towerhouse consulting

Appeals from Ofcom decisions

Time for reform?

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1. Introduction

This report examines the regime for appeals from Ofcom in the telecoms field, including in relation to radio spectrum - i.e. under section 192 of the Communications Act 2003[1]. It considers the legal framework, the economic rationale behind appeals regimes, and the policy environment.

The subject is highly topical; since our project commenced, the Government has published proposals for reform[2].

Decisions by regulators have immensely significant impacts on the shape of telecoms markets and the companies operating in them; on their employees; on consumers, both business and residential; and on the economy as a whole. To take one example: some 20 years on, the allocation of spectrum in the 1800MHz bands in 1990 is arguably still the biggest defining factor in the shape of the mobile market in the UK. This is a structural issue. To take another: companies operating in these markets and buying regulated products from BT can spend up to 50% of turnover on regulated products[3]. This is likely to be more than they spend on salaries. To take a third: BT's heavily regulated Openreach division generated over £2bn of EBITDA in the year to end-March 2010 – nearly 35% of the total for BT Group[4].

In our stakeholder interviews, a respondent commented as follows:

> *"Given that Ofcom has so much power and freedom to use that power, it needs some checks and balances. We rely upon the ability to challenge Ofcom decisions and we see the appeals process – a proper appeal on the merits - as the only effective check."*

The subject of appeals is universally and rightly recognised as important.

It can also be surprisingly emotive. Looking at the issue in purely detached terms, there are legitimate arguments to be had about whether a robust appeals process ultimately results in better decisions; and about the relationship between appeals mechanisms and regulatory certainty.

At a more basic level: companies in the regulated markets do not <u>like</u> regulatory decisions which disadvantage them. The regulatory process gives a third party (in the form of a regulator) massive control over the shape of the market and the success or failure of individual businesses. The checks and balances on that power are very important. This has an impact at an emotional level. Equally, it would be unnatural to suppose that a regulator can – or should - enjoy their decisions being overturned.

[1] Note however that the scope of our work does not extend to section 192 as it applies to broadcasting matters by virtue of section 317(7) of the Act

[2] Consultation issued by BIS on implementation of the so-called Better Regulation and Citizens' Rights Directives

[3] Source: THC own research

[4] Source: BT annual report and accounts, y/e 2010

The questions involved in appeals policy are complicated and the argument typically focuses on the legal issues: what does the case law say? What standard of review do appeals bodies apply? Should their work be process-based or should they investigate "merits"? What evidence is admissible? What does the European regime require? Would a judicial review process be better than a "full" appeal?

These legal questions are of course important – but they are not the only questions. Equally significant are the questions of principle – why should regulatory decisions be subject to appeal at all? Who should be able to appeal? What are the qualities of an ideal appeals process? How can it be made to work in the real world?

This paper attempts to synthesise legal, economic and policy arguments to derive principles which should govern the appeals regime. It then applies them to various models - including the current UK appeals regime. Methodologically we have combined analysis of the law with economic thinking and a traditional consulting approach (in which we have sought the views major stakeholders in a structured questionnaire).

Some aspects of these questions are out of scope. For example, we do not seek to examine Judicial Review in detail; to the extent that we do look at JR, it is only to understand how JR might adapt to deal with appeals from Ofcom decisions. Decisions of the regulator are in scope only to the extent that they inform thinking on the appeals process; likewise the processes of the regulator.

Our findings, in outline, are as follows:

- Our headline conclusion is this: a robust appeals mechanism raises the standard of all regulatory decision making, as well as correcting those decisions which are appealed directly; it is an essential part of a properly-functioning regulatory schema.
- The current appeals regime is astonishingly popular. In particular the standard of review currently applied by the appeals bodies – a "profound and rigorous scrutiny" – attracts strong support.
- It is our view that a proper, full consideration of the merits on appeal is important; we do not consider any substantial watering-down of the right to merits-based appeals is attractive. In principle we believe that the deeper an appeals regime can investigate the first instance decision, the better. In practice we consider that the current standard of review reflects a decent balance between principle and practicality.
- The current regime has been in place for nearly seven years. There is now a substantial body of jurisprudence about how the appeals regime works in practice (based on a statute that gives limited guidance). Findings have been made on issues like standards and burden of proof; the standard of review by the appeals bodies; materiality; the deference to be accorded to the regulator

as a result of its special position; the approach to costs; the admissibility of evidence. The regime is now reasonably well understood.

- So any fundamental revision of the appeals standard would be likely to generate significant confusion. It would throw away the clarification work of the last seven years. This would almost inevitably manifest itself in protracted legal battles about the meaning of the new standard. The potential rejection of this mature regime for something new was a major concern for stakeholders in our research exercise.

- We have looked carefully at possible defects in the current regime. On balance we do not consider that the current regime generates any material regulatory uncertainty or that its continuance will result in regulatory gridlock. In fact many of the stakeholders we have interviewed consider that the appeals regime is today a bulwark against regulatory uncertainty.

- That said, there are some genuine issues about practicality to be considered. The appeals regime should be as quick and efficient as possible. We have considered a very wide range of options to improve the practical efficacy of appeals. We have concluded that there is a case for fine-tuning incentives on appellants, reforming procedures before the appeals bodies and reconsidering rules on evidence. We make recommendations about this in Chapter 5.

- It would be naive to look at the appeals regime without thinking about the end-to-end process by which regulatory decisions are derived, including the role of all parties in the process before the regulator. We consider that more transparency at the Ofcom stage would reduce the number and scope of appeals.

- The implementation of the Better Regulation and Citizens' Rights Directives does not represent an appropriate opportunity to reform the appeals regime from a policy perspective; such a move would also present real questions from a legal perspective.

While the views in this report are our own, we feel it appropriate to record that we have been paid by a group of communications providers to undertake the substantial volume of work involved. We have also sought views from a wider range of stakeholders. A list of those contributors is shown in Annex 3. Our thanks goes to those who contributed their time and their thoughts.

2. History & Legal Framework in outline

This section describes the history of the UK appeals regime and analyses the law which governs the current framework in outline[5]. It will look at the old T Act jurisdiction of the CC, the requirements in the Directives for merits-based appeals, and the extent to which ECA regulations can be used to reform the current regime.

a) The law today - Europe and UK

This section summarises the current UK appeals regime and the European rules which govern it.

The UK statutory framework is in section 192ff of the Act. In outline, the regime is simple. Ofcom decisions on telecoms (including spectrum) matters may be appealed to the Competition Appeal Tribunal. Where the appeal includes price control matters, the CAT must refer those matters to the Competition Commission. The proceedings of the CAT are governed by detailed rules made under Statutory Instrument[6] supplemented by guidance notes which also constitute a practice direction; the CC operates with considerably more freedom[7]. Both the CAT and the CC are expert bodies and the roles of both are examined further in Chapter 3 below.

Although the UK appeals regime is comparatively straightforward conceptually, it is complex and contentious in some areas of detail. Some of these may be apparent from the structure of the regime – for example, the exact nature of the relationship between the CAT and the CC. There has also been argument about a wide range of procedural and substantive questions including the standard of review which applies, the kind of evidence which should be admissible and so on.

This UK regime is governed by the European Directives which require that there be a right of appeal to an independent body, with appropriate expertise, which takes the merits into account. The appeals regime under the Act was in fact put in place to give effect to this requirement.

The relationship between the European rules and the UK regime gives rise to a number of interesting questions. However for current purposes it suffices to say two things. First, no-one has seriously contended that the UK regime is not compliant with the requirements of the Framework Directive. However, it has been suggested that the regime goes beyond what is required and that it would be open the UK to comply with the Directives in a different way. These issues are discussed in much more detail later in this report.

[5] Detailed questions about the workings of the current regime are considered in the next chapter.
[6] Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (as amended by SI 2004/2068)
[7] See s193 of the Act for the CC's procedure

b) The role of appeals historically

This report is emphatically not intended to be a historical record of UK appeals regimes. However, it is worth comparing the current regime with what went before. The current regime was new when devised as part of the 2003 Act. However its origins can be traced to a number of long standing sources. It is worth contemplating these when considering the current regime and any potential reforms.

First, the role of the Competition Commission: this was presaged by the role of its predecessor, the Monopolies and Mergers Commission, under the Telecommunications Act 1984 (T Act). Under the T Act, telecommunications operators were required to operate under licences issued by the Secretary of State, which contained rules which today would be made in SMP, General or Universal Service Conditions. Changes to those licences required the consent of the licensee. In the absence of consent, however, Oftel could make a reference to the MMC which, following an investigation, could approve (or not) the modification; following which, if approved, Oftel had the power to make the modification regardless of consent.

The role of the MMC was therefore to act as an appeal body for many of the same issues which are the subject of appeals today: number portability was the subject of an MMC inquiry (although today an appeal would be likely to be heard by the CAT); mobile termination rates were investigated by the MMC / CC under the T Act regime on two occasions.

Other regulatory decisions have always been subject to judicial review (and, indeed, still are). JR has been used by companies operating in these markets to some effect[8] in the days before the Act brought the current regime into effect. These judicial reviews repay some detailed analysis. For current purposes it is worth noting that in the Oftel days, important decisions were often appealed one way or another – either by way of reference to the MMC / CC or through JR[9].

Finally, the CAT has its origins as an appellate body in relation to Competition Law decisions, having been established under the Enterprise Act to deal with appeals from decisions made under the Competition Act 1998[10].

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[8] The author was Regulatory Counsel at One2One at the time it undertook three judicial reviews: of the government's proposed national roaming condition as a pre-requisite of participate in the 3G auction; of the timing of awards in the same auction; and of the use of ECA powers to implement changes which were not required by the Directive concerned.

[9] So, for example: all the mobile termination controls put in place by Oftel were referred to the MMC / CC; likewise the original decision on number portability. These find more or less direct counterparts in the new regime with appeals on the same issues to the CAT / CC. Likewise the 3G auction was subject to two separate judicial reviews. The total number of appeals was lower; but then the number of decisions was also lower.

[10] Ofcom currently enjoys concurrent jurisdiction under that Act and decisions made under that jurisdiction would be appealable to the CAT regardless of amendments to the appeals regime under the 2003 Act. This could give rise to some interesting anomalies and would arguably create a perverse incentive on Ofcom not to use the Competition Act power.

The regime in the 2003 Act did not therefore emerge fully formed and blinking into the sunlight. Instead it represented a melding of existing rules and traditions. In particular it is worth noting the following:

- Price controls have always been subject to a reference to the MMC or the Competition Commission – the difference with the regime since 2003 is that any affected party may now trigger a reference.
- There is a long tradition of fairly aggressive appeals when important matters are at stake – whether price controls, number portability or decisions about how to allocate spectrum. All of these have been appealed both in the old world and the new.
- An attempt to reform the current regime would not be a matter of knocking a seven-year experiment on the head; it would mean changing an approach which has been in place, in origin, since the markets were first liberalised in the UK[11]. It should therefore not be undertaken lightly.

While we are not convinced that the Parliamentary intention behind the current regime (or that of the executive branch at the time) is an important factor in considering reform today, it is worth noting that Hansard from the debates on the 2003 Act is not particularly enlightening. It is difficult to glean any specific Parliamentary intention from the debates.

That said, a move away from Judicial Review was widely perceived as important at the time of the 2003 Act, with one stakeholder who was involved in discussions at the time commenting as follows:

> *This was all discussed with the DTI in the drafting of the 2003 Act. There was a specific decision taken by Government at that time to move from a system which had proven to be incapable of appealing Oftel decisions* [sic] *to a more effective system that would allow the regulator's decisions to be challenged. There was a policy decision that the old system had failed.*

[11] Prior to the Communications Act 2003, the regime was governed by s. 18 Telecommunications Act 1984, Regulation 12 Telecommunications (Interconnection) Regulations 1997, Regulation 14 Amendment to the Telecommunications (Open Network Provision and Leased Lines) Regulations 1997, Regulation 38 Amendment to the Telecommunications (Open Network Provision) (Voice Telephony) Regulations 1998, all as amended by the Telecommunications (Appeals) Regulations 1999 Statutory Instrument 1999 No.3180.

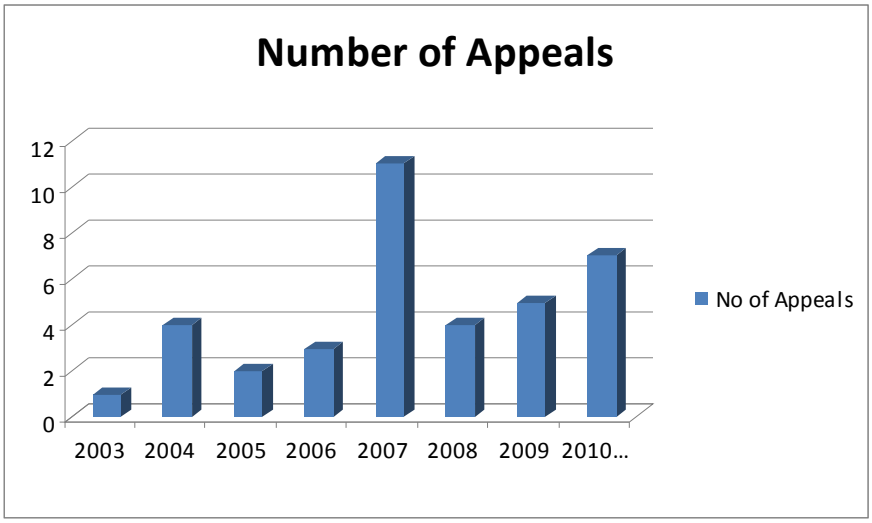
3. The Current Regime and its effectiveness

This section examines the current regime in detail, the cases that have been taken so far, and what they tell us about the effectiveness of the appeals regime and Ofcom's decisions. Case synopses – which itemise much of the source data for this Chapter – are included in Annex 1.

a) Some basic facts

We have based our findings on our analysis of the cases taken to appeal under the regime in the 2003 Act[12]. Of these, the time distribution is as follows:

Year	Number of appeals
2003	1
2004	4
2005	2
2006	3
2007	11
2008	4
2009	5
2010 (so far)	7



[12] The analysis in this section is our own but we have reconciled it with one other independent source and with Ofcom's data as supplied to the NAO. Neither source is directly comparable but, suitably adjusted, the data are consistent so far as we can ascertain. The Ofcom / NAO data treats cases heard together as a single case, which changes the outputs and appears to include cases outside our scope. It can be found here: http://www.nao.org.uk/idoc.ashx?docId=076dd996-23da-474a-8e1a-08e84260c82d&version=-1 .

The pattern, broadly, is reasonably flat except in years when Ofcom takes controversial or important decisions, which tend to result in multiple appeals. For example, some of the appeals of 2007 resulted from an important decision on mobile termination[13]; a number of 2004 appeals were on the price of directory inquiries data in a crucial year for the newly-liberalised DQ market; 2003 was at most a part-year. In 2010, four appeals have related to termination of calls to mobile-originated non-geographic numbers by BT.

In terms of subject matter, the largest category by some margin is appeals from Ofcom's exercise of its disputes (20 cases) and enforcement jurisdiction (4) (section 185 ff of the Act on disputes and section 94 ff respectively) which accounted for 24 of the total number. This sounds like a lot. However, eight were withdrawn before the process was finalised, leaving only 15[14]. By way of comparison, the total number of proceedings opened by Ofcom under these sections of the Act was over 160; and some of those were blanket proceedings involving more than one target.

A comparatively small number of appeals related to the non-remedies aspects of market reviews (we identified three, all about SMP findings and one of those was withdrawn).

Only three appeals under this jurisdiction related to spectrum and one of those (the so-called sequencing decision) ended up proceeding by way of judicial review. However it is fair to say that this comparatively low number is at least in part because many appeals from spectrum matters are excluded from this route by virtue of Schedule 8 of the Act.

Five appeals have related to SMP remedies alone and, in fact, they all related to price controls. Of these, some were more-or-less combined at the Competition Commission stage: the Carphone Warehouse appeals on LLU and WLR pricing; as were the various 2007 appeals on mobile termination rates. It would be wrong to reclassify these as single appeals; however, in relation to the two appeals by CPW that Ofcom had originally planned to make the LLU and WLR decisions as a single decision. So it is not quite right to view them as totally separate appeals either.

Overall, a significant number of appeals were withdrawn or otherwise did not proceed to the end of the process.

Ultimately these are only numbers. However, we can learn from what they tell us:

- First, Ofcom gets through a lot of work and as a proportion of total decisions, the total number of appeals looks quite low – and it is significantly lower than in many other European jurisdictions

[13] Although that year also includes the arguably anomalous Bracken Bay and Rapture cases

[14] Again, two of the remaining 12 were Bracken Bay and Rapture. At the time of writing, it is too soon to disregard or include the recently opened cases regarding 080 (NCCN 1007) and Ethernet disputes in this analysis.

- Secondly, important decisions will tend to be appealed. (It is our view that this is likely to be true regardless of the precise nature of the appeals mechanism.)

More qualitative analysis follows in the rest of this section.

b) What do appeals tell us about the effectiveness of the regulatory regime?

We are not concerned in this report with reviewing the quality of Ofcom's work. In fact we are fairly clear that the arguments about the need for an appeals regime need to stand apart from arguments about the quality of regulatory decision-making. In any event, the statistical analysis says broadly what you would expect about the work of the regulator. Most Ofcom decisions are not appealed; some Ofcom decisions contain errors which the appeals regime can correct; and a small minority contain quite serious mistakes.

In more detail:

- First, most Ofcom decisions are not appealed. They may have mistakes, but not mistakes that are so large that anyone cares to appeal them. In other words, the data on appeals tells us, if we did not already know, that the majority of Ofcom's work is sound or insufficiently material to justify the considerable cost and effort involved in an appeal.

- Secondly, many appeals are withdrawn, not defended by Ofcom or otherwise finish before the end of the appeals process. Of themselves they do not tell us much[15]. These are best seen as examples of the appeals regime working effectively by weeding out cases where an alternative solution is possible. Of the 31 appeals decided so far, 12 have been withdrawn, rejected or determined on purely jurisdictional issues.

- Thirdly, a significant number of appeals result in an Ofcom decision being overturned in one way or another. Of these, a reasonable proportion represents decisions which are genuinely significant in terms of scope or economic value. Ofcom's decision has been overturned either in part or to the full extent that was set out in the Notice of Appeal in 12 of the 31 appeals so far determined[16].

- Fourthly, Ofcom wins some appeals: 7 of out of 31 appeals are "clean" wins where the Ofcom decision was upheld in its entirety. This is a comparatively low number but, again, this is a good statistic; it should not be taken to imply anything about the quality of Ofcom's overall decision-making because

[15] Although we would note that a significant proportion represents appeals of decisions which Ofcom, in our view, got wrong.

[16] In one of these the Court of Appeal appeared to side with Ofcom, but in the event referred various questions to the ECJ

companies should not be bringing appeals that do not have a reasonable chance of success.

- Fifthly, the outcome of a small minority of appeals suggests that Ofcom has got a particular decision quite badly wrong. Again, this should not be taken to imply anything about the quality of Ofcom's decision-making overall. Ofcom's decision has been overturned to the full extent set out in the Notice of Appeal in 8 out of the 31 appeals[17].

All of these conclusions are to a greater or lesser degree a question of common sense. It is unrealistic to expect public bodies to reach entirely accurate conclusions all the time. One would expect most of their decisions to be basically good; and only a small minority to be really bad. The numbers of themselves do not imply a pattern of unusual decision making by the regulator or a pattern of frivolous appeals by companies operating in the market. As BT put it to us in our research exercise:

> *"We're not in a world where everything is appealed; or where nothing is appealed. Either end of that spectrum would say something more about how it's working."*

It is worth recording that a significant majority of stakeholders in our research considered that the quality of regulatory decision-making in some cases is such as to justify a full and robust appeals mechanism. The raw numbers of themselves do suggest, in any event, that the appeals regime is important and valuable in correcting cases where mistakes are made[18].

What would happen to these "mistake" appeals in a modified JR regime as suggested by the BIS consultation? The first point to note is that this is by definition speculative. As we discuss in Chapter 5 (part (a)), it is not clear how judicial review would adapt to deal with appeals as required by the Framework Directive. However, at a reductionist level, there are only two possible outcomes. Either:

(i) Some "mistake" appeals would be rejected; or

(ii) All the "mistake" appeals would have succeeded.

We take a more nuanced look at this question later on, but neither of these is a satisfactory outcome: the former because it implies genuine mistakes would go unrectified; the latter because reform – probably quite costly reform – would have been pointless.

[17] This category and the second and third categories contain a significant proportion of cases where Ofcom apparently accepted there were defects in its original decision. However we have resisted the temptation to add further granularity to the analysis here because analysis at that level inevitably increases the element of subjectivity.

[18] In our view this remains true even if the numbers are cut differently, as in the Ofcom / NAO data. That data concerns a slightly different data set from ours, and it is analysed differently. The outcome is stated as follows: "Of these Ofcom won six, lost four, achieved a split decision in two, and five cases were withdrawn: eight cases are ongoing."

c) Key features of the current regime

This section analyses the current appeals regime on a number of criteria: standard of review; expertise; materiality; speed and efficiency; incentive properties.

(i) Standard of review

UK appeals bodies currently subject Ofcom decisions to a "profound and rigorous" scrutiny[19]. On the face of it, this sounds impressive and our stakeholder interviews found strong support for this standard of review. However, a pithy characterisation such as this can only convey so much. It is worth looking closely at the decisions of the Tribunal and the CC to investigate exactly what they do. Our review shows the following:

First, it is clear that the appeals bodies put Ofcom decisions through a rigorous process and investigate appeals pretty closely. A review of the more technical decisions by the CAT or the CC makes this clear. For example:

- CC decisions on LLCC and LLU / WLR: regardless of views on the outcome, these are very detailed, thorough decisions;
- Vodafone's appeal on number portability – a good example of the Tribunal getting to grips, thoroughly, with complex issues;
- The "blended rates" decisions which were challenged in the TRD appeals.

The question of expertise is dealt with below, but in terms of the thoroughness in individual cases it is clear that both the appeals bodies are comprehensive and rigorous.

Secondly, it is important to note that profound and rigorous scrutiny does not equate to a full re-hearing. The appeals process does not, and should not, equate to a re-investigation by the appeals bodies of the matters dealt with originally by Ofcom. The current position is summarised neatly in the CAT's recent admissibility judgment[20]:

> *What is intended is the very reverse of a* de novo *hearing. OFCOM's decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points... it is not for the Tribunal to usurp OFCOM's decision-making role.*

This approach – followed closely by the CC in its LLU decision - sounds like the model of an appellate jurisdiction and it received strong support from stakeholders

[19] Hutchinson 3G UK Limited v Office of Communications (Mobile Call Termination) [2008] CAT 11 "The Tribunal accepts… that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner."

[20] BT v Ofcom, Admissibility Judgment, Case number 1151/3/3/10, 8 July 2010 (subject to appeal)

interviewed in our research[21]. One stakeholder commented that this level of scrutiny is:

> *"absolutely what an appeals process should do to a regulator's decision."*

Another stakeholder said this:

> *"there has to be robust decision-making and this test supports it. A lot of these decisions involve major redistribution of money between competing companies."*

Our own view accords closely with these opinions.

The BIS consultation implies confusion about the standard of review undertaken by the appeals bodies[22]. We did not find any such confusion[23]. In any event, even if there were any confusion, it is very unlikely that this persists after the CC's ruling in the CPW appeals[24]. The discussion there was quite detailed but it boils down to this: the role of the appeals bodies is to exercise an appellate jurisdiction in which appellants must prove their case as set out in the Notice of Appeal. It is not – as noted above - to conduct a full rehearing. The burden of proof is on the appellant; and the Commission approaches its task in full cognisance of the fact that Ofcom is a specialist regulator whose decisions are not to be overturned lightly. To quote from the Commission's decision in that case:

> *"it is for a party asserting that a decision is wrong to bear the burden of establishing its case."*

And again:

> *"We have... borne in mind that Ofcom is a specialist regulator whose judgement should not be readily dismissed"*

And again:

[21] Although support for "profound and rigorous scrutiny" was strong, verging on overwhelming, among those we interviewed, it was not unanimous. Those who deferred, however, did not favour major change. For example, one lawyer, experienced in both CAT and CC appeals, argued cogently for the appeals bodies to afford Ofcom's position – as the specialist regulator – greater respect than it had shown, certainly in the earlier appeals. .

[22] "The current transposition has been interpreted by some appellants as requiring a full rehearing of the case". Of course, one might say that there is no structural problem if potential appellants are confused about the standard of review to be exercised; it is their responsibility to educate themselves about that and if they are under misapprehensions, they will not succeed. They are just as likely – if not moreso – to be confused by the standard of review to be exercised in a "modified" judicial review. Difficulty arises, however, in terms of allocation of resources – which is one of the issues discussed in our section on adjusting incentives.

[23] Although it was fairly widely noted that it had taken the appeals bodies time following the 2003 Act to get to grips with their role

[24] BT noted the following in this context: "*The OFFR* [Openreach Financial Framework Review] *decision puts some real boundaries in place.*"

> *"the purpose of this appeal process... is to carry out an appellate review of Ofcom's decision and not to re-take the decision itself."*

This is a very clear and recent expression of the appellate jurisdiction. Importantly, it may not be something fully taken into account by early appellants to date. It is also more circumscribed than some other comparable appeals jurisdictions (see Annex 2 on benchmarking.)

