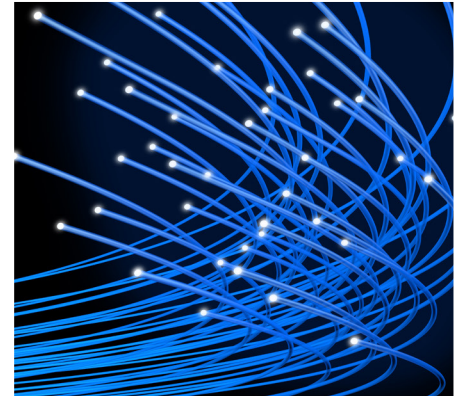
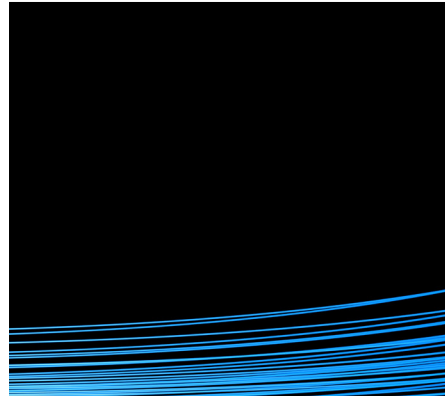


Ofcom fine BT a record breaking £42 million A move to a more punitive approach?



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On 26 March 2017, Ofcom (the UK telecommunications regulator) fined BT a record breaking £42 million for irregularities in compensation payments that should have been made to customers of its network arm, Openreach. BT is also required to compensate all the affected customers within 12 months. These compensation payments will amount to approximately £300 million.

The application of such material financial penalties is unprecedented in UK telecommunications regulation and is indicative of a change in Ofcom's approach in this area. However, this development arguably follows a broader trend among UK regulators towards regular, substantial and highly publicised applications of their enforcement powers. For example, such an approach has been prevalent at Ofgem, the energy market regulator for a number of years.

The fine

Ofcom's investigation focused on contractual practices Openreach undertook between January 2013 and December 2014 in respect of the provision of Ethernet services to its wholesale customers, who are other telecommunications providers (who, in turn, supply services to businesses and individuals).

Essentially, BT is required by a number of special regulatory conditions imposed on it, due to its 'Significant Market Power' (SMP), to:

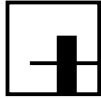
- Provide such Ethernet services as soon as reasonably practicable and on fair and reasonable terms.

- Publish reference offers containing the terms and conditions for the provision of Ethernet services and to not depart from these.
- Provide services on such terms, conditions and charges as Ofcom may from time to time direct.

The contractual arrangements that were put in place to satisfy these regulatory conditions require BT to deliver Ethernet services within 30 working days, or pay compensation to the company affected. The contractual arrangements do allow BT to assume that a customer has accepted an extension to the 30 working day time period in certain specified circumstances.

Ofcom, however, found that BT had misused the provisions allowing for such extensions by applying them retrospectively, in an inappropriate manner, over a sustained period.

Ofcom considered this to be an extremely serious breach of regulation as most telecommunications companies rely on access to BT's network to provide services such as broadband to their customers. In Ofcom's view, its rules regulating BT's SMP (such as the those being



enforced in this case) are, therefore, fundamental to protecting competition in telecommunications markets and ultimately ensuring that consumers and businesses receive high quality and fairly priced services.

BT was also fined an additional £300,000 for not providing accurate information to Ofcom.

The compensation payments

Ofcom is also requiring BT to compensate those customers who suffered financial loss, within twelve months. BT will set up a scheme to process these payments. Estimates suggest the compensation scheme will cost BT approximately £300m.

Ofcom's approach

This fine is, by some distance, the largest ever levied by Ofcom. When it is combined with the scale of the Ofcom mandated compensation payments, the complete remedies package is one of significant punitive force. The Financial Times referred to the scale of overall financial penalties levied by Ofcom in this case as "unprecedented in UK telecoms."

The application of such material financial penalties is indicative of a change in Ofcom's approach to regulation, with arguably a move towards a more punitive and adversarial approach to regulation. This development follows a broader trend among UK regulators towards regular, substantial and highly publicised applications of their enforcement powers. For example, such an approach has been prevalent at Ofgem, the energy market regulator for a number of years.

Serious move towards such an approach at Ofcom have been developing over the past year to eighteen months. In late 2015 Ofcom put in place new penalty guidelines, which had an increased emphasis on deterrence and punishment. This was followed in 2016 and early 2017 with a number of multi-million pound fines against a

number of high-profile market operators for a variety of regulatory infractions (e.g. fines against Vodafone for mis-selling and complaints handling issues and EE for overcharging).

Whether such an approach will have the desired effect of improving compliance and deterring recidivism in respect of regulatory breaches is open to debate. While, clearly, the risk of significant financial penalties should have an effect on corporate compliance, there is academic and policy analysis to suggest that increasing fines in and of itself will not necessarily achieve these goals.

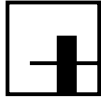
Practically, however, it seems that those active in telecommunications markets will need to deal with the reality of a regulator willing to take a more adversarial and punitive approach to regulatory enforcement. How this affects various market participants remains to be seen, but on any matters touching on Ofcom enforcement, businesses would be prudent to take advice and consider their strategy carefully going forward.

Get in touch

Shepherd and Wedderburn have a team of vastly experienced regulatory and competition specialists in the telecommunications, media and technology (TMT) sector. Members of our team have worked in private practice and in telecommunications carriers across the globe.

We are able to advise clients on all aspects of TMT regulatory and competition issues; in particular, we have experience of advising on regulatory enforcement actions in telecommunications and other regulated markets (especially energy markets) in various jurisdictions. Our unique offering combines focused sectoral expertise, with access to a wider range of cross-sectoral regulatory and competition law knowledge and experience.

Please get in touch if this briefing has been of interest.



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