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# Dispute resolution in telecommunications

*The aftermath of the Supreme Court's judgment in the 080/0870/0845 case*

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The first key judgment by the Supreme Court in the telecommunications sector<sup>1</sup> raises fundamental questions for telecoms operators, regulatory lawyers and Ofcom about how Ofcom exercises its dispute resolution functions and the impact this may have on the way telecoms operators interact in the future.

The judgment highlights the importance of contractual terms as a factor within the dispute resolution process, particularly in assessing which party bears the burden of proof and how Ofcom goes about resolving disputes. In certain circumstances, the Supreme Court's judgment suggests that Ofcom's role is restricted to interpreting the contract between the parties and giving primacy to the parties' agreed terms, within the ambit of the objectives of Article 8 of the Framework Directive. This is a material departure from past findings. It also raises doubt about the Supreme Court's conclusion that Ofcom is only exercising an adjudicatory function, as assessing a party's exercise of its contractual discretion for consistency with the Article 8 objectives seems, to us, to be a regulatory function.

In addition, the judgment raises interesting questions about when Ofcom should invoke exceptional circumstances in the context of a dispute and if and when Ofcom should withdraw decisions that are rendered fallible by a subsequent court judgment. The answers to these questions have far reaching implications, particularly given the number of interconnection disputes currently underway and the prospect of many more to follow.

## Background to the case

The context for those not familiar with the case is as follows.

BT had issued other operators with network charge change notices (**NCCNs**) under clause 12 of its Standard Interconnect Agreement (**SIA**). These notices indicated that BT's termination charges for 080 and 0870 / 0845 calls would in future be linked to the price charged by the originating operator. Under this so called "ladder pricing" model, the higher the price charged by an operator to the end user, the higher the termination charge charged by BT.

Vodafone, Orange, T-Mobile, H3G, 02 and Everything Everywhere objected to one or more of BT's price changes and referred disputes to Ofcom under section 185(1) of the Communications Act 2003 (**Communications Act**) on the basis that the charges were not fair and reasonable.<sup>2</sup> BT's ability to introduce price changes for these services was not subject to any Significant Market Power (**SMP**) regulation.

## Ofcom's determination on the disputes

In resolving the dispute, Ofcom applied the test outlined in the T-Mobile case<sup>3</sup> to assess whether the changes were "fair and reasonable". In making this assessment, Ofcom applied **three** principles:<sup>4</sup>

**Principle 1:** Mobile operators should be able to recover their efficient costs of originating calls;

**Principle 2:** The new charges should provide benefits to consumers, taking into account:

- the impact of the price change on retail call prices (**the Direct Effect**);
- the impact of the price changes on service providers offering NTS call services (**the Indirect effect**); and
- the impact of the price changes on mobile tariffs overall (**the Mobile Tariff Package Effect**); and

**Principle 3:** The price changes should be reasonably practicable for operators to implement (together, the **Principles**).



Ofcom imposed the burden of proving that all three principles were made out on BT, as the party proposing the price change. In doing so, it followed the approach of the Competition Appeal Tribunal (**CAT**) in the T-Mobile case.

Ofcom reached different conclusions in the two different determinations as to whether the Principles were met. In the case of the 080 Determination, Ofcom found that neither Principle 1 or Principle 2 were satisfied but that it should be possible to satisfy Principle 3. In the case of the 0845/0870 Determination, Ofcom found that although Principle 1 was satisfied, Principle 2 was not demonstrated and therefore not satisfied and Principle 3 was not satisfied. In both cases, therefore, Ofcom found that BT had not justified its price changes and that they were therefore not fair and reasonable.

### **CAT overturns Ofcom's finding**

BT lodged an appeal with the CAT against both the 080 and the 0845/0870 determinations. A key focus of the appeal was whether Ofcom had correctly applied Principle 2 in assessing the impact of the price changes on consumers.

In August 2011, the CAT issued a joint judgment that overturned both of Ofcom's determinations and remitted them back to Ofcom for reconsideration.<sup>5</sup> The CAT found that, in making its determinations, Ofcom failed to consider, (amongst other things):<sup>6</sup>

- BT's rights under the SIA; and
- the regulatory obligations and duties on the different parties.