(ii) Expertise and merits

The Framework Directive tells us that bodies carrying out the appeal functions required by Article 4 must have "the appropriate expertise available to it to enable it to carry out its functions". Following the implementation of the Better Regulation Directive, this text will be revised as follows to require that an appeals body must have:

> *"the appropriate expertise ~~available to it~~ to enable it to carry out its functions effectively."*

So far as we are aware, no-one has claimed that the current arrangements at the CAT and CC do not meet these requirements – either the original requirements or the strengthened version. The BIS consultation proposes that the CAT and CC retain their roles but applying a new enhanced JR standard. The CAT and the Court of Appeal have both commented (in the Sequencing Decision) on whether Judicial Review would meet the requirements of Article 4. There are two aspects to this question which are relevant here. First, does the administrative court have the requisite expertise to comply with the Article 4 requirements; secondly, can JR properly take into account the merits (as also required by Article 4)?

First, the CA found clearly that JR can take into account the merits. The judgment on this issue, although it was conceded, is instructive and worth quoting.

> *the common law in the area of JR is adaptable so that the rules as to JR jurisdiction are flexible enough to accommodate whatever standard is required by [the European provisions]."* [emphasis added]

So it is not as simple as saying "JR will do"; it would need to adapt to meet the European requirements. However, this presents some serious questions: in what way would JR "adapt"? Would the "profound and rigorous" approach continue? If not, what would apply instead? What materiality and evidential standards would apply? How could a JR "take into account" the merits, but fall short of undertaking a full merits review?

In other words while as a matter of principle the CA has decided that JR can undertake the level of review required by the Framework Directive, there is little

clarity as to how that would work in practice[25]. The Sequencing Decision does not tell us **anything at all** about appeals in the terms of the Framework Directive – all it tells us is that whatever that Directive requires, Judicial Review can meet the standard.

In our view it is overwhelmingly likely that this question – what standard of review does the directive require? – and others like it would generate litigation on issues which (in many cases) are now clear in respect of the CAT and the CC jurisdiction.

There are some readily-identifiable areas where the approach taken by the Administrative Court in relation to Judicial Reviews is quite different from that in the CAT. So, for example, transparency is one of the key issues in the telecoms appeals process for many appellants - an issue discussed further in Chapter 4 (d) below. They rely on the appeals process to give access to information not made available in the Ofcom process. Ofcom does not have the power to disclose confidential information to interested parties but the Confidentiality Ring procedures in the CAT and CC work well. The tradition in the Administrative Court, however, is quite different, with a presumption against disclosure and a reliance instead on the duty of candour[26] by the public body under review. It is not at all clear whether this would work in the context of a merits appeal in telecoms, which will often concern proprietary information of a regulated party. In particular, it is not clear how the candour duty would affect a third party. In the Belize case[27], the candour duty was held to extend to the interested party but because it was deemed to be in partnership with the Defendant. Our experience from the CC procedure is that it can be an extremely effective environment for the airing of facts. So there must be a real question about how the evidential process would work in a modified JR process.

One interviewee in our research expressed concern about revising the standard of appeal as follows:

> *"...the CAT and the CC have built up over the years a good understanding of the sector and quite a bit of case law. That gives you a good idea of what appeals are going to get through and what the process should be. There is a concern about this being dissipated. It would be really detrimental to lose that."*

The issue of expertise was also dealt with by the CA in the Sequencing case. The current BIS proposals do not involve taking away the jurisdiction of the CAT or the

[25] There is some hint about the extent to which a JR might be able to look at the merits aspects in the dicta of Hale LJ in the Broadmoor case: "Super-Wednesbury is not enough. The Claimant is entitled to a proper hearing, on the merits...". However the judgement in the Sequencing case goes on to point out that the Framework Directive's requirement is only that the merits are "taken into account". So in practice this probably doesn't take us very far.

[26] The duty is expressed in the Quark Fishing case: "there is a very high duty on public authority respondents... to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide."

[27] Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment [2004]

CC. However the issue is of interest to the wider debate. The Court of Appeal understandably gave pretty short shrift to the suggestion the Administrative Court might not have the right expertise. There were three points made here:

- the President of the CAT is a Chancery Judge and all Chancery Judges can sit in the CAT as Chairman and, by arrangement, in the Administrative Court. In other words, the CAT does not necessarily have any more expertise than the Administrative court.
- the CAT's lay members may well not have any experience of the particular subject-matter in question before the CAT.
- the JR court itself, if it felt expertise were necessary (which would be a rare case) could sit with assessors (to match the role of the lay members of the CAT).

The Court of Appeal was commenting here on the current requirement in Framework Directive, not the new amended requirement. At least the last point here could be different in the new wording, which eliminates the stipulation that the expertise must merely be "available".

Also, the Court of Appeal was commenting only on the CAT. The CC fairly clearly has more wide-ranging expertise than the Court or the CAT in the form of a wider range of backgrounds on the panel and a larger permanent staff.

Finally, it is important to note that despite these stipulations, the Court of Appeal judge went to some lengths to specify his preferences for how the matter be dealt with, given that the Court would be fulfilling the appeals function from the Framework Directive: his preference was that the matter be heard

> *"preferably with a Chancery Judge sitting in the Administrative Court, that Judge being, if possible the president of the CAT, Barling J."*[28]

There is existing case law about Modified Judicial Review. Some of these relate to cases where the reviewing court should exercise special restraint – for example, in reviewing decisions about whether to commence legal proceedings such as prosecutions[29]; or decisions on national economic policy[30]. There are also areas where the JR scrutiny can be enhanced – the Human Rights Act is one well-known area.

This all leaves unanswered exactly how JR would adapt in the current instance; the only thing that is clear is that the answer is really very ***un***clear.

It is also unclear exactly how the new wording in the Framework Directive changes the existing requirements. Clearly there would have been no need to change the

[28] And the case was, in the event, moved to the Chancery Division itself by the admin court
[29] See for example, Sharma v Antoine [2006] UKPC 57
[30] See Hammersmith and Fulham LBC [1991]

words if there was no change to the meaning and the requirements of the new wording do seem more stringent than the old. So one imagines that the CA views in the Sequencing decision would not be binding (in directly precedential terms) in relation to the application of the new wording. On this point, therefore, we would expect litigation if any reform of the appeals regime became contentious.

In implementing any new regime there are broadly two approaches. The first would be to follow the wording of the Directive as closely as possible when amending the 2003 Act. This has the merits of being very likely to comply with the requirements of European Law; but the demerit of being unclear as to what it actually means in practice.

The second would be to attempt some new drafting in the 2003 Act which would specify a new standard of review in more detail. This might provide more clarity about what the new process would mean in practice (although this is certainly not guaranteed); but it would be less sure to comply with the European requirements.

In our research, BT said that if there must be reform, they favoured the first approach, and offered views about what that might mean:

> *"...if the government considers change is needed, then we would seek change in the direction of reflecting the words in the directive – i.e. to ensure that the appeals process has "due regard" to the merits. This gets you to a $64 million question – how much regard to the merits does that involve? The Act only has one appeals regime for a whole range of decisions but we think that it can be operated so that the amount of "regard to the merits" varied on a case to case basis. In market reviews, for example, where the parties have been able to debate the issues thoroughly already, a lighter touch on appeal might be justified; but in enforcement proceedings (and, to a lesser extent, disputes) it might be appropriate for there to be considerably more thorough review of the merits of the decision."*

Others would not necessarily agree with BT's conclusions – we do not - but in positing the "$64m question" BT has gone to the heart of the matter. This is not a question which we believe is capable of being answered clearly.

In any event, therefore, it is important to note here that there is a good chance that litigation on many of these issues would end up at the ECJ - on the basis that there would be real doubt about the meaning of the (revised) requirements of the Framework Directive in relation to appeals and / or whether the UK's new regime complies with them. In the UK appeals regime thus far only one case has gone in that direction[31]. On the basis of that experience, the process would be lengthy – the Ofcom decisions which sparked the debate began in 2005 and the ECJ process is still not finished.

[31] The appeal brought by BT on The Number Limited's case on OSIS charges. (http://www.catribunal.org.uk/files/1100_The_Number_CofA_Judgment_15.12.09.pdf)

Finally, while one senses a frustration in the BIS consultation about the direction of appeals today, it is not clear exactly where that frustration is directed. Is it against the approach taken by the appeals bodies themselves for being too intrusive, or against the appellants for supposedly misconstruing the scope of review undertaken on appeal? If the latter, we do not think it is a correct characterisation but in any event it is unlikely to subsist given recent cases; if the former, there really is no guarantee that the new process would be any less intrusive than that currently undertaken by the CAT / CC. So, while uncertainty would be the outcome of change, perversely, it is possible that the outcome of that uncertainty, after litigation, would be something that still closely resembles today's regime.

(iii) Speed, process and the need for multiple appeals bodies

There are broadly no complaints from the stakeholders we spoke to about the speed of the appeals process. It is our view that appeals are not generally excessively lengthy[32]. No-one, however, would object if the process could be made quicker.

It is our view that the current institutional arrangements (CAT and CC) would benefit from a review and, indeed, we note that the Commission itself has launched a review of its processes. The dual role of the CAT and CC was essentially an amalgamation of previous jurisdictions, combining the MMC / CC function under the 1984 Act with the CAT's role under the Competition Act.

We stress that no criticism of the institutions themselves is intended here; but we are not convinced that the arrangements are correct structurally. So, for example, in the regime under the 1984 Act, Oftel drafted reference questions for the MMC. Oftel drafted questions which broadly made sense on their face. In the current regime, that role is taken by the CAT. In practice, however, the questions are negotiated between the parties. They tend in fact to refer out to the Notice of Appeal. Now this makes total sense because of course the whole appeal ought to be framed by the Notice. But it also means that the reference questions tend to be (A) very long and (B) incomprehensible on a standalone basis.

The reference questions from all cases to date are set out in Annex 4. We strongly recommend anyone interested in this process to read Annex 4 in its entirety. The reference questions for the 1995 Inquiry into number portability and those in the 1998 reference on mobile call termination pretty much make sense on their face. Anyone reasonable knowledgeable in the telecoms field can read them and make sense of them.

We defy anyone to read the later reference questions – say those at item (e) in Annex 4, which shows the questions in the Leased Line Charge Control Appeal – and make any sense of them at all. Not only are they very long; they can only be construed with reference to the Notice of Appeal; which is not a public document. Even with the

[32] See Annex 1, table A1:2, for this analysis

Notice to hand (and this firm acted for an Intervener in those proceedings) the questions are not easy to follow.

Partly this is function of the type of review undertaken by the CC; pre-2003 proceedings simply reconsidered the whole matter which meant that the questions could be written in clear, broad terms. In the current jurisdiction, the CC exercises a targeted appellate jurisdiction which means that the questions need to map closely to the ground of appeal set out in the NoA. However, if the reference questions simply reflect the contents of the Notice of Appeal, this begs the question of why the Appellant could not be allowed to appeal price control matters directly to the CC[33]. This would also eliminate the other early stage aspects of appeals on price control matters; and could also eliminate the CAT's judicial review role at the end of the CC process. This in turn would reduce the time taken to decide appeals. Reform options along these lines are considered further in Chapter 5 below, which also deals with the parallel possibility of eliminating the CC from the process altogether.

Of the stakeholders we interviewed, some players were quite happy with the current arrangements and were wary of the uncertainty associated with **any** change. However a significant number took the view that some minor changes to the process might be valuable. A significant number considered that the appeals process should be made more accessible – that, effectively, smaller companies were barred from appealing decisions. Although opinion was by no means uniform on these questions, the main comments included the following:

- The appeals bodies could usefully be more decisive / directive in case management matters. In this, the CAT was cited as a better example and its approach was contrasted with the CC's preference for collaborative case management.
- In contrast, the CC's more informal approach to proceedings was praised by many (although it was also commented that, unlike the CAT, the CC is too cautious about signalling its thinking in directional terms; that the provisional determination stage can be something of an ambush).
- The CC's rigorous approach to fairness and disclosure was also praised.

(iv) Regulatory certainty and the regulatory burden

The issue of regulatory certainty is raised in the BIS consultation as a reason for making appeals more difficult to bring. We should say first of all that we consider that this question is quintessentially one for companies operating the market. They are the entities who are subject to the risk; and they certainly have no incentive to argue for increased risk. There is a good argument, therefore, that their views should be determinative.

[33] The onus would be on the appellant to restrict its appeal to genuine price control matters; if they did not do so, they would likely open their appeal to challenges on its scope.

Our survey of interested stakeholders suggests overwhelmingly that it is an elementary mistake to assume that appeals add uncertainty. In fact the opposite is true: they make the regime more certain by creating a greater chance of a correct outcome. There is no trade-off between appeals and certainty. Typical views were these:

> *We rely on the CAT and Europe for regulatory certainty in the regime at the moment.*

Indeed, one major company told us that if the appeals regime were to be watered down, they would advise their board that regulatory risk had increased.

Another said this:

> *"We see the risk of... worse decisions significantly outweighing the danger of regulatory uncertainty. Regulatory uncertainty is a much smaller issue than any risk associated with appeals."*

Some stakeholders found it artificial to engage in discussion of fine-sounding regulatory principles with one commenting:

> *"Everyone loves regulatory certainty as long as it's in their favour."*

In short, there was no support at all for the idea that a robust appeals regime should be sacrificed on the altar of regulatory certainty. Not only would such a move stem from a misunderstanding about how risk and certainty is perceived; it would also be misconceived even on its own terms. The current appeals regime is actually pretty stabilising; for example, if regulatory decisions were often suspended while appeals were heard, that would be destabilising. In fact that almost never happens in appeals to the CAT / CC (unlike in other jurisdictions). In those rare cases where it has happened, it has been on the basis of some agreed approach to unravelling the consequences later.

We also consider that a change to the appeals regime would result in significant uncertainty for the reasons set out in paragraph (ii) above: at the moment the appeals regime is pretty well-understood. Any new regime is likely to take some years to bed down – but at the moment there is no guarantee as to how it would work in practice.

More seriously, the BIS consultation considers the question of whether the appeals regime might result in regulatory gridlock once other provisions in the New Directives are implemented. In particular there is a stipulation that market reviews be carried out every three years. This is a genuine concern, with very broad agreement that regulatory gridlock is undesirable and a significant minority of stakeholders we interviewed were concerned that the triennial review requirement could hamper the regulatory process.

We do not expect this to be a practical concern in relation to the issues considered here for a number of reasons. First, the three-year requirement is qualified – the National Regulatory Authority may extend the period on notice to the European Commission. It is unclear what exactly would constitute exceptional circumstances. However, *prima facie* there is surely a good case that an extant appeal on a previous decision is a legitimate reason for extending the period. We have observed elsewhere that Ofcom is held in high regard internationally and we doubt the European Commission would raise serious obstacles in those circumstances.

Secondly, appeals do not take three years; they are much quicker. For example, the CPW appeals took just over 13 months from the date of the Ofcom decision and themselves applied to a two-year price control. The MCT appeals have been the longest, at 22 months, but they involved a point of law which has now been decided. In addition, the Competition Commission has itself begun a consultation on its own processes which may be expected to speed things up. Many appeals are much shorter. For example Vodafone's number portability case took 7 months and 28 days – and was by no means the quickest.

Thirdly, there is no guarantee that a modified JR process as envisaged by BIS would be any quicker. Our Freedom of Information request on the length of civil judicial reviews gives an average time of 39 weeks for JRs decided in August this year. These, of course, are standard judicial reviews; modified JR, looking at more (and more complex) issues, would probably take longer. To take a recent example: the Digital Economy Act received Royal Assent on 8 April 2010; BT's and TalkTalk's judicial review application was lodged on 5 July; at the time of writing, the permission stage has just finished and the matter is not expected to be heard until some time in February – April 2011; this has been described by the Judge as an "early hearing". Fourthly, the BIS consultation takes account of the qualified requirement for market reviews to be held every three years, but does not attempt to assess the wider picture. In practice the regulatory workload does fluctuate. For example, NRAs operating under the CRF are required to review markets set out in a Recommendation published by the European Commission. The original recommendation[34] listed 18 markets. In 2007 a new recommendation[35] listed only seven markets, effectively reducing Ofcom's workload by more than half. To be fair, it is obvious that Ofcom spends considerable resource – internal and external – on appeals[36]. However, Ofcom's networks and services function is funded by a direct

[34] Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation (2003/311/EC)

[35] Commission Recommendation of 17 December 2007: (2007/879/EC)

[36] Some useful data are given in the National Audit Office's report at http://bit.ly/dyVp91 ; however they need to be kept in perspective. Ofcom's average £1m per annum spend on appeals (quoted by the NAO) needs to be compared with a total £10m spend on professional fees (Ofcom report and accounts, page 89.

levy on the industry, which therefore ultimately bears the cost[37]. In fact one respondent to our questionnaire – not an active user of the appeals system – said this:

> *"as a [Communications Provider] you probably want a more open [appeal] process and accept that the appeals process is a necessary overhead for the industry (since we ultimately pay Ofcom's bills)."*

Finally, appeals are inevitably limited in scope and, unlike in many other jurisdiction, do not generally have suspensive effect on regulatory decisions. Only a minority of appeals has attacked market reviews at all; and where they do so, they tend to challenge not the underpinnings of the market review process (i.e. in relation to market definition and to SMP findings) but only the remedies. So there is nothing to stop much of the work of the regulator continuing.

In short, we doubt the gridlock effect will generate much concern in practice. That said, everyone believes that the appeals regime should be as fast as is reasonably practicable. Our reform options in Chapter 5 deal with this in more detail.

Finally in this section, a word on regulatory burdens. The view was expressed forcefully by more than one stakeholder we interviewed that increased barriers to appeals would result in more regulation. In this world view, there is a danger of Ofcom imposing more and more rules unless checked by a robust appeals regime.

(v) Materiality

The question of materiality has arisen in the BIS consultation with an implication that there is a concern that appeals currently deal in the immaterial. This is not correct. The appeals bodies already take a sophisticated approach to materiality. The matter was recently considered by the Competition Commission in The Carphone Warehouse Group appeal against Ofcom's decision in "*A new pricing framework for Openreach"* (the Financial Framework Review or "FFR" Statement).[38]

In that appeal Ofcom argued that the Competition Commission should not look at every single element of an Ofcom decision and in effect be a duplicate regulator sitting in the wings. Ofcom's view is that the Commission's role is confined to determining whether Ofcom got a decision "materially wrong".

> *"1.36 Ofcom raised the issue of materiality in its Defence where it submitted that CPW had mistaken our role in undertaking a review of price control matters.... Ofcom submitted that we could not sensibly act as a substitute regulator, revising all aspects of Ofcom's decision making, even where there were several alternative solutions potentially available to any given regulatory*

[37] Source: Ofcom Annual Report and Accounts, year to 31 March 2010, page 86

[38] http://www.competition-commission.org.uk/appeals/communications_act/llu_determination.pdf

problem. According to Ofcom, our task was, instead, to identify whether Ofcom was materially wrong."[39]

Ofcom did appear to accept that the Competition Commission is best placed to decide what is and is not material, in that their comments on materiality in the LLU appeal were made to help the Commission to focus scarce resources.

"1.39 Ofcom then went on to state in its skeleton argument that 'Ofcom's analysis of materiality is intended to assist the CC in focussing its resources … the CC is… entitled to decide how much time and effort to devote to the many detailed points raised under each ground of appeal'."

Sky argued that there were no grounds for Ofcom to introduce a materiality threshold into the test to be applied by the Commission. Carphone Warehouse argued that many small factors, which are in themselves apparently non-material, can when viewed cumulatively, be considered material. It was also argued that even where no materiality might be evident in relation to one appeal, an apparently non-material decision or factor might be deemed material when it was considered that the same approach might be applied to the entire industry. The impact in relation to multiple CPs over a period of time could then be sufficient to merit treating that decision as material.

The Commission rejected both the Ofcom and the Carphone / Sky approaches since both sought to create a general, one size fits all, approach. The Commission held that the circumstances of each appeal will vary and therefore the question of materiality will also vary from case to case.

1.51 We consider that there is force in Ofcom's submission that our task is to identify whether Ofcom's decision has been shown to be materially in error. But we have not found it possible to set out a general approach to the assessment of materiality. In practice considerations of materiality are not amenable to a formal analytical scheme. We have considered materiality on a case-by-case basis as part of our analysis of specific criticisms made by CPW of Ofcom's decision making.

Nevertheless the Commission also found that in some cases the circumstances **will** justify combining many immaterial errors and considering them together, while in others such an approach will not be appropriate. But they indicated that their inclination was towards a presumption against such an aggregation of minor errors. Their reasoning was that such a general approach might lead to appellants adopting a "scattergun approach" in the hope that they could flag up enough minor errors to persuade the Commission to reverse an Ofcom decision. This is precisely the situation which Ofcom infers already exists.

[39] http://www.competition-commission.org.uk/appeals/communications_act/llu_determination.pdf para 1.36

The Commission therefore appear already to have addressed the perception problem which may have been a perceived cause of uncertainty.

> *"...as a general approach we would be cautious about elevating the immaterial into the material. We also observe that aggregation might encourage a scattergun approach on the part of appellants in future appeals, with a great number of wholly insignificant points taken by an appellant in the hope that if assessed on a cumulative basis, all such minor points will be remedied. We do not think this is the purpose of this appeal process, which is to carry out an appellate review of Ofcom's decision and not to re-take the decision itself. "*[40]

Finally the Commission also noted that there is a need to consider materiality in relation to remedies (though this did not arise in the LLU appeal). In relation to remedies they said that

> *"we have considered materiality when deciding whether it is proportionate for the error to be corrected. In terms of materiality in remedies we do not specifically look at the value of the error as such but at the balance between the effort and effect (or cost and benefit) of correcting such error."*[41]

The BIS consultation suggests that the current appeals system is "out of line" with the requirements of the EU Directives. It paints a picture of a system which has been misinterpreted by appellants and where that misinterpretation has gone uncorrected. It is possible that the BIS consultation was drafted before the CPW ruling came out. In any event, we do not consider that materiality is a real issue or that there is any disparity between the approach taken by the CAT / CC and that set out by Jacob LJ.

Finally in relation to materiality, the current approach to materiality is broadly supported by those we interviewed.

(vi) Incentives in the current regime

We have considered whether the current regime generates the correct incentives in relation to appeals.

It is worth saying first of all that all the stakeholders we interviewed who had taken or considered an appeal took the prospect extremely seriously. All of them considered the costs involved in bringing appeals – which can be very significant indeed. All of them also considered other effects like the cost of internal resource and the time of key individuals. And all of them, without exception, considered possible effects on their relationship with Ofcom. Appealing is a step no-one takes lightly. Some

[40] http://www.competition-commission.org.uk/appeals/communications_act/llu_determination.pdf para 1.64

[41] http://www.competition-commission.org.uk/appeals/communications_act/llu_determination.pdf para 1.65

stakeholders who had not taken an appeal considered that costs of so doing were an insurmountable barrier[42] and that they were therefore excluded from the process altogether; and that there was a good case for making it easier to appeal.

That said, there was a pragmatic openness to considering fine-tuning the incentives on appellants. We have considered three options:

- Changing the current approach to costs awards: there was openness in principle to fine-tuning the current approach to costs in appeals to make it more likely that unsuccessful appellants would have costs awarded against them.
- Changing the range of possible outcomes to appeals – which could take two forms:
    - Allowing issues raised in the NoA to be pleaded in the opposite direction by interveners: at the moment there is a widespread belief (which we share) that the appellant sets the range of outcomes for appeals. So if a Notice of Appeal seeks the outcome that a particular charge should be reduced, the appellant may or may not win; but there is no (or a limited) chance that the price will in fact go up[43]. These assumptions could be reversed so that once an issue was brought into play by an appellant, it became fair game for other changes at the request of interveners[44].
    - Allowing Ofcom and/or interveners to introduce matters which were the subject of the same Ofcom decision but which were not in the NoA.

Each of these innovations would need to be approached with caution. Two respondents to our interview process stated that they are often blind to the facts when bringing appeals (which is discussed further below). In those circumstances it would seem unfair to penalise them on costs. The second proposal would arguably undermine the CAT's role as an appellate body.

d) Evidence and transparency - the "first instance" regulatory process

We have considered whether and how the process by which decisions are made by the regulator plays a part in appeals. In this we have looked not just at Ofcom's practice but also the role of the other participants in the process. We consider the extent to which changes to the "first instance" regulatory framework might obviate the current need for appeals. We conclude that there are good reasons for implementing a range of minor reform options.

[42] One typical comment: "if anyone believes the process is an easy thing then they're much mistaken"

[43] This current approach is entirely consistent with the CAT's role as a body of appellate jurisdiction rather than one which substitutes its own judgment for that of Ofcom.

[44] One respondent already took this possibility into account when considering appeals. The reason for restricting this option to interveners is that Ofcom ought by rights to stick to its original decision in most cases.

First, we consider there is a strong case for statutory simplification. Ofcom currently has some 265 duties including some which were included in the 2003 Act without real thought or scrutiny. We strongly recommend that the 2003 Act be simplified to simplify Ofcom's task. This is examined more fully from a theoretical perspective in Chapter 5 but can be summarised simply: we cannot see how it is realistically possible for Ofcom staff or board members to undertake their work with a clear view of what they are trying to achieve in the current statutory framework.

Secondly, there is considerable concern about transparency before the regulator – a theme which emerged from almost all of our stakeholder interviews and which is also touched on by the Competition Commission in the decision on CPW's LLU case:

> *"We would also add that we see merit in any decision maker seeking to give the greatest possible degree of transparency to its decisions and decision-making process (consistent with duties of confidentiality) so as to obviate as far as possible the need for extensive disclosure applications in these time-sensitive appeals. This might produce the collateral benefit of discouraging challenges to a decision being brought on the basis of incomplete information."*

Partly this is a result of the statutory framework. There is a "transparency" duty in the 2003 Act but it is heavily-qualified. In addition, when a party claims confidentiality over particular information, Ofcom must be wary of the provisions of section 393 of the Act. This section is designed to prevent the disclosure of confidential information[45]; breach of it attracts personal liability for the people involved and can carry penalties of up to 2 years in prison[46].

