



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 consultation document since the subject matters which it encompasses are of fundamental importance to our member companies. We recently responded to the DCMS Consultation on the possible reform of competition law which touched in part on many of the very same issues as the current consultation and we would refer the Department to our earlier response which is published on our web site¹.

2. Summary

The stated aims of Government are to 'deliver faster, better focused appeals' and so reduce costs and ensure that corrections to regulation are made more quickly. It is difficult to argue with such objectives and indeed we believe that these outcomes would be in the best interests of all parties. However, we are very dubious that the Government's proposals are the best way of achieving the objectives. We note that the CAT, the body best placed to comment, seems to share our doubts and believes that the proposed reform will make 'little material difference' (§70). They sum up the issue perfectly when they say "*Therefore precisely what will be achieved by altering the form of words in section 192 (other than the promotion of further and prolonged uncertainty) is mysterious since the conceptual nature of appeal springs from the Framework Directive*"²

The Government acknowledge that the proposed reforms will lead to uncertainty and upheaval in the short term while a new body of jurisprudence is developed, an inevitable consequence of introducing an entirely new (and as yet undeveloped) standard of review. Many of the reasons cited to justify reform (uncertainty, increased number of appeals etc) stem directly from the same process of jurisprudential development which followed the introduction of the current rights of appeal. This situation is only now starting to settle down

1

http://www.ukcta.org.uk/public_doc_11/110624%20UKCTA_response_BIS_competition_law.pdf

² http://www.culture.gov.uk/images/consultation_responses/FWR2011-Competition_Appeal_Tribunal.pdf

in relation to the current system. Quite why the Government believes it makes sense to repeat this process of legal upheaval to get to the stage at which the current system has only recently arrived, is beyond us and seems to make no sense whatsoever.

The Government *may* consider that reform is worthwhile (even though the impact is unclear) in the hope that it *might* reduce the cost of appeals but we believe the negative consequences of reform far outweigh any potential benefits. We believe the proposals will result in added regulatory uncertainty (thereby deterring investment) and will increase legal costs for both industry and the regulator while a fresh body of jurisprudence is established.

The Government appears to us to be taking a gamble on these reforms, and is gambling without having first identified and explained the risks of that gamble. Nor does the Government appear to have considered how it might mitigate the risks of the negative consequences.

3. Answers to the Questions set out in the Consultation

Q1. The Government welcomes views on whether the specific proposal (at Annex A) to amend the Communications Act 2003 will deliver speedier more efficient appeals, whilst still guaranteeing fair, open and accessible appeals from Ofcom decisions.

We do not believe that the specific proposal will deliver speedier, more efficient appeals, and we have serious concerns that the proposals will limit the ability of communications providers to challenge poor regulatory decisions. Given that the CAT has stated that the reform will make little difference, and the fact that UKCTA members have been assured by DCMS that the proposals will not result in any significant change to the rights of appeal, we struggle to see how DCMS can justify the significant cost, and degree of upheaval and uncertainty which they themselves predict proposals will produce.

It would seem that DCMS has not fully understood or thought through the practical implications of its proposals, which UKCTA considers will do far more harm than good. There is insufficient information or reasoning about how DCMS envisages the proposals improving the current arrangements. The lack of any counterbalance to the negative outcomes, other than a possible marginal reduction in the length of hearings, is particularly worrying. The fact that the proposals apparently lack the support of the CAT (see below) leads us to question on what grounds the Government can possibly justify making these changes. It seems to us that the Government is taking an enormous gamble, and we submit that the minor nature of any possible benefits simply do not justify taking such a gamble.

There is also an implicit suggestion in the consultation that the costs to Ofcom of the appeals process are excessive. While there is no doubt room for some efficiency improvements, we do not actually think that, when one considers the value and importance to the industry and the wider economy of the matters on which Ofcom is asked to decide and which are then appealed, is that significant and represents good use of public funds.

Q2 The Government also welcomes views on the proposal that the new basis for appeals should apply only to appeals against decisions made after the changes come into force.

For the reasons set out more fully below we strongly disagree with the suggestion that these proposals are in any way necessary. However, if the Government is minded to proceed despite the views from industry stakeholders and the expert body in this area, the CAT, then not applying the new arrangements retrospectively would confine the uncertainty and upheaval to new cases and would therefore be the “least worst” option.

Q3. Do consultees agree with the proposal that the changes to the basis of appeal extend to the appeals described in paragraphs 59-60?

As per our answers to questions 1 and 2 above we disagree fundamentally with the suggestion that reforms of the type proposed are in any way necessary. However, if the Government is determined to press ahead with reform then it would make sense to impose unnecessary reform in a consistent manner in order that all stakeholders have to deal with only one regime rather than two different systems.

Q4. The Government welcomes views of stakeholders on the value of pursuing tighter evidential rules as an alternative or complement to legislative reform of the telecoms appeals framework.

As will be evident from our more general comments set out below, we believe that rather than dramatic reform of the basis of appeal, the current system could be improved by means of incremental, process reform, such as reform of the evidential rules. We believe that the Government is less well placed to determine the nature and scope of such reforms and that such decisions would be best left to the CAT. As the body with the greatest current knowledge of the way that the current system operates, they are uniquely well qualified to decide how best to improve current arrangements. Government is simply too remote from the practice and procedure of the appeals system to make well informed decisions in this area.

Incremental reform of the current system has the potential to deliver the improvements which Government seeks but without the upheaval, cost and uncertainty which DCMS have said their proposals will produce for the next few years. Once again we question the basis on which DCMS believes these negative aspects of their proposals can be justified.

Q5. The Government welcomes views of stakeholders on the value of pursuing confidentiality rings as an alternative or complement or complement to legislative reform of the telecoms appeals framework.