In relation to BT's rights under the SIA, the CAT referred to the judgment in the T-Mobile case which stated:<sup>7</sup>

"The onus lies on the party proposing the variation to provide to the other party and to OFCOM the justification for the change in terms upon which the parties have hitherto been prepared to do business. This would be the position in any situation where one party to a binding contract proposes a variation of that contract."

The CAT held, however, that the current 080/0845/0870 case was distinguishable from the T-Mobile case because the price variations in the current case were issued under clause 12 of BT's SIA, while the variation in the T-Mobile case was proposed under clause 13. Clause 12.2 of the SIA provides that:<sup>8</sup>

"BT may from time to time vary the charge for a BT service or facility by publication in the Carrier Price List and such new charge shall take effect on the Effective Date [...]"

Elaborating on the distinction, the CAT held that in clause 13 of the SIA:<sup>9</sup>

"[...] it makes sense to speak of a 'burden of proof' – whereby the proponent of a variation justify it, otherwise the status quo remains – this makes no sense in paragraph 12 cases, which the Tribunal in T-Mobile was not considering. Accordingly, we reject the contention that there is in some way an onus on BT to justify its NCCNs".

The CAT also stated that the nature of the regulatory obligations and duties applying to the parties to the dispute was a highly material factor in the dispute resolution process. It stated that:

"The power to regulate by rule or condition is curtailed for a reason, and it is our view that this is something that OFCOM needs to take into account in the Dispute Resolution Process. A 'regulatory absence' of this sort is an important indicator for the purposes of the Dispute Resolution Process, suggesting that a price set by a communications provider should not be interfered with."

Overall, the CAT held that because BT had a unilateral right to vary its price charges and given that there was no SMP regulation to restrict it in exercising that right:<sup>10</sup>

- BT was not required to positively demonstrate that its price changes had a consumer benefit; and
- Ofcom should only intervene and reject price changes if it could positively demonstrate that the price changes would harm consumer welfare.

The CAT also stated that in relation to resolving disputes in the future, the test that Ofcom is to apply to assess the fairness and reasonableness of a charge "*must be capable of being concluded within four months.*"<sup>11</sup>

### **Court of Appeal overturns the CAT's judgment**

In July 2012, the Court of Appeal overturned the CAT's decision and re-instated Ofcom's findings.<sup>12</sup> The Court of Appeal rejected the idea that there was no onus on BT to justify its changes merely because they were introduced under clause 12 of the SIA.

The Court of Appeal also stated that it was common ground amongst the parties to the appeal that:

“Ofcom’s task, where it undertakes the resolution of the dispute, is to impose a solution that meets the public policy objectives of the CRF, as set out in article 8 of the Framework Directive, and therefore goes beyond deciding disputes on the basis of the parties’ respective contractual rights. Dispute resolution is a form of regulation in its own right, to be applied in accordance with its own terms [...]”

Accordingly, the Court of Appeal held that:<sup>13</sup>

“If there is already a contract, the NRA’s powers must enable it to override the contractual rights of one party (or even those of both parties). There is no place for any kind of presumption either way as to the position of one party or the other.”

## Supreme Court overturns the Court of Appeal’s judgment

Finally, in a judgment given in July 2014, the Supreme Court overturned the Court of Appeal’s decision.

The Supreme Court’s decision is notable because it held that:<sup>14</sup>

- in carrying out its dispute resolution functions, Ofcom has both regulatory and adjudicatory powers;
- where Ofcom makes a declaration under section 190(2)(a) of the Communications Act, it is applying an adjudicatory power; and finally
- the starting point for Ofcom in a dispute resolution exercise should be the contractual provisions agreed between the parties.

In reaching its conclusions, the Supreme Court examined Article 20 of the Framework Directive and Article 5.4 of the Access Directive dealing with the dispute resolution powers of the national regulatory authorities (**NRAs**). It concluded that NRAs could deal with three types of disputes:<sup>16</sup>

- disputes under the existing interconnection terms (**Type 1**);
- disputes where the parties cannot agree the terms and one party requests that the regulator impose terms (**Type 2**); and
- disputes where the binding terms do not (or no longer) satisfy the provisions of Article 5.3<sup>15</sup> or Article 8 of the Access Directive (**Type 3**).

