



1. Introduction

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com. UKCTA welcomes the opportunity to respond to this call for inputs since the subject matters which it encompasses are of fundamental importance to our member companies. While we have provided our views on the proposed reforms to Competition law we wish to highlight in particular our concerns about any reform which would impose a presumption that would oblige Ofcom to use Competition Law powers ahead of ex ante remedies under the Communications Act.

The views expressed by UKCTA in this response do not reflect the views of Sky and Virgin Media. These UKCTA members will be submitting their own responses to the consultation.

Q.1 The Government seeks your views on the objectives for reform of the UK's competition framework, in particular:

- *improving the robustness of decisions and strengthening the regime;*
- *supporting the competition authorities in taking forward the right cases;*
- *improving speed and predictability for business.*

Q.2 The Government seeks your views on the potential creation of a single Competition and Markets Authority.

UKCTA supports the objectives set forth in the consultation document. We have previously called for a more robust standard of decision making by Ofcom generally, whether those decisions are taken under Competition Law powers or using ex ante powers under the Communications Act. Speed and predictability are key in our sector which is a particularly fast moving and developing industry. Indeed for these very reasons it is often preferable for business that Ofcom use its ex ante sector specific powers to deal with abuse of a dominant position quickly rather than relying

on the ex post powers available under Competition Law. Put bluntly it is preferable for action to be taken before irreversible harm has been caused by a dominant entity, rather than waiting until after the event. In these circumstances, our perception is that ex post remedies under Competition Law can be seen as less effective than timely regulatory intervention in a sector as fast moving as the electronic communications sector, particularly given the long duration of Competition Act investigations.

Insofar as it may assist in achieving the objectives outlined above, UKCTA supports the creation of a single CMA. However, it is important to ensure that a newly merged entity retains the strengths of its predecessors without inheriting any of their perceived weaknesses. We also believe that process reforms to address the current deficiencies within the Competition Law regime are required since as already noted, we have concerns about the time and expenses involved in competition law proceedings.

Q3: The Government seeks your views on the proposals set out in this Chapter for strengthening the markets regime ...

We agree with the proposal to allow the CMA to carry investigations across markets (§3.8) but only in particular circumstances.

Harmful practices can occur across multiple markets and having to investigate them on a market-by-market basis is inefficient. We consider that a number of the initiatives taken by Ofcom in respect of potential harmful practices are not telecom specific but are common to many markets and therefore there may be advantages in having them handled by a cross-sectoral regulator such as the OFT (or CMA or a new consumer body in future). Examples of this are Ofcom's work on automatically renewable contracts, early termination charges, additional charges and switching. A great many examples of work which Ofcom undertakes typically on consumer protection matters are not unique to telecoms and could we believe be dealt with more efficiently by a body such as the CMA operating on a cross sector basis.

However, a cross market review would not always be appropriate and care would have to be taken in deciding when to investigate in this way. There is the real risk that practices can be taken out of context or that investigations could become very large and cumbersome. The telecoms sector does see a good deal of competition issues and these are typically very telecoms specific. We believe that Ofcom is much better placed in the first instance to investigate complex, telecoms specific matters and therefore we could not support a proposal to allow the CMA to conduct (phase 1) market investigations or reviews in respect of such matters.

We agree that it is preferable that independent regulators (and not Government) analyses and decide on public interest issues (§3.10) since regulators are, in general, better placed, more objective and have more transparent decision-making. Though it

may not be appropriate in every case the rebuttable presumption should be that regulators take these decisions.

We are less convinced that the introduction of an unfettered power to launch own initiative investigations and/or market reviews is a good idea. Market reviews and investigations are extremely costly for the businesses concerned and should only be commenced where there is a genuine issue of public concern that needs to be addressed. We believe that were such a power to be introduced it would be sensible to have the right to launch such initiatives to be subject to a degree of Government supervision, oversight or direction. In the electronic communications sector communications providers are already subject to an EU derived programme of regular market reviews so the potential for additional demands in terms of reviews would not, we believe, be a positive development.

Q.4 The Government also welcomes further ideas, in particular, on modernising and streamlining the markets regime, and on increasing certainty and reducing burdens.