We strongly believe that appropriate use of confidentiality rings has great benefits, since a lack of transparency prejudices competitors’ ability to build strong arguments against BT’s position. We were rather disappointed that the Government has not proposed enabling Ofcom to set-up/enforce confidentiality rings as a means of improving transparency. Particularly in respect of setting charges for BT’s wholesale products, UKCTA members are frequently handicapped in their ability to respond to Ofcom’s consultations since much of the information provided by BT is considered commercially confidential. Our inability to see BT’s

information is particularly important since Ofcom heavily relies on what BT tells it in determining wholesale charges. The use of confidentiality rings would be an effective mechanism to address this lack of transparency.

The lack of transparency due to the absence of confidentiality rings has a number of harmful consequences to consumers' interests. We have set out in Annex A an example of the type of problem caused by the absence of confidentiality rings.

The lack of transparency in the current system increases the time spent by Ofcom and consultees in the probing process. Confidentiality rings could save significant amounts of time.

For instance, in the current LLU charge control over 500 man hours was spent by Communications Providers and their advisors in trying to comprehend the limited data provided and asking questions of Ofcom to probe further. Ofcom probably spent 100s of man hours responding. With a confidentiality ring much of this time could have been saved.

Without sight of the full picture, Consultees' responses are incomplete and therefore less useful and less forceful. As a consequence the Ofcom decision will be less robust and so more likely to be appealed

This creates a dangerous information asymmetry whereby BT has the full information and other consultees do not. The natural consequence of this (combined with Ofcom's reliance on BT's data) is a strong bias in BT's favour resulting in higher than appropriate prices.

Consultees are more likely to bring an appeal or bring a less focused appeal as a result of the absence of confidentiality rings. For example:

- in CPW's LLU appeal in 2009 a number of points were dropped when information was revealed in a confidentiality ring
- added transparency allows appellants to focus on the more material issues.
- The delay in disclosure results in longer appeals.
- Absent confidentiality rings at the regulatory proceeding stage there is a clear incentive to bring an appeal in order to get disclosure and then look for errors since there is a (well-founded) suspicion that BT are trying to hide something.

Transparency is one of Ofcom's duties. For example:

In performing their duties under subsection (1), Ofcom must have regard, in all cases, to ... the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed ... (Comms Act s3)

Ofcom will strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome

Transparency is critical to ensure high quality decisions, fairness and to increase stakeholder confidence. We see little reason to block the use of confidentiality rings.

As Mr (now Lord) Pannick QC eloquently highlighted in the *Eisai* case in 2008 regarding the effect of lack of transparency "*... the consultee is left making shots in the dark, in circumstances where the light could so easily be switched on.*"

We do not consider that confidentiality rings need to be used in all Ofcom consultations. Rather Ofcom should be granted the powers to set-up and enforce confidentiality rings and can then decide whether to use them on a case-by-case basis subject to their various duties.

It may be more appropriate that rather than Ofcom setting-up and enforcing confidentiality rings itself, confidentiality rings could be effected by allowing Ofcom to impose an obligation on certain operators to disclose information to other parties under bi-lateral non-disclosure arrangements

We do not see the use of confidentiality rings as an alternative to or linked to an amendment in the appeals framework

We accept that confidentiality rings may be limited to external advisors though we note that in the CAT certain internal employees (typically lawyers) are sometimes included in confidentiality rings.

Government have provided a number of reasons as to why it considers confidentiality rings to be inappropriate (§§109-112). We disagree, and have set out more fully in Annex B our reasons for so doing.

Q6. The Government welcomes views of stakeholders on the value of pursuing simplification of Ofcom duties as an alternative or complement to legislative reform of the telecoms appeals framework and welcomes suggestions as to which duties should be simplified and how such changes should be made.

This is frankly a subject for a consultation in its own right. We have no doubt that there is room to simplify and streamline Ofcom's duties but have not had the time to consider this subject or form views at this stage.

Q8. The Government welcomes views of stakeholders on the above suggestion on Ofcom's role in appeals of dispute determinations.

We strongly agree with Government that there is already scope for Ofcom to be more selective in deciding which cases it requires to intervene, and that this can be achieved without any radical reform.

One of the reasons put forward by DCMS as triggering the need for (urgent) reform is the changes to the dispute resolution process under the revised EU Electronic Communications Framework that have recently come into effect. In particular, DCMS has raised a concern that the widening of the categories of persons who may submit a dispute to Ofcom to include persons who indirectly benefit from access, but who may not themselves be communications providers, may increase the number of disputes which Ofcom may be required or decide to resolve, and hence may increase the number of dispute related appeals in which Ofcom needs to be involved (consultation, paragraphs 12; 82-83). UKCTA does not consider these concerns to be well founded.

Firstly, another change that has been introduced by Government in its implementation of the revised EU Electronic Communications Framework is to remove Ofcom's duty to resolve disputes relating to network access where that access is not provided pursuant to a

regulatory obligation and to leave it to Ofcom’s discretion whether or not to accept such disputes. It remains to be seen how Ofcom will exercise its discretion in this regard, and UKCTA certainly hopes and expects that Ofcom will continue to accept disputes of significance for the furtherance of fair competition and the interests of consumers in line with Ofcom’s statutory duties even where the dispute relates to non-regulated access. Nevertheless, we believe that the greater discretion now conferred upon Ofcom to decline to accept certain types of access disputes should be a tool that Ofcom can successfully use to ensure that the widening of the categories of persons who may submit a dispute to Ofcom does not result in a strain on Ofcom’s resources that would result in an impairment of its ability to carry out its statutory functions and maximise welfare.