The Supreme Court then went on to say that in resolving Type 1 disputes, Ofcom may be exercising an adjudicatory role, a regulatory role or some combination of the two.<sup>17</sup> It concluded that:<sup>18</sup>

“A dispute may arise (i) under the existing interconnection terms, or (ii) because the parties have been unable to agree terms and one of them wants the regulator to impose them, or (iii) because there are binding terms but they do not satisfy (or no longer satisfy) Article 5.3 of the Access Directive or the policy objectives in Article 8 of the Framework Directive. In case (i) it may perform an adjudicatory or a regulatory role or a combination of the two. The existence side by side of both adjudicatory and regulatory functions follows from the scheme of the Directives, but is particularly clearly spelled out in section 190 of the Communications Act, which I have already quoted. The section distinguishes between Ofcom’s powers in the course of dispute resolution to declare the rights and obligations of the parties (section 190(2)(a)), to fix the terms of transactions between the parties (section 190(2)(b)) and to impose an obligation to enter into a transaction on terms fixed by Ofcom (section 190(2)(c)). The first of these powers is plainly adjudicatory. The second and third are regulatory.”

The Supreme Court did not address how section 190(2)(d) and Ofcom’s new powers in section 190(6) to require payments from parties to the dispute should be classified. However, we presumed that the Supreme Court would classify these powers as regulatory. In fact, as discussed below, the CAT has recently appeared to confirm that Ofcom’s powers under section 190(2)(d) are regulatory – at least where the dispute concerns SMP products.<sup>19</sup>

The Supreme Court’s classification of Ofcom’s powers and duties as either regulatory or adjudicatory is notable because it appears to go even further than BT had argued for – at least in the initial stage of proceedings. Before the CAT, for example, BT argued that:<sup>20</sup>

“[...] the intervention is as regulator. Ofcom is performing a regulatory function when it uses its powers under s. 190 and is using them as regulator, not as arbitrator. This is not only clear we say from the Act, but also from the common regulatory framework as well.”



It is also interesting because, as already indicated by the Court of Appeal, before the Supreme Court's decision it appeared to be common ground between all parties that Ofcom's dispute resolution function was a third limb of regulation.

### Limitation of Ofcom's powers?

In classifying Ofcom's section 190(2)(a) power as adjudicatory, the Supreme Court appears to be limiting the scope of Ofcom's powers at least in **non-SMP** cases by restricting Ofcom to a contractual interpretation exercise that gives primacy to the contractual agreement between the parties.

In taking this view, the Supreme Court set itself apart from the Court of Appeal, which had ruled that Ofcom's dispute resolution powers should be approached in the same way, regardless of the contractual provision under which a price change was proposed.

In the Court of Appeal's view, for Ofcom to base the approach to dispute resolution on the contractual provision would *"distort the application of Ofcom's regulatory power by way of dispute resolution, for no reason that can be discerned from the CRF or from the domestic legislation."*<sup>21</sup>

In contrast, the Supreme Court held that the starting point should be the contractual provisions. It held:<sup>22</sup>

"[...] if there is no contractual right to vary the charges, it is difficult to see how Ofcom can approve a variation unless it is necessary to achieve end to end connectivity or to achieve the Article 8 objectives. If there is a contractual right to a variation but the proposed variation is not consistent with the Article 8 objectives, Ofcom may reject the variation. It may also modify any terms which create an entitlement inconsistent with the Article 8 objectives. If there is a contractual right to a variation which is consistent with the Article 8 objectives, Ofcom's function when the right is challenged is to give effect to it."

Turning to the 080/0845/0870 case, the Supreme Court noted that under clause 12 of the SIA, BT was able to unilaterally introduce the ladder pricing. It commented that although the mobile operators had made submissions to the CAT that the unilateral nature of clause 12 meant that it should not be given weight; neither the mobile operators nor Ofcom had argued that clause 12 should be varied. In making these comments the Supreme Court was apparently unaware that mobile operators had separately raised a dispute before Ofcom arguing that the asymmetry between clauses 12 and 13 of the SIA was not fair and reasonable and that the clauses should be varied.