This environment does not promote transparency.

In some regulatory proceedings – especially price controls, which will often involved detailed consideration of the financial affairs of the regulated party - this means that other interested parties must base their submissions to Ofcom on incomplete information. If they want complete information they can only get it by appealing; at the appeal stage a confidentiality ring can be set up and information shared between professional advisers.

There are three direct effects of this curious state of affairs.

- First, interested parties can be disadvantaged in the Ofcom process.
- Secondly, they have no choice but to appeal if they want access to full information. This clearly generates the wrong incentives.

[45] ...which is a perfectly proper concern of itself.

[46] There are carve-outs from section 393 but our experience is that Ofcom often takes a cautious approach, which is quite understandable.

- Thirdly, if they do appeal they are forced to draft their Notice of Appeal on the basis of incomplete information. This means that Notices of Appeal may not be as well-targeted as they should be[47].

None of these is satisfactory. We are therefore making two specific recommendations in relation to transparency:

- First, that Ofcom be given power to create confidentiality rings for proceedings relating to the setting and enforcement of price controls in the telecoms sector, together with appropriate powers to enforce the terms of those rings; and
- Secondly, that more general measures be taken to increase transparency.

What do these suggestions mean in practice? First, in relation to confidentiality rings:

Ofcom would be given a new power to create confidentiality rings in the Communications Act 2003. This would give Ofcom a right to disclose information obtained under powers in section 135 to the same classes of people that could be included in a confidentiality ring set up by the Tribunal (i.e. external advisers of the parties and in-house lawyers (in some circumstances)).

Ofcom would also have a duty to *use* that power in specified circumstances (we recommend that those circumstances should be where Ofcom considers is appropriate in order to further the objectives in section 3(3)(a) or in connection with a strengthened transparency requirement (see below)).

The statutory modifications would need to set out the circumstances in which the power should be used. Our current view is that the power should be quite restricted; for example, it could be limited to use in connection with section 44(2)b(iv) of the Act (i.e. setting SMP conditions) insofar as they related to intended conditions described in section 87(9) of the Act; and in relation to the enforcement of such conditions[48].

There would need to be careful provision about those who would be allowed into the ring. These should only be representatives of persons directly affected by the proceedings in question.

Ofcom would need to be given the power to enforce the provisions of a confidentiality ring. For solicitors, the provisions of the ring could be given as an undertaking and would be enforceable as a professional conduct matter through the Solicitors'

[47] In our research exercise one appeal was described in which it became clear only the CC stage that information Ofcom had never sought in its own proceedings was going to be crucial to the outcome. In the end the appeal failed on the particular issues in question. However the appellant felt strongly that a different outcome could have resulted if more information had been available.

[48] In our view the proposal for a confidentiality ring is really relevant in relation to BT's charges. This is because BT's charges are calculated on the basis of actual costs (currently CCA FAC). This contrasts with the approach to mobile termination rates which use a single model for all four networks; in other words, digging into the business of each individual mobile operator is largely irrelevant.

Regulation Authority. For other professional advisers, a good starting point would be to consider contractual enforcement of the terms of the ring[49].

Issues about confidentiality rings and about transparency generated a really active debate in our research. A significant body or opinion has it that Ofcom is too ready to accept assertions of confidentiality by BT, with one stakeholder saying that:

> *"Ofcom broadly accept it when confidentiality is claimed [by BT]."*

Another commented as follows:

> *"[Ofcom] should make more information available to the parties – including models. This would operate at the least to narrow the scope of appeals. A more open approach would result in less appeals, not more. The regime for disclosing information to stakeholders needs to be reformed. At the moment [we] have no choice but to appeal to get access to confidential data."*

BT, on the other hand, said that Ofcom already pushes them hard on transparency and concluded that:

> *"we don't think that it would be appropriate to start using confidentiality rings at the dispute stage."*

They also doubted whether confidentiality rings would solve the issues, by positing an interesting question:

> *"Is confidentiality always really the issue? Sometimes what looks like "confidentiality ring" issues are actually issues about the regulator needing to iterate its work more carefully with the parties."*[50]

However, BT also expressed a degree of openness to information sharing, while praising Ofcom's approach to transparency more generally:

> *"Having said that, we can see that there may be occasions where there is highly sensitive commercial information involved and that in these cases, rather than making it public, it may be better to look at using trusted independent third parties to validate it. We would however add that, Ofcom – when publishing its decisions – publishes significantly more information than other NRAs. Colleagues who work on non-UK matters are astounded by the level of information made available by Ofcom. The LLU statement, which was appealed, was one of the most detailed ever published."*[51]

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[49] A contractual approach has been used in Australia: http://www.accc.gov.au/content/index.phtml/itemId/904344

[50] They added by noting that this would be helped by tight definition of the issues actually at stake

[51] It is worth commenting that we agree there is a genuine debate to be bad here. For example it might be argued that the availability of a confidentiality ring process at the first instance stage would encourage commercial rivals to go "fishing" for sensitive information of the regulated party. Another criticism is that confidentiality rings would be cumbersome - they would create more work, add to regulatory backlog and require the appointment of external advisers (for some players). In this analysis

Other stakeholders had real concerns about transparency. We can summarise it no better than one respondent, representing one of the biggest providers:

> *"Transparency is a real issue."*

Overall, a significant number of players would welcome a different approach to transparency; this, it is felt, would alter the dynamic in relation to appeals quite fundamentally. One participant in our research advocated Ofcom's adopting a process akin to that of the Competition Commission; another said that they look "with envy" at the more formal regulatory processes in the US. While we have sympathy for this view, this direction of reform would be a radical one in the UK. However, as mentioned above, we also recommend that Ofcom create an open process where each party's submissions are made available to other parties as a matter of course. This would require the adoption of more formal procedures by Ofcom although in our view they could be designed in such a way as to minimise the administrative burden. In some cases practices have been improved already – for example, Ofcom is now proactive in pushing for non-confidential versions of all consultation responses. In addition, further transparency measures in relation to disputes and complaints could be enshrined in Ofcom's guidelines[52] - of which we understand a new version is to be issued for consultation shortly.

It would be possible for these changes to be implemented as simple changes to practice; however, there is also merit in bumping up the existing transparency obligations in section 3 of the Act. At the moment this is phrased thus:

> *In performing their duties under subsection (1), Ofcom must have regard, in all cases, to the principles under which regulatory activities should be transparent.*

This is hardly the clearest statement and in any event it is limited to only some of Ofcom's duties. As we have seen, the setting of price controls and the hearing of disputes present serious difficulties from a transparency perspective. We recommend that the transparency requirements in relation to those functions be enhanced as follows:

- By a new subjection 89(9)(A): "*In determining whether to set a condition falling with subsection (9) and in determining the terms of such a condition, Ofcom must carry out its duties in a manner which is as transparent as is reasonably practicable."*
- By a new subsection 188(9): *"In handling disputes, Ofcom must carry out its duties in a manner which is as transparent as is reasonably practicable."*

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there is merit in restricting confidentiality rings to the appeals stage, where they can be applied to the most important cases. There is some sense behind these arguments; in our view they voice objections which can be met. But they explain why at this stage we are arguing for this approach to be applied in fairly tightly-circumscribed circumstances.

[52] http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/other/guidelines.pdf

We have also examined the position of new evidence at the appeal stage[53]. The proposition that the types of new evidence which can be brought on appeal might sensibly be slightly circumscribed was discussed in our research exercise. At the moment, the position broadly is that parties may bring evidence which is new – in the sense that it had not been presented to Ofcom. Most of those interviewed supported the notion that parties to proceedings before Ofcom should put their "best foot forward" in those proceedings[54]. They should not normally be seeking to make totally new points at the CAT. However there was unanimity that this should not be an absolute prohibition. There are circumstances where it is not possible to bring all evidence to bear at the Ofcom stage. This is particularly true in relation to submissions in response to Ofcom draft decisions: in disputes, for example, there is often as little as two weeks to respond to a draft decision; and Ofcom may make points in final decisions to which the parties have not had a chance to respond at all. Finally, in the current arrangements for information sharing at Ofcom some parties to Ofcom proceedings are unaware of relevant facts. That ignorance should not bar them from bringing new evidence on those unknown facts at the appeal stage.

e) Conclusions

In summary, we recommend two reform packages:

(a) Package 1: this consists of:

   a. Statutory modifications giving Ofcom the power to set up and enforce confidentiality rings;

   b. Statutory modifications reinforcing Ofcom's statutory transparency obligations;

   c. Adjusting the regime on bringing new evidence at the appeals stage to ensure that all players put their "best foot forward" at the Ofcom stage[55];

   d. Non-statutory adjustments to Ofcom's existing procedures to increase transparency including introducing a presumption in Ofcom dispute guidelines that all non-confidential submissions will be shared with the other parties.

(b) Package 2: this consists of a wider programme of simplification to Ofcom's statutory duties.

[53] Ofcom themselves, in submissions to the National Audit Office have pointed to "a shortcoming in its legislative environment which it cannot control", indicating a concern that their failure to account of evidence regardless of when it is submitted might be grounds for appeal .

[54] Though there is a real question of degree here. Many stakeholders believe that they should have relative freedom to raise what they consider important at the appeal stage regardless of whether it has been brought to Ofcom.

[55] Issues related to this point are currently the subject of an appeal by Ofcom the Court of Appeal in the 080 case

Although each package would require statutory changes, we consider the wider programme of simplification in Package 2 to be a significant undertaking.

4. Building the perfect appeals regime – theory and principles

> *"If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."* James Madison (The Federalist No. 51, 1788)

Everyone makes mistakes, and regulators are no exception. Incorrect decisions may be the product of mere accident, but may also result from systemic bias. It is therefore important that checks and balances be designed with the underlying causes of error in mind. This chapter considers the appeals regime in the context of the incentives of a regulatory body and its stakeholders. We ask why the regulatory body might make mistakes and how this is affected by the introduction of a right to appeal.

We start by noting that assuming, *a priori,* a correct regulatory decision exists, it is not inevitable that an appeal process will reach this decision. Different appeal processes will lead to different decisions. The design of the end-to-end regulatory decision making process, including any appeals regime, is therefore vitally important.

In terms of appeals, we conclude that the presence of an appeals regime is likely to improve the quality of the regulatory body's decisions. This effect is strongest when appeals are heard by an expert body considering the merits of the case. A further conclusion is that the cost of bringing an appeal has an important incentive effect: the fact that appeals are expensive proves that appellants have a lot at stake. Without the option to appeal it can be very difficult for a stakeholder to make the regulator believe its claims over the impact of a decision.

However, it is also important that the right to appeal remains effective for all stakeholders, and therefore the appeals process must remain user friendly. Finally, the fact that evidence from the consultation stage of the regulatory decision making process may be used in an appeal adds to the credibility of the consultation responses.

a) Chapter outline

We start by considering the importance of processes and institutions in making regulatory decisions. The following section then introduces our model of regulatory decision making. The model underpins our analysis of both appeals in general and of the specific UK legal framework. This analysis draws on several fields of economic research including law and economics, public choice theory, social choice theory and behavioural economics.

The model is used to assess the need for an appeals regime in terms of the likelihood of making mistakes. Economists generally assume that individuals behave rationally –

they know what they want and set about achieving these goals given various constraints imposed by their environment. There is little room for error in this hypothetical world. Individuals do make mistakes – particularly when dealing with an uncertain future - but on average across the population, or across a number of repeated decisions, the mistakes tend to cancel each other out[56]. That is, there is no systematic bias in the errors. In such a world there is no obvious need for an appeals regime. If the appeal body can be trusted to get the right answer (or at least get closer to the right answer), then why not simply adopt the same institutional framework to get this decision in the first instance[57]?

We adopt three different approaches to this and the broader question of the need for an appeals regime.

- In part 1, we take a traditional economic approach. We assume that a regulatory body acts rationally, and its goals are aligned with fulfilling its legal duties. However, we also assume that a regulatory body acts within a resource constrained environment and therefore must decide how much effort to put into making each decision. This approach does not assume error-free decisions; rather, the greater the level of effort, the lower the chance of error in the decision.
- In part 2, taking our cue from public choice theory, we continue to assume that the regulatory body acts rationally, but consider a number of alternative objectives. It may be comforting to think that regulatory bodies will try their utmost to act in accordance with legal duties and regulate in the best interests of consumers, industry and the wider economy, but this will not always be the case.
- Finally, in part 3, we consider the possibility of systematic bias in the decision making of a regulatory body. There are a number of circumstances in which people tend to make mistakes consistently, and not learn from these errors. That is, people tend to behave 'irrationally'.

b) Why process matters

The design of processes and institutions are vitally important to bureaucratic decision making. This is the key finding of social choice theory. Early research by Kenneth

[56] This does *not* imply that the level of error will be reduced if a decision is taken repeatedly. The expected level of error remains the same each time, but if the errors are symmetrically distributed around the correct answer then there will be no error on average.

[57] As a matter of interest, a number of respondents in our research exercise have suggested just this solution: adopt the process of the Appeals bodies for the Ofcom stage of the proceedings. We consider that there is some merit in this approach – although such fundamental reform of the regulator itself is outside the scope of this paper. For the purposes of the current analysis, though, it does not alter the basic arguments, which are about the need for appeals regardless of how "good" the first instance regulatory process is.

Arrow[58] asked whether there is a way to aggregate a diverse set of individual preferences in a consistent and coherent way - for example, a voting mechanism which will fairly and consistently represent the views of the population. The answer turns out to be no[59]. Faced with a choice between at least three alternatives, and given a population of individuals with fixed preferences over these alternatives, there is no 'correct' way to aggregate these preferences in order to make a collective decision.

How is this relevant to appeals? Although regulatory interventions ought to be objective, evidence based decisions, they are also accurately construed as collective decisions which aggregate a variety of preferences (stakeholder and regulator) over potential outcomes. Arrow's analysis tells us that the process for making any collective decision can affect the decision ultimately made. That is, without changing either relevant evidence or preferences *the process of reaching a regulatory decision can affect the outcome*.

So, the question of structure of the end-to-end regulatory decision making process, including appeals, is important – not just for its own sake, but for the substance of the decision. This may seem like an obvious point. Adding the right to appeal will likely lead to some decisions being overturned. The implications, however, are more subtle: even minor changes in process may affect the substance of future regulatory decisions, and so the institutional arrangements for regulatory decision making must be designed with great care.

For example, in moving from appeals to the CAT on the merits of a case to something closer to a traditional Judicial Review would likely result in different final decisions being taken; as would changes to the rules about admissibility of evidence during an appeal; or even to the format of regulatory consultations.

A further, albeit more tentative, conclusion is that the 'correct' process must be designed with reference to very clear policy objectives. In effect, we interpret the social choice theory result to mean that processes will always introduce some sort of bias in decision making - there is no purely objective process which will represent all interests fairly. For example, in the present context it is easy to envisage processes which are skewed towards the representation of either consumer interests or the interests of industry. The conclusion is that processes should be designed such that any identified bias fulfils predetermined policy objectives.

One difficulty with the UK regime is that the legal duties of the regulator are far from clear. Ofcom has some 265[60] statutory duties; the duties described as "principal

[58] Arrow wrote a book, "Social Choice and Individual Values" in 1952 based on his PhD thesis. He went on to become the youngest ever winner of the Nobel memorial prize in economics, in 1972, due to this and other contributions to social choice and to general equilibrium theory.

[59] This is the result of Arrow's Impossibility Theorem, first publicised in the book referred to in footnote 58.

[60] See section 3(d) above for more on this

duties", although presented as over-riding are in fact subsidiary duties[61]; and, in the case of conflict the only guidance is that Ofcom should ensure it is resolved "in the manner they think best in the circumstances". This almost certainly creates a set of contradictory preferences over eventual outcomes. This is just the kind of situation envisaged by Arrow and it is therefore impossible to aggregate these preferences fairly and consistently. Either some duties will completely override all others, or the final decision will depend on the order in which the duties are considered.

c) Game Part 1A: Modelling regulatory decision making without appeals

The study of "law and economics" applies microeconomic analysis to a wide variety of legal issues. The field has grown considerably since its inception in the 1960s, but there is very little within the literature on the need for, or impact of, appeals. Our approach, therefore, has been to build our own simple model of regulatory decision-making. In the tradition of economic modelling, we are forced to step some distance from the real world in order to disentangle specific incentives from the complex array of factors which affect behaviour. The key to a good model is that it is sufficiently simple to enable analysis, but not so simple as to distort the overall process. We start by considering a hypothetical situation in which there is no right to appeal regulatory decisions. Only later, in Part 1B, do we consider the right to appeal explicitly. It is important that readers bear in mind, in the next sections, that we are considering a model – not the actual situation at hand.

For our model we assume that the regulatory body tries to fulfil legal duties which lead to decisions which are optimal from a social welfare perspective. The specification of a social welfare function and its relationship to the legal duties is beyond the scope of this paper. Our concern lies with the possibility of mistakes made by the regulatory body.

A mistake, or error, is defined in terms of a decision which does not fulfil the regulator's legal duties[62]. We assume that there is always a single correct decision, and therefore all other decisions represent mistakes. This applies to both decisions of a binary nature (e.g. to apply an SMP remedy or not), and to those of continuous nature (e.g. the choice of a price level or X-factor in a charge control). Although this definition of error is rather complex and linked to the objectives of regulatory intervention, it is important to note that it most likely includes simple and objectively defined errors such as mistakes in calculation[63].

[61] So the "principal duty" in section 3(1), which is presented as a headline duty, "front and centre" in the Act, is in fact subsidiary to the Community Requirements in section 4

[62] As noted previously, the UK Communications Act is extremely complex, and can be actively unhelpful in terms of the regulator's duties.

[63] Strictly speaking, our definition would not include mistakes in calculation if the ultimate decision were, fortuitously, the same as the correct decision. We do not believe that this is material to the subsequent analysis.

We consider a regulatory body attempting to make decisions across a range of different issues. The regulator's behaviour is modelled by a regulatory product function which links the level of effort[64] put into each decision and the likelihood that the decision is correct. We assume that extra effort leads to better decisions: more effort reduces either the probability of error in the case of binary decisions, or the size of the error in the case of continuous decisions. We also assume that there is diminishing marginal return in the regulatory production function. That is, the probability or size of error falls as more resource is spent on getting the decision right, but falls at a decreasing rate[65].

In the model, the regulator must first decide how best to allocate effort between the various issues. Assuming it knows the impact that potential decisions would have on stakeholders, and knows the regulatory production function, it could conduct a cost benefit analysis across the different issues. It could then choose to exert more effort on issues where the aggregate impact of mistakes was greater.

Welfare analysis, such as the measurement of the aggregate impact, is complicated by issues of (welfare/wealth) distribution between stakeholders. To keep things simple, we will aggregate the impact of an error by taking the sum of the effect on each stakeholder *regardless of whether the impact is positive or negative*. For example, if one stakeholder is better off to the tune of £1million under an erroneous decision and another is worse off by £3million, we will measure the total impact to be £4million.

Given our assumptions about the regulatory production function, efficiency would be achieved when the marginal expected impact of an error with respect to additional effort was the same across all projects. That is, at the margin, exerting an extra unit of effort on each project would achieve the same reduction in aggregate expected impact on stakeholders.

The difficulty for the regulator is that they are unlikely to know the impact that proposed decisions will have on stakeholders[66]. It therefore makes sense for the regulatory body to ask stakeholders for their views on proposed decisions. In this regard, public consultations can be viewed as a means of gathering information about the impact of possible regulatory decisions. Unfortunately, there is good reason to

[64] More precisely, this is the economic cost to the regulator of reaching a decision. This covers both a bureaucratic cost of performing the required analysis, and a time-related opportunity cost of resources consumed by this work.

[65] This assumption isn't strictly necessary – it is overly specific – but it does have an intuitive appeal. It is likely that many regulatory decisions do follow this pattern: one can provide a very good guess as to the correct answer with very little work, but resolving all the details can be extremely complex and time consuming.

[66] They are also unlikely to know the precise form of the regulatory production function, i.e. they will not know how much more accurate their decision becomes given an extra unit of effort.

believe that stakeholders will not always respond truthfully to such consultations. This issue is explored in the following subsection[67].

(i) Signalling games

Public consultations can be viewed as a signalling game[68] in which stakeholders try to persuade the regulator of the potential impact of its proposed interventions. The regulator's allocation of effort between projects is dictated by the impact across all stakeholders, but the regulator does not know what this impact is. We assume that stakeholders know the value of the impact (on themselves), and can signal this to the regulator through the consultation process. We start by considering a game with the following stages:

1. The regulator proposes a range of interventions across its various projects.
2. Stakeholders submit their individual impact assessments.
3. The regulator then decides how much extra effort to exert in reaching a conclusion on each project.

It should be noted that the 'consultation' in stage 2 is highly stylised – it is only possible for a stakeholder to say what the impact will be of the proposed decisions, and they can only influence the level of effort that the regulatory body puts into making the decision. If the regulator exerts extra effort on a project then the relevant decision is likely to become more accurate. We consider a more realistic version of events below in which stakeholders comment directly on the substance of the proposed intervention.

In the game, we assume that neither the regulator nor the stakeholders know what the 'correct' decisions are. The optimal strategy for a stakeholder depends on the difference between the proposed decisions from stage 1 and their expectation of the correct decision. If moving to the expected correct decision would affect the stakeholder negatively, they will prefer the current proposal, and so will not want the regulator to exert any extra effort on the project. Therefore, they should underplay the impact of the proposal in their consultation response – or not respond at all.

Conversely, if the stakeholder believes that the correct answer would be better for them than the current proposal, they will want to persuade the regulator to continue

[67] Of course, Ofcom is required by section 7 of the Communications Act to carry out impact analyses in important cases. The analysis in this section highlights the importance of those analyses. Note, however, that the model in this part of the paper is a hypothetical model designed to offer insight into the behaviour of stakeholders in the regulatory process; it is not intended directly to inform the debate on impact analyses which are considered elsewhere in the paper.

[68] 'Signalling' was introduced to economics by Michael Spence through his paper "Job Market Signalling" in the Quarterly Journal of Economics (1973). As a result of his work in this field Spence was awarded the Nobel prize in 2001. The original paper argues that higher education can have a value to employers and employees even if it contributes nothing to productivity. An expensive university education may simply be a signal of greater ability – a signal which is difficult for people of lesser ability to copy. It therefore provides useful information for potential employers about ability levels.

working on the project. Therefore, they should exaggerate the impact[69] assessment submitted to the regulator.

The regulator will expect stakeholders to behave in this way. The question for the regulator is whether the consultation responses contain any useful information, which ultimately would allow them to take a more efficient decision over the allocation of its resources.

Signalling to the regulator through consultation responses is virtually costless. There is, in this simple model, no direct feedback between what is said to the regulator and the impact on the stakeholder, and so the stakeholders can say whatever they please. Economists refer to this as 'cheap talk' – the signals are costless, non-binding and non-verifiable and therefore just talk.

Before considering the outcome of the game, it is worth noting again its hypothetical nature: stakeholders do not comment directly on proposed interventions, and only submit impact assessments in order to persuade the regulator to continue working on a project in the hope that the decision might change. Given this framework, the only useful information that the regulator gleans from the consultation process is that if a stakeholder responds, they must believe that the correct decision is different from the original proposal. Beyond this, the responses contain no useful information - the level of the impact signalled by stakeholders will always be exaggerated, and so should be disregarded by the regulator.

This is a common result from cheap talk games. In general, the conditions required for cheap talk to become useful information are quite difficult to meet[70]. However, even given our restrictive assumptions, there is still *some* useful information for the regulator. For example, even if the regulator decided to allocate resources to projects on the basis of the number of consultation responses, this is likely[71] to lead to greater efficiency.

Our main conclusion from considering the consultation process as a signalling game is that consultation responses may represent cheap talk, and as such it is difficult for the regulator to have confidence that these responses are truthful. The game we have presented is highly stylised. A more realistic game in which stakeholders

[69] Note that given the structure of the game and our assumption about the measurement of total impact, the strategy to overestimate applies equally to positive and negative impacts. A high total impact, whether positive or negative, is likely to persuade the regulator to do more work on a project. This is somewhat counter intuitive – in real life a stakeholder is clearly unlikely to overestimate a positive impact on the expectation that the final result then becomes even more positive for them.

[70] These conditions were first discussed in a paper by Crawford and Sobel, "Strategic Information Transmission", *Econometrica* (1983).

[71] Strictly speaking, this will depend on the distribution of beliefs of stakeholders over the correct decision relative to the true correct decision. If the average belief is correct, or at least as accurate as the prior belief of the regulatory body, then the allocation strategy described will lead to greater efficiency relative to alternative strategies for the regulatory body. Given our assumption that they have no knowledge of impact on stakeholders, these strategies would be things like a random allocation, or an equal allocation.

commented directly on proposed decisions would involve much more complex strategies for both regulator and stakeholders. However, even with those changes to the game, talk would still be cheap. There would still be no direct feedback mechanism between what a stakeholder said in its responses and how it would be affected by regulatory decisions. Therefore, even in these circumstances it is likely that the regulator will only get very limited useful information from the consultation process.

This result depends on two key assumptions: first, that there is no cost to the stakeholder in sending different types of signal, and secondly that it is not possible for the regulator to verify the stakeholder's claims. In the following sections we continue to assess the simple model in which stakeholders only signal impact, but relax the assumptions by introducing signalling costs to sending the signal and considering the possibility that the regulator can verify claims.