Secondly, as has been noted in the consultation, it is pertinent that, since the Government’s initial consultation on this matter was issued in September 2010, the Court of Appeal has handed down its decision in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245. This decision related to BT’s appeal, then before the CAT, of Ofcom’s decision to accept two disputes, one regarding BT’s charges for termination of calls to 080 numbers (case 1151/3/3/10) and the other relating to historic Ethernet pricing. In that judgement, Toulson LJ observed (at paragraph 87):

“Section 192(2) of the [Communications Act 2003] gives a right of appeal to a person affected by a decision of Ofcom. It is the practice for Ofcom to be named as the respondent, **but it does not follow that it needs to take an active part in the appeal**. There may be cases in which Ofcom wishes to appear, for example, because the appeal gives rise to questions of wider importance which may affect Ofcom’s approach in other cases or because it is the subject of criticism to which it wishes to respond. But Ofcom should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal.” (Emphasis added)

In the consultation, DCMS suggests that the option for Ofcom to take a lesser role in dispute appeals than it has traditionally taken “...would need to be tested...” (paragraph 118). However, directly following this Court of Appeal decision, Ofcom did indeed decide to take lesser role before the CAT in case 1151/3/3/10 (and also cases 1168/3/3/10, and 1169/3/3/10 concerning the appeal of Ofcom’s dispute decision regarding BT’s charges for termination of calls to 0845 and 0870 numbers), with the CAT noting as follows in this regard:

“The decision of the Court of Appeal was handed down on 10 March 2011, relatively shortly before the hearing of these appeals in April 2011. In the light of that decision, OFCOM made it clear to the other parties in a letter dated 15 March 2011 that it would, given the observations of Toulson LJ, “not need to engage in the detail of all issues in dispute”, which might “in turn mean that those parties who have intervened in these proceedings may wish to take a more active role that they might otherwise have done”. The parties very helpfully and sensibly allocated who was to deal with what issues between them, and in the event, the Tribunal was not called upon to resolve any procedural difficulties that might have arisen out of OFCOM’s (quite proper) decision to take a back seat on certain issues.”^{3[1]}

Again, whilst UKCTA members would hope and expect that Ofcom would continue to play an active part in defending its dispute decisions where the appeal relates to Ofcom’s material

^{3[1]} British Telecommunications plc and Everything Everywhere Limited v Office of Communications [2011] CAT 24, at paragraph 18

findings in the dispute and/or questions of wider regulatory importance, the Court of Appeal's judgment and the example of the 080/0845/0870 appeal before the CAT makes it very clear that Ofcom is perfectly able, under the current standard of merits review, to decline to engage in rigorous and extensive examination of its factual and analytical dispute findings in situations where Ofcom believes that it would not be the best use of its limited resources in fulfilment of Ofcom's overall statutory duties for Ofcom to do so.

Q9. The Government welcomes views of stakeholders on the value of pursuing changes to the award of costs as an alternative or complement to legislative reform of the telecoms appeals framework.

We believe that the CAT is the best judge of what the most appropriate award would be in any given case. We do not believe that a rigid rule to be applied regardless of the circumstances of an individual case would be appropriate.

Q10. The Government welcomes views of stakeholders on changes to CAT rules as an alternative or complement to the Government's proposed legislative change. Specifically, the Government is interested in which of the suggested rule changes, either singly or jointly, would be most effective in delivering the stated aim of a speedier and more efficient appeals process.

As will be clear from our views expressed throughout this document we do not believe that DCMS have set out a convincing case for reform. One of the most persuasive factors in reaching this conclusion is that the CAT in its response to the initial consultation said that there was any pressing need for reform, nor indeed that reform would radically change current practice. We consider that the CAT is far better placed than the Government to determine the necessity of reform and we would urge DCMS to take full account of the views of the subject matter experts in this area.

Q11. The Government welcomes views on the supporting economic and equalities Impact Assessments.

The impact assessments do not appear to us to fully consider the impact of reform on all stakeholders and appear to focus mainly on the implications for only one stakeholder. The only potential beneficiary of the reforms identified appears to be Ofcom, which has cited budgetary constraints as the main driver of reform. While we are not opposed to reforms that make the appeals less costly for all concerned, we do not believe this to be the sole or main factor. Furthermore, for the reasons set out elsewhere in this response, we are by no means convinced that the proposed reforms will necessarily result in any cost savings. Given the financial impact of the decisions Ofcom takes, ranging from single digit millions to potentially hundreds of millions or even billions of pounds, we think Ofcom's budget on resourcing appeals is money well spent, helping to protect UK competitiveness and protect the consumer interest in areas of complex regulation. Often these involve cases where market failure has occurred and intervention is required to ensure that market power is constrained for the benefit of the consumer, businesses and ultimately the UK economy. Ofcom must of course seek to deliver value for money, however to cause upheaval to a well understood appeals framework that is naturally evolving towards narrower boundaries and replace it with something that will re-introduce a period of years of uncertainty is not the answer to Ofcom's budgetary challenge.

At a time when the current appeals regime is bedding down, issues have been clarified and certainty is improving for all market participants, it would be hugely disruptive to then reset the clock on the appeals regime by implementing a new standard of reform, one which is untested and the benefits of which are far from clear. The fact that the economic consequences of the changes haven't been quantified simply further undermines the case for these reforms.

4. Additional Comments

Having answered the questions set out in the consultation we now wish to make some additional comments on areas where the Consultation did not explicitly seek views.

a. The legitimacy of the proposal to implement this reform through secondary legislation

It is proposed that the regime for appeals from Ofcom be without recourse to primary legislation but instead through Regulations passed by Statutory Instrument.⁴ The exercise of this power has been challenged in the courts on many occasions due to vague wording in the ECA. In order to enable the UK government to fulfil its EU obligations, the courts have appeared to interpret the power fairly widely. However, it is worth considering carefully whether invoking the power is advisable in this case. For whilst we cannot definitively say whether the power can or cannot be exercised in the way which is proposed - the case law shows that judges consider the vague wording in the ECA gives them a high degree of latitude - it is a power which is highly susceptible to litigation.