Q8: The Government seeks your views on the proposals set out in this chapter for strengthening the antitrust regime

We believe it is essential that the proposed modifications to the competition regime continue to allow for merits based appeals rather than a more limited form of scrutiny such as judicial review. In the context of Ofcom decisions (albeit in the area of Communications Act rather than antitrust) access to merits based appeals has been a vital means to allow for the correction of decisions which Ofcom got materially wrong, including some appeals which were not defended.

These erroneous decisions came about, we believe, due at least in part to a degree of confirmation bias. If these decisions were only subject to judicial review, it is possible that some of them (though materially wrong) would have been beyond challenge. This would not have been in the best interests of customers, the industry nor indeed the wider UK economy.

The fact that the right to an appeal with the merits taken duly into account is enshrined in EU law for the electronic communications sector has been an extremely useful tool in addressing the issues of abuse of dominance which have arisen in the sector and has helped address some relatively isolated instances of poor decision making by the regulator. Contrary to the perception given by some who would seek to restrict rights of appeal, the percentage of decisions which are actually appealed is extremely low as was shown in a recent research paper prepared by Towerhouse Consulting.¹ This revealed that the number of appeals each year is reasonably

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http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf

constant except in years when Ofcom takes controversial or important decisions, which tend to result in multiple appeals. Indeed the level of challenge against Ofcom decisions is significantly lower than in many other European countries.

Q.9 The Government also seeks views on additional changes to antitrust and investigative and enforcement powers in paragraphs 5.48 to 5.59, and the costs and benefits of these.

UKCTA has no comment to make in response to this question.

Q.10 The Government welcomes further ideas to improve the process of antitrust investigation and enforcement.

UKCTA has no comment to make in response to this question.

Q11 - 13 CRIMINAL CARTELS -

UKCTA has no comment to make in response to these questions.

Q14: Do you agree that the sector regulators should maintain their concurrent antitrust and MIR powers in parallel to the CMA?

This question is set in the context that sectoral regulators (such as Ofcom) have made relatively little use of their powers under Competition law. We consider that the low number of cases is due in the telecoms sector, to the availability of *ex ante* powers under the Communications Act to address dominance and abuse. Unlike Competition law, *ex ante* powers can be deployed in advance to avoid abuse and are also more effective in ensuring continued competition as opposed to remedying infringements after the harm has already been caused². We would therefore be extremely concerned were the Government to introduce a compulsory preference to use Competition Act powers rather than *ex ante* powers. This would we believe, be damaging to competition. *Ex ante* powers can provide a significantly more timely and efficient remedy. One only needs to look at the example of the Freeserve case which took eight years to conclude to see just how long it can take to use Competition Act powers to resolve the type of complex circumstances which all too often can arise in the electronic communications sector. By the time the case was concluded both the regulator and Freeserve had long since been replaced by successor organisations.

The wholesale calls case raised by THUS plc and Gamma Telecom in June 2008, and subsequently accepted by Ofcom as a Competition Act case in August 2008 is

² A good example of such a difference is in the case of margin squeeze protection. Under Communications Act powers the margin can be wide enough to allow a reasonably efficient entrant (with say a 20% market share) to operate profitably whereas under Competition Act powers the margin cannot be set so wide since it is based on an 'equally efficient operator' model whereby the incumbent's market share (may be 80%) is assumed

yet another example. Due to the complex and cumbersome nature of using the Competition Act powers, Ofcom was only able to issue a Statement of Objections in December 2010. Communications Providers received s.135 Information Requests from Ofcom as long ago as 2009 and yet in 2011 BT is still making representations so it is unlikely that this case will be concluded any time soon. As with the Freeserve case, while the legal process has moved on agonisingly slowly, events in the real world have moved on rather more quickly and one of the parties (THUS plc) has been taken over by another provider. We are therefore highly sceptical that ex post remedies should be preferred to ex ante regulation.

One criticism we would make of the way in which regulators use their concurrent powers would be that information requests are often framed far too widely and are not at all well considered. This in turn causes respondents to swamp the regulator with a great deal of often irrelevant information needlessly prolonging the investigatory process. The process could be improved by providing recipients with draft information requests in advance, discussing the questions with respondents and seeking to narrow the scope of the questions before finalising the information request.

