' that have been identified. It notes that the consultation produces 'scant evidence' to support the view that appeals take 'too long', and that the CAT's appeal processes compare very favourably to the EU courts or other EU jurisdictions applying the same rights. Moreover, some of the procedural innovations proposed, such as early timetabling of procedural steps in the proceedings 'are already well-established features of the CAT's case management for every case that comes before it.'[29] The CAT's response emphasises the importance of judicial independence to the integrity of the process.

Assessment of the proposed changes

It is difficult to predict how the changes that will emerge from the consultation process will be implemented in detailed form. As with the prior consultations to reforming communications appeals, the government's intention seems to be that the new regime will be much more restricted than the former regime, with new incentives to discourage perceived 'gaming' of the system by parties appealing regulatory measures and controls, and further changes to diminish the substantive standard of review and recovery of costs incurred by parties to the appeals.

We share the CAT's concerns, however, that the proposed moves could limit the scope of judicial over-view and could deprive litigants of their ability to properly review appeal decisions. Further as the CAT pointed out in its response to the consultation, reforming the process and substance of Communications Act appeals could well risk the re-opening in litigation of matters and rights which were thought settled.

As the CAT pointed out, the present appeals are *not* in fact that lengthy or costly, given the complexity of the issues at stake. Indeed, having practised both in the CAT and other areas of the judicial system, we regard the CAT as a paragon of case management and rigid control of the appeal process. Perhaps the government would have done better to concentrate its attention on other parts of the legal system more obviously in need of improvement.

More importantly, from a stakeholder perspective, for every lengthy appeal process an there is even lengthier regulatory decision process underpinning the appeal. We think that the government should also have considered moves to tighten up the procedural timetables of regulators in reaching determinations. Even in dispute resolution cases before Ofcom under the 2003 Act (which are supposed to have a hard long-stop of four months) the time period is often missed. Indeed in one such case, the PPC case, (actually relied upon in the consultation as an example of the appeals process 'arguably slowing down regulatory decision making'[30]), Ofcom took longer, from the first dispute being submitted to it, to reach its final determination, than it took the CAT, from the date of the appeal being lodged, to give its final decision (and indeed as part of that process having heard also a preliminary issue on jurisdiction).

It is difficult to resist the conclusion that the government is seeking to reform the appeals process by diminishing substantive rights and stripping back the administrative processes. The cynical might be tempted to say that the government's proposals will cut the costs of the regulator and administering the appellate bodies.

We await the outcome of the consultation with interest, and hope to update readers of *Communications Law* with a future discussion in due course.

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(Graham is listed as one of the leading telecoms Silks in the legal directories for telecoms appeals and has been involved in most of the cases referred to above. John worked in-house at the Competition Commission and Ofcom before specialising in telecoms at Devereux).

Notes

1 'Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform', Department for Business, Innovation & Skills, (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), paras 4.6-7, discussing the Partial Private Circuits litigation [2011] CAT 5.
2 See 'Implementing the Revised EU Electronic Communications Framework', September 2010 at p 15 onwards.
3 See p 34 of the Impact Assessment to 'Implementing the Revised EU Electronic Communications Framework', September 2010.
4 Article 4 of the Communications Framework Directive 2002/21/EC is follows: 'Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.'
5 Streamlining Regulatory and Competition Appeals, at paras 4.26-7.
6 Streamlining Regulatory and Competition Appeals, at para 4.7.
7 Streamlining Regulatory and Competition Appeals, at para 4.10
8 Streamlining Regulatory and Competition Appeals, at para 1.10.
9 Streamlining Regulatory and Competition Appeals, at paras 2.3-4.
10 Page 5, Streamlining Regulatory and Competition Appeals.
11 Streamlining Regulatory and Competition Appeals, para 4.21
12 Paragraph 4.19, Streamlining Regulatory and Competition Appeals.
13 Streamlining Regulatory and Competition Appeals, at box 4.2, p 34.
14 Streamlining Regulatory and Competition Appeals, at para 4.46 et seq.
15 Streamlining Regulatory and Competition Appeals, at para 4.88.
16 Streamlining Regulatory and Competition Appeals, at para 4.67 et seq.
17 Streamlining Regulatory and Competition Appeals, at para 4.73.
18 Streamlining Regulatory and Competition Appeals, at para 5.9.
19 Streamlining Regulatory and Competition Appeals, at para 3.22.
20 Streamlining Regulatory and Competition Appeals, at para 6.22.
21 Streamlining Regulatory and Competition Appeals, at para 6.25.
22 *British Telecommunications & Ors v Office of Communications* [2012] CAT 30.
23 See pp 17-18 of 'Competition litigation: what the next few years may hold' (19 June 2013).
24 Response of the Competition Appeal Tribunal (available at http://www.catribunal.org.uk/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html), para 4, at sub-para. (5): 'We note the Government's views on the "standard of review" in regulatory appeals…but it is questionable whether changing (or reformulating) the standard of review will bring the benefits sought. In particular, there seems to be a degree of misunderstanding and misinformation about how "merits" appeals work in Communications Act 2003 cases and what would be the likely effect of changing them. Changing the standard of review is unlikely to prove itself a "silver bullet" as the Government appears to believe it to be.'
25 Response of the Competition Appeal Tribunal, para 20.
26 Response of the Competition Appeal Tribunal, para 21.
27 Response of the Competition Appeal Tribunal, para 38.
28 British Telecommunications v. Ofcom [2011] EWCA Civ 245.
29 Response of the Competition Appeal Tribunal, para 46.
30 Streamlining Regulatory and Competition Appeals, at para 4.7.