The specific provisions are contained in s.2(2) ECA, which relates to the implementation of Directives⁵ (whose objective must be given effect but the means of achieving it may be left to the member state). The statute sets out two purposes for which the power to make Regulations may be invoked:

- *under subsection (a), for the direct purpose of implementing Community obligations*
- *under subsection (b), "for the purpose of dealing with matters arising out of or related to any such obligation"*

It has been common practice when invoking the powers under s.2(2) for the Secretary of State to refer generally to s.2(2) and not specify whether the purpose is either that in

⁴ s.2(2) and Schedule 2 s.2(2) European Communities Act 1972. The statutory instrument may be rejected by Parliament in its entirety but cannot be amended.

⁵ As interpreted by the courts, see, for example, *Oakley Inc v Animal Limited and Ors* [2005] EWCA Civ 1191 at [19]

subsection (a) or that in subsection (b).⁶ For that reason we have addressed the entirety of the powers under section 2(2) ECA.

The salient question is whether the minister has the power under s.2(2) to alter the appeals regime governed by the Communications Act 2003 through secondary legislation. As the wording of the ECA is vague and open to interpretation it is no surprise that similar questions regarding the scope of a minister's powers under s.2(2) ECA have been litigated previously. That scope is being defined gradually through case law; the leading case today on s.2(2) ECA is *Oakley Inc v Animal Limited and Ors* [2005] EWCA Civ 1191.

The court in *Oakley* found that s.2(2) ECA is *sui generis* because

“[u]nlike other provisions allowing for the amendment of primary legislation by secondary legislation, it flows directly from the Treaty obligations of the United Kingdom”⁷.

It is a power to give effect to the country's EU obligations. Consequently, the court was able to interpret the minister's powers under s.2(2) much more widely than would ordinarily be the case when amending an Act of Parliament through secondary legislation.⁸

First we consider the purpose for which the power may be exercised under s.2(2)(a). Measures may be made “for the purpose of implementing any community obligation”. Given the limited nature to which the amending Directive relates to appeals, it is in our view unlikely that the appeals regime could be substantially reformed through regulations made purely for the direct purpose of implementing the Directive. The amending Directive makes a minor wording change to clarify that the appeals body should have the appropriate expertise to carry out its functions effectively. The Framework Directive is amended in the following way:

Article 4 - Right of Appeal

1. ... “This body, which may be a court, shall have the appropriate expertise ~~available to it~~ to enable it to carry out its functions **effectively**. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism.” ...⁹

Although the s.2(2)(a) power is not limited to the line-by-line implementation of what might be considered “core” parts of the Directive¹⁰, in our view a reform of the appeals regime would be outside of the direct scope of implementing the Directive; for the simple reason that, in

⁶ For example, The Electronic Communications (Universal Service) Regulations 2003, S.I. 2003 No. 33

⁷ *Oakley Inc v Animal Limited and Ors* [2005] EWCA Civ 1191, Waller L.J. at 18

⁸ In contrast, the judge at first instance classified the power under s.2(2) as a “Henry VIII clause”: “[I]t is clear that the combined effect of section 2(2) and (4) is to enable the Executive, in appropriate circumstances, to make legislation with all the force of an Act of Parliament, and even to amend an existing or future Act of Parliament. Thus section 2(2) combined with section 2(4) is an instance of what is sometimes known as a “King Henry VIII clause”... It is a power granted by Parliament to the Executive to make subordinate legislation which itself counts as if it were primary legislation. The name is a reference to that monarch's supposed avidity for absolute powers. “Now, whatever may be the precise constitutional position concerning King Henry VIII clauses, it will be obvious that powers of that sort have to be watched rather carefully. Therefore when Parliament does delegate to the Executive the power to amend primary legislation the courts scrutinise that power with care and consider that it should be resolved against the Executive...” *Oakley Inc v Animal Ltd and Ors* [2005] EWHC 419 (Pat) Peter Prescott QC sitting as Deputy High Court Judge at 79-80

⁹ The full text from the Better Regulation Directive is included in Annex 1. Recital 14 of the Directive explains the reason for the addition of “effectively”: “In order to ensure legal certainty for market players, appeal bodies should carry out their functions effectively; in particular, appeals proceedings should not be unduly lengthy.”

¹⁰ [2005] EWCA Civ 1191, Jacob L.J. at 65

relation to appeals, the Directive has already been implemented; there is no question that the current regime complies with the European requirement; and the changes to be made before May 2011 are unrelated to the changes now proposed by DCMS.

We turn our attention therefore to the exercise of the power in s.2(2)(b): does the power to make regulations “for the purpose of dealing with matters arising out of or related to any such obligations or rights or... the operation from time to time” extend to the type of reform envisaged here?

It has been established that regulations made under s.2(2) may make wider changes to the law than that which is required by the Directive.¹¹ Regulations, for example, widening the scope of consumer protection further than prescribed in the relevant directive have been found to be valid under s.2(2):

*“The Regulations tend, in my view, to further the essential aim of the Directive by widening the scope of the protection. They certainly did not undermine those objectives.”*¹² [emphasis added]

Further characterisation of the concept of “matters arising out of or related to” was given by the court in *Oakley*. Measures may be taken, Waller L.J. said, which “naturally arise from or closely relate to the primary purpose being achieved.”¹³

Yet the court has indicated that the use to which the s.2(2)(b) power is not untrammelled. In *Oakley*, Waller, L.J. stated:

*“I do not think that for example Section 2(2)(b) could allow a Secretary of State to amend by secondary legislation primary legislation, when he or she was not at the same time bringing into force a directive or without the trigger of a law becoming directly applicable under section 2(1).”*¹⁴

The questionable element in present case is whether there is a sufficient relationship between the amending Directives which constitute the communications reform package and the proposed Regulations to introduce a stripped-back appeals process.