The Supreme Court acknowledged that the unilateral rights in clause 12 of the SIA gave BT a broad discretion but said that the interconnection agreement was made in a regulated environment. The Supreme Court stated that the intention of the parties in entering into the agreement must be to comply with the regulatory scheme as it stands from time to time. Accordingly:<sup>23</sup>

"[...] the discretion conferred by clause 12 of the Standard Interconnect Agreement is limited by reference to the purposes set out in Article 8 of the Framework Directive. It follows that contractually BT was entitled to set its own charges, but only within limits which are fixed by those objectives."

In effect, the Supreme Court held that clause 12 of the SIA must be read as containing an implied reference to Article 8 of the Framework Directive along the lines of the following:

"From time to time vary the charge for a BT service or facility by publication in the Carrier Price List (**provided that such variation is consistent with Article 8 of the Framework Directive**)."

In limiting the exercise of BT's discretion under Article 12 to the ambit of the Article 8 objectives, the Supreme Court engaged in a parallel exercise of limiting the tasks that Ofcom was required to carry out when assessing a dispute from a regulatory exercise to a purely adjudicatory task involving interpreting and applying a contract.

**In the case of the 080/0845/0870 cases, the Supreme Court held that:**

"[...] Ofcom's function was to determine whether BT's proposed charges exceeded the limits of its contractual discretion<sup>24</sup> [...] in resolving this particular dispute, Ofcom was not exercising a regulatory function, but resolving a dispute under the unchallenged terms<sup>25</sup> of an existing agreement".<sup>26</sup>

Notwithstanding that Article 8 is directed to NRAs and should be effectively incorporated into the separate contractual agreement of an operator, the difficulty with the approach outlined by the Supreme Court is that the objectives of Article 8 represent 'all things to all men'.

Article 8 has a wide ambit and requires that NRAs promote competition by ensuring that (among other things):

- users, including disabled users, elderly users, and users with special social needs derive maximum benefits in terms of choice, price, and quality; and
- there is no distortion or restriction of competition in the electronic communications sector, including the transmission of content.

Either side to a dispute will argue that their approach is consistent with the Article 8 objectives, although BT may have the benefit of not bearing the burden of proof. This is because the Supreme Court's judgment appears to suggest that other parties to a dispute must prove that BT's price change is not consistent with the Article 8 objectives. This may be a substantial burden.

In deciding whether a price change is or is not consistent with the Article 8 objectives and therefore within the scope of BT's contractual discretion, Ofcom must still obtain evidence on the impact of a contractual change on competition and end users and make reasoned about the weight of such evidence.

As a result, it is hard to see how Ofcom can only act as an adjudicator. Despite the Supreme Court's attempt to classify this as an exercise of pure contractual interpretation and therefore an adjudicatory exercise, it still seems to be a regulatory function (albeit a function where the burden of proof may have changed).

### **The Supreme Court's judgment in practice: the application of the burden of proof**

The limits of the Supreme Court's judgment and the way in which Ofcom should approach the question of whether price changes issued by BT under clause 12 are consistent with Article 8 is soon to be tested. On 13 October 2014, Everything Everywhere and Three raised a new dispute before Ofcom which alleged that BT's termination charges for '03' numbers should be reduced because there has been a substantial reduction in the underlying costs used to set the rates. Ofcom has announced that it will examine:<sup>27</sup>

"[...] whether in light of regulatory and market developments, the wholesale termination charges notified by BT in NCCN 96 for calls to 03 numbers that terminate on BT's fixed network are no longer consistent with the policy objectives in Article 8 of the Framework Directive including end to end connectivity."

This case will be the first dispute in which Ofcom will be required to identify who carries the burden of proof in relation to the new test outlined by the Supreme Court.

### **Fallout from the Supreme Court's decision: when to invoke exceptional circumstances?**

Another fallout from the Supreme Court's decision relates to Everything Everywhere, H3G and Telefonica's attempts to have the alleged asymmetry between clause 12 and 13 of the SIA declared unfair and unreasonable and the issue of when Ofcom should rely on the existence of exceptional circumstances under Section 188 when resolving a dispute. In this case, Ofcom's reluctance to exercise exceptional circumstance and await the outcome of the Supreme Court's decision in the 080/0845/0870 case has led it to issue final conclusions on a dispute that it may have been unlikely to reach, if it had the benefit of reading the Supreme Court's judgment.