(ii) Costly cheap talk

If there are costs to producing a signal, then this provides a separate source of information for the regulator. For example, if a stakeholder produces a large volume of information and analysis for its consultation response and/or pays external consultants to produce an expensive report, then claims of a high impact are more credible. The reason is simple: if the impact of the proposed decisions were in fact low, then it would not make sense for a stakeholder to incur such costs in producing its response.

However, the substance of the response still contains no useful information as it remains cheap talk, i.e. there is still is no downside to making exaggerated claims. It is only the *cost of producing the report* that provides useful information to the regulatory body.

Bringing an appeal of a regulatory decision is expensive. As with the preceding analysis, the mere fact that bringing an appeal is costly lends some credibility to the claims made by stakeholders.

Appeals and the decision to appeal are modelled explicitly in section 1B below.

(iii) Reputation

Assuming that the impact on stakeholders of past regulatory decisions can be observed, then the claims made in the consultation become verifiable and the content of the response is no longer cheap talk. It then makes sense for a stakeholder to tell the truth when responding to consultations over a period of time. This would create a reputation for truthful responses, and the possibility of losing this reputation can create the incentive to maintain honesty. In turn, this can allow the regulator to trust the signals from stakeholders.

There are two difficulties with this idea. First is that even after the event it can be very difficult to observe the specific impact of a regulatory decision on an individual

stakeholder; and, while the statutory framework requires Ofcom to undertake impact assessments before taking a decision[72], there is no such requirement *ex post facto*[73]. This means it is easier to get away with exaggeration, and so the regulator will still not be able to fully trust the signals from stakeholders. Secondly, in order for reputation to be valuable, it must be possible to lose it. This implies that the regulator must be able to choose to ignore some stakeholder responses whilst taking notice of others. Such discrimination could be illegal if it involves paying less attention to the views of a particular stakeholder on the basis that the regulator disbelieves something they have said before; even it not directly prohibited, it might be considered contrary to the spirit of the legislative framework[74]; on the other hand, it is difficult to see how individuals assessing consultation responses could ignore reputation in practice.

(iv) Cheep talk

Biology, and its study through evolutionary game theory, provides an interesting analogy. From a pure survival perspective, birds of paradise are something of a mystery. The bright colours, loud songs, and oversized plumage all detract from a bird's ability to avoid predators. They are a handicap[75].

One explanation for the development of these features is that they represent a signal of health. If a bird has survived to maturity with such a handicap, then it is much more likely to be fit and healthy, and therefore will have good genes to pass on the next generation.

Consider an alternative development scenario in which birds were not handicapped by these features. This would make signalling health that much easier. Relatively less fit and healthy birds would survive to maturity, and would therefore win mates and pass on their genes. The health signal becomes cheap talk. This would dilute the 'health' of future generations, and therefore make this alternative development strategy less strong in evolutionary terms than that in which birds are handicapped. The handicap becomes a good survival strategy for the species because it helps to 'weed out' genes which result in less strong individuals.

In terms of our model, if a stakeholder can sufficiently handicap itself with the costs of preparing a response or appeal, or perhaps by building a strong reputation and making a commitment to publish its own measurements of regulatory impact, then its claims about the impact of the proposed regulatory decisions would be more credible.

[72] Section 7 of the 2003 Act

[73] We consider the other "research and review" duties in the 2003 Act – such as those in section 6 (review regulatory burdens) and 15 (publish and consider consumer research) to be too broad to make a material difference.

[74] See for example Article 8(3)(c) of the Framework Directive

[75] The 'handicap principle' discussed in this section was first proposed by A. Zahavi in "Mate selection – a selection for a handicap", *Journal of Theoretical Biology* (1975).

This could become a stable strategy in the long term as the stakeholder would benefit from being able to communicate effectively with the regulator.

(v) Conclusions on a regulatory process without appeal

- Although the model is highly stylised, it contains many of the key features of the regulatory decision making process. No-one knows with certainty what constitutes the correct, error-free regulatory intervention. Also, the regulator does not know for sure how proposed decisions will affect stakeholders, but stakeholders will have a better idea.
- An important conclusion is that consultation responses will not necessarily provide a good source of information for the regulator. It is too easy for stakeholders to exaggerate their claims and to present self-serving arguments.
- This means that it is very difficult for the regulator to avoid making the worst mistakes – in essence, the regulator gets little help from stakeholders in making better decisions.
- However, the consultation process is obviously not entirely without merit. Whatever information the regulator can glean from stakeholder responses should help it to make better decisions. In particular, reputation effects may help to improve the amount of useful information that the regulator gets from consultation response.
- Additional credible signals from stakeholders, such as the cost of producing responses, will also help the regulator to make better decisions. Reputation effects may also help improve the level of communication between regulator and stakeholder.

d) Game Part 1B: Introducing the right to appeal decisions

Continuing the approach set out above, we now consider the effects of introducing a right to appeal regulatory decisions. We can model this by adding stages to our game.

1. The regulator proposes a range of interventions across its various projects
2. Stakeholders submit their individual impact assessments
3. The regulator then decides how much extra effort to exert in reaching a conclusion on each project
4. The regulator announces a set of decisions
5. Stakeholders decide whether to appeal decision

We make a simplifying assumption that no new evidence is available to the appeal body, that they have the same objective as the regulatory body (i.e. the same underlying legal duties), and that there is no narrowing of the scope of the

investigation. An appeal therefore has the effect of increasing the amount of scrutiny over a decision. In terms of our model of regulatory decision making, an appeal is akin to the regulatory body allocating greater resource to the project relevant to the appealed decision.

a) When will a stakeholder appeal?

Launching an appeal is a costly process. Preparing a Notice of Appeal and providing appropriate representation at hearings generally means incurring considerable expense on both external and internal advisors.

Based on our assumptions, there is no distinction between the regulator and the appeal body – collectively, they represent the decision maker. In effect, therefore, an appeal simply forces the combined regulatory body to exert more effort in reaching a decision, and this will mean that the ultimate decision is more likely to be correct. An individual is therefore likely to appeal a decision if they believe that this will result in a different decision which furthers their private interests to an extent which outweighs the costs of making the appeal.

As discussed in section 1A, efficiency in this model is determined by the distribution of effort between the regulator's projects. The regulator could make an efficient allocation if they knew the expected impact of their decisions. However, this information is held privately by stakeholders, and the regulator cannot trust the claims made by stakeholders concerning this impact because they have little disincentive to lie.

The introduction of an appeal process creates a quasi market in regulatory effort: stakeholders can buy more effort to reach a regulatory decision by making an appeal. We are now in a position to ask whether this market-based approach will be efficient, or at least will lead to greater efficiency.

The conditions for efficiency are that the marginal expected impact of an error across all stakeholders is the same across all projects[76]. Or, put more simply, greater efficiency will be achieved if relatively more effort is spent in reaching decisions which have a larger (financial) impact on stakeholders. It is likely that more will be spent on appeals when there is more at stake, so from this point of view the presence of the appeal mechanism can lead to greater[77] efficiency.

[76] This results from the assumed regulatory production function under which the probability of an error reduces continuously as more effort is exerted. Decisions which affect large markets will therefore automatically attract lots of effort. The unrealistic element of this assumption is that the chance of error continues to reduce without limit. In reality, there will be an irreducible chance of error in any decision. That is, once you reach this limit, no extra level of effort will reduce the chance that you have the right answer. Alternatively put, there is no right answer, only a range of more or less correct answers.

[77] Full efficiency would require that the cost of the appeal be functionally related to the expected impact of the error. This is unlikely to be the case. More complex decisions affecting large and complex markets may well require greater cost, but the relationship between the two is likely to be weak.

However, this need not always be the case. Appeals are generally brought by individual stakeholders, whereas efficiency is determined by the aggregate impact of a decision across all stakeholders. Therefore, circumstances could exist in which the aggregate impact of a decision suggests that work should continue, but the costs of making an appeal are large relative to the impact on affected individual stakeholders.

b) Admission of evidence and truthfulness of consultation responses

Although the presence of costs in making an appeal changes incentives, it does not in itself add to the credibility of the claims made by stakeholders. The level of cost incurred demonstrates the significance of the impact on stakeholders, but does not change the fact that the content of consultation responses is cheap talk.

However, talk is far from cheap in UK judicial proceedings. Perjury carries criminal sanctions, and therefore one cannot simply say whatever would be most self-serving. Unjustified claims may also result in adverse costs awards.

If, as we have assumed in our model, no new evidence is presented at the appeal stage, the appeal body must rely on the consultation responses from stage 2 of the game. Therefore, if a stakeholder believes that they may wish to appeal a decision at stage 5, talk is no longer cheap at stage 2. They will therefore submit truthful responses. (The same point holds good (although to a lesser degree) to the extent that the appeals body scrutinises statements made at stage 2 at all.)

The conclusion is that the stronger the link at the appeal stage to the information used in the consultations, the stronger the following incentive effect: it would encourage stakeholders to tell the truth during the consultation phase, and make the evidence submitted more credible to the regulator. In turn, this would allow the regulator to make better decisions.

On the other hand, if new evidence is admissible at the appeal stage, this will water down the incentives to present a fully truthful case at the consultation stage. And if evidence submitted at the consultation stage may be disowned entirely at the appeal stage, the incentive effects will be eliminated altogether.

c) Appeals on specific grounds and regulatory capture

So far we have assumed that appeals simply extend the decision making process of the regulator, and are therefore likely to make the ultimate decision more accurate. To allow for greater realism, we now assume that appeals on specific grounds are possible. Stakeholders can therefore appeal specific points within a decision that are not favourable to their private interest.

We began by assuming that the regulator (and, by implication, the appeal body) work to fulfil their legal duties to all stakeholders – i.e. to work, in the broadest sense, in the

public interest[78]. If the scope of an appeal can be determined by the appellant, and is then limited to that scope, it would allow a stakeholder to skew the decision ultimately made. The individual issues may still be settled according to the objective of working in the public interest, but taken out of the wider context, there is no guarantee the end-to-end decision making process continues to operate in the public interest. In terms of our model, additional effort being put into making the decision no longer necessarily reduces the chance of mistakes in the decision.

In essence, the appeal regime becomes a vehicle for regulatory capture. Those who can afford an appeal can influence the decision ultimately made by restricting attention of the appeal to specific issues. A full discussion of regulatory capture would go beyond the scope of this paper[79]. There may be a counterbalancing effect from appeals from other stakeholders, or perhaps interventions. However, this need not be the case and will depend on the relative size of stakeholders and their preferences over the regulatory decisions.

In order to avoid this effect, it is important that the scope of the appeal be sufficiently broad to remove the possibility that the issue(s) considered could only be determined in the interests of the appellant. That is, the scope needs to be broad enough that there is at least a risk, even if only small, that the ultimate decision is worse for the appellant. The question is who should have the ability to expand the scope. The most obvious options are the regulator or other stakeholders. The risk in both cases is that the scope of appeals grows uncontrollably, and that this acts as a disincentive to appeal, and therefore limits the beneficial incentive effects of the presence of an appeal regime. We consider this practical aspect in Chapter 5 below; for the moment we simply note that there is a benefit to ensuring that the scope of an appeal is not determined solely by the appellant.

d) Awards for costs

A final point we consider is the incentive effect of cost awards associated with bringing an appeal. The previous subsection considered the possibility that appeals might be brought on purely self-serving grounds. It is also possible that appeals are brought which are unjustified on substantive grounds, but are perhaps self-serving for tactical reasons - for example, bringing an appeal to force the regulator to divert its

[78] Here, as with part 1A of the game, we assume a simplified legal structure where the legal duties of both bodies are aligned with the outcomes which maximise social welfare

[79] There is a large literature in both economics and politics on regulatory capture. A good summary of the general economic approach is given in "The Independent Judiciary in an Interest-Group Perspective", Landes and Posner, Journal of Law and Economics, 1975:

> *In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. The price that the winning group bids is determined both by the value of legislative protection to the group's members and the group's ability to overcome the free-rider problems that plague coalitions. Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation.*

resources into appeals work, or perhaps to delay a regulatory decision. These are examples of appeals which would almost certainly not lead to greater efficiency and better decision making.

One would hope that in these circumstances, the appeal body would ultimately find against the appellant. Awarding costs against the losing appellant would reduce the incentive to make such appeals. This is possible within the current UK appeal framework, but very rarely used. If so rarely used, the incentive effect to dissuade stakeholders from bringing such appeals in the first place is significantly reduced.

e) Conclusions to Part 1B

- The presence of an appeal regime adds to the options for stakeholders to send credible signals to the decision maker (the regulator and appeal bodies jointly), and this should enable better decisions in many cases.
- This conclusion may, however, be relatively weak since it relates principally to the cost of bringing an appeal.
- It certainly does not imply that appeals should be made to be (artificially) costly. Inefficiencies arise when the aggregate impact of error on a group of stakeholders would justify an appeal, but the costs are prohibitive when viewed from the perspective of an individual stakeholder.
- There are strong and beneficial incentive effects from limiting the admission of new evidence at the appeal stage, and relying on consultation submissions. This adds credibility to consultation responses, and therefore helps the regulator make better decisions in the first place.
- Appeals where the scope is determined entirely by the appellant would institutionalise regulatory capture. There are several potential solutions to this problem, each with their own difficulties, but the essence is to allow the scope of the appeal to be expanded.
- The award of costs against losing appellants provides an important incentive effect to dissuade stakeholders from bringing poor appeals.

e) Part 2: A public choice approach

The general approach of public choice theory in studying political behaviour is that one focuses on an individual's personal motivations. As defined by one of its founding fathers, James Buchanan, public choice is "politics without romance"[80]. It starts with an assumption that public officials will not necessarily act in the public interest. Like everyone else, they will tend to act according to their own private goals. These *may* coincide with the public interest, but we should not assume that this is always the

[80] The phrase comes from the title of a lecture he gave in Vienna in 1978. Buchanan won the Nobel Memorial prize for economics in 1986 for his work on public choice theory.

case. This gives rise to a need for checks and balances – as envisaged by James Madison, "Father of the US Constitution", in the quotation at the start of the chapter.

This is essentially an economic approach to behaviour which assumes that we all act as rational, self-interest utility maximisers. In such models, we all have a utility function, based on underlying individual preferences, which explains how different factors affect our level of utility. The starting point for our enquiry is to identify the "arguments" of the regulator's utility function – the variables which influence their utility, and ultimately motivate behaviour. Therefore, we start by asking what motivates the individual decision makers who form the regulator. (For ease of exposition we will refer to 'the regulator' and 'the individuals working at the regulator' interchangeably).

In considering judicial behaviour, Posner[81] lists the following as possible elements of a utility function: money income, leisure, power, prestige, reputation, self-respect, the intrinsic pleasure (challenge, stimulation) of the work, and other satisfactions that people seek in a job. We do not intend to assess each of these factors, but simply to identify those which may have a significant effect on regulatory behaviour and which could lead to an increased likelihood of regulatory error. We therefore focus on two sets of factors: financial reward and reputation.

(i) Financial reward

A company operating in a competitive market which makes a bad decision is likely to lose custom. The company's financial performance therefore tends to reflect the collective decision making of its employees. In turn, this measureable financial performance is often reflected in employee incentive payments. Thus, there is a link between individual incentives, actions and (measureable) effect.

Unfortunately, there is no equivalent to the market mechanism for regulatory decisions. The action of the market is twofold: it decides what represents a good and a bad decision, and it creates the incentives to make good decisions. Both actions are missing in the regulatory context: the effectiveness or appropriateness of regulatory decisions is not observable (or even objectively defined), and a good/bad decision may have considerable positive/adverse affects on industry or consumers, but this need not have *any* impact on the regulator. Perhaps an egregious decision might result in loss of employment, but otherwise there is no automatic feedback to create a financial incentive to drive the regulator towards making correct decisions.

As noted in the previous section, appeals create a pseudo market in regulatory effort. Given that effort implies costs for the regulator, appeals therefore do create some form of financial incentive. If appeals are avoided, legal costs can be minimised. However, since the regulator's costs will almost always be met, either through general taxation or levies on industry, this incentive effect may be relatively weak.

[81] The list refers to the elements of a utility function for judicial behaviour. Page 36, "How Judges Think", Posner, 2008.

The incentive can be strengthened if the regulator's budget is controlled externally, and fixed without regard to the amount of appeals work. Costs for appeals must then be financed using resources that would otherwise be spent on different projects. If there is a strong desire to complete certain other projects, perhaps driven by prestige or recognition motives, then this could make the financial incentive to avoid appeals much more effective.

Realistically, however, there are likely to be circumstances where the regulator expects its decision will be appealed regardless of its substance. In such cases, the financial motivation to avoid appeals is unlikely to influence their behaviour.

An indirect financial motivation could be the desire to place oneself in a good position for future employment. The effect on regulatory decisions differs depending on whether potential future employment lies elsewhere in the public sector, or is in the private sector. Acting in order to promote the chances of a job in the private sector can be seen as a form of regulatory capture. In these circumstances, a regulator, or employee of the regulator, might not want to take decisions, or be associated with decisions, which would be harmful to potential future employers.

The prospect of promotion to another public sector role may lead to a regulator to want to leave a legacy. They may therefore be a tendency to engage in a small number of high profile projects – to the exclusion of smaller and more mundane issues.

(ii) Reputation

To varying degrees, regulatory bodies operate in the public eye, and their decisions are subject to public and media scrutiny. Maintaining a reputable public profile can be a powerful motivating factor. In particular, maintaining a good reputation means avoiding being shown to have made a mistake.

This effect is strongest where the subject matter is most easily understood, and where there is a clear impact on the general public. For example, issues such as retail pricing, or the regulation of terrestrial TV services. A mistake, or bad decision, in these areas is almost certain to result in high profile media scrutiny. No regulator wants to be hauled over the coals by John Humphrys first thing in the morning, so there is a strong incentive to get the decision right[82].

Conversely, many telecoms issues relate to complex and obscure wholesale markets, which even the experts find difficult to understand. As a result, these tend to generate much less media interest. An inappropriate allocation of duct cost affecting partial private circuits is unlikely to grab the headlines.

If a regulator wants to avoid the embarrassment of being shown to have made a mistake, then they are likely to focus resources on those subjects most likely to generate media interest. An extension to this thinking would be to include projects

[82] Or at least to exert effort to provide a robust justification for the decision which is taken.

affecting stakeholders who are more effective at lobbying the media. The distortion to the allocation of resources will be greatest with regulatory bodies, such as Ofcom, that look after both media and telecommunications sectors.

An appeals regime could provide a counterbalancing influence. In terms of incentives, it can be the John Humphrys for dry, technical issues. Just as no regulator wants to be held to account in highly visible circumstances, less public admonishment on a professional level from a court could have a similar effect. A number of academic papers have suggested that judges may act in order to avoid the 'disutility' of having decisions overturned. Also, a recent paper by Levy[83] derives this preference from a game theoretic model of judicial decision making. The same is likely to apply to regulatory bodies – they will have a strong preference not to have their decisions overturned by the appeal body, and therefore will act to avoid this happening[84].

This incentive effect will be strongest when the appeal body is an expert tribunal which can consider the merits of the case. Any limitation in the scope of appeals would mean less scrutiny of the regulator's decisions, and therefore less chance of public admonishment. Ultimately, such limitations would reduce the incentive to get a decision right from the outset.

More generally, processes and institutions which subject the regulator's decisions to greater scrutiny will create stronger incentives to avoid mistakes. This implies that the regulatory decision making process should be made as transparent as is possible. Not only would this help identify errors without the need for an appeal, but it would also help the appeal body to assess the regulator's decision more accurately.

One assumption that is implicit in all of the above analysis is that avoiding appeals equates to better regulatory decisions. This need not always be the case for two reasons. First, there may be an element of institutionalised regulatory capture in the sense that working to avoid an appeal, and working on appeals, soaks up regulatory resources. Since bringing an appeal is a costly process, this level of influence on the regulator is only open to those who can afford to 'lobby' in this manner. Secondly, an effective appeal regime may prevent the regulator from taking incorrect decisions, but it is much less likely to be able to force the regulator to make decisions on issues which have not even been considered. In making the appeal filter very strict, and in

[83] "Careerist judges and the appeals process", Gilat Levy, RAND Journal of Economics, 2005.

[84] The paper by Levy considers judicial behaviour in appeals. The conclusion is that concern over careers may lead to judges overturning more decisions than would be efficient. Overturning becomes a signal which indicates expertise (on the part of the overturning judge), and therefore judges tend to overturn more than is necessary. Levy considers a counterbalancing incentive effect if promotion is determined by experts, i.e. senior judges as opposed to laypeople. These experts are more likely to be able to tell whether the overturning decisions were correct/efficient. This is analogous to our conclusion that regulatory decision making will be made more efficient when decisions are subject to scrutiny by an expert body under appeal.

incentivising the regulator to avoid being appealed, there is a risk that the regulator responds by avoiding decisions altogether[85].

(iii) Conclusions to Part 2

- No matter how professional they are, people working for a regulatory body are no different from anyone else: they are motivated by personal issues and objectives
- It is at least possible that some of these private objectives may lead to regulatory decisions which do not lead to maximised social welfare - for example, a desire to maintain future employment prospects, a desire to create a lasting legacy or even a simple desire to leave work on time at the end of the day.
- In conjunction with people's desire to maintain and enhance their reputation, an appeals process can create strong incentives for the regulator to try to get decision right and to avoid mistakes. Without an appeal regime, these incentives might simply be absent.
- As with the analysis in Part 1, we conclude that the incentive will be strongest when decisions are subject to the greatest level of scrutiny. This implies the need for an expert appeal body able to consider the merits of a case. It also implies the need for transparency of the regulatory decision making process.

f) Part 3: Persistent biases

This final section considers a number of cognitive biases which commonly affect individual behaviour, and how these might cause mistakes in decisions made by a regulator. Over the past 20 or so years, there has been an increasing acceptance that people do not always behave rationally in the manner envisaged by economic theory. In making choices people are swayed by things like the circumstances in which options are presented or the order in which they are presented. In the following paragraphs we give a very brief overview of some biases which could influence regulatory decision making, and therefore lead to mistakes (as defined above).

The purpose of this chapter is to develop our understanding of the behaviour of individuals associated with the regulatory decision making process. The current line of enquiry, concerning biases, certainly serves to illustrate how errors might arise in regulatory decisions. However, the applicability of such theories to a regulator stems from the universality of these behaviours: there is a tendency in all of us and in all institutions to behave irrationally (at least on occasions). Therefore, we must also accept that an appeal body would be subject to similar biases.

[85] In the current context this effect is likely to be minimal because for a large number of cases the regulator is under a duty to make decisions at periodic instances; the same is not true in respect of – for example – Ofcom's competition law jurisdiction.

Appeals, therefore, cannot guarantee that such biases will be removed from regulatory decisions (or that new biases would not be added to decisions). However, this is certainly not an argument against additional scrutiny of decisions. Although biases apply to decision making in all circumstances, their effect is often diminished or removed once identified, and identification is most likely under rational examination.

There are two ways biases could affect decisions: first by affecting the regulator directly, and secondly by affecting stakeholders and their responses to consultations. We now consider two broad categories of cognitive bias: anchoring, and framing.

a) Anchoring

Anchoring refers to the tendency for people making an estimate to be influenced by potentially arbitrary information – the 'anchor'. In one of the first papers exploring cognitive biases, Kahneman and Tversky[86] set up an experiment in which people were asked to estimate the percentage of African nations in the UN. A wheel of fortune was spun producing a random number between 0 and 100, and then people were asked to say whether their estimate was higher or lower than this number before giving their precise estimate. The random number from the wheel of fortune was found to have a significant impact on the estimate with, for example, the median estimate for groups who saw 10 and 65 being 25% and 45% respectively.

Another aspect of anchoring is that the first piece of information seen often becomes the most influential. When a decision is repeated the anchor for the first decision continues to influence future choices even when new information is made available[87]. In terms of regulation, this could imply that the anchor of pre-existing decisions may lead to a bias towards maintaining the status quo – or at least staying close to the status quo. See also the discussion of confirmation bias below.

One explanation for this trait is that, without a good reason to think otherwise, people have a tendency to see their past decisions as being justified, and therefore take the

[86] "Judgement under uncertainty: heuristics and biases", *Science,* Kahneman and Tversky (1974). Kahneman won the Nobel prize for economics in 2002 for his work on cognitive biases and the implications for economic theory. It is generally understood that Tversky would also have been awarded the prize had he been alive at the time.

[87] Dan Ariely discusses a fascinating experiment that he has done to test this hypothesis in his book "Predictably Irrational" (2008). The essence of the experiment is that he gets participants to reveal how much they would be willing to get paid to listen to an unpleasant noise for 30 seconds. However, he first introduces an anchor. Some people are asked whether they would accept 10 cents, whilst for others the figure is 90 cents. The participants then 'pitch' a price to sell their services, i.e. to listen to the noise. If their price is accepted, they get paid, and have to listen to an unpleasant noise for 30 seconds. On average the 10 cent anchor group demanded 33 cents, whilst the 90 cent group demanded 73 cents. He then goes on to repeat the test with a different noise, but introducing different anchors to the same groups. First, both groups are asked if they would accept 50 cents, and finally the anchors are reversed the original 10 cent group are asked if they would accept 90 cents, and the 90 cents group asked if they would accept 10 cents. In both cases the original anchor price stays as the strongest influence, with the (original) 90 cent group always demanding higher prices.

same decision again. Regulatory decisions often involve estimates at one stage or another, and in some instances form a significant part of the substance of a decision, for example, in price controls. Although new evidence will clearly play a part in such estimates, any pre-existing prices or modelling assumptions will almost always take on special significance since these were the options that survived the previous decision making process. A tentative conclusion from this is that getting a body that did not make these previous assumptions to reconsider the decision, i.e. to offer a genuinely fresh view of the evidence, may lead to better decision making.