The court in *Oakley* gave clear guidance that the answer to this question lies in the context of the attempted invocation of s.2(2) powers. Jacob, L.J, concluded:

*“So s.2(2)(b) indeed adds more... How much more must depend on the particular circumstances of the case -- the statutory language is the guide. It says “for the purpose of dealing with matters arising out of or related to”. Whether a particular statutory instrument falls within those words must depend on what it purports to do and the overall context.”*¹⁵

There is a real question here. The Directives now being implemented amend the existing requirements to strengthen appeals regimes in the Community. The appeals body must no longer merely have access to appropriate expertise, as in the old formulation; from May 2011 it must itself be possessed of that expertise. And the extent of that expertise is no longer to

¹¹ *R. v Secretary of State for Trade and Industry Ex parte Unison* [1996] ICR 1003 held that s.(2)(2)(b) could justify making a change to UK law by regulation which was wider than the change to law required by the directive if related to it. Confirmed by *Oakley*.

¹² *R. (on the application of Cukurova Finance International Ltd) v HM Treasury* [2008] EWHC 2567 (Admin)

¹³ [2005] EWCA Civ 1191 Waller L.J. at 38

¹⁴ [2005] EWCA Civ 1191 Waller L.J. at 22

¹⁵ [2005] EWCA Civ 1191 Jacob L.J. at 79

enable the appeals body simply to carry out its function, but to do so “effectively.”¹⁶ To the extent that they change the regime, they are requiring that it be strengthened.

The DCMS proposals, on the other hand, go the other way: they would tend to limit the appeals regime. As BIS explained in the previous consultation on these proposals, “There may be a reduction in the level of scrutiny to which Ofcom decisions are subjected on appeal.”¹⁷

In this analysis, the proposed changes run in the opposite direction from those made by the Better Regulation Directive. They fall squarely outside, for example, the analysis in *Cukurova* which talks about the s2(2)(b) being used to widen the scope of the protection being offered. Rather, they narrow it.¹⁸

In all of this it is worth remembering that reform of the appeals regime in the way the Government proposes is highly likely to be the subject of litigation in one way or another. In a best case, this will probably involve protracted wrangling about what standard is required to ensure the Directive’s requirements as to a merits review are met. However, litigation has a tendency to follow the exercise of the s.2(2)(b) power in contentious areas. Notable in the telecoms sector was the case of *R. v Secretary of State for Trade and Industry ex parte Orange Personal Communications Ltd*, where the purported use of the power was successfully challenged.¹⁹ There is potential in the challenge that paring the appeals regime does not further the essential aim of the Directive and even that it undermines the objective of securing an expert body that can appropriately consider the merits of the case. The UK would appear to move in a different direction to that which the EU intended, using the very Directives as a tool to do so. Indeed, whether or not the ECA power is invoked, the question of whether enhanced Judicial Review meets the requirements of the Framework Directive at all will almost certainly arise.

b. Do current arrangements represent “gold plating” of the terms of the Directives?

In its consultation, the DCMS sets out its view that the standard for appeals under the current telecoms appeal framework is unnecessarily high, and that the effect of section 192 of the

¹⁶ One might question the extent of the difference between the old and new wording, but the direction of the changes is clear - the expertise requirement is strengthened.

¹⁷ BIS document ‘Implementing the Revised EU Electronic Communications Framework - Impact Assessment’ September 2010, p.28

¹⁸ One might argue here that the requirement in the Better Regulation Directive deals with expertise; whereas the DCMS proposals are concerned with the scope of investigation on appeal and how far it deals with the merits. Such a nice distinction, however, is a very common-law driven perspective. From a teleological perspective it makes sense to look at the provisions on appeals as a whole; from that perspective, to weaken the regime at a time when the Directive is requiring it to be strengthened is surely not envisaged.

¹⁹ The Regulations in question were made under section 2(2) of the 1972 Act. If valid, they took away rights of Orange which they had enjoyed under the Telecommunications Act 1984. It was held that the Regulations were ultra vires, on the ground that they had failed explicitly to state that rights enjoyed under primary legislation were being taken away. The relevant Act provided clear rules for making amendments to licences. The Secretary purported to amend the licences to comply with a European Directive, but the new regulations did not specifically dis-apply the regime for amending the licences. It was found that he should have made it clear in the statutory instrument that the protections were being removed.

Communications Act 2003 is to “gold plate” the provisions of Article 4(1) of the Framework Directive.

As a group of stakeholders with significant collective experience of the appeals regime, the members of UKCTA strongly reject this assertion. UKCTA considers that the current system is effective, well embedded and has significantly improved the quality of decisions made by the regulator. It is also well understood by stakeholders including Ofcom, the industry and the CAT. Therefore any change to the regime would need to represent a significant demonstrable improvement in order to offset the upheaval and uncertainty that would inevitably occur.

UKCTA considers that far from representing an improvement, the proposed new regime would be more costly and less efficient especially for Ofcom. We would argue that the consultation contains no credible evidence for how the new regime would bring about more than a marginal reduction in the length of (some) appeals. In short, it would represent a huge step backwards for all stakeholders. UKCTA would urge DCMS to re-consider its proposals given the flaws in its reasoning explained below.

Furthermore, UKCTA challenges the basic premise of the DCMS perception that the current UK telecoms appeal regime is gold plated and encourages operators to initiate an appeal. If this were the case then the number of appeals submitted in the UK would be disproportionately high compared to other European jurisdictions; this is not the case.

The level of challenge to Ofcom appeals is comparatively low when compared to some EU member states. (Germany, Belgium). **Only around 10% of Ofcom’s decisions are appealed** and those that are appealed are generally both genuinely important and materially wrong.