In early 2012, the three mobile operators had all lodged disputes with Ofcom alleging that BT's ability to change prices unilaterally under clause 12 without an equivalent provision for CPs under clause 13 created an asymmetry between the parties' rights that was unfair and unreasonable. As part of their dispute submissions, the mobile operators argued that the asymmetry of the provisions was exacerbated by the CAT's judgment in the 080/0845/0870 case. They argued that the CAT's judgment created a material difference in the approach Ofcom should take to dispute resolution and the burden of proof, depending on whether the change was introduced under clause 12 or 13 of the SIA.

Section 188 of the Communications Act requires that Ofcom must generally resolve a dispute in four months after it has accepted it, unless there are exceptional circumstances. Ofcom had accepted the disputes on 14 February 2012 which meant that under section 188 it should have resolved the dispute by 14 June 2012.

However in early June 2012 Ofcom informed the parties to the SIA dispute that it felt that the Court of Appeal's judgment on the 080/0845/0870 case (May 2012) was likely to be relevant to its consideration of the SIA dispute and that it could not issue its provisional conclusions without sight of the Court of Appeal judgment. It therefore indicated that it felt this constituted exceptional circumstance under section 188 of the Communications Act.



The Court of Appeal handed down its judgment in the 080/0845/0870 case on 25 July 2012, overturning the CAT's decision and stating that:

"[...] while upholding contractual rights, thereby favouring commercial certainty, can be a relevant consideration for the regulator to bear in mind, neither the actual or previous contractual position, nor any right of BT to impose a change, can be of overriding significance"

In October 2012, Ofcom issued its provisional conclusions on the SIA dispute indicating that its view was that clauses 12 and 13 of the SIA were fair and reasonable. In reaching its provisional conclusions, Ofcom noted that the Court of Appeal disagreed with the CAT's view that while a price change made under clause 13 must be justified by the proponent, there was not the same onus on BT to justify a price change made under clause 12.

Ofcom concluded that the mobile operators' concern that the imbalance between clauses 12 and 13 of the SIA was extended by the CAT's judgement in 080/0845/0870 case was removed by the Court of Appeal's judgement and it was not necessary to consider that issue further as part of the dispute.

Ofcom also noted in its provisional conclusions that BT had applied for permission to appeal the Court of Appeal's judgment to the Supreme Court and stated that if the Supreme Court granted permission to BT, Ofcom might need to reconsider its future steps in resolving the SIA dispute.

BT was granted leave to appeal to the Supreme Court on 12 February 2013. Six months later in August 2013, Ofcom issued its final decision in the SIA dispute although the Supreme Court had not yet heard the appeal on the 080/0845/0870 case which was set down for hearing in February 2013.

Procedurally, Ofcom's approach is interesting and reveals Ofcom's general reluctance to invoke exceptional circumstances within the context of a dispute. While initially Ofcom took the view that it was unable to issue provisional conclusions ahead of the Court of Appeal's judgment and that this constituted exceptional circumstances<sup>28</sup> it then reversed this decision and decided that it could finalise the dispute despite knowing that the Supreme Court was due to hear BT's appeal in February 2014.

In taking this decision, Ofcom was influenced by its judgments about the matters to be heard by the Supreme Court and the timing of the Supreme Court's decision. In its final conclusions Ofcom placed weight on the fact that BT's appeal documentation did not seek to appeal the Court of Appeal's conclusions on the proper interpretation of the SIA and that it also sought a reference to the European Court of Justice (**ECJ**) if there was any doubt as to the correct interpretation of the directives underlying the dispute resolution process. Ofcom was therefore making a judgment not only about the issues to be scrutinised by the Supreme Court, but also that a decision could be many years in the future if an ECJ reference was made.

In its final decision on the SIA dispute Ofcom did note, however, that it may be appropriate to further consider the issues raised in the dispute on clauses 12 and 13, following the Supreme Court's final judgment.

As is now evident, the Supreme Court's judgment squarely and emphatically addresses the issue of how clause 12 of the SIA should be interpreted and what weight should be placed on a price variation introduced under this clause.

Arguably, the Supreme Court's judgment goes further than the CAT's judgment in terms of addressing how Ofcom should deal with the case of a price change introduced under clause 12 of the SIA (at least in the case of a price change in a competitive market), suggesting that Ofcom misjudged the way in which the 080/0845/0870 case was likely to play out in practice before the Supreme Court.