Finally, as a lobbying strategy, many stakeholders believe that it is important to be one of the first to discuss an issue with the regulator, and that the greatest scope to influence decisions is before a consultation is drafted. This provides anecdotal evidence in support of the idea that the regulator is influenced most by the evidence they see first – their initial anchors. One implication is that any subsequent consultation process will not be genuine in that some aspects of the decision will already have been made. This is difficult to avoid, but greater transparency of the entire decision making process would at least help to highlight how decisions are reached in practice.

b) Framing

As the name implies, framing concerns how information is presented. It is often possible to frame the same question in different ways and in doing so to influence the choices that people make. That is, different frames can induce predictable shifts in preferences.

There are many different examples of framing biases. Before discussing some of these, we should note that the purpose of the examples is to highlight the general underlying tendency for decisions to be influenced by the information that is presented to the decision maker. So, although the specific examples may not be directly relevant to regulatory decision making, this should not detract from the conclusion that framing will likely influence regulatory decisions.

A plausible explanation for much of the behaviour is that comparing options is often very difficult. Therefore, we rely on contextual information to help us reach a decision. Dan Ariely discusses a number of examples in which a consumer is presented with three choices: A, B and C. A and C are quite different from one another, but B is simply a weaker version of C. In these circumstances, it is difficult to compare A and C, but easy to say that C is better than B. As a result, many people will choose C even though they may not have made this choice if option B had not been presented.

A specific example is the following advert[88] for *Economist* subscriptions:

In an experiment, 100 students were first asked to choose based on the options above. 84 chose the combined print and web subscription and the remainder chose the online only. Not surprisingly, no-one chose the print only subscription. The test was then repeated with the print only option removed. The result was that only 32 students chose the print and web subscription with the remaining 68 choosing the online only.

Another well known example of framing is the Jam experiment[89]. People were offered a free sample of different flavours of a single brand of jam in a posh[90] supermarket. In the first test, 6 flavours were offered. In a second test, people were offered 24 different flavours. People were considerably more likely to subsequently buy some of the jam when the choice was more limited[91]. In this example, the number of alternatives presented has a significant impact on the choices that people then made.

Two final examples are worth mentioning – both adapted from a paper by Tverysk and Kahneman[92]. First, imagine you are buying a new calculator on Tottenham Court Road for £12. The friendly salesman tells you that the same model is on sale in the

[88] Taken from "Predictably Irrational", Dan Ariely (2008). Relevant extract from the book available online at http://danariely.com/the-books/excerpted-from-chapter-1-%E2%80%93-the-truth-about-relativity-2/

[89] "When Choice is Demotivating: Can One Desire Too Much of a Good Thing?", Iyengar and Lepper, *Journal of Personality and Social Psychology*, 2000.

[90] important because the shop offered a very wide variety of products

[91] Of the people who stopped at the stall, 30% (31 people) made a subsequent purchase when faced with a limited choice, whereas only 3% (4 people) purchased when faced with 24 flavours. There is a significant difference in the absolute number of purchases despite the fact that more people were initially attracted to the stall offering 24 flavours: 60% (145) of those passing this stall stopped, whereas only 40% (104) stopped at the stall displaying only 6 flavours.

[92] "The Framing of Decisions and the Psychology of Choice", *Science,* Tversky and Kahneman (2001).

Oxford Circus branch of the shop for £7, but unfortunately he cannot match the deal in this store. Do you take the 10 minute walk to save £5? In these circumstances many people will make the journey – in essence they are saying that it is worth walking for 10 minutes to save £5.

Now imagine you are buying a laptop for £439, and the salesman tells you it is available in the other branch for £434. Somehow the journey now seems less worthwhile. A plausible explanation for this behaviour is that people do not want to feel that they are being ripped off. However, the end result is that the same 10 minute journey is valued differently.

How might this apply in a regulatory context? Consider the costs of a circuit rental. Duct and physical network costs work out as £439 per year; service assurance at £12 per year. There is reason to believe that each element might be overestimated by £5. Which potential error do you focus on?

The second example shows that people have a tendency to choose risk-free options if these are framed in a positive light, and to choose more risky options if the certain option is framed negatively. Consider a development which will have 600,000 new homes. Each home may be fitted with either fibre to the home and receive at least 100Mbps symmetric broadband; or they may get a traditional copper network with broadband provided via a distant exchange and get less than 2Mbps.

The regulator can adopt one of two policies. The first will mean that 200,000 homes get FTTH with the remainder on old technology. The second is uncertain: there is a one third chance that all homes get FTTH (and no-one gets copper), and a two thirds chance that all homes get copper (and no-one gets FTTH).

How should these two options be presented in a consultation document? Under Option 1, stakeholders are told of the development and the stark choice between FTTH or poor broadband for each home. However, the policy options are presented as a choice between the following:

- Policy A: "200,000 homes will get FTTH"
- Policy B: "there is a one-third probability that all homes will get FTTH, and a two-thirds probability that no home will get FTTH"

Under Option 2, stakeholders are given the same explanation of the issue, but the policy options are now presented as a choice between:

- Program C: "400,000 homes will be stuck with old technology and sub 2Mbps broadband"
- Program D: "there is a one-third probability that no home will be stuck with old technology, and a two-third probability that all homes are stuck with old technology"

Note that Policies A and C are mathematically equivalent, as are B and D; that is, the choice is exactly the same under options 1 and 2.

In the original setting the hypothetical issue was a deadly disease about to kill 600 people and the choice was between policy options which would either save 200 lives with certainty or save everyone with one third probability. In the experimental version of option 1, 72% of participants preferred A (save 200 lives with certainty) with the remaining 28% choosing B. However, under option 2, when the certain alternative was presented in a negative frame (Policy C – 400 people will die) only 22% made this choice, with the remaining 78% opting for D.

The conclusion of the original research was that people tend to make relatively risk-averse choices when options are presented in a positive frame. If the same options are presented in a negative frame, people tend to take greater risks. If this trait holds true in a regulatory context, then the tendency for public consultation documents to dwell on the positive may induce greater risk aversion in regulatory decisions than would otherwise be the case.

c) Conclusions to part 3

There are several other biases which could be relevant to regulatory decision making, but which have not been explored in this paper. One notable omission is confirmation bias. This refers to situations in which people try to find reasons to rationalise (confirm) previous decisions. The underlying motive is perhaps the need to avoid holding contradictory views about something[93]. In circumstances like regulatory decisions, where evidence involves complex analysis and is always subject to interpretation, it is certainly possible that new evidence will be viewed in a manner which supports the existing point of view.

The purpose of this section is merely to highlight the fact that errors may well creep into regulatory decisions no matter how much effort goes into a decision, and even if the regulator's private objectives coincide perfectly with its legal duties. This could be through biases which affect the regulator directly – for example, by being influenced by the first set of evidence presented; or through stakeholders and the effect of the consultation process and presentation of options within a consultation document.

The more that is know about such biases, the easier they are to identify. Although no decision maker is immune from such biases, they can be easier to observe in other

[93] This is closely related to cognitive dissonance theory. Confirmation bias may be seen as a particular method of reducing cognitive dissonance, which is a term used to describe the unpleasant feeling associated with holding conflicting views. The theory suggests that people are motivated to minimise cognitive dissonance, and will go to great lengths to do so such as changing their beliefs and preferences, or even inventing evidence to avoid holding contradictory views. For example, Jon Elster in "Sour Grapes: Studies in the Subversion of Rationality" (Cambridge, 1983) considers how people change their preferences to avoid the unpleasant feeling associated with not being able to have something. The title comes from Aesop's fable of the fox and the grapes. The fox decides he never wanted grapes in the first place once he discovers they are not within his reach.

people. This simply adds supports to the need for an independent review of decisions. And, as we concluded in parts 1 and 2 above, it is important that such a review consider all aspects of a decision. As is clear from the examples, biases can occur through procedure and in the substance of decisions – and perhaps are most likely in the elements of decisions which are most subjective – the underlying assumptions which support regulatory analysis.

g) Conclusions

Regulators make mistakes. This is no surprise when the decisions being made concern a highly uncertain future and highly complex subject matter. Even if a regulator intends to reach a correct decision (i.e. a decision which fulfils their legal duties) they might not allocate enough resource to tackle the analysis on a particular issue, or their decisions may be subject to any number of systematic biases. Equally, fulfilment of abstract legal duties is unlikely to be the immediate motivating factor driving individual behaviour. More realistically, individual motives may also cause increased likelihood of errors in regulatory decisions.

An appeals regime acts as a filter, reducing the chance that final decisions contain errors. However, almost more important than this, the presence of the appeals regime acts to create the incentive for a regulator to get decisions right in the first place.

Our analysis supports the intuitive conclusion that this incentive will be strengthened the greater the level of scrutiny the original decision is subject to. This leads to the following two principles which should guide any amendments to an appeals regime.

i) Expertise: appeals need to be heard by a body with the right expertise to deal with them. In the absence of this, the regime will generate incorrect incentives on the regulatory process. It is also, of course, a requirement of the Directives.

ii) Appropriate level of scrutiny: appeals must enable the merits to be considered properly. In the absence of this, appeals will tend to be more focussed on the process aspects of the regulatory body's decision.

Finally, from a stakeholder perspective the decision to appeal will depend on the expected costs and benefits of this action. It is important that stakeholders can bring an appeal where they have good reason to believe that the regulator's decision is in error. If the expected costs of bringing an appeal are too high, appeals will not be made, and the incentive effect on the regulator's initial decisions will diminish. Therefore, we propose a third principle to govern any reforms of the regime:

iii) Ease of use: the regime must be reasonably user friendly (and ideally not onerous for any of the parties) without encouraging inefficient or frivolous appeals. If there scheme is too difficult to use it will not enable efficient appeals to be brought and, again, will generate limited incentives.

The next chapter deals with the application of these principles to individual case models.

5. Appeals reform in practice

This section looks at possible reform models; applies the principles identified in the last chapter to a number of actual and possible models for appeals in practice and thereby seeks to identify the best approach.

While we think this is a valuable exercise, we do have some concerns about whether the risks of undertaking any reform might outweigh any benefits. Almost all the stakeholders we interviewed considered reforming the regime carried implementation risk and even those who had concerns about the current regime were cautious about changing it at the statutory level. BT, for example, said this:

> *"We do need to try to reduce the size, length, and cost of appeals, and to stop appellants bringing cherry-picking appeals. We are therefore pleased to see that the CAT is, through some of its recent decisions, starting to give some focus to the scope of appeals. It's clear (a la Jacobs and others) that it's not deciding appeals on an "Ofcom mark 2" basis. So, we think that it would be better to allow this process to continue and see if this has the desired effect. We feel this would be a better way forward than changing the test as set out in the Act."*

This sentiment was broadly echoed by another stakeholder, who also noted that we may have reached a high-water mark in appeals:

> *"With sufficient case law laid down and Ofcom having a much clearer understanding of how to properly exercise its duties, potential appellants are more educated as to what they can realistically expect from the appeals process and have a far greater knowledge of the cost consequences of mounting appeals. Taken together these factors are likely to lead to a drop off in the number of appeals mounted."*

That point made, we begin with a discussion of how a modified judicial review might work in practice.

a) Modified JR – what does it mean, how would it work?

(i) Summary

Judicial Review traditionally does not consider the merits of the decision that is being reviewed. The court can only substitute its own view of what is correct in relation to "hard-edged" questions - for example on the objective question of how a statutory power is to be interpreted. These are to be distinguished from "soft-edged" question which, traditionally, are a matter for the original decision maker as matters of judgment or discretion.

There are already some possible exceptions to this approach; notably where fundamental or human rights are involved and a full merits review has been permitted. By their very nature however these rights give the decision maker little discretion and so conceptually they do not stray very far from "hard-edged" questions.

In this section we discuss the general nature of judicial review and the possible accommodation of merits review within its remit in detail below. We then go on to consider what the implications of moving to a process modelled on judicial review might be for cases where Ofcom has made an error of judgment. We consider, so far as possible, how certain past cases (which have been heard within the current merits-based regime) might be dealt with in a modified JR.

(ii) Judicial review – can it take account of the merits?

BIS propose an "enhanced JR" process for appeals from Ofcom decisions - "enhanced" because it will be a process which takes account of the merits of the appeal to an extent which may go beyond the very limited scope permitted so far by the judicial review courts. It is well understood that traditionally "the judicial review court is not concerned with the merits of the decision under review"[94]. A fundamental tenet of the judicial review process is that it is a supervisory review of the way in which a decision-maker has exercised power; it is not a comprehensive examination of the decision that has been reached. Specifically this means that:

> *"The court does not ask itself the question, 'Is this decision right or wrong?'. Far less does the judge ask himself whether he would himself have arrived at the decision in question… The only question for the judge is whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did."*[95]

Where the decision-maker's powers include an element of judgment, discretion or policy-making, the court is not invited "to entertain an appeal from them or to substitute the court's discretion for his."[96]

Yet, in relation to the question of the legality of the decision - for example, has the decision-maker properly interpreted his or her powers?, has the decision-maker asked the right question? – the judicial review court may look into the decision and determine whether it requires correction. These are not "soft" questions of judgment. Errors of law, along with other "hard-edged" review questions are ones which may be answered and corrected by the court. Statutory interpretation is a clear example of this. Succinctly put, there is an

> *"important constitutional principle that questions of law [are] to be determined authoritatively by courts of law; that errors in construing primary or secondary legislation made by inferior tribunals that are not courts of law, however*

[94] *R v Somerset County Council ex p Fewings [1995] 1 All ER 513*
[95] *R v Somerset County Council ex p Fewings [1995] 1 All ER 513*
[96] *R v Chief Registrar of Friendly Societies, ex p New Cross Building Society [1984] QB 227*

> *specialised and prestigious they may be, are subject to correction by judicial review"*[97]

Altering the Communications Act 2003 in the way that BIS proposes would present a legislative challenge - how to modify judicial review to accommodate an appropriate consideration of the merits.

Judicial review has already proved itself flexible enough to adapt to such challenges, in response to the Human Rights Act 1998 ("HRA"): the requirement of proportionality introduced by the HRA, which the decision-maker must apply in relation to rights-affecting decisions has prompted developments in the standard of review which the courts might apply. As expressed in *Daly:*

> *"the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational and reasonable decisions"*

The court in *R(G) v London Borough of Ealing* went as far as to say that:

> *"in some contexts nothing short of a full merits review will suffice even in a judicial review case".*

Subsequently, in *Wilkinson*[98] and *Haddock*[99] full merits reviews were permissible. In each case the application for judicial review was against forcible anti-psychotic medication. In each in order to establish whether it had been necessary a full merits review was required, including the opportunity to give oral evidence and cross-examine medical witnesses.

However, some caution is required. The category of human and fundamental rights cases was a peculiarity within the remit of judicial review since before the HRA. The courts have separately adopted a "modified" review for such cases. In cases involving fundamental rights, the courts have established that the relevant decision will be "rigorously examined and subjected to the most anxious scrutiny"[100] reflecting the fact that when dealing with fundamental rights the state must give proper justification for its decisions and demonstrate high standards of fairness. Further it is a reflection of the fact that the discretion given to the decision-maker will naturally be minimal in relation to decisions affecting fundamental rights. This is highlighted by the contrast with other forms of "modified review" which have been developed. In the area of national economic policy, for example, the court has applied the "lowest level of scrutiny available on grounds of rationality".[101]

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[97] *E's Applications* [1983] RPC 231, 235 Lord Diplock
[98] *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545
[99] *R (JB) v Haddock* [2006] EWCA Civ 961
[100] *R v Secretary of State for the Home Department ex p Turgut* [2001] 1 All ER
[101] *R (South Cambridgeshire District Council) v First Secretary of State*[2005] EWHC 1746 (Admin)

Appeals from Ofcom decisions under the current regime are in fact narrower than the review to which the applicants in those cases was entitled to. The issue was addressed in *T-Mobile (UK) Ltd & Telefonica O2 UK Ltd v Office of Communications* [2008] EWCA Civ 1373 by Jacob, LJ:

> *"It may … be noted that the present case is not as strong as Wilkinson or Haddock. For this case is concerned only with the merits being duly taken into account in the JR proceedings, not with a full investigation ab initio of facts and evidence for the first time in the JR application itself."*[102]

Our review of the case law confirms, therefore, that there is no standard to which JR cannot adapt. Again, though, it tells us nothing about how modified JR in this context might work – all we can say for certain is that it could lie anywhere on this spectrum.

(iii) Past appeals before the CAT – how would they fare in a modified JR?

We first examine the CAT's judgment in the TRD case. First, there is no question that the CAT considers judicial review-type issues. In this example the CAT sternly overturned Ofcom's interpretation of its statutory duties and replaced it with the correct interpretation of the Communications Act and Community obligations as follows:

> *"It is true that the statutory provisions establishing the dispute resolution procedure do not expressly provide that OFCOM must resolve a dispute by setting reasonable terms and conditions. They do not give any guidance to OFCOM as to how it is to approach its task. However, the absence of any provision in section 185 of the 2003 Act as to how OFCOM is to approach its task does not leave a lacuna, because dispute resolution is one of the functions covered by the duties in sections 3 and 4 of the 2003 Act. The answer to the question: what kinds of terms and conditions should OFCOM set when resolving a dispute under section 185 therefore lies in the application of those sections, having regard to the objectives set out in article 8 of the Framework Directive."*[103]

Thus far, then, some of the important questions look hard-edged. However, the case turned also and perhaps pivotally on "soft" issues relating to Ofcom's use of the gains from trade test. The CAT was clear that Ofcom was wrong to use this test even though as a matter of judgment it would not normally be subject to review by a JR court – a classic soft-edged question. Rather:

> *"The Tribunal's conclusion is that the gains from trade test is seriously flawed and should not have been used by OFCOM in resolving these disputes. It is not an* ***appropriate*** *methodology to adopt in order to arrive at a result which is reasonable..."* [emphasis added]

[102] *T-Mobile (UK) Ltd & Telefonica O2 UK Ltd v Office of Communications* [2008] EWCA Civ 1373
[103] TRD at 100

The CAT reached this conclusion through a full review of the methodology involved in the gains from trade test. Though under judicial review the court might well have been persuaded that the hard-edged elements of the decision were susceptible to review, there is a good chance that the gains from trade test would not have been. At most, therefore, the case might have been remitted – at which point the gains from trade test could have been used again.

(iv) Offnet Call Termination versus the DCC case

A comparison of these two cases – based purely on the summaries published by the CAT - presents an interesting study. The cases are on broadly similar subject matter (although in fact we are not concerned here with the substance of the cases. (Neither case, in the end, was defended by Ofcom which implies they were strong appeals and we believe this is widely accepted.) Rather we are concerned with how they are pleaded.

Here are extracts from the first operative paragraph of the CAT's summary of the DCC NoA:

> *(a) OFCOM failed to construe General Condition 18 (number portability) in accordance with Community law, in particular the provisions of the Universal Service Directive;*
>
> *(b) OFCOM's approach to "agreement" under General Condition 18.2(a)(i) was erroneous and/or inconsistent; and*
>
> *(c) The retroactive application of donor conveyance charge rates was not permissible as a matter of Community law.*

Here are roughly equivalent extracts from the same part of the CAT's summary or the Offnet Call Termination NoA:

> *(a) OFCOM's determination that the relevant market for call termination on O2's network includes the supply of off-net call termination for all O2's subscribers without exception, including subscribers with ported numbers, is incorrect in fact and law, and inadequately reasoned. The appellant contends that calls to "ported-in" numbers are provided on a separate economic market from the market for the termination of calls to other, non-ported numbers and that OFCOM has not made any finding of significant market power on that separate market; nor could it as a matter of law.* [emphasis added]
>
> *(b) OFCOM's consequent determination that O2 has significant market power over all off-net call termination on its network, including call termination for ported numbers, is therefore incorrect in fact and in law.*

The point here is this: in the DCC case, the summary essentially presents a case which relies on hard-edged grounds. In the Offnet case, the summary presents a case which relies of soft-edged grounds (and we are focussed, here, on the words in

bold). As with the TRD case, there are hard-edged elements in the case, but it turns on a question which a court might well regard as soft-edged.

This is hypothetical – we have deliberately not examined the cases themselves. Nevertheless it demonstrates that two appeals, apparently roughly equally well-founded, might suffer completely opposite fates in a regime based on JR.

(v) Conclusions

There is no way accurately to guess how a modified JR might work in practice. In cases which can be considered on judicial review grounds and which fall under the "hard-edged" type of question which are already considered on the merits, the new review might not look any different to today's appeal on the merits. (An example of this would be the MNP case in which Ofcom was found not to have complied properly with section 7 of the 2003 Act – thus failing in its duty to investigate properly – a classic JR ground.)

In cases where Ofcom exercises discretion, the CAT already considers that it may be slow to overturn Ofcom's decision, as explored in the TRD case:

> *"There may well be no single "right answer" to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology…"*[104]

In other words it is possible that in many cases judicial review would take the same or a similar approach to some appeals from Ofcom decisions.

Where appeals tread on soft-edged issues, it is totally unclear how a new regime might work. Taking the example of the gains from trade test, which was patently wrong to those involved, including the CAT, it is questionable whether the finding that it was not an appropriate methodology to adopt in order to arrive at a result which is reasonable would have been reached in a JR-based jurisdiction. That is because it involved an examination of the test itself - an examination discussed over a number of pages in the judgment, longer than the entirety of many judicial review judgments. Strong appeals might fail simply because, while Ofcom's exercise of discretion was inappropriate and may even have achieved the wrong outcome, that exercise nevertheless remained within its statutory duties; Ofcom could not be considered to have "taken leave of its senses"[105] and reached an irrational decision.

In which case, the CAT and the CC who will be the ones to interpret the new provisions may determine that the FW Directive requirement to take due account of the merits in appeals against the NRA requires a *Haddock*-type review. The likely role of the CAT and the CC in deciding the precise scope of a modified JR is

[104] TRD case at 82

[105] *R v Secretary of State for the Environment ex p Nottinghamshire County Council* [1986] AC 240: this, to be fair, is one of the most colourful formulations of the approach well-known from *Wednesbury*. It is, however, one which we cannot resist quoting.

recognised in the BIS consultation. Note, however that the key question here is where in the spectrum between traditional JR and a *Haddock*-style full re-decision this new procedure would lie. It could end up right at either end of that spectrum; but there is every chance that it would end up where it is now – approximately in the middle.

In short, there is a real danger of perverse outcomes in a modified JR approach.

b) Scoring principles

First in this section, we remind ourselves of the principles by which we judge appeals models as set out in Chapter 5.

We also add another principle, guided by practical concerns: ease of implementation. This is required because the previous Chapter was concerned primarily how a regime might look in an ideal world, rather than the business of changing an existing regime. To be clear, we consider the inefficiencies introduced by any change to the existing regime to be very important. The current appeals regime is very simple conceptually; but significant clarity has been added to it in the (approximately) seven years since it was adopted. Any material changes to the regime would require a similar sort of bedding down period.

The scoring factors[106], therefore, are these:

- Speed
- Expertise
- Level of scrutiny
- Ease of use
- Implementation factors

We deliberately consider a very wide range of reform models against our criteria. Nothing should be read into this; and we would also note that any reform would have to fit with the wider reform agenda for, potentially, a CC / OFT merger.

We outline our sample models below, before scoring them. The hypothetical models[107] are these:

1. *Full re-hearing* by a shadow regulator: in this model a new appeals body is created which has the power to review the totality of any Ofcom decision.

[106] Applied together, we consider that these factors should lead to a regime which corrects the greatest possible number of material errors with the minimum collateral inefficiency in terms of delay, wasted resource, etc

[107] NB these nay need to adapt to wider government reforms – for current purposes we assume Single Tribunal Service takes the CAT role, and the new combined OFT/CC takes the current CC role

Unlike in today's CC / CAT model, it would conduct a full rehearing *de novo*. It would be made up of expert staff. This, in fact, is what happens in price control reviews in some other UK utilities (See Annex 2) and is the same as the jurisdiction of the MMC under the 1984 Act.

2. *Limited reform option - modified CAT / CC*: in this model, today's regime is preserved but with amended rules on evidence (to restrict the bringing of new evidence), costs awards (to relax the current approach so that costs awards are made against losing appellants in more cases than currently) and outcomes (to allow issues brought into play in an appeal to be decided in any direction). This would increase the role of the interveners by allowing them to plead more actively on matters appealed but would not allow them to bring new issues within the scope of the appealed decision into play.

   It is worth discussing briefly how we came to define this option. We considered carefully whether interveners / Ofcom might be allowed to bring 'new' issues into play in an appeal: in this we are referring to issues which were within the scope of the original Ofcom decision but not of the Notice of Appeal (and we refer to it here, for convenience, as a "New Issues Model"). We decided against it for various reasons.

   First, there is a real problem with scoping a new issues model correctly. If, for example, an appeal was lodged about a price control, there is element of sense about all aspects of the price control itself being open for review in the appeal. But what about other aspects of the Ofcom decision? What about the SMP finding – or even the product or geographic market definition – that are essential underpinnings of the price control? What about decisions in separate but closely related markets (e.g. WLR / LLU)? Faced with this sort of question it fast becomes clear that detailed subsidiary rules would be needed to make sense of such an approach. As an approach, it is not easy to define.

   Secondly, even if those rules were clear, there is still a risk of any appeal in a New Issues Model spiralling to the maximum allowed by the rules. So we might expect every price control appeal to become, effectively, a full review of the whole price control; which, in practice, makes it a version of Option 1 above but with added procedural complexity. There is also the danger of tactical games by interveners – to spoke the wheels of the original appellant by extending the appeal to the maximum allowed. The appeals process, in short, could become excessively cumbersome.