Of the **28 appeals that were lodged up to the end of 2010, in 24 cases (i.e. over 85%)** Ofcom’s original decision has been fully or partly overturned. Further, in almost all cases the issues and corrections were material involving corrections of £10s - £100s millions.

c. Ofcom costs are not materially linked to standard of review

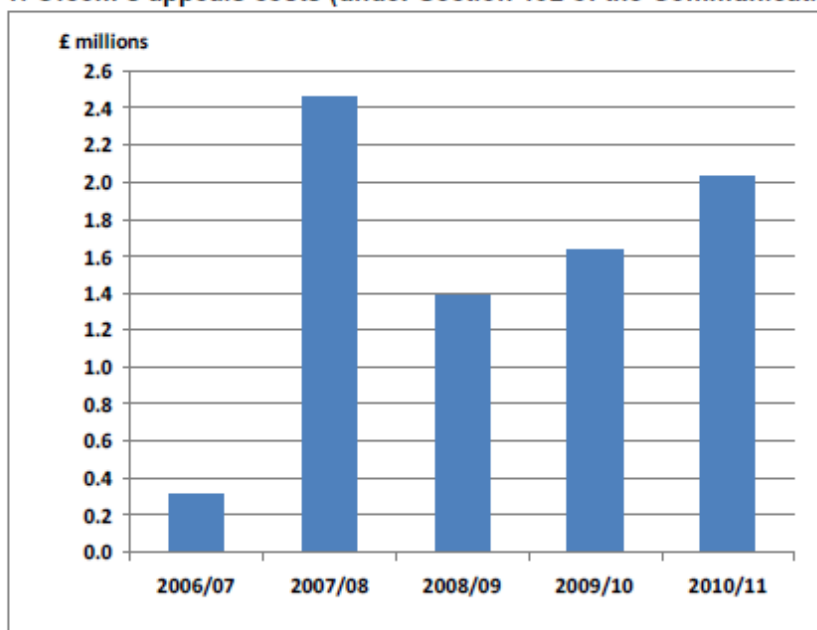
At paragraph 36 of the consultation, it is suggested that there is “some evidence” that Ofcom is spending increasing amounts of time dealing with appeals. Reference is made to the increasing number of hours and associated costs that Ofcom is forced to devote to appeals, set against a reduced budget.

This is evidence generated by Ofcom, and it is opaque at best. There is no breakdown of how these hours were allocated within the tasks that go to preparing an appeal. They are not set in any kind of context and they are impossible to challenge or scrutinise.

In any event it is not valid for DCMS to draw a conclusion from this evidence that simply by changing the telecoms appeal framework, Ofcom’s hours and costs would reduce (as it implies at paragraph 39). Further, it is certainly not the case that the proposed new regime would achieve this.

This is quite simply evident from Ofcom’s appeal costs in recent years, during which time there has been no change to the appeal framework:

Figure 1: Ofcom's appeals costs (under Section 192 of the Communications Act)



Source: Ofcom. The costs are higher than those presented in the NAO report because they include overheads.

It is quite clear that the standard of appeal is not a material driver of costs, since the former has remained consistent whereas the later fluctuate significantly. Rather, the drivers of Ofcom's resource and costs are far more likely to be:

- the complexity of the issues that need to be explained to the CAT (this would need to be explained to the same level regardless of the standard of review in order that the CAT understands sufficiently);
- Ofcom's view on the importance of the outcome for its future policy and statutory objectives (because the more important it is considered to be, the more time the regulator will devote to it at senior level);
- The size and profile of the case both within Ofcom and externally (similar to the point above, the higher profile the case, the more senior resource will be allocated);
- the actual number of appeals; and
- appeals that attract a high number of interveners, which must massively increase the complexity, admin costs etc

A move to a modified (and untested) standard of review will not have any obvious impact on any of these except for the number of appeals where it will have a significant detrimental effect as explained below.

d. DCMS view that the number of appeals will increase

UKCTA considers it likely that a significant portion of Ofcom's resource that is dedicated to appeals is spent on functions that could be described as administrative - such as retaining and liaising with external counsel, preparing appeal bundles and drafting witness statements. These are significant resource costs that are incurred irrespective of the standard of review at appeal. The greater the number of appeals, the more these types of cost rise.

DCMS appears to consider that its proposals are likely to lead to an increase in the number of appeals. At paragraph 52 of the impact assessment, DCMS concedes that “it is possible that the number of appeals will *increase* under the proposed regime [...]” and that “there will be costs associated with a higher number of appeals (in both the short and long term) in addition to a short-term cost increase that will be driven by more litigation on appeals that would have been heard anyway [...]”.

This seems completely at odds with DCMS’s desire to create a more streamlined efficient and ultimately less costly regime. Any marginal reduction that might be achieved in the length of the appeal hearing (which we doubt would often materialise, see below) would be countered by an increased administrative burden on the regulator having to prepare for an increased number of cases.

e. Nothing will really change

It is not at all clear from the consultation exactly what DCMS expects to change during the course of an appeal under the proposed new regime that will result in material streamlining and efficiency gains. In paragraph 45, it sets an expectation of more focus on “material points”, and a reduced scope for examination of factual and expert witnesses. However in the following paragraph it concedes that it is ultimately up to the CAT (and Court of Appeal) to develop the necessary jurisprudence, and further concedes that it is only “likely” that the scope of the review and length of appeal process will change.

UKCTA contends that DCMS has not fully understood or thought through the practical implications of its proposals, which UKCTA considers will do far more harm than good. There is not enough information or reasoning in the consultation paper about how in practical terms DCMS sees these supposed efficiencies materialising.

It is extremely doubtful to suggest that the upheaval, uncertainty and increased cost that will be caused by this new regime would be offset by a perceived marginal reduction in the length of a hearing, especially as it lacks the support of the CAT (see below).

f. The CAT’s views on the proposed reforms

In the final analysis, it will be the CAT which ultimately determines whether a new process is needed or will deliver efficiencies. The CAT has suggested that the proposed reform will not substantially alter the way in which appeals are handled. The proposed new regime would render irrelevant the established body of jurisprudence and create unnecessary confusion and uncertainty for all stakeholders.