SMEs in particular need rapid action and competition law may not always provide the most effective remedy for such companies. The experience of our members has been that the smaller a company is, the more likely it is that the damage suffered by virtue of an abuse of dominance will be irreparable. The fact that Competition law does not seek to preserve the position pending the legal process is a major weakness particularly for smaller companies.

We agree that sectoral regulators should retain their antitrust and MIR powers. Even though little used, they are useful to have to address certain sectoral problems.

Q15 The Government also seeks views on the proposals set out in this Chapter for improving the use and coordination of concurrent competition powers in particular:

The arguments for and against the options;

The costs and benefits of the options, supported by evidence wherever possible.

Q.16 The Government welcomes further ideas to improve the use and coordination of concurrent competition powers.

UKCTA has no comment to make in response to these questions.

Q.17 Do you agree that the CMA will be the most appropriate body for considering regulatory references/appeals currently heard by the CC?

Q.18 The Government also seeks your views on creating model regulatory processes that set out the core requirements that future regulatory reference/appeals processes should have.

Under the current regime, appeals against Ofcom decisions concerning price controls matters are referred by the CAT to the CC. The CC determines the specified price control matters referred to it, reports back to the CAT and the CAT then takes a decision on the appeal in line with the CC's determination (subject to the application of judicial review principles to the CC's determination).

We consider this process to be unnecessarily cumbersome. If it were furnished with the right expertise and resources, there is no reason why the CAT should not be capable of deciding price control appeals for itself without there being any need for it to refer price control matters off to the CMA for an "expert" opinion. Alternatively, if the Government considers that the CMA is the right body to decide such matters on appeal from Ofcom, it ought to be possible for those decisions to be appealed directly to the CMA without passing first through the CAT.

The involvement of two parallel bodies in the communications price control appeals process is an unfortunate anomaly which we believe should be addressed - and removed - through this review of the regime.

Q.19 The Government seeks your views on appropriate objectives for the CMA and whether these should be embedded in statute.

Q.20 The Government see your views on whether the CMA should have a clear principal competition focus.

Q.21 The Government also seeks your views on the proposed governance structure and on the composition of the Executive and Supervisory Boards.

UKCTA has no comment to make in response to these questions.

Q.22 The Government seeks your views on the models outlined in this chapter, in particular:

the arguments for and against the options;

the costs and benefits of the regime and to business, supported by evidence wherever possible.

Q.23 The Government also seeks views on the appropriate composition of the decision-making bodies set out in this chapter, and in particular what the appropriate mix of full-time and part-time members is and the role of executive.

Q24: The Government welcomes suggestions for alternative decision-making structures for each of the competition tools that will deliver robust decisions through a fair and transparent process that is compatible with ECHR requirements.

We note that much of the discussion regarding the right and need for appeal focuses on the ECHR Article 6 requirement. Whilst this is a legitimate objective we see the ability to access an effective appeal remedy as not only essential as a matter of fairness but also essential in order to correct poor decisions that would otherwise be harmful to customers. Our experience of Ofcom is that they have made a number of decisions that were materially wrong and that could only be corrected through a merits based appeal.

The latest research which we have seen³ (dated December 2010) reveals that a relatively high proportion of appeals result in a successful or partially successful challenge against Ofcom's original decision. As at December 2010 Ofcom's decision had been overturned in 12 of the 31 appeals which had been determined. Only 7 of the 31 cases involved Ofcom's decision being upheld. (the remaining 12 cases were disposed of on a purely jurisdictional basis).

Q.25 What are your views on options in this section or is there another fee structure which would be more appropriate and would ensure full cost recovery under a voluntary/ mandatory notification regime?

Q26: Do you agree with the principle that the competition authority should be able to recover the costs of an investigation arising from a party found to have infringed competition law? If not, please give reasons

Q.27 What are your views on recovery where there has been an infringement decision being based on the cost of investigation?

We do not agree with the proposal that the competition authority should be able to recover the costs of an investigation from a party found to have infringed competition law. The administration and enforcement of competition law by the competition authority is of general public benefit and it should be properly publicly funded. This proposal, if enacted, would influence the way the authority behaved and the types of cases it chose to investigate. For example, the competition authority may be less inclined to investigate difficult or borderline cases if it meant that it was less likely to recover its costs. Furthermore, in the interests of fairness, if the authority were able to recover costs from a guilty party, presumably the opposite would be true and a company investigated by the authority but ultimately not found to have infringed the law ought to be able to recover its costs of its defence from the competition authority, thus exposing the authority to greater risks.