   Thirdly, we would anticipate that in at least some appeals our Limited Reform Option would allow most significant issues to be pleaded by interveners anyway. While many CAT appeals are complex in scope, most of them put the core issues of the decision squarely into scope; it is only at the CC that the complexities of a price control mean that the issues become quite fragmented.

If this is right, a New Issues Model would make little practical difference in those cases – it only becomes relevant in cases where it would change things for the worse.

Finally, we believe our more restricted approach captures the most important incentive properties suggested in section 5(d)(c) above: it allows issues to be decided in both directions, thus introducing an element of risk which undermines the "one way bet" of the current system; it takes control of the scope of the appeal away from just the appellant – albeit in a more limited way than in the full New Issues Model – and therefore restricts the extent to which a private party is able to set a public agenda.

The Limited Reform Option represents quite a subtle series of changes, in our view. The evidential rule, for example, could be best described as a soft obligation on parties to "put their best foot forward" at the Ofcom stage, rather than a hard restriction on raising new evidence at the Tribunal.

3. *CAT / CC unmodified* (i.e. today's regime): it is worth recalling here that today's regime already includes a nuanced approach to discretion and materiality.

4. *Direct CC reform option:* in this model, appellants would be able to take pure price control matters directly to the CC. That apart, this option as scored includes the proposals in the Limited Reform Option as well[108].

5. *New model appeal*: this adopts the innovations of the Limited Reform Option in terms of re-aligning incentives for appellants. In addition, it establishes a single body to deal with appeals encapsulating the judicial expertise of the CAT and the price control expertise of the CC. It eliminates hand-off inefficiencies. It takes the CAT's decisive approach to case management and the CC's more informal style. The precise details of the model need refinement but one possible approach would be for the CAT to co-opt staff and panel members from the CC to deal with all kinds of appeals.[109]

6. *Modified Judicial Review*: this takes the proposal in the BIS consultation. It assumes that the appeal bodies remain as today – the CAT and, for price control matters, the CC – but applying a different standard.

7. *Modified Judicial Review*, as option 6 but in the High Court.

[108] There is actually a case for abolishing the CC's role in these appeals altogether. This is not considered here as a separate option because, to our minds, it treads too directly on the likely course of reform of competition regulation more generally. We do not wish to become embroiled here in that debate. For the record, we consider that an option 4(A) – abolish the CC and include the other Limited Reform Options – would score just a little less than option 4; it would lose out on expertise, which in our experience is valuable in the context of BT price controls appeals.

[109] May need to adapt to wider government reforms – assume Single Tribunal Service takes the combined function, but with the power to take staff on secondment from the OFT to deal with price control matters both to support and to sit on panels

The table is shown overleaf. For simplicity, the table assumes a linear scale where the highest score is the "best" result. So a high score in "implementation factors" means that an option would be easy to implement. This is also important to preclude excessive subjectivity in the table. An example of this in practice is in relation to the "level of scrutiny" measure: a subjective assessment (even from someone who favours the current "profound and rigorous" scrutiny) might posit that the level of scrutiny in a full rehearing is excessive. Our table does not do that – we simply assume that more scrutiny is better. In fact this is consistent with the conclusions of Chapter 5.

A scoring exercise like this is artificial, at least to a degree. However we stand by the conclusion of the table, which is that while there is real merit in today's regime, it is certainly worth considering one or two options for minor reform. In other words, there is room for improvement.

TABLE: ranking of appeals policy options

Factor ➔ Appeal type ➔	Speed	Expertise	Level of scrutiny	Ease of use	Implementation factors	TOTAL
Full rehearing	1	4	5	3	2	**15**
Limited Reform Option: CAT / CC with minor changes to rules and process	4	4	4	3	4	**19**
Today's regime unchanged	3	4	4	3	5	**19**
Direct CC Reform Option: modified CAT / CC but with direct CC access for price control matters	5	4	4	4	3	**20**
Modified JR as proposed by BIS	3	4	3	3	2	**15**
Modified JR - High Court only	3	2	3	2	1	**11**

6. Postlude – reform and the real world

Our conclusions on the questions considered by this report are set out in the Executive Summary in Chapter 1 and we see no particular value in repeating them here. Instead we examine briefly how reform could and ought to be put into effect.

First of all, there is a strong and, in our view legitimate concern about how the issue has been raised in the BIS consultation. Stakeholders would normally have expected to be engaged in discussion about this type of proposed reform before proposals appeared in print – particularly as the proposals in the BIS consultation are radical.

Secondly, we have some concerns about the proposals to introduce reform through ECA Regulations. Our concerns here are twofold:

- It is quite clear that these reforms are not required by the Better Regulation and Citizens Rights Directives.
- It is not clear whether the ECA power would allows such far-reaching reform to be brought in by means of regulations. The exercise of ECA powers for contentious purposes tends to result in litigation. We analyse this issue in more detail in Annex 5.

Finally, we would strongly recommend that the Government takes a long, deep breath before undertaking any reform. For a moment here we leave aside the questions of principle: in the real world, there are some regulatory decisions that will always be appealed, regardless of the shape of the appeals mechanism available. The reason for this is straightforward: these very important decisions affect large organisations with thousands of employees and millions of customers. They often act to transfer tens or hundreds of millions of pounds between competing companies. It is unrealistic to expect them not to protect these interests. Crucially, this remains true regardless of the appeals mechanisms that exist. So, for example, in the UK's 3G auction, there were two judicial reviews; and the same can be expected in future auctions. To be clear, our view is that a robust appeals mechanism is a necessary check on executive power. However, even if you disagree with that view it is worth recognising the reality of the situation. Some decisions will always be appealed; adjusting the standard of review will not affect that; it may well just cause confusion.

7. Annex 1 – review of appeal cases

Table A1:1 – list of cases with description and notes

	Appeal name	*Case Number*	*Date registered*	*Classification*	*Matter*	*Notes / Quotes*
1	British Telecommunications plc v Director General of Telecommunications	1018/3/3/03	21/08/03	Dispute	Dispute between BT and Vodafone regarding the provision of PPCs. BT contended that the provision of radio base station backhaul circuits was not a "dispute concerning interconnection".	The CAT overturned the DGT's direction. It held that the supply of RBS backhaul circuits did not fall within the scope of the Interconnection Directive or Regulations.
2	British Telecommunications v Office of Communications (CPS Save Activity)	1025/3/3/04	07/01/04	General Condition	Notification by the Director General of Telecommunications of reasonable grounds for believing BT contravened General Condition 1.2 by using customer-specific information for marketing activity.	The CAT upheld the DGT's notification. Ofcom and BT agreed terms of a new BT Notification of Transfer letter.
3	VIP Communications Limited (in administration) v Office of Communications	1027/2/3/04	20/02/04	Abuse of dominant position	Decision by the Director General of Telecommunications rejecting a complaint by VIP Communications and deciding that T-Mobile had not infringed the prohibition on abuse of a dominant position by periodically suspending GSM Gateway Services	The proceedings were stayed pending the outcome of the Floe Telecom case. After the judgment in Floe Telecom, at Ofcom's request, the CAT set aside Ofcom's decision and directed Ofcom to conduct a reinvestigation.
4	British Telecommunications plc v Office of Communications (WLR Save Activity)	1040/3/3/04	09/07/04	General Condition	Notification by Ofcom of reasonable grounds for believing that BT contravened General Condition 1.2	Proceedings were stayed pending the CPS Save Activity case (1025/3/3/04). Following the CAT's judgment in that case, Ofcom withdrew the contested notification and issued a further notification to BT. BT did not contest the second notification and withdrew the appeal.
5	Hutchinson 3G (UK) Limited v Office of Communications	1047/3/3/04	29/07/04	Market Review	Determination in Ofcom's statement 'Wholesale Mobile Voice Call Termination' that H3G has	The CAT partially upheld the appeal. It found that Ofcom had erred in its determination as to the existence of SMP

					SMP.	because it had not carried out a full assessment of the extent to which BT had countervailing buying power.
6	Media Marketing Promotions v Office of Communications	1053/3/3/05	25/10/05	General Condition	Decision that Media Marketing Promotions had contravened and was contravening General Conditions 18.1 and 18.2 and requiring MMP to provide number portability in respect of specified non-geographic numbers as soon as reasonably practicable to Prime Time Radio and provide number portability to Uniworld Communications.	The CAT found in favour of Ofcom.
7	The Number (UK) Limited v Office of Communications	1057/3/3/05	30/11/05	Dispute (whether to accept)	Decision by Ofcom not to proceed with the handling of The Number's dispute with BT in connection with BT's charges for access to information through the OSIS database	The appeal was withdrawn as Ofcom subsequently decided to handle the dispute between The Number and BT.
8	British Telecommunications v Office of Communications (The Number (UK) Limited)	1063/3/3/06	08/05/06	Dispute (scope)	Decision by Ofcom purporting to amend the scope of a dispute between BT and The Number	Ofcom indicated that it would issue a further draft determination of the dispute and BT withdrew the appeal.
9	British Telecommunications v Office of Communications (Conduit Enterprises Limited)	1064/3/3/06	08/05/06	Dispute (scope)	Decision by Ofcom purporting to amend the scope of a dispute between BT and Conduit Enterprises	Withdrawn.
10	Hutchinson 3G (UK) Limited v Office of Communications	1066/3/3/06	30/05/06	General Condition	Decision of Ofcom in statement 'Number Portability and technology neutrality - Modification to the Number Portability General Condition and National Telephone Numbering Plan' and implementation of the number portability system. H3G appealed Ofcom's failure to act on H3G's concerns.	H3G withdrew the appeal following the publication of Ofcom's consultation into mobile number portability.
11	Bracken Bay Kitchens Limited v Office of Communications	1079/3/3/07	23/03/07	Determination	Determination of a penalty of £40,000 in respect of misuse of an electronic network or service (by means of silent or abandoned calls)	During the proceedings, Bracken Bay Kitchens appeared to have become insolvent and its solicitors did not have instructions as to whether or not to continue with the appeal. The Tribunal issued an

						Unless Order which stated that unless Bracken Bay Kitchens informed the Tribunal of its wish to continue the appeal, the Tribunal would reject it. Rejected.
12	Orange Personal Communications Services Limited v Office of Communications	1080/3/3/07	05/04/07	Dispute (decision to accept)	Decision by Ofcom to accept the reference of a dispute between Orange PCS and BT in connection with charges Orange made for terminating calls on its mobile networks.	Orange withdrew the appeal after the CAT found on the preliminary issue that Orange and BT were in dispute.
13	Rapture Television plc v Office of Communications	1082/3/3/07	09/05/07	Dispute	Decision by Ofcom that determined a dispute between Rapture Television and BSkyB concerning electronic programme guide listing charges.	NB in terms of the scope of this report, Rapture is sui generis: it is the only PCG case; it is not concerned with "core" electronic comms matters.
14	Hutchinson 3G UK Limited v Office of Communications (Mobile Call Termination)	1083/3/3/07	23/05/07	SMP finding and price control	Decisions made by Ofcom in: (i) Statement "Assessment of whether H3G holds a position of SMP in the market for wholesale mobile voice call termination on its network"; and (ii) Statement "Mobile call termination"; finding that H3G had SMP and imposing price controls	Preliminary issue: Whether the imposition of a price control on H3G was an appropriate and proportionate response to a finding of SMP. The CAT held that this was not a specified price control matter and therefore to be determined by the CAT, not the CC. H3G appealed to the Court of Appeal certain non-price control matters. The appeal was dismissed, supporting Ofcom's finding that H3G had SMP in the market for MCT on its network. (See case 1085/3/3/07 on price control issues)
15	O2 (UK) Limited v Office of Communications	1084/3/3/07	29/05/07	SMP finding	Decision by Ofcom that O2 had SMP in off-net call termination	Ofcom indicated that it did not intend to defend the appeal. The Tribunal made an Order quashing the relevant parts of the decision and remitting them back to Ofcom for reconsideration.

16	British Telecommunications plc v Office of Communications (Mobile Call Termination)	1085/3/3/07	29/05/07	Price control	Level of price control set by Ofcom on the supply of mobile call termination by each of the MNOs	BT's appeal was upheld by the CAT to the extent set out in the CC's determination. The CC set out what it considered the appropriate standard of review. See text below for detail.
		"1.30 Section 195(2) of the 2003 Act provides for an appeal on the merits. Section 192(6) shows that appeals can be brought on the basis of errors of fact or law or against the exercise of a discretion. The Tribunal interpreted its role under a section 192 appeal as being one of a specialist court designed to be able to scrutinize the detail of regulatory decisions in a profound and rigorous manner. In our view, our role in determining the specified price control matters that have been referred to us is similar. We note that this is the role that appears to have been contemplated for us by the Tribunal in its Reference Ruling and in the wording of the Reference itself (reference question 8 in particular). *1.31 We also note that the wording of rule 3 of the 2004 Rules envisages a determination of disputes that relate to the principles or methods applied or the calculations or data used in determining a price control, as well as disputes that relate to what the provisions imposing the price control should be including at what level the price control should be set. That also suggests a rigorous and detailed examination of the price control matters subject to appeal.* *1.32 We have carried out that examination… with the purpose of determining whether Ofcom erred for any of the specific reasons put forward by the parties. In determining whether it did so err, we have not held Ofcom to be wrong simply because we considered there to be some error in its reasoning on a particular point–the error in reasoning must have been of sufficient importance to vitiate Ofcom's decision on the point in whole or in part.* *1.33 We have also kept in mind the point made by the Interveners that Ofcom is a specialist regulator whose judgement should not be readily dismissed. Where a ground of appeal relates to a claim that Ofcom has made a factual error or an error of calculation, it may be relatively straightforward to determine whether it is well founded. Where, on the other hand, a ground of appeal relates to the broader principles adopted or to an alleged error in the exercise of a discretion, the matter may not be so clear. In a case where there were a number of alternative solutions to a regulatory problem with little to choose between them, we do not think it would be right for us to determine that Ofcom erred simply because it took a course other than the one that we would have taken. On the other hand, if, out of the alternative options, some clearly had more merit than others, it may more easily be said that Ofcom erred if it chose an inferior solution. Which category a particular choice falls within can necessarily only be decided on a case-by-case basis. "*				
17	T-Mobile (UK) Limited v Office of Communications (Termination Rate Disputes)	1089/3/3/07	07/09/07	Dispute	Determinations made by Ofcom to resolve the mobile call termination rate disputes between T-Mobile and BT and between H3G and BT	The CAT upheld all four appeals (case numbers 1089/3/3/07 - 1092/3/3/07). The Tribunal concluded that the dispute Determinations should be quashed and

						remitted them to Ofcom with directions specifying the mobile call termination rates to be set between the parties to resolve the disputes. The CAT also found five flaws in the determinations and guided Ofcom as to how it should approach disputes.
18	British Telecommunications plc v Office of Communications (Termination Rate Disputes)	1090/3/3/07	07/09/07	Dispute	Determination made by Ofcom in "Disputes between T-Mobile and BT, O2 and BT, Hutchinson 3G and BT, and BT and each of Hutchinson 3G, Orange Personal Communication Services and Vodafone relating to call termination rates".	As for case 1089/3/3/07 above
19	Hutchinson 3G UK Limited v Office of Communications (Termination Rate Disputes)	1091/3/3/07	07/09/07	Dispute	Determinations made by Ofcom in "Disputes between T-Mobile and BT, O2 and BT, Hutchinson 3G and BT, and BT and each of Hutchinson 3G, Orange Personal Communication Services and Vodafone relating to call termination rates" and to resolve the disputes between H3G and each of O2 and Orange	As for case 1089/3/3/07 above
20	Cable & Wireless and others v Office of Communications (Termination Rate Disputes)	1092/3/3/07	07/09/07	Dispute	Determination made by Ofcom in "Disputes between T-Mobile and BT, O2 and BT, Hutchinson 3G and BT, and BT and each of Hutchinson 3G, Orange Personal Communication Services and Vodafone relating to call termination rates".	As for case 1089/3/3/07 above
21	T-Mobile (UK) Limited v Office of Communications (Donor Conveyance Charge)	1093/3/3/07	17/10/07	Dispute	Determinations to resolve disputes between H3G and each of T-Mobile, O2, and Orange regarding donor conveyance charges	Withdrawn as Ofcom indicated it did not intend to resist the appeal.

22	Vodafone Limited v Office of Communications	1094/3/3/08	21/01/08	General Conditions	Decision made by Ofcom to modify the General Conditions relating to Number Portability	The CAT examined Ofcom's cost benefit analysis and concluded that the appeal was well founded. It held that Ofcom had deprived themselves of the opportunity to properly inform their analysis of costs; and that the stated key objective (protection of consumers from network failure) was not a sufficient ground on which to base their decision. The matter was remitted back to Ofcom.
23	The Number (UK) Limited and Conduit Enterprises Limited v Office of Communications	1100/3/3/08	07/05/08	Dispute	Determinations made by Ofcom in relation to the resolution of price disputes concerning the supply of certain directory information by BT.	The Ofcom decision found that Universal Service Condition 7 was unlawful and that BT was therefore not required to provide access to information in the OSIS database under USC7. The CAT judgment overturned Ofcom's decision, finding that USC7 had been validly imposed by Ofcom. The case was appealed to the Court of Appeal. Part of the decision rests on the construction of Article 8(1) of the Universal Service Directive, consequently the Court of Appeal has made a reference to the European Court of Justice. Awaiting judgment from the European Court of Justice and the Court of Appeal.
24	T-Mobile (UK) Limited v Office of Communications (Sequencing decision)	1102/3/3/08	16/05/08	Regulatory decision making Spectrum	Decision by Ofcom as to the sequencing of two regulatory matters within its control in relation to the allocation of radio spectrum.	The CAT found that it did not have jurisdiction to consider the appeals by T-Mobile and O2 challenging the way in which Ofcom decided to conduct the auction of two bands of spectrum, under s.192 Communications Act 2003 or otherwise. T-Mobile and O2 appealed to the Court of Appeal. The Court of Appeal dismissed the

						appeals, finding that the applicants' route of redress, if any, was judicial review.
25	Telefonica 02 UK Limited v Office of Communications	1103/3/3/08	03/06/08	Spectrum	Decision of Ofcom to reject the possibility of proceeding with the allocation of radio spectrum by the way of split auction.	As for case 1102/3/3/08.
26	The Carphone Warehouse Group plc v Office of Communications (Local Loop Unbundling)	1111/3/3/09	22/07/09	Charge control	Decision made by Ofcom on price controls for MPF and SMPF	The price control matters were referred to the Competition Commission. In its final determination, the Competition Commission upheld some aspects of the appeal. However, they upheld Ofcom's assessment of the level of efficiency improvement which might reasonably be expected to be achieved in relation to Openreach's costs. The non-price control matters raised by the appeal were settled between the parties and the appeal on those points withdrawn. The CAT remitted the decision to Ofcom with directions to adjust the price control in accordance with the Competition Commission's determination. Matters of disclosure were considered, the Competition Commission directed BT to disclose unredacted versions of certain documents. The Competition Commission also considered the issue of materiality in its Determination, which is addressed in detail below.
		Ofcom had argued that the Competition Commission should not look at every single element of an Ofcom decision and in effect be a duplicate regulator sitting in the wings. Ofcom's view is that the Commission's role is confined to determining whether Ofcom got a decision "materially				

wrong".

"1.36 Ofcom raised the issue of materiality in its Defence where it submitted that CPW had mistaken our role in undertaking a review of price control matters. Ofcom submitted that we should proceed with caution in seeking to revisit detailed issues that required a fine weighing and balancing of evidence and that had been considered and consulted upon exhaustively by Ofcom. Ofcom submitted that we could not sensibly act as a substitute regulator, revising all aspects of Ofcom's decision making, even where there were several alternative solutions potentially available to any given regulatory problem. According to Ofcom, our task was, instead, to identify whether Ofcom was materially wrong. Ofcom submitted that CPW failed to show any such material error in relation to any of its grounds of appeal."

Ofcom did accept that the Competition Commission is best placed to decide what is and is not material, and added that their comments on materiality in the LLU appeal were made merely to help the Commission to focus scarce resources.

"1.39 Ofcom then went on to state in its skeleton argument that 'Ofcom's analysis of materiality is intended to assist the CC in focussing its resources … the CC is… entitled to decide how much time and effort to devote to the many detailed points raised under each ground of appeal'."

Carphone Warehouse and Sky both took a contrary view.

Sky argued that there were no grounds for Ofcom to introduce a materiality threshold into the test to be applied by the Commission.

Carphone Warehouse argued that many small factors, which are in themselves apparently non material, can when viewed cumulatively, be considered material. It was also argued that even where no materiality might be evident in relation to one appeal, an apparently non material decision or factor might be deemed material when it was considered that the same approach might be applied to the entire industry. The impact in relation to multiple CPs over a period of time could then be sufficient to merit treating that decision as material.

The Commission rejected both the Ofcom and the Carphone / Sky approaches since both sought to create a general, one size fits all approach. The Commission held that the circumstances of each appeal will vary and therefore the question of materiality will also vary from case to case.

1.51 We consider that there is force in Ofcom's submission that our task is to identify whether Ofcom's decision has been shown to be materially in error. But we have not found it possible to set out a general approach to the assessment of materiality. In practice considerations of materiality are not amenable to a formal analytical scheme. We have considered materiality on a case-by-case basis as part of our analysis of specific criticisms made by CPW of Ofcom's decision making.

This clearly shows that The Commission accept that there is no right to a full re-examination of the merits and that they are not a "shadow regulator". It is therefore hard to see on what basis Ofcom and BIS can claim that there is any regulatory uncertainty. The comments from the Commission are perfectly clear.

Nevertheless the Commission also found that in some cases the circumstances **will** justify combining many immaterial errors and considering them together, while in others such an approach will not be appropriate. But they indicated that their inclination was towards a presumption against such an aggregation of minor errors. Their reasoning was that such a general approach might lead to appellants adopting a "scattergun

		approach" in the hope that they could flag up enough minor errors to persuade the Commission to reverse an Ofcom decision. This is precisely the situation which Ofcom infers already exists. The Commission therefore appear already to have addressed the perception problem which Ofcom and BIS claim has caused uncertainty. *"1.64 But as a general approach we would be cautious about elevating the immaterial into the material. We also observe that aggregation might encourage a scattergun approach on the part of appellants in future appeals, with a great number of wholly insignificant points taken by an appellant in the hope that if assessed on a cumulative basis, all such minor points will be remedied. We do not think this is the purpose of this appeal process, which is to carry out an appellate review of Ofcom's decision and not to re-take the decision itself. "* Finally the Commission also noted that there is a need to consider materiality in relation to remedies (though this did not arise in the LLU appeal). In relation to remedies they said that *"we have considered materiality when deciding whether it is proportionate for the error to be corrected. In terms of materiality in remedies we do not specifically look at the value of the error as such but at the balance between the effort and effect (or cost and benefit) of correcting such error."*				
27	Cable & Wireless UK v Ofcom (Leased Line Charge Control)	1112/3/3/09	02/09/09	Charge control	Decision made by Ofcom in the Leased Line Charge Control	The price control matters were referred to the Competition Commission. The Competition Commission found in Ofcom's favour on the majority of challenges to the Leased Lines Charge Control Statement but some aspects of the appeal were upheld. The CAT remitted the Leased Lines Charge Control Statement to Ofcom with directions to revisit some elements of the decision. In particular, Ofcom was directed to reach its own decision on elements which it had originally delegated to BT.
28	Cable & Wireless & others v Office of Communications (Carrier Pre-Selection Charges)	1113/3/3/09	04/02/09	Dispute	Determination of dispute about per-customer line transaction charges for Carrier Pre-Selection	In the course of proceedings Ofcom acknowledged an error in the Determination and proposed to issue a redetermination. The proceedings were stayed; following the publication of a

						redetermination, the appeal was withdrawn.
29	British Telecommunications v Office of Communications (Partial Private Circuits)	1146/3/3/09	14/12/09	Dispute	Determination of a dispute relating to BT's charges for PPCs	On two preliminary issues, the CAT decided that: 1. The Communications Act 2003 explicitly states that matters concerning the imposition of price controls are to be referred to the Competition Commission, not compliance; and 2. The dispute resolution process provided for in the Communications Act 2003 does not distinguish between Ofcom's jurisdiction to determine historical and non-historical disputes. Subject to possible appeal. The main case is to be decided.
30	The Carphone Warehouse Group plc v Office of Communications (Wholesale Line Rental)	1149/3/3/09	24/12/09	Charge control	Decision on charge controls for WLR	The Competition Commission found in favour of Ofcom on all price control matters. The non-price control issues were settled between the parties and the appeal on those points was withdrawn. The CAT dismissed the appeal.
31	British Telecommunications plc (Termination Charges: 080 calls) v Office of Communications	1151/3/3/10	06/04/10	Dispute	Determination to resolve disputes about BT's charges for 080 calls.	Judgment on admissibility of evidence, 08/07/2010. See text below for detail. Subject to appeal - the Court of Appeal granted BT permission to appeal.