Further, the CAT implies that regardless of the proposed new regime it is unlikely to reduce the level of detail they would need to look at. In their response to the previous consultation document the CAT stated that the only result which they could foresee from the proposed change would be “promotion of further and prolonged uncertainty”.²⁰

It is therefore difficult to see how the DCMS can continue to pursue its proposals in the face of such clear opposition from the CAT. It seems strange that the DCMS is adamant of the

²⁰ http://www.culture.gov.uk/images/consultation_responses/FWR2011-Competition_Appeal_Tribunal.pdf

benefits of a new process given that the body which would effectively implement it does not see the need for it.

g. The right of appeal MUST have the word “merits” otherwise will depart too far from the directive.

Article 4 of the Framework Directive requires Member States, when establishing an appeals regime in relation to relevant regulatory decisions, to “*ensure that the merits of the case are duly taken into account*”. In the Consultation, the Government sets out its view that the current transposition, which provides for an “*appeal on the merits*”, goes beyond what Article 4 requires.

In order to correct what it claims is an “over-implementation” of Article 4, the Government proposes to include a new section 195(2A) of the Act which would state:

“In deciding the appeal the Tribunal must apply the same principles as would be applied by a court on an application for judicial review, ensuring that the merits of the case are duly taken into account.”

Government claims that this change will ensure that the requirements of Article 4 of the Framework Directive “are fully met but not exceeded, by importing verbatim the requirement to take due account of the merits”.²¹ Yet the proposed implementation does not import verbatim the requirement in Article 4, because the standard of review now proposed involves an appeal in which “the same principles as would be applied by a court on an application for judicial review” are applied, with the reference to merits being included almost as an afterthought, whereas no such language, or any reference whatsoever to “judicial review”, is included in the Framework Directive itself.

If it is indeed the Government’s intention accurately to reflect the language of the Framework Directive and avoid over-implementation, or even under-implementation, UKCTA believes that the most appropriate solution would be to simply mirror the exact wording of the Framework Directive in the new section 195(2A), for example so it states:

“The Tribunal, in deciding the appeal, shall ensure that the merits of the case are duly taken into account.”

UKCTA is concerned that the revised standard to be included in the new section 195(2A) could likely result in a failure by the UK Government to implement the requirements of Article 4 of the Framework Directive. UKCTA considers that there must be a clear separation between the reference to judicial review principles and ensuring that the merits of the case are duly taken into account.²² Any other outcome could result in a watering down of the EU requirements, which is clearly not the Government’s intention.

Accordingly, if the Government believes that it will bring benefits to amend the Act to include a reference to judicial review (although we do not support this belief) then, to safeguard against any watering down of the requirements of the Framework Directive, UKCTA

²¹ Paragraph 44 of the Consultation.

²² UKCTA notes that in *T-Mobile (UK) Ltd v Ofcom* [2008] EWCA Civ 1373 the Court of Appeal recognised that judicial review would need to be adapted to ensure that the merits of the case are duly taken into account.

considers that the following language, at a minimum, would be preferable to the current proposed wording set out in Annex 1 of the consultation and would more accurately reflect the requirements of Article 4 of the Framework Directive:

*“In deciding the appeal the Tribunal must apply the same principles as would be applied by a court on an application for judicial review **and ensure that the merits of the case are duly taken into account.**”*

UKCTA also notes that Government has failed to provide stakeholders with the full draft statutory amendments. Given the importance of these changes, UKCTA considers that it is essential for stakeholders to be given the opportunity to comment on the revised statutory language.

h. Ofcom decisions have improved due to the appeals process (this helps reduce volume going forward)

UKCTA is in no doubt that the appeals brought in recent years against Ofcom have had the effect of improving the quality of regulatory decision making, clarified Ofcom’s duties and obligations and been squarely within the long term consumer interest, helping to protect competition in various wholesale and downstream retail markets.

No regulator is, or would ever claim to be, infallible. Errors in decision making do occur. The appeal process has highlighted that fact, correcting unjust or unsound decisions and preventing repetition through clearer guidance and the continuance deterrent of another appeal. We have a very different interpretation of the outcome of the appeals brought against Ofcom, to the one set out in the consultation. Indeed it is our understanding based on research carried out in December 2010, that at that time of the 28 appeals that have been lodged against Ofcom decisions, 24 have resulted in Ofcom’s original decision being fully or partly overturned. So the picture has not been one of unwarranted appeals being taken and the regulator’s decisions being largely upheld.

Ofcom themselves have acknowledge when errors have been made and have on more than one occasion requested that the CAT remits the matter back to them at the outset of an appeal. Other misjudgements, such as the flawed 'gains for trade' test that Ofcom sought to apply in a number of cases and that could have had a distortive and damaging impact on our industry were only avoided as a result of the current appeals regime.

There is a consensus view across the industry that the quality of Ofcom's output over the past two years has improved, and while disagreements over policy direction will always occur, the improvements in the quality of regulatory decision making can be seen. This has the effect that even when appeals are brought, they are often drawn on narrower grounds, making the process more straightforward and efficient. It is our firm believe that improvement in Ofcom's approach can be put down to the work of the CAT & CC in the appeals process and indeed Ofcom's own positive and constructive reaction to adverse appeal decisions, where there has been a real desire to ensure that future decisions are properly arrived at and that process has been followed. Appeal judgements have given Ofcom a frame of reference that was absent before and has proved essential to guide them when they seek to resolve the wide range of complex and difficult policy questions and disputes they encounter. We are unconvinced that the current reform proposals will deliver

an appeals framework that will measure up to the current regime, potentially making it far easier to get away with poor regulatory decisions in the future.

i. Will a change to a new and untested standard of review achieve the aim?

We broadly agree with the Government's intent to 'deliver faster, better focused appeals' and so reduce costs and ensure that corrections to regulation are made more quickly. Such outcomes would be in the best interests of all parties. We also strongly agree that access to appeals should not be reduced. However, whilst this is a laudable aim it is highly unclear as to whether the proposed amendment in legislation ('JR taking account of merits') will actually achieve this desired effect. Notably the CAT consider that the amendment will make 'little material difference' (§70).

