

TELECOMS

Regulatory appeal

A recent case is testing the boundaries of regulation, private law rights and appeal



Graham Read QC (above) and Ben Lynch QC (below) of Devereux Chambers

The process of innovation and development grows ever quicker in the telecommunications sector, one example being the impending sale of 4G licences to mobile network operators. Regulation has played a part in these innovatory developments, a central role being taken by the EU, for example, first with the 1997 Interconnection Directive, then with the five 2002 directives (commonly referred to as the Common Regulatory Framework or CRF). The principles of the CRF were incorporated into English law in the 2003 Electronic Communications Act (CA 2003). This has been further amended by SI 2011 No 1210, which implemented EU changes to the CRF, contained in the so-called Better Regulation Directive (2009/140/EC).

Ofcom, as the UK regulator since 2004, has introduced many regulatory obligations on market players, such as Access Related Conditions (eg end-to-end connectivity obligations), or Significant Market Power Conditions (imposed on operators found to have economic dominance in specific markets). Given these obligations it is not surprising that arguments as to whether they have been imposed correctly and how they should be applied have multiplied. Interwoven into this is a further 'dispute resolution' power given to Ofcom under sections 185-191 CA 2003. Telecoms operators often ask Ofcom to intervene in disputes they have with other operators and to override strict contractual rights of parties.

Some answers

That, in turn, has brought into focus two major questions, first, the nature of the right of appeal to the Competition Appeal Tribunal (CAT) under sections 192-195 of the CA 2003, and second, how Ofcom (and, on appeal, the CAT) should use the dispute resolution powers. One case in the past two years (*BT v Ofcom*, or the so-called 080/0845/0870 numbers case) has provided some, but not all, of the answers.

In a preliminary issue, the Court of Appeal ([2011] EWCA Civ 245) had to consider whether the CAT was primarily reviewing the decision of Ofcom based on the material available to Ofcom or whether new evidence could be introduced.

Perhaps unsurprisingly, Ofcom was seeking a more limited role for the CAT's appellate function, contending that new evidence, after Ofcom's original determination, should not normally be considered by the CAT. For example, Ofcom suggested that when any form of discretion was involved "an appeal should be allowed only where the regulator has clearly stepped outside the bounds of a reasonable exercise of discretion", a test akin to *Wednesbury*

unreasonableness in Judicial Review cases.

Toulson LJ, in the main judgment, after noting Parliament's use of similar wording ("decide the appeal on the merits") in the 1998 Competition Act (where new evidence was routinely admitted), noted there was nothing in either the CRF or the CA 2003 "which confines the function of the appeal body to judgment of the merits as they appeared at the time of decision under appeal".

He also dismissed comparison with the appellate function of the Court of Appeal, noting there were "significant differences between the procedure for determining a dispute under the CA 2003 Act and an ordinary civil claim". The latter "is ordinarily determined after a trial at which witnesses give evidence and can be cross-examined. A dispute under the relevant part of the CA 2003 is determined by Ofcom on paper".

The Court of Appeal thus firmly rejected Ofcom's arguments for limiting the CAT's function.

The issue as to what, if any, deference should be given to a regulator's decision was considered by the CAT itself in the main hearing of the 080/0845/0870 numbers case [2011] CAT 24. It clearly depends upon the nature of Ofcom's decision. With questions of policy Ofcom should be accorded some deference. Ofcom's decisions as to policy preferences were considered "to be par excellence the sort of question where there is no single 'right answer'" and "the Tribunal should be slow to overturn such decisions". The issue is also being considered by Parliament – whether s195 should be amended so as to restrict the appeal to one of quasi-Judicial Review.

The CAT's decision is also of key interest as to the interplay between regulatory powers and private law rights.

The CAT stated: "Ordinarily, persons such as communications providers are entitled to expect their legal position to be dictated by their private law rights and obligations, although of course these rights and obligations can be modified by such regulatory regime as they may be subject to. [...] while we certainly do not suggest that private law rights can dictate the outcome of the Dispute Resolution Process [...] private law rights are relevant factors to take into account."

The case has recently been heard in a three-day expedited hearing before the Court of Appeal. Arguments ranged over a number of areas but the importance of private law rights was a central part of the appeal. Judgment is keenly awaited.