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Q.28 What are your views on the recovery of costs in cases involving considerations of immunity, leniency, early settlement and commitments?

Q.30 Should a party who successfully appeals all or part of an infringement decision be liable for the costs element and should a party who appeals the method of penalty calculation, but does not appeal the substance of the enforcer's decision, be liable for a reduction in costs?

Q.31 Should the Government introduce a power to allow the enforcer to recover their costs, or amend the Competition Act 1998 to enable the level of fine to cover the cost of the investigation rather than introduce costs?

Q32: Do you agree that telecoms should be treated in the same way as other regulatory appeals (e.g. Water Licence Modifications and Energy Price Control Appeals) in that the CC should have the ability to reclaim their own costs from an unsuccessful or partly successful appeal from the appellant at the end of the hearing?

And Q33: What are your views on the proposal that the CAT recover their full costs except where the interests of justice dictate the costs should be set aside and what affect, if any, would there be on CAT incentives?

We would not support a full cost recovery by the CAT. The barrier in terms of costs and management time required to mount an appeal already severely restricts the ability of many companies to appeal decisions. Any further raising of this barrier would be a retrograde step. We do agree that the CAT should have discretion to award costs in exceptional circumstances e.g. where an appeal can be shown to have been purely vexatious. It would be grossly unjust if unsuccessful appellants were required to pay the CC's (or CAT's costs) when the appeal was brought because Ofcom was not transparent in its evidence and/or reasoning and the evidence and/or reasoning only became apparent during the appeal process. In this case it would be wholly inappropriate for the appellant to be charged for the CC's costs.

Therefore, any cost order must take into account all of the relevant circumstances which led to the appeal. Courts and tribunals are well versed in considering the appropriateness of awards of costs on appeals. We consider that the optimal outcome is to maintain flexibility for courts and tribunals in this respect, calling on their expertise and experience to decide how and when an award should be made.

We do not agree with a blanket presumption that Ofcom should not ordinarily have to bear the CC costs. Though in many cases Ofcom is required to make a decision it is critical that Ofcom feels the force and financial impact of its decisions in order that it makes robust and evidence-based decisions in the first place. As in the case of a cost award against an (unsuccessful) appellant, the decision on whether Ofcom should refund CC/CAT costs (in the case the appellant is successful) must consider the circumstances. So for example where Ofcom's decision lacked evidential support

and/or they were not transparent in their evidence or reasoning then an award of costs against it, including where appropriate the CC's costs, might be appropriate - whereas if Ofcom's original decision and judgement was finely balanced then a cost reclaim would ordinarily not be appropriate. Again, we consider these questions are best left to the discretion of the courts.

CONCLUSIONS

While UKCTA supports any moves to improve and strengthen the competition law regime, especially where these help to improve the speed of decision making and cut the cost of proceedings, we believe that the particular circumstances of our industry mean that the regulator ought to be able to choose the most appropriate statutory tool on a case by case basis. This is a fast moving sector with a number of newer entrants competing at both the service and infrastructure levels with a former incumbent which retains a significant position of strength in the market. We have an experienced specialised regulator with a discretion to apply either ex ante or ex post remedies as the situation demands. This remains of vital importance to the development and maintenance of competition in the UK and we do not believe it would be helpful to fetter the regulator's discretion by means of a statutory presumption or duty to favour one set of powers over another.

In relation to the proposals to reform the rules around recovery of costs in relation to appeals in the electronic communications sector we do not believe there is a pressing need for change in this area. Parties appealing regulatory decisions already face significant deterrents in terms of the sheer cost involved both in terms of money and the considerable time and effort required. We also disagree with a blanket presumption that Ofcom should not ordinarily have to bear the CC's costs. As is the case of a cost award against an (unsuccessful) appellant, the decision on whether Ofcom should refund CC/CAT costs is, we believe, best left to the discretion of the tribunal to best determine what is appropriate in the circumstances of the case.

We would welcome the opportunity to discuss any of the matters raised in this response in more detail with the Department if this would be of any assistance.

24 June 2011