						Main case to be decided.
		1. Ofcom put forward two general propositions: a. Evidence should not be admissible on appeal if the party putting it forward had not put it to Ofcom in the dispute process; b. Evidence should not be admissible in an appeal if it had been put forward *at the wrong time* (e.g. too late) in the Ofcom dispute process. 2. The Tribunal held that in general, there are no rules which make evidence not submitted to Ofcom (or submitted 'too late') inadmissible on appeal. However, there are cases where evidence could be ruled inadmissible by the Tribunal – if, for example, a party had "quite deliberately" declined to make a point or argument during the dispute process before Ofcom. The purportedly expert evidence and the purportedly argumentative evidence were allowed. The former was allowed as evidence of fact, although the Tribunal commented that the employee relationship of the witnesses to BT would "very likely, affect the weight of their evidence". 3. The Tribunal also considered whether, even if Ofcom's propositions on admissibility were correct, the facts of this case constituted "exceptional circumstances" in which the evidence should be considered. The Tribunal decided that, yes, these were exceptional circumstances and Ofcom could have extended the four-month period to allow BT to submit further evidence.				
32	Telefonica O2 UK Limited v Office of Communications (900 MHz Band)	1154/3/3/10	26/05/10	Licence, Spectrum	Failure by Ofcom to grant O2's application for a variation of the terms of O2's Public Wireless Network Licence	O2's claim for relief dismissed. O2 granted permission to appeal to the Court of Appeal.
33	Everything Everywhere Limited v Office of Communications	1167/3/3/10	11/08/10	Dispute	Determination to resolve a dispute between Stour Marine and O2 about termination rates payable for voice call that originate on O2's network and terminate on Stour Marine's	Proceedings stayed.
34	Everything Everywhere Limited v Office of Communications (Termination charges: 0845 and 0870 numbers)	1168/3/3/10	11/10/10	Dispute	"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". Everything Everywhere challenges Ofcom's reasoning in the dispute determination.	To be decided

35	British Telecommunications plc v Office of Communications (Termination charges: 0845 and 0870 numbers)	1169/3/3/10	11/10/10	Dispute	"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". BT challenges Ofcom's approach and cost benefit assessment in the dispute determination.	To be decided
36	British Telecommunications plc v Office of Communications (Termination charges: 080 calls, NCCN 1007)	1171/3/3/10	11/11/10	Dispute	Appeal of Ofcom's decision that it was appropriate to handle the alleged dispute despite a pending appeal on another 080 NCCN.	To be decided
37	British Telecommunications plc v Office of Communications (Ethernet Extension Services)	1172/3/3/10	15/11/10	Dispute	Appeal of Ofcom's decision that it was appropriate to handle the alleged dispute despite the pending PPC appeal on similar issues.	To be decided

Table A1:2 - list of selected appeals in date order, with length of proceedings shown

Case	Case number	Date registered	Final Judgment	Length of appeal (months)	Court of Appeal Judgment
British Telecommunications v Director General of Communications	1018/3/3/03	21/08/03	12/05/04	3 months 22 days	
British Telecommunications v Office of Communications (CPS Save Activity)	1025/3/3/04	07/01/04	09/12/04	11 months 2 days	
VIP Communications Limited (in administration) v Office of Communications	1027/2/3/04	20/02/04	01/12/04 Final rejection of request to amend Notice of Appeal 19/11/09	Anomalous	10/02/09
Hutchinson 3G (UK) Limited v Office of	1047/3/3/04	29/07/04	29/11/05	17 months	

Communications					
Media Marketing Promotions v Office of Communications	1053/3/3/05	25/10/05	15/05/06	6 months 21 days	
Rapture Television v Office of Communications	1082/3/3/07	09/05/07	31/03/08	10 months 22 days	
Hutchinson 3G UK Limited v Office of Communications (Mobile Call Termination)	1083/3/3/07	23/05/07	02/04/09	22 months 10 days	20/04/10
O2 Limited v Office of Communications	1084/3/3/07	29/05/07	26/07/07	1 month 27 days	
British Telecommunications plc v Office of Communications (Mobile Call Termination)	1085/3/3/07	29/05/07	02/04/09	22 months 4 days	20/04/10
T-Mobile (UK) Limited v Office of Communications (Termination Rate Disputes)	1089/3/3/07	07/09/07	15/08/08	11 months 8 days	
British Telecommunications plc v Office of Communications (Termination Rate Disputes)	1090/3/3/07	07/09/07	20/05/08 core issues 15/08/08 rates in dispute 17/11/08 remitting the disputes to Ofcom	8 months 13 days	
Hutchinson 3G UK Limited v Office of Communications (Termination Rate Disputes)	1091/3/3/07	07/09/07	20/05/08 core issues 15/08/08 rates in dispute 17/11/08 remitting the disputes to Ofcom	8 months 13 days	
Cable & Wireless and others v Office of Communications (Termination Rate Disputes)	1092/3/3/07	07/09/07	20/05/08 core issues 15/08/08 rates in dispute 17/11/08 remitting the disputes to Ofcom	8 months 13 days	
Vodafone Limited v Office of Communications	1094/3/3/08	21/01/08	18/09/08	7 months 28 days	

The Number (UK) Limited and Conduit Enterprises Limited v Office of Communications	1100/3/3/08	07/05/08	24/11/08	6 months 6 days	Pending
The Carphone Warehouse Group plc v Office of Communications (Local Loop Unbundling)	1111/3/3/09	22/07/09	11/10/2010	15 months 20 days	
Cable & Wireless UK v Ofcom (Leased Lines Charge Control)	1112/3/3/09	02/09/09	20/09/10	12 months 18 days	
The Carphone Warehouse Group plc v Office of Communications (Wholesale Line Rental)	1149/3/3/09	24/12/09	11/10/2010	9 months 28 days	
Telefonica O2 UK Limited v Office of Communications (900 MHz Band)	1154/3/3/10	26/05/10	07/10/10	4 months 11 days	

8. Annex 2 – review of international benchmarks and UK utility appeals

International benchmarks in telecoms

1. The approach to appeals against regulatory decisions in the telecoms sector varies widely even where there is a common regulatory framework as there is throughout the EU. Different jurisdictions take different approaches – some have specialist appeal bodies; others use administrative courts (national or, in some cases, local)[110].

2. It is difficult to draw direct conclusions from the benchmarking[111]. We would tentatively suggest based on the research we have done that specialist bodies are likely to be more effective than non-specialists. In addition, the international interviews we have carried out suggest that at least some stakeholders in countries without specialist appeals bodies envy the UK approach.

3. In the EU the right to an effective judicial review of NRA decisions, as laid down in Article 4 of the Framework Directive, is granted to anyone who is "affected" by that decision. The terms user "affected" or undertaking "affected" are interpreted by the Court of Justice as meaning that not only the addressee of the decision taken in the context of a market analysis, i.e. the (former) SMP undertaking, but also any user or undertaking in competition with it, whose rights are or may be (adversely) affected by it, has the right to appeal against that decision.[112]

4. The latest survey of European regulators by ECTA suggests that appeals can create a source of legal uncertainty in some countries but it is not the existence of a merits based appeal per se that leads to uncertainty; rather uncertainty arises where the appeals are heard by the administrative courts rather than specialist bodies and where incumbents combine numerous challenges with lengthy court processes to delay the outcome. In some cases the effect is exacerbated by the fact that the courts suspend the effect of decisions while the appeal is pending, thereby creating even greater uncertainty.

5. This is of particular concern in Belgium, the Czech Republic, Italy, Poland Slovenia and Switzerland (but is, of course, unusual in the UK).

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107 - So, for example, in the Czech Republic and Slovenia, appeals lie to local administrative courts; Poland offers parties a choice of appeal routes to either the Provincial Administrative Court or before the Court of Competition and Consumer Protection. Both allow parties to seek suspension of the decision pending appeal though this is easier to obtain in the provincial court.

111 In general, we are cautious about "survey" benchmarking, which often attempts to draw quantitative conclusions across multiple jurisdictions; we prefer qualitative benchmarking studies which deal with individual, useful benchmark jurisdiction thoroughly and in detail. In the case of appeals, this value of that approach is reduced by the differences between legal jurisdictions.

112 Judgements of 21 February 2008, C-426/05, Tele2 Telecommunication, Rec. 2008, p. I-685, and 24 April 2008, C-55/06, Arcor, p. I-2931.

6. In terms of volume, there are some stand-out jurisdictions: in Belgium Belgacom has a tendency to appeal almost all NRA decisions, to the Appeal Court and then the Supreme Court; in Italy the administrative court heard 138 appeals between 2007 and 2009. NRA decisions tend to be systematically appealed particularly in Belgium, Bulgaria, Denmark, Italy, Germany, Poland and Slovenia.

7. ECTA research suggests that regulatory uncertainty is particularly common where there is a high frequency of appeal combined with other negative factors in the appeals process such as long timeframes, suspensive effect or annulments.

8. In our view none of these factors is at work in the UK and it would therefore be wrong to suggest that the UK is subject to anything like the degree of regulatory uncertainty found in many other member states.

9. Germany has experienced a particularly high number of appeals. Market analysis decisions in particular are almost automatically appealed. BNetzA's decisions are appealed to the Administrative Court in the first instance with a further right of appeal to the Federal Administrative Court. The Court can suspend regulatory decisions pending the appeal. Applications for suspension take between three weeks and three months to determine but in practice are rarely granted by the Court.

10. The volume of appeals against BNetzA decisions has been significant, for example in 2007 there were 122 main proceedings and summary proceedings in the regional Administrative Courts. Appeals supposedly take up to one year to be decided in the Administrative Courts but there have been examples of cases lasting well beyond a year. For example a decision on LLU prices which was adopted in 1999 was only repealed by an Administrative Court in 2009. Non-LLU pricing decisions of the Administrative courts have been faster (but have still taken up to 3 years).

11. If the judgment of the Administrative Court is appealed to the Federal Administrative Court, the proceedings can take another 1-2 years.

12. In terms of the rate of challenge to BNetzA's decisions and the rate of successful challenge, every access and price control decision implementing market analysis decision is appealed; but no market analysis has ever been annulled or overturned. For all other decisions, some 75% of BNetzA's decisions have been upheld, 25% of appeals are lost by BNetzA.

13. France, which also utilises the normal administrative courts to resolve regulatory appeals, has a much lower rate of appeal against decisions by the regulator, ARCEP, and decisions are issued relatively quickly. Between 2007 and the end of 2009 there were only 15 appeals, 3 of which were against

market analysis decisions. The time taken to decide the appeals ranges from 4 and a half to nineteen months. Of the three market analysis appeals, two were rejected and one resulted in a partial annulment of the decision.

14. The French courts will only order suspension of an NRA decision in cases where the applicant can show that there is prima facie illegality and that irreparable harm will result if suspension is not ordered. In order to get a decision suspended a party has to make an emergency appeal to a judge. In practice all suspension requests have been rejected by the courts.

15. Other countries such as the Netherlands have established specialist bodies in the same way as the UK has done. The Netherlands has established a specialised court to appeal against Opta decisions. This is the College van Beroep voor het bedrijfsleven (CBb). The Tribunal, also known as Administrative High Court for Trade and Industry, is a specialised administrative court which rules on disputes in the area of social-economic administrative law. In addition, this appeals tribunal also rules on appeals for specific laws, such as the Competition Act and the Telecommunications Act. [113]

16. Under Dutch administrative law, submission of a written opinion on a draft decision by the regulator is a prerequisite for any later appeal against a finalised market decision.

17. Looking beyond Europe, in New Zealand there is a single regulator – the Commerce Commission - which regulates all sectors. They operate under two statutes, with limited rights of appeal.

a) Appeal rights under the NZ Telecommunications Act

The Commission only has power to regulate at the Wholesale level (not the retail level). Before regulating a service the Commission must first carry out an investigation. The Commission must then make a recommendation to the Minister of Communications as to whether the service should be regulated or not against a standard as to whether it is "in the long-term benefit of end-users…"

There is a right of appeal against the regulated price of a service. When a price is set in the first instance it is done by benchmarking against prices in other relevant countries. (This is called the initial pricing principle). Parties can choose to reject an initial pricing principle outcome and instead ask for prices to be calculated in a much more detailed and scientific way e.g. the Commission might have to calculate a TSLRIC price (this is called the final pricing principle).

No one has ever requested that a regulatory outcome should be recalculated on the basis of a final pricing principle because no one really knows how the

[113] http://www.rechtspraak.nl/Information+in+English/Judicial+system/Special+Tribunals.htm and www.rechtspraak.nl/Gerechten/CBB

price is likely to move in that instance – or whether the Commission would just game the process to get the same answer. Other than this, parties are forced to rely on judicial review which does not examine the merits and is therefore seldom used.

b) Regulation and appeal rights under the New Zealand Commerce Act

The regulatory provisions under the Commerce Act have recently been reformed. And the Commission is currently setting up new regimes to govern electricity lines, gas pipelines and airports.

Before regulating a sector under this Act the Commission first has to satisfy a competition test.

The Commission has to then undertake a very complicated inquiry into the business or sector in question. As part of that inquiry the Commission has to set "input methodologies" for the business or sector. The input methodologies are the building blocks that will go into the regulatory decision, including issues like the relevant cost of capital, the regulatory asset base approach to tax, approach to allocating common costs etc.

Parties who have made submissions on the formulation of these input methodologies then have a right to appeal the decisions on the input methodologies to the High Court on the merits.

In that instance the panel of the Court is comprised of a Judge plus one or two lay members (e.g. expert economists). An appeal does not delay the regulatory process. Further only material put before the Commission before the input methodologies were formulated can be considered during the appeal.

Once the Commission has formulated its input methodologies it then makes a recommendation to the Minister on whether and how to regulate. The final recommendation is not then subject to any appeal rights (except judicial review).

These new appeal provisions were introduced because the absence of accountability on the part of the regulator was perceived as resulting in less than optimal outcomes – especially for the electricity sector.

Water Industry

18. In the water industry in England water companies dissatisfied with price control measures imposed on them by Ofwat can require Ofwat, under s. 12(3)(a) of the Water Industry Act 1991 to refer the matter to the CC for a consideration of the decision on the merits. This constitutes a full review – not a targeted appeal as in the Communications Act Jurisdiction. Non price control decisions are subject to narrower rights of appeal which have been widely criticised in the past both by the water industry and by the Better Regulation Task Force. A

recent study for Water UK by concluded that merits based appeals ought to be introduced for matters other than price control decisions[114].

Postal Industry

19. The Postal Services Bill[115] provides a right of appeal on price control measures which requires parties to notify Ofcom of their appeal within two months at which point Ofcom must refer the matter as soon as possible direct to the Competition Commission, without any need to go first to the CAT.

20. In relation to all other postal decisions by Ofcom, any person affected by the decision may appeal the decision to the CAT (section 55 of the Bill). But in determining the appeal the CAT has to apply the same principles as the courts would apply on an application for judicial review.

21. The postal legislation seems to confirm that in the absence of EU derived requirements to have merits based appeals, the Government's preference is for a judicial review based system. Yet even where this is the case a right of appeal to the Competition Commission on price related decisions is considered essential.

Energy Sector

22. Decisions by the energy regulator are subject to a complex regime with various rights of appeal depending on the type of decision which a party seeks to challenge. Typically the rights of appeal are if anything more extensive than those available in the telecoms sector. Broadly there are three types of regulatory decision which can be appealed:

    - Special licence conditions
    - Standard licence conditions
    - Industry codes

23. Special and standard conditions are akin to Ofcom's regime of general conditions of entitlement, with standard conditions applying to all providers and special conditions being company specific. Special conditions typically relate to price controls and are subject to a right of appeal to the Competition Commission.

24. Standard conditions are in all licences and can be voted down by energy companies if they do not accept them. The voting rights are set out in SI 1746 of 2003.

25. There are a number of codes governing certain aspects of the industry. Ofgem can modify these and there is a right of appeal (as set out in SI 1646 of 2005.)

[114] http://www.water.org.uk/home/news/comment/appealing--080802-1?s1=oxera
[115] http://www.publications.parliament.uk/pa/cm201011/cmbills/078/11078.i-v.html

26. Section 5(1) of the Gas Act 1986 (as amended) and section 4(1) of the Electricity Act 1989 (as amended) set out that companies in the sector have to be licensed.

27. Ofgem decides the content of licences. The licences require the establishment of a number of multilateral industry codes that underpin the gas and electricity markets. These codes establish detailed rules for industry that govern market operation, the terms for connection and access to energy networks. Licensees are signed up as parties to codes in order to operate in the gas and electricity markets.

28. Modification to the codes may be proposed by code signatories or by consumer representatives. Each code has a panel or committee that oversees the assessment of proposed changes to that code. In general change should only be made if it better meets that particular code's relevant objectives than the current arrangement. For some kinds of proposed changes, that body will also make the final decision on whether implementation is appropriate, but this is not always the case.

29. Some complete codes (such as the Balancing and Settlement Code or Uniform Network Code), or sub-sections of codes (such as Part 1 of the Distribution Connection and Use of System Agreement) may only be altered with the consent of, or at the direction of, Ofgem.

30. The Energy Act 2004 introduced a right for market participants to appeal certain Ofgem decisions on proposed industry code changes to the Competition Commission.

31. The eligibility criteria for this appeal right are determined by the Secretary of State, who has the right to designate which kinds of decisions may be appealed. This designation may be subject to periodic review and change.

32. The current designations by the Secretary of State are set out in The Electricity and Gas Appeals (Designation and Exclusion) Order 2005 and The Electricity and Gas Appeals (Designation and Exclusion) Order 2009 Under these Orders, the following codes are eligible for appeal:

    - Balancing and Settlement Code (BSC);
    - Connection and Use of System Code (CUSC);
    - Network Code;
    - Supply Point Administration Agreement (SPAA);
    - Master Registration Agreement (MRA);
    - Uniform Network Code (UNC);
    - Distribution Connection and Use of System Agreement (DCUSA); and,

- Independent Gas Transporters Uniform Network Code (iGT UNC).

33. There are two specific exclusions from the right of appeal for the designated codes shown above. These exclusions are where Ofgem:

    - is in agreement with the majority recommendation of the code's own governing panel; or
    - considers that the delay caused by holding an appeal against that decision is likely to have a material adverse effect on the availability of electricity or gas for meeting the reasonable demands of consumers in Great Britain.

Conclusions

This benchmarking exercise reveals two main findings:

(i) In the world of telecoms regulation, Ofcom's decisions are subject to a relatively low number of challenges. The fact that appeals on the whole have no suspensive effect on decisions means the UK does not suffer the sort of regulatory uncertainty found in other EU member states.

(ii) Comparing the UK telecoms regime with other industry sectors does not demonstrate that Ofcom is subject to a more extensive appeals regime than all other regulators. In some sectors, regulated entities have much greater scope to challenge the sectoral regulator. Price control decisions are almost always subject to a merits based appeal or a complete review.

9. Annex 3 – UK stakeholder views

This annex contains a list of individuals and organisations interviewed as part of our research, together with a copy of the questionnaire we used.

- British Telecommunications
- Cable & Wireless
- Catalyst Communications Consulting Limited - Huw Saunders
- COLT Technology Services
- Everything Everywhere
- FCS
- Field Fisher Waterhouse – Nicholas Pimlott
- Gamma Telecom
- GEO
- Global Crossing
- MTS Allstream (Canada; amended questionnaire)
- Olswang – Rob Bratby
- Sky
- TalkTalk
- Vodafone
- Verizon
- Vtesse
    - **Notes:**
    - Two stakeholders participated in the research exercise but preferred to remain anonymous
    - Ofcom did not consider it appropriate to participate in the exercise given their position as the regulator
    - Only three other stakeholders declined to be interviewed (a remarkable response rate)

Our research exercise was based on the questionnaire below. In general we undertook a structured interview based quite closely on the questionnaire. In some cases, however, we diverted from the questionnaire to discuss issues of particular

interest to the stakeholder concerned, or where they had special knowledge. The interviews were all scheduled to take one hour but we allowed for the possibility of over-run and in many cases they continued for 90 minutes. All were written up and records kept. The purpose of the research exercise was to inform our own thinking and we have quite deliberately not attempted any coherent representation of the overall position of any party apart from ourselves. However we have bent over backwards to treat all the views expressed fairly; as part of this, where we quote the research exercise in the report, we have also sought to note any material body of opinion which diverges from our own view. (An example would be in relation to confidentiality rings.)

INTERVIEW QUESTIONNAIRE

	GENERAL	
	Name and company:	

	Before we start I am going to ask about how we should deal with your answers in terms of confidentiality and attribution. Our default position is this:
	• We will use your views in compiling the report and we may quote them directly.
	• We may also attribute views to you / your company unless you would rather we did not.
	  • Alternative: attribute to "a respondent"
	  • Alternative: attribute to company not individual;
	  • Alternatives: named individual and company but expressed as a "personal view"
	• We will list your company as a respondent in an Annex
	  • Alternative: name individual and company as a respondent but ascribe views as personal
	  • Alternative: refer to company as a generic company type "e.g. "a major consumer ISP" or "an altnet". Agree designation.
	  •	

	NB if there is something you want to say on a non-attributable basis in the course of the process, you can say so.	
	ABOUT APPEALS	
1.	How has your company participated in the appeals process? An appellant An intervener in "effective defendant" position An intervener [other] A respondent An observer – directly affected by the appeal but not party to it Other	
2.	Overall would you rate the experience?	Very good Good Neutral Bad Very bad
3.	Please could you tell me about your experience of the UK appeals system...	

4.	...and of any views you've formed about it...	
5.	...good experiences...	
6.	...bad experiences...	
7.	...about the process...	
8.	• "Can you give me specific examples of that?"	
9.	...and about the substance...	
10.	• Is there a distinction between process and substance? Is it important? Why / how?	
11.	...how easy is it for stakeholders to appeal Ofcom decisions?	On a scale of 1 - 5 where: 1. It's much too easy to appeal 2. It's a bit too easy to appeal 3. It's about right 4. It's a bit too difficult to appeal 5. It's much too difficult to appeal
12.	Are you aware of any frivolous appeals?	
13.	What factors do <u>you</u> / [others] take into account when deciding whether or not to appeal / intervene?	
14.	As a matter of principle, how should the possibility of an appeal affect first instance processes / decisions (i.e. by the regulator)? And as a matter of ***practice***, how does it?	
15.	How do you feel the appeals regime sits in the regulatory scheme as a whole? How are the role / set-up of the regulator (on the one hand) and the appeals regime (on the other) related? •	
16.	Can you think of changes that could be made to Ofcom's powers, duties and processes that would make appeals less of an issue? •	
17.	What are your views on appeals and regulatory certainty? •	
18.	Do appeals (either individually or more widely) say anything meaningful about the quality of regulatory decisions? What is your view on the suggestion that appeals bodies might merely substitute their own judgments for Ofcom's?	
19.	Do you have any views about whether there <u>should</u> be an appeals regime....?	
20.	• ...at all...?	
21.	• ...beyond something focussed on (for example) whether the correct procedure was followed?	
22.	• ...and if so, how easy it should be to appeal Ofcom decisions?	
23.	At the moment the appeal process subjects the Ofcom decision to "profound and rigorous scrutiny". Do you have views on that? Is it good or bad?	
24.	Is it viable to draw a "materiality" line for appeals bodies? Should appeals bodies discount issues which are not material and who should decide what	

	is and isn't material? Could rules be set up-front (e.g. in statute)?	
25.	If given a blank slate - what are the qualities you'd like to see in an appeals regime?	
26.	• For example what kind of body should hear appeals from Ofcom?	
27.	• ...and is there anything specific to say about how long appeals should take?	
28.	How would an appeals regime work in practice in an ideal world?	
29.	At the moment appeals do not allow "retrospection". Is that the right approach?	
30.	What would be some of the practical implications / impacts on your organisation of limiting the ability to appeal?	
31.	Roughly what proportion of your turnover is accounted for by charges that are directly affected by regulation? i.e. on the "buy" side, how much of your turnover do you spend on regulated products; on the "sell" side, how much of your income is accounted for by regulated products (e.g. your own termination charges or (for BT) other regulated products such as PPC, LLU, CPS etc)?	
32.	Can you envisage a totally new kind of appeals body? What would it look like?	
33.	Evidence admissibility: at the moment evidence is broadly admissible at the CAT whether or not it has been raised at the Ofcom stage. Is that the correct approach?	
34.	What can you say about the place of appeals in the overall regulatory structure? For example, are appeals more important now than under the old Telecoms Act regime? Is it different for Ofcom as against Oftel?	
35.	What's your view on liability for costs – e.g. should the loser pay?	
36.	How does risk stack up in bringing appeals (i.e. because it's unlikely / impossible that appeals against prices will result in the changes in the opposite direction to those requested by the appellant)? Are there arguments for a different approach?	
37.	Have you ever taken a "defensive appeal" i.e. appealed just in case someone else does? Is there an incentive to do so?	
38.	How do you see the relative roles of the CC and the CAT?	
39.	• Is there a clear distinction?	
40.	• Do they work together well?	
41.	• What are your views on having two separate bodies involved?	
42.	• Do they take different approaches to the substance and the process?	
43.	Is it necessary to have a specialist body to deal with price controls?	
44.	Further issues	
45.	Further issues	

10. Annex 4 – Reference Questions – MMC and CC

a) MMC Reference – 1995 – telephone number portability

(1) The Director General of Telecommunications (`the Director'), in exercise of his powers under section 13 of the Telecommunications Act 1984 (`the Act'), hereby refers to the Monopolies and Mergers Commission (`the Commission') for investigation and report, the questions set out in paragraph (3), which relate to the matter set out in paragraph (2).

(2) The matter referred to in paragraph (1) is that:

(i) following the directions from the Director to BT dated 22 August 1994 made under Condition 34B.11 of the Licence and directing British Telecommunications plc (`BT') to provide Portability to the extent set out in paragraph 34B.12 of the Licence in the Licensed Areas of the Videotron Companies, BT has not been able to reach agreement with Videotron as to the basis upon which the costs of providing Portability shall be allocated between BT and Videotron;

(ii) the Licence does not provide for the Director to resolve such a dispute concerning the allocation of costs;

(iii) the unresolved dispute is impeding the conclusion of negotiations between BT and other Operators to whom BT might otherwise provide Portability with the result that no Portability has been or is being provided by BT.