The Government may consider that making such a change is worthwhile even though the impact is unclear since it *might* reduce the cost of appeals. However, the change will also have some negative consequences. For instance, it will without doubt result in added regulatory uncertainty (and so deter investment) and increase legal costs whilst a fresh body of jurisprudence is established - just at the point where such a body of jurisprudence is becoming established for the current system. Further it might have a number of detrimental unintended consequences such as reducing the discipline on Ofcom, making it more difficult to bring an appeal and/or not allowing sufficient scrutiny of Ofcom's decisions by the CAT.

In effect, amending the legislation will be a risky gamble since the costs may outweigh the benefits. Government may well believe that this is a risk worth taking but UKCTA believes it is incumbent on the Government to identify, explain and properly weigh up the gamble it is entering into and consider how it might mitigate the risks of the downside.

5. Conclusions

UKCTA does not accept the proposition that the reforms proposed by Government are either necessary or indeed desirable.

The Government has suggested that the current implementation of the EU directives represents a degree of "gold plating". We do not agree with this conclusion and do not believe there was any suggestion at the time that the previous Government had engaged in over implementation of the Directives in this area.

It is doubtful whether the legislative route proposed is in fact lawful.

Having been through the pain and disruption of establishing a body of jurisprudence for the current system, we believe there is no justification to repeat the process (and the cost and disruption for a key sector of industry) at this time, especially given that both DCMS and the CAT have said there is likely to be little material difference in the handling of appeals.

The current system can and should be improved. Innovations such as the use of confidentiality rings could be devised to deliver the type of benefits which DCMS wish to achieve, without the unnecessary cost, difficulty and upheaval of developing an entirely new standard of appeal and the associated body of jurisprudence.

Annex A

In considering the impacts it is useful to consider the counter-factual that occurs in the absence of confidentiality rings. This example below is taken from the ongoing consultation to set BT's LLU/WLR charges.

Example: LLU/WLR charge control

Though Ofcom has provided a range of data on BT's costs as well as versions of the cost models it is using consultees lack much information. One consistent issue is that the information that is disclosed is at a highly aggregated level which is too high level to be able to properly challenge. It is like complaining at a supermarket checkout that they have overcharged but, rather than being able to check the price of every item, they only tell you how much you have spent in each department. Some specific examples we have had include:

- BT allocate 43% of certain Group costs to Openreach but this is inconsistent with the BT/Ofcom claims that most costs are allocated in proportion to Openreach's FTE (which is 30%). BT have not provided disaggregated data to enable consultees to understand or challenge the 43% assumption
- In its costs estimates Ofcom have relied on a BT claim from an internal BT report that WLR and MPF line lengths are the same though a variety of independent analysis indicates that WLR lines are 20% or more longer than MPF lines. Yet we cannot see the internal report to assess or challenge its methodology or reasonableness
- The amount of Openreach's fixed cost allocated to non-LLU/WLR services (such as NGA, non-regulated services) affects the cost allocated to LLU/WLR. Yet even though the allocation looks wrong (we are aware that the cost allocation to these services stays flat whereas the revenue doubles) we cannot get access to information to scrutinise the allocation
- Though we have been provided models that are very heavily redacted and frozen (in that the links don't work) so they are of limited use
- To try to overcome this lack of sufficient transparency we have over the last five months participated in a 'probing' process of trying to get the missing data. This has been extremely laborious and in many respects ineffective. We have spent 100s of man hours trying to understand the partial data we have been provided, identify gaps, formulate over 150 separate questions, wait for a Ofcom response (which took over two months) and then in many cases wait on a response from BT (which is five months and waiting)

Annex B Confidentiality Rings

Government have provided a number of reasons as to why it considers confidentiality rings to be inappropriate (§§109-112). We disagree, for the following reasons:

- *Government not aware that appeals withdrawn once confidentiality ring set up* [by this point we presume the Government is inferring that lack of confidentiality rings at the regulatory stage does not increase the number of appeals].

We disagree. In CPW's LLU appeal it introduced new appeal points once data had been disclosed in the CAT confidentiality ring. – i.e. lack of confidentiality ring can create the incentive for consultees to appeal to discover new/useful information

In CPW's LLU appeal a number of points were dropped once evidence became available – i.e. the lack of confidentiality ring increased the initial breadth of the appeal

- *We foresee potentially significant difficulties around identity persons to be admitted.*

The Government has provided no evidence to support this claim. There is no reason as to why, if confidentiality ring can be effectively managed by the CAT, they cannot be managed by Ofcom.

- *Stakeholders who do not employ external advisors may feel compelled to do so.*

Confidentiality rings allow stakeholders the option of employing external consultants to get admission to a confidentiality ring if they so wish. It cannot be legitimate to argue that deprive some stakeholders transparency because other stakeholders might chose not to get involved. It would be tantamount to dumbing down the level of transparency to the lowest common denominator

- *Real danger that confidentiality rings become unwieldy.*

The Government has provided no evidence to support this claim. In fact, given that typically only 2 to 5 stakeholders are deeply involved in each consultation (and so would want to participate in a confidentiality ring) and based on the effort required to set up confidentiality rings in other circumstances (e.g. the CAT) we think that setting a ring and enforcing a ring would take 10s of man hours. In any case the effort will be far less than the effort required in the laborious probing process required when there is no confidentiality ring

- *Set-up / monitoring of rings might result in delays.*

This is highly unlikely to be the case. Once a framework approach to set-up a confidentiality ring has been developed it could be implemented in each case in a week or two (just as it is in the CAT). Furthermore, consultations where a confidentiality ring might be appropriate involve processes that typically go on for around a year so the extra time involved is minimal. In any case the additional time required will be far less than the effort required in the laborious probing process required at present.