

More certainty in Ofcom's dispute resolution powers (BT & TALKTALK v OFCOM)

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TMT analysis: The decision of the Court of Appeal in *BT & TALKTALK v OFCOM* [2017] EWCA (Civ) 330 has given practitioners in the Telecoms sector much more certainty as to how Ofcom's dispute resolution powers will be applied. Graham Read QC and Georgina Hirsch of Devereux Chambers have commented on the case, in which they acted for BT—alongside Rhodri Thompson QC of Matrix Chambers.

Original news

BT & TALKTALK v OFCOM [2017] EWCA (Civ) 330

What issues did this case raise?

The appeal to the Court of Appeal from the decision of the Competition Appeal Tribunal originated from a Determination by Ofcom under its dispute resolutions powers, which are contained in [sections 185-191](#) of the Communications Act 2003 ([CA 2003](#)).

In essence, Ofcom had considered that, for the period from 2006 to 2011, BT had breached the regulatory condition imposed upon it by Ofcom requiring that BT's charges for the products it supplied in the ethernet market should be cost orientated. Ofcom assessed the cost orientation of BT's charges primarily by reference to a benchmark called distributed stand alone costs (DSAC).

In respect of charges above DSAC, Ofcom found that BT had overcharged other Communications Providers (CPs) by approximately £95m and ordered BT to repay this.

There were four grounds of appeal to the Court of Appeal, three by BT and one by TalkTalk. These were:

- first, BT contended that Ofcom's power to order repayment of any overcharge, contained in [CA 2003, s 190\(2\)\(d\)](#), was limited in time to the period from when the disputes actually arose (2010 onwards) and that Ofcom had no retrospective power to order repayments for the earlier period
- secondly, BT argued that Ofcom's determination had breached the EU principle of legal certainty in several respects, so that the approach Ofcom adopted in its Determination was not legally clear to BT at the time when BT had set its charges
- BT's third ground of appeal was that no express provision was made under [CA 2003, s 190\(2\)](#) which permitted Ofcom to order BT to pay interest on any of the overcharged sums, and nor could any such provision be implied either by reference to EU law or the rest of [CA 2003](#)
- Talk Talk's single ground of appeal was that, in relying primarily on DSAC Ofcom had applied the wrong 'benchmark' for assessing cost orientation and, in fact, BT's charges should be assessed by reference to its fully allocated costs (FAC), across an aggregated range of products. FAC would represent a much tighter control on BT's charges and thus, if used, would have substantially increased the amounts BT would have to repay

What are the practical implications of this case?

BT's and TalkTalk's grounds of appeal had big implications in the telecoms sector. CPs now regularly seek to avoid litigation by referring disputes to Ofcom, often long after the original events, and it is difficult to overstate how important Ofcom's powers of dispute resolution have become in the Telecoms sector.

If BT's first or third ground succeeded, then the incentive to use Ofcom's dispute resolution powers would have been substantially reduced. In particular, BT's exposure to retrospective claims for breach of contract or regulatory condition would have been dramatically reduced.

If TalkTalk's ground of appeal had succeeded, then BT would potentially have been exposed to numerous claims for alleged overcharging across many other markets (even where BT's charges had been below the DSAC benchmark).

To what extent is the judgment helpful in clarifying the law in this area?

The Court of Appeal rejected all four grounds of appeal. The judgment has now fully clarified the issues and brought a degree of certainty to Ofcom's power under [CA 2003, ss 185-191](#) in resolving disputes between CPs. As a result, a number of telecoms appeals have already been withdrawn in light of the Court of Appeal's decision.

Is this case likely to go further?

Despite the major implications of the Court of Appeal's decision, neither BT nor TalkTalk have sought permission from the Supreme Court to appeal. Had BT sought to appeal it is likely that there would have been a reference to the Court of Justice of the European Union.

What are the implications for practitioners?

Practitioners in the telecoms sector now have much more certainty as to how Ofcom's dispute resolution powers will be applied. For example, the defeat of TalkTalk's ground of appeal means all assessments of overcharging will focus on whether charges are above DSAC.

This will substantially reduce the number of overcharging claims against BT. It will also make the outcome of any dispute reference to Ofcom easier to predict and thus is likely to lead to more compromises being reached in the negotiations that must take place before any such reference can be made.

Interviewed by Anne Bruce.

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