The mobile operators will no doubt feel aggrieved about Ofcom's handling of this dispute and its reluctance to declare that exceptional circumstances continued to exist and to await the Supreme Court's judgment.

Despite Ofcom's suggestion that it might be appropriate to reconsider the dispute following the Supreme Court's judgment, there has been no evidence that Ofcom has sought to do so. This may well be because Ofcom's ability to proactively revisit this issue has been weakened following the repeal of section 105 which gave it a power to examine network access questions on its own initiative.

Accordingly if the mobile operators wish to revisit this issue it appears they will need to do so via the contractual review provisions in section 19 of the SIA and the reference of a fresh dispute to Ofcom.

## Limiting the Supreme Court's judgment to competitive services

Since the Supreme Court's decision, the process of applying the principles outlined by the Supreme Court has already begun with the CAT attempting to narrow the impact of the Supreme Court's judgment in its recent Ethernet judgment.<sup>29</sup>

In the Ethernet case a number of operators had raised a dispute that BT had overcharged them for certain SMP Ethernet services. Whilst Ofcom found that BT had overcharged the operators and ordered BT to repay them, Ofcom decided not to award interest on the amount of the overcharge. In doing so Ofcom relied on clause 12.3 of the SIA, which provided that:<sup>30</sup>

"If any charge is recalculated or adjusted with retrospective effect under an order, direction, determination or requirement of Ofcom, or any other regulatory authority or body of competent jurisdiction, the Purchaser Parties agree that interest will not be payable on any amount due to either party as a result of that recalculation or adjustment."

It appeared therefore that following the Supreme Court's judgment Ofcom was giving priority to the commercial terms entered into by the parties. On appeal, one of the questions was whether Ofcom had jurisdiction to order the payment of interest or whether it was restricted by the position set out in clause 12.3 of the SIA. In deciding this question, the CAT referred to the Supreme Court's judgment and considered Ofcom's role and functions in resolving disputes.

The CAT held that:

- the Ethernet case was distinguishable from the 080/0845/0870 case because the Ethernet case involved assessing whether BT had complied with its SMP obligation;
- when Ofcom interprets and applies a party's SMP obligation, it is clearly performing a regulatory function;
- once Ofcom has made a regulatory determination about the interpretation of the SMP obligation it then needs to consider what direction should be made under section 190 (2) (d) to give effect to its determination;<sup>31</sup>
- it is only at that stage that Ofcom needs to consider the contractual provisions such as clause 12.3; and
- in carrying out this consideration, Ofcom is carrying out a regulatory function.

The CAT concluded that Ofcom must answer the question of whether interest is payable according to what will:<sup>32</sup>

"[...] best ensure compliance with the SMP obligations imposed under Article 13 of the Access Directive and promote the objectives of Article 8 of the Framework Directive. We accordingly accept the submission of Sky/Talk Talk that in the circumstances of this case, clause 12.3 and the maintenance of commercial certainty are relevant only to the extent that they feed in to these central objectives of the CRF."

The CAT closed off its discussion by rejecting BT's argument that, as a result of the Supreme Court's judgment, the CAT must defer to the terms of clause 12.3 of the SIA as the SIA was freely negotiated. Instead, the CAT referred to the fact that the Supreme Court's judgment advocated respecting freely negotiated interconnection terms in a **competitive** market. As the Ethernet market was not a competitive market, there was no automatic presumption in favour of BT's contractual terms.<sup>33</sup> Accordingly it was open to Ofcom to award interest if that would promote the objectives of Article 8 of the Framework Directive.

BT has sought leave from the CAT to appeal this decision to the Court of Appeal and no doubt one of the areas of concern will be the CAT's interpretation of the Supreme Court's decision.

## Should Ofcom have withdrawn its other determinations on ladder pricing?

The final issue to draw from the Supreme Court's decision is whether, following the decision, Ofcom should have withdrawn its determinations on other ladder pricing disputes.