(3) The questions referred to in paragraph (1) are:

(a) whether the matter specified in paragraph (2) operates or may be expected to operate against the public interest; and

(b) if so, whether the effects adverse to the public interest which the matter specified in paragraph (2) has or may be expected to have could be remedied or prevented by modifications of the conditions of the Licence.

(4) The Director, in exercise of the powers conferred upon him by section 13(3) of the Act, and for the purpose of assisting the Commission in carrying out their investigation on this reference, specifies in the Schedule hereto certain effects adverse to the public interest which, in his opinion, the matter specified in paragraph (2) above has or may be expected to have.

(5) In this reference, unless otherwise indicated-[definitions follow]

b) MMC Reference – 1998 calls to mobiles (Cellnet questions[116])

(a) whether the following matters operate or may be expected to operate against the public interest:

the charges made by Telecom Securicor Cellular Radio Limited ('Cellnet') to operators of fixed public telecommunications systems:

[116] The Vodafone questions were the same

(i) for the delivery of calls to telephone handsets connected to Cellnet's mobile public telecommunications system;

(ii) for unanswered calls to such handsets; and

(iii) for the diversion of such unanswered calls; and

(b) if so, whether the effects adverse to the public interest which those levels of charges have or may be expected to have could be remedied or prevented by modifications of the conditions of the licence granted to Cellnet under section 7 of the Act on 22 March 1984.

c) MMC Reference – 2002 calls to mobiles (Vodafone and Cellnet[117])

1. Whether any of the following matters operate, or may be expected to operate, against the public interest:

(a) the charges, in the absence of a charge control mechanism on those charges, made by Vodafone Limited ("Vodafone") to operators of fixed or mobile public telecommunications systems for calls to telephone handsets connected to Vodafone's mobile public telecommunications system;

(b) the charges, in the absence of a charge control mechanism on those charges, made by BT Cellnet Limited ("BT Cellnet") to operators of fixed or mobile public telecommunications systems for calls to telephone handsets connected to BT Cellnet's mobile public telecommunications system.

2. If so, whether the effects adverse to the public interest which the above-mentioned matters have, or may be expected to have, could be remedied or prevented by modifications of the conditions of the respective licences granted under section 7 of the Act to Vodafone on 9th December 1993 and to BT Cellnet (formerly Telecom Securicor Cellular Radio Limited) on 22 March 1994.

3. For the purpose of assisting the Commission in carrying out its investigation on this reference:

(a) the Director hereby specifies, pursuant to section 13(3)(a) of the Act, that in his opinion the adverse effect to the public interest that the absence of a charge control mechanism on the above-mentioned charges has, or may be expected to have, is the harm likely to be caused to consumers. The Director has in his recent investigation found that Vodafone's and BT Cellnet's current interconnection charges for termination of calls on their respective mobile networks are excessive in relation to cost, to the detriment of consumers;1 and

(b) the Director further specifies, pursuant to section 13(3)(b) of the Act, that in his opinion that effect adverse to the public interest could be remedied or prevented by modifications of the conditions of the respective licences granted to Vodafone and BT Cellnet by inserting in each of those licences a condition substantially in the form of that set out in Annex A2 attached to this reference.

d) 2008 mobile call termination

1. Having regard to:

[117] The One-2-One and Orange questions were broadly the same

(A) the Mobile Call Termination Statement and Notification issued by the Office of Communications ("OFCOM") dated 27 March 2007 ("OFCOM's Decision");

(B) the price controls set by Condition MA3, Control of Fixed to Mobile Interconnection Charges ("Condition MA3") and by Condition MA4, Control of Mobile to Mobile Interconnection Charges ("Condition MA4") in Annex 20, Schedule 1 part 2 of OFCOM's Decision;

(C) the notice of appeal dated 23 May 2007 lodged by Hutchison 3G UK Limited("H3G") in Case 1083/3/3/07 (and amended pursuant to the Order of the Tribunal dated 6 November 2007) and the statement therein that the Appendix to the Notice of Appeal ("the H3G Appendix") sets out specified price control matters within the meaning of Rule 3(1) of the Competition Appeal Tribunal(Amendment and Communications Act Appeals) Rules 2004 ("the 2004 Rules"); and

(D) the notice of appeal dated 29 May 2007 lodged by British Telecommunications plc ("BT") in Case 1085/3/3/07 (and amended pursuant to the Ruling of the Tribunal dated 17 December 2007) ("the BT Notice of Appeal") challenging certain aspects of the setting of Conditions MA3 and MA4 and the statement therein that the appeal relates exclusively to specified price control matters within the meaning of Rule 3(1) of the 2004 Rules; and

(E) the outline defence to the price control matters filed by OFCOM on16 November 2007 and the defence and supporting evidence filed by OFCOM on 28 January 2008; and

(F) the outline statements of intervention filed by each of the Interveners (includingH3G and BT as Interveners in each other's appeals) on 30 November 2007 the Tribunal, pursuant to Rule 3(5) of the 2004 Rules and section 193 of the Communications Act 2003, hereby refers to the Competition Commission for its determination the specified price control matters arising in these appeals.

2. By this reference the Tribunal orders the Competition Commission to determine the following questions:

In relation to the BT Appeal

Question 1

Whether, in relation to the BT appeal, the price controls imposed by Conditions MA3 and MA4 on any or all of the four 2G/3G Mobile Network Operators (T-Mobile, Vodafone, O2 and Orange) or as regards the 3G Mobile Network Operator (H3G) have been set at a level which is inappropriate for one or more of the following reasons:

(i) OFCOM erred in its approach to the inclusion of spectrum costs for the reasons set out in paragraphs 83 to 148 of the BT Notice of Appeal;

(ii) OFCOM erred in its approach to the inclusion of administration costs for the reasons set out in paragraphs 149 to 159 of the BT Notice of Appeal;

(iii) OFCOM erred in its approach to the allowance of a network externality surcharge for the reasons set out in paragraphs 160 to 184 of the BT Notice of Appeal;

(iv) OFCOM erred in failing to take proper account of the cost savings arising from network sharing between the MNOs when conducting its analysis for the reasons set out in paragraphs 185 to 187 of the BT Notice of Appeal.

In relation to the H3G appeal

Question 2

Whether the price controls imposed on H3G were too low relative to the price controls imposed on the other 2G/3G MNOs because OFCOM erred in failing to take account, or sufficient account, of the financial impact of these controls on H3G's business and on the adverse effect of that impact on competition, for the reasons set out in paragraphs 3.3 to 3.12 of the H3G Appendix.

Question 3

Whether the price controls imposed on H3G have been set at a level which is inappropriate for one or more of the following reasons:

(i) OFCOM's welfare analysis was flawed for the reasons set out in paragraphs

3.13 to 3.15 of the H3G Appendix;

(ii) OFCOM erred in basing its modelling of costs on Economic Depreciation methodology for the reasons set out in paragraphs 5.1 to 5.15 of the H3G Appendix;

(iii) OFCOM erred in failing to make allowance for H3G's costs of Customer Acquisition, Retention and Service in setting the price cap for call termination for the reasons set out in paragraphs 8.1 to 8.46 of the H3G Appendix;

(iv) OFCOM erred in failing to take account of distortion created by arrangements for ported numbers for the reasons set out in paragraphs 9.1 and 9.2 of the H3G Appendix;

(v) OFCOM erred in selecting the charge to be imposed from the values generated by the scenarios it used for the reasons set out in paragraphs 10.1 to 10.4 of the H3G Appendix.

Question 4

Whether the level of Target Average Charge set for each of the 2G/3G MNOs (of 5.1ppm) is inappropriate because OFCOM erred in basing its modelling of costs on Economic Depreciation methodology, for the reasons set out in paragraphs 5.1 to 5.15 and 11.1 to 11.6 of the H3G Appendix;

Question 5

Whether OFCOM erred in setting a blended Target Average Charge for the 2G/3G MNOs rather than specifying separate rates for termination on 2G and 3G networks for the reasons set out in paragraphs 12.1 to 12.8 of the H3G Appendix.

Question 6

Whether OFCOM erred in setting H3G's glide path for the reasons set out in paragraphs 7.2 to 7.4 of the H3G Appendix.

Question 7

Whether OFCOM should have exercised its powers in such a way that net wholesale payments between MNOs were zero, with suitable cost-based price controls retained for fixed to mobile calls, either (a) for the period of the price controls or (b) pending the introduction of

revised arrangements for mobile number portability, for the reasons set out in paragraphs 4.1 to 4.7 of the H3G Appendix.

In relation to both appeals

Question 8

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the Communications Act 2003 and in the event that the Competition Commission determines that the answer to any of the above questions is yes, the Competition Commission is to include in its determination:

(i) clear and precise guidance as to how any such error found should be corrected; and

(ii) insofar as is reasonably practicable, a determination as to any consequential adjustments to the level of the price controls.

3. The Competition Commission is directed to determine the issues contained in this reference by either 31 October 2008 or two months after the Tribunal delivers its judgment on the non price control matters in the H3G appeal, whichever date is the later. The Competition Commission shall notify the parties to these appeals of its determination at the same time as it notifies the Tribunal pursuant to section 193(3) of the Communications Act 2003.

4. Should the Competition Commission require further time for making its determination it should notify the Tribunal and the parties so that the Tribunal may decide whether to extend the time set out in the previous paragraph.

5. There shall be liberty to apply for further directions.

e) LLU appeal

1. Having regard to:

(A) the Statement and Notification issued by the Office of Communications ("OFCOM") dated 22 May 2009 and entitled "A new pricing framework for Openreach" ("OFCOM's Statement");

(B) the price controls set by Condition FA3(A) ("Condition FA3(A)") in Annex 3, Schedule 1 of OFCOM's Statement;

(C) the Notice of Appeal ("the Notice of Appeal")1 dated 21 July 2009 lodged by Carphone Warehouse ("CPW") in Case 1111/3/3/09 challenging certain aspects of the setting of Conditions FA3(A) and the statement therein that the appeal raises specified price control matters within the meaning of Rule 3(1) of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004;

(E) the Defence and supporting evidence filed by OFCOM on 26 October 2009; and

(F) the Statements of Intervention filed by British Sky Broadcasting Limited on 6 November 2009 and British Telecommunications plc ("BT") on 10 November 2009

the Tribunal, pursuant to Rule 3(5) of the 2004 Rules and section 193 of the Communications Act 2003 ("the 2003 Act"), hereby refers to the Competition Commission for its determination the specified price control matters arising in these appeals.

2. By this reference the Tribunal orders the Competition Commission to determine the following questions:

Question 1

Whether the price controls imposed by Condition FA3(A) on BT have been set at a level which is inappropriate because OFCOM erred in estimating BT's efficient costs in 2012/13 for metallic path facility rental ("MPF"), shared metallic path facility rental ("SMPF") and associated ancillary services ("ancillary services") in one or more of the following respects:

(i) OFCOM erred in its estimation of the level of efficiency improvements that might reasonably have been expected to be achieved in respect of Openreach's costs and/or BT Group's costs allocated to Openreach for the reasons set out in paragraphs 76 to 84 of the Notice of Appeal;

(ii) OFCOM erred in its calculation of Openreach's cost of capital for the reasons set out in paragraphs 85 to 87 of the Notice of Appeal;

(iii) OFCOM erred in the allocation of costs as between Openreach and BT's other business activities for the reasons set out in paragraph 91 of the Notice of Appeal;

(iv) OFCOM erred in the allocation of costs as between MPF on the one hand, and wholesale line rental and SMPF on the other, to provide the basis for decisions on respective price controls for each of those services, for the reasons set out in paragraphs 92 to 100 of the Notice of Appeal;

(v) OFCOM erred in its assessment of inflation for the reasons set out in paragraph 101 of the Notice of Appeal.

Question 2

Whether the price controls imposed on BT are inappropriate because OFCOM erred in specifying the price caps for baskets of ancillary services imposed on BT in one or more of the following respects:

(i) OFCOM erred in setting the individual price caps on the baskets of ancillary services for the reasons set out in paragraphs 106 to 113 of the Notice of Appeal; A3

(ii) OFCOM failed to provide sufficient or appropriate safeguards to prevent anti-competitive exploitation by BT of its pricing latitude in respect of the baskets of ancillary services for the reasons set out in paragraphs 114 to 118 of the Notice of Appeal.

Question 3

Whether OFCOM erred in setting the glide path for MPF and SMPF and/or by making certain one-off adjustments to the prices of certain ancillary services for the reasons set out in paragraphs 119 to 125 and 127 to 129 of the Notice of Appeal.

Question 4

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the 2003 Act and in the event that the Competition Commission determines that OFCOM erred in relation to any of the above questions, the Competition Commission is to include in its determination:

(i) clear and precise guidance as to how any such error found should be corrected; and

(ii) insofar as is reasonably practicable, a determination as to any consequential adjustments to the level of the price controls,

indicating:

(a) what price controls should have been set in OFCOM's Statement had OFCOM not erred in the manner identified; and

(b) if the price controls set in OFCOM's Statement have during the elapsed period of the price control been at an inappropriate level and on the assumption that it may, having regard to the criteria in section 88 of the 2003 Act, be lawful and appropriate to adjust the price control applicable during the unelapsed period, what adjustments to that part of the price control should be made, if any.

3. The Competition Commission is directed to determine the issues contained in this reference by 1 June 2010. The Competition Commission shall notify the parties to this appeal of its determination at the same time as it notifies the Tribunal pursuant to section 193(3) of the 2003 Act.

4. Should the Competition Commission require further time for making its determination it should notify the Tribunal and the parties so that the Tribunal may decide whether to extend the time set out in the previous paragraph.

5. There shall be liberty to apply for further directions.

f) LLCC Appeal

1. Having regard to:

(A) the Leased Lines Charge Control Statement and Notification issued by the Office of Communications ("OFCOM") dated 2 July 2009 (the "LLCC Decision");

(B) the price controls set by:

(i) Condition G4, TISBO up to and including 8 Mbit/s, in Schedule 1 to Annex 9 of the LLCC Decision ("Condition G4");

(ii) Condition GG4, TISBO above 8 Mbit/s up to and including 45 Mbit/s, in Schedule 2 to Annex 9 of the LLCC Decision ("Condition GG4");

(iii) Condition GH4, TISBO above 45 Mbit/s up to and including 155 Mbit/s, in Schedule 3 to Annex 9 of the LLCC Decision ("Condition GH4");

(iv) Condition HH4, AISBO up to and including 1 Gbit/s, in Schedule 4 to Annex 9 of the LLCC Decision ("Condition HH4"); and

(v) Condition H4, Trunk, in Schedule 5 to Annex 9 of the LLCC Decision ("Condition H4").

(C) the Notice of Appeal ("the Notice of Appeal") dated 2 September 2009 lodged by Cable & Wireless UK ("C&W") in Case 1112/3/3/09 challenging certain aspects of the setting of Conditions G4, GG4, GH4, HH4 and H4 and the statement therein that the appeal relates exclusively to specified price control matters within the meaning of Rule 3(1) of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (the "2004 Rules");

(E) the Defence filed by OFCOM on 16 November 2009; and

(F) the Statements of Intervention and supporting evidence filed by each of the Interveners on 30 November and 1 December 2009

the Tribunal, pursuant to Rule 3(5) of the 2004 Rules and section 193 of the Communications Act 2003 (the "2003 Act"), hereby refers to the Competition Commission for its determination the specified price control matters arising in this appeal.

2. By this reference the Tribunal orders the Competition Commission to determine the following questions:

Question 1

Whether the price controls imposed by Conditions G4, GG4, GH4 and H4 on British Telecommunications plc ("BT") have been set at a level which is inappropriate because OFCOM erred in failing to take the utmost account of the EC Leased Lines Recommendation[1] in setting starting prices for digital private circuit network elements ("DPCN Services") for the reasons set out in paragraphs 37 to 45 of the Notice of Appeal.

Question 2

Whether the price controls imposed by Conditions G4, GG4, GH4 and H4 on BT have been set at a level which is inappropriate because OFCOM erred in setting starting charges for DPCN Services and 2 Mbit/s Local Ends in one or more of the following respects:

(a) OFCOM erred in:

(i) that the price increases go beyond what is necessary for individual services to be priced above Ofcom's view of distributed long run incremental cost ("DLRIC") for the reasons set out in paragraph 49 of the Notice of Appeal;

(ii) concluding that the price increases were necessary to avoid BT earning a return on capital employed ("ROCE") on the TI Basket below its weighted average cost of capital ("WACC") for the reasons set out in paragraphs 49 to 51 of the Notice of Appeal;

(b) OFCOM erred in adjusting some prices and not others within the TI Basket for the reasons set out in paragraphs 52 to 56 of the Notice of Appeal;

(c) OFCOM erred in its assessment of the DLRIC for the DPCN Services and 2 Mbit/s Local Ends because it should have made further and/or different adjustments to the figures used in its costs model for the reasons set out in paragraphs 57 to 60 of the Notice of Appeal;

(d) OFCOM erred in setting the price increases to starting charges for the reasons set out in paragraphs 61 to 66 of the Notice of Appeal.

Question 3

Whether the price controls imposed by Conditions G4, GG4, GH4, H4 and HH4 on BT have been set at an inappropriate level because OFCOM erred in estimating BT's efficient costs and associated revenues for leased line services in one or more of the following respects:

(a) OFCOM erred in its use of BT's regulatory financial statements for the reasons set out in paragraphs 72 to 77 of the Notice of Appeal;

(b) OFCOM erred in its adjustments to BT's reported costs and revenues for DPCN Services for the reasons set out in paragraphs 83 to 103 of the Notice of Appeal;

(c) OFCOM erred in the allocation of costs to the services subject to the Conditions for the reasons set out in paragraph 104 of the Notice of Appeal;

(d) OFCOM erred in the calculation of the relevant cost of capital for the reasons set out in paragraphs 105 to 107 of the Notice of Appeal.

Question 4

Whether OFCOM erred in the setting of the point of handover charges in Part 1 of Annex C to the price controls imposed by Conditions G4, GG4, GH4 and H4 on BT in one or more of the following respects:

(a) OFCOM erred in deciding not to set the charges on Local Ends used by BT but only on those used by BT's competitors:

(i) OFCOM erred in its use of BT's estimate of the costs to be recovered by the charges for the reasons set out in paragraphs 110 to 111 of the Notice of Appeal;

(ii) OFCOM erred in not treating promotion of competition as its primary objective and/or erred in its assessment of what the promotion of competition would require for the reasons set out in paragraph 112 of the Notice of Appeal;

(iii) OFCOM erred in setting point of handover charges that are discriminatory, inefficient and/or which distort competition for the reasons set out in paragraphs 113 to 116 of the Notice of Appeal;

(iv) OFCOM erred in its assessment of its "six principles of cost recovery" for the reasons set out in paragraphs 117 to 121 of the Notice of Appeal;

(b) OFCOM erred in deciding to set the same charges on synchronous digital hierarchy and plesiochronous digital hierarchy points of handover:

(i) OFCOM erred in giving BT the discretion it did as to future charges for points of handover for the reasons set out in paragraphs 122 to 128 of the Notice of Appeal;

(ii) OFCOM erred in setting charges that are inefficient and discriminatory for the reasons set out in paragraphs 129 to 132 of the Notice of Appeal.

Question 5

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the 2003 Act and in the event that the Competition Commission determines that OFCOM erred in relation to any of the above questions, the Competition Commission is to include in its determination:

(a) clear and precise guidance as to how any such error found should be corrected; and

(b) insofar as is reasonably practicable, a determination as to any consequential adjustments to the level of the price controls indicating:

(i) what price controls should have been set in the LLCC Decision had OFCOM not erred in the manner identified by the Competition Commission; and

(ii) if the price controls set in the LLCC Decision have, during the elapsed period of the price control been at an inappropriate level, and on the assumption that it may, having regard to the criteria in section 88 of the 2003 Act, be lawful and appropriate to adjust the price control applicable during the unelapsed period, what adjustments to that part of the price control should be made, if any.

3. The Competition Commission is directed to determine the issues contained in this reference by 30 June 2010. The Competition Commission shall notify the parties to this appeal of its determination at the same time as it notifies the Tribunal pursuant to section 193(3) of the 2003 Act.

4. Should the Competition Commission require further time for making its determination it should notify the Tribunal and the parties so that the Tribunal may decide whether to extend the time set out in the previous paragraph. A5

5. There shall be liberty to apply for further directions.

11. Annex 5 – the European Communities Act

Executive power to make secondary legislation under s.2(2) European Communities Act 1972 ("ECA")

It is proposed that the regime for appeals from Ofcom be reformed as part of the implementation of the EU's 2009 communications reform package.[118] The ECA envisages that EU Directives may be implemented without recourse to primary legislation but instead through Regulations passed by Statutory Instrument.[119] 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 statutory provisions which the Government proposes to refer to are set out in full in Annex 1. The specific provisions are contained in s.2(2) ECA, which relates to the implementation of Directives[120] (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 subsection (a) or that in subsection (b).[121] 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

[118] Directive 2009/140/EC of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services.

[119] 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.

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

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

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"*[122].

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.[123]

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." …*[124]

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

[123] 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 Prescot QC sitting as Deputy High Court Judge at 79-80

[124] 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."

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 Directive[125], 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 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 BIS.

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 that that which is required by the Directive.[126] 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."*[127] [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."[128]

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)."*[129]

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:

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[125] [2005] EWCA Civ 1191, Jacob L.J. at 65

[126] *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*.

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

[128] [2005] EWCA Civ 1191 Waller L.J. at 38

[129] [2005] EWCA Civ 1191 Waller L.J. at 22

> *"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."*[130]

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 enable the appeals body simply to carry out its function, but to do so "effectively."[131] To the extent that they change the regime, they are requiring that it be strengthened.

The BIS proposals, on the other hand, go the other way: they would tend to limit the appeals regime. As BIS puts it, "There may be a reduction in the level of scrutiny to which Ofcom decisions are subjected on appeal."[132]

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.[133]

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 require 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.[134] There is

[130] [2005] EWCA Civ 1191 Jacob L.J. at 79

[131] 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.

[132] BIS document 'Implementing the Revised EU Electronic Communications Framework – Impact Assessment' September 2010, p.28

[133] One might argue here that the requirement in the Better Regulation Directive deals with expertise; whereas the BIS 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.

[134] 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 disapply the regime for amending the licences. It

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.

was found that he should have made it clear in the statutory instrument that the protections were being removed.

12. Glossary

3G auction – the Third Generation Mobile Auction held in April 2000

Act or **2003 Act** – The Communications Act 2003

Better Regulation Directive – Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services

BIS – Department for Business, Innovation and Skills

BIS Consultation – the consultation entitled "IMPLEMENTING THE REVISED EU ELECTRONIC COMMUNICATIONS FRAMEWORK Overall approach and consultation on specific issues SEPTEMBER 2010" on implementation of the Better Regulation Directive (Directive 2009/140/EC) and the Citizens Rights Directive (Directive 2009/136/EC) which amend the Framework Directive 2002/21/EC, Access Directive 2002/19/EC, Authorisation Directive 2002/20/EC, Universal Service Directive 2002/22/EC and e-Privacy Directive 2002/58/EC

CA – Court of Appeal

CAT – Competition Appeal Tribunal

CC – Competition Commission

Citizens' Rights Directive – Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

CPW – Carphone Warehouse

DQ – directory inquiries

DTI – former Department of Trade and Industry, now BIS

EBITDA – earnings before interest, taxes, depreciation and amortization

ECJ – European Court of Justice

ECA – European Communities Act 1972

ECTA - European Competitive Telecommunications Association

European Directives – collectively: the Access Directive (Directive 2002/19/EC); the Authorisation Directive (Directive 2002/20/EC); the Framework Directive (Directive 2002/21/EC); the Universal Service Directive (Directive 2002/22/EC); and the Telecoms Data Protection Directive (Directive 2002/58/2002), each as amended by the Better Regulation Citizens Rights' Directives.

Framework Directive - Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on common regulatory framework for electronic communications networks and services

FTTH or Fibre to the home – form of next generation access in which services are delivered over fibre-optic cable right into the end user premises. Cable in theory of delivering almost limitless bandwidth, but in practice not in all of its variations.

General Conditions – General Conditions of Entitlement

HRA – Human Rights Act 1998

JR – judicial review

LLU – Local Loop Unbundling

NAO – National Audit Office

Notice of Appeal or NoA – the document, drafted by the appellant, which sets out the grounds for an appeal from an Ofcom decision to the CAT

NRA – National Regulatory Authority

MCT appeals – collectively *Hutchinson 3G UK Limited v Office of Communications (Mobile Call Termination)* CAT case number 1083/3/3/07 and *British Telecommunications plc v Office of Communications (Mobile Call Termination)* CAT case number1085/3/3/07

MMC or Monopolies and Mergers Commission – the predecessor to the CC

Ofcom – Office of Communications

OFT – Office of Fair Trading

Oftel – former Office of Telecommunications; the UK's telecommunications regulator preceding Ofcom

Sequencing decision appeal – *T-Mobile (UK) Limited v Office of Communications (Sequencing decision)* CAT case number 1102/3/3/08

SMP – significant market power

T Act or **1984 Act** – The Telecommunications Act 1984

TRD appeals – collectively: *T-Mobile Limited v Office of Communications (Termination Rate Disputes)* CAT case number 1089/3/3/07; *British*

Telecommunications plc v Office of Communications (Termination Rate Disputes) CAT case number 1090/3/3/07; *Hutchinson 3G UK Limited v Office of Communications* CAT case number 1091/3/3/07; and *Cable & Wireless & others v Ofcom (Termination Rate Disputes)* CAT case number 1092/3/307

TSLRIC – total-service long-run incremental cost

USC – Universal Service Conditions

WLR – Wholesale Line Rental