Following its decision on the original 080 and 0845/0870 cases, Ofcom issued further determinations on additional "ladder pricing" disputes for 0834/4, 0871/2/3 and 080 numbers (the **Tiered Charges Disputes**) in April 2013. In its conclusions on the disputes, Ofcom relied on the Court of Appeal's judgment in the 080/0845/0870 case.

Unsurprisingly these Tiered Charges Disputes determinations were appealed by BT. Due to the on-going appeal proceedings in 080/0870/0845 case, the CAT stayed the appeal until the Supreme Court proceedings were concluded.

Following the conclusion of the Supreme Court proceedings, BT has since filed a revised notice of appeal and a case management conference held on 29 October 2014 has set down the further timetable for this dispute.



We question whether, following the Supreme Court's decision, Ofcom should have withdrawn its determination on the Tiered Charges Disputes instead of requiring all parties to engage in the cost and time associated with continuing the appeal process.

There is historical precedent for this approach. In November 2003, the Director General of Oftel issued a notice under section 94 of the Communications Act that alleged that BT's conduct in carrying out save activity in relation to its Carrier Pre-selection customers breached General Condition 1.2 (the **CPS Save Notification**).<sup>34</sup> BT appealed the CPS Save Notification to the CAT.

During the appeal proceedings, Ofcom issued a separate notification on 11 May 2004 that alleged that BT had breached General Condition 1.2 in respect of its conduct in relation to Wholesale Line Rental (the **WLR Notification**). BT appealed that notification and the appeal was stayed by the CAT awaiting the judgment in the CPS Save case.

The CAT handed down its judgment in the CPS case on 9 December 2004. Following consideration of that judgment Ofcom decided to withdraw its WLR Notification of May 2004 on the grounds that the original notification was now incomplete. Ofcom withdrew the original notification on 3 March 2005<sup>35</sup> and issued a fresh notification on 25 May 2005. BT decided not to appeal the new notification.

There are clearly differences between the two cases. For example, the WLR Notification related to a notification of breach under section 94 of the Communications Act as opposed to a dispute determination under section 185. However, it is difficult to see any reason why Ofcom could not adopt the same approach to its determinations in the Tiered Charges Dispute.

While the Communications Act does not explicitly give Ofcom the right to withdraw a determination or indeed a notification, this power must be implicit in Ofcom's general duties – particularly the requirement in section 3(3) of the Communications Act to act in a way that is consistent, accountable, proportionate and according to principles that represent "best regulatory practice".

The withdrawal of the WLR Notification illustrates that it can be best regulatory practice for Ofcom to withdraw a decision that is no longer complete in light of subsequent litigation. We query why, given the emphatic nature of the Supreme Court's judgment, Ofcom has not taken steps to do this in the Tiered Charges Dispute case.

The latest case management conference in the CAT on the Tiered Charges appeal suggests that the parties are preparing to potentially rerun the dispute before the Tribunal which raises questions about whether this is the most efficient way of reaching a decision.

## Conclusion

The Supreme Court's judgment in the 080/0870/0845 case leaves a lot for regulatory lawyers and Ofcom to ponder. Many of the issues that were thought to be settled, such as the nature of Ofcom's dispute resolution function and the weight that should be attributed to contractual provisions in the dispute resolution process as well as on whom the burden of proof should rest have suffered in the fallout from the Supreme Court case and now appear to be re-open for debate.

In addition it has raised a question of whether Ofcom should be more willing to accept that exceptional circumstances have arisen and also if it should be more willing to withdraw a decision that is impacted by a subsequent court decision and to rehear that matter rather than having the dispute potentially rerun in the CAT.

Given the importance of the issues around dispute resolution to the parties and the willingness of parties on both sides of these issues to appeal unhelpful judgments, it is unlikely that the debate on any of the issues discussed in this paper will be resolved quickly. At the very least we are likely to see the Ethernet judgment litigated in the Court of Appeal and potentially taken all the way to the Supreme Court.

The debates around issues of contractual primacy, burden of proof and the nature of Ofcom's dispute resolution functions and the accompanying uncertainty are therefore set to run and run.





## References

1. *British Telecommunications Plc. v Telefonica O2 UK Ltd and Others* [2014] UKSC 42 (Supreme Court Judgment).
2. See Ofcom, *Determination to resolve a dispute between BT and each of Vodafone T-Mobile, H3G, O2, Orange and Everything Everywhere about BT's termination charges for 0845 and 0870 calls, 11 August 2010 and Ofcom, Dispute between BT and each of Vodafone, T-Mobile, O2 and Orange, about BT's termination charges for 080 calls, 8 February 2010.*
3. *T-Mobile (UK) Limited, British Telecommunications Plc., Hutchison 3G UK Limited, Cable & Wireless UK & Ors, v Office of Communications* [2008] CAT 12 (T-Mobile case).
4. The principles were articulated differently in the 080 determination and the 0870 determination but the generic approach described in this paragraph identifies the key aspects of the three principles.
5. *British Telecommunications Plc and Everything Everywhere Limited v Office of Communications* [2011] CAT 24 (CAT Judgment).
6. CAT Judgment, para 418.
7. T-Mobile case, para 178.
8. Clause 12.2 of BT's Standard Interconnect Agreement (SIA).
9. CAT Judgment, para 438.
10. CAT Judgment, paras 447-449.
11. CAT Judgment, paras 415 and 419.
12. *Telefonica O2 UK Limited, Everything Everywhere Limited, Vodafone Limited and Hutchison 3G UK Ltd v British Telecommunications PLC and Office of Communications* [2012] EWCA Civ 1002 (CA Judgment).
13. CA Judgment, para 73.
14. Supreme Court Judgment, para 32.
15. The reference Article 5.3 appears to be a typo as earlier in the Supreme Court's judgment they refer to Article 5.4.
16. Supreme Court Judgment, para 32. Supreme Court Judgment, para 32.
17. Supreme Court Judgment, para 32.
18. Supreme Court Judgment, para 32.
19. *British Telecommunications Plc, Cable & Wireless Worldwide Plc, Virgin Media Limited, British Sky Broadcasting Limited, Talk Talk Telecom Group Plc v Office of Communications* [2014] CAT 14 (the Ethernet case). BT has applied to the CAT for permission to appeal the Ethernet case to the Court of Appeal.
20. *British Telecommunications Plc v Office of Communications* (Transcript Day One, p36, lines 32-34).
21. CA Judgment, para 73.
22. Supreme Court Judgment, para 34.
23. Supreme Court Judgment, para 37.
24. Supreme Court Judgment, para 38.
25. As stated above, the Supreme Court is apparently unaware of the dispute on clauses 12 and 13 of the SIA. We discuss this dispute in the paragraph headed "Alleged asymmetry between clause 12 and clause 13 of the SIA" below.
26. Supreme Court Judgment, para 46.
27. Ofcom. *Dispute between BT and each of EE and Three regarding BT's wholesale termination charges for calls to 03 numbers* (13 October 2014). Available here: [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw\\_01139/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01139/).
28. SIA Final Determination, para 2.33.
29. *British Telecommunications Plc, Cable & Wireless Worldwide Plc, Virgin Media Limited, Verizon UK Limited, British Sky Broadcasting Limited, Talk Talk Telecom Group Plc and Office of Communications* [2014] CAT 14 (Ethernet case)
30. SIA, clause 12.3.
31. Ethernet case, para 297.
32. Ethernet case, para 298.
33. Ethernet case, paras 299-300.
34. Notification of Contravention of General Condition 1.2 under section 94 of the Communication Act 2003- Notice served on British Telecommunications plc by the Director General of Telecoms. 7 November 2003. (the CPS Save Notification).
35. See [http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw\\_739/](http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_739/)



## Technology, Media and Telecoms (Competition and Regulatory) team

The Technology, Media and Telecoms (Competition and Regulatory) team at Shepherd and Wedderburn has an unrivalled understanding of the whole TMT sector gained both in private practice and in-house at leading TMT organisations. We work on a huge variety of telecommunications, media and technology transactions across the globe, acting for many of the largest global TMT organisations, as well as regulators and third parties, including industry associations. We are proactive in fully understanding our clients’ commercial objectives, which enables us to add value by delivering practical and tailored advice which reflects the latest position in this fast moving sector. Our team has achieved ground breaking work in the UK and Europe, and also has particular experience of working with clients on matters in India, Asia and the Middle East. We have a huge network of specialist connections globally that we work with and also benefit from our membership of the World Services Group.

## About Shepherd and Wedderburn

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