



## UK Appeals from SMP Decisions



COMPETITION APPEAL TRIBUNAL

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## UK Appeals from SMP Decisions under the Common Regulatory Framework

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## The Task of the Competition Appeal Tribunal

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*A specialist court to scrutinize the detail of regulatory decisions in a profound and rigorous manner*

## The Common Regulatory Framework

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- The need for *ex ante* obligations in developing a competitive market – Framework Directive (FD) recital 25
- Significant market power = dominance – FD recital 25
- The need for analysis – FD recital 27
- Community law and utmost account of Commission guidelines – FD recital 28
- Appeals on the merits – FD Article 4

### Wholesale services for retail competition

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- So far all appeals have been about wholesale markets
- Well regulated wholesale services have been a bedrock of retail competition
- Large amounts of money are at stake
- Parties are ready to spend time and money on appeals
- There is an issue in not being able retrospectively to cure *ex ante* remedies
- Some SMP decisions lead on to dispute resolution where there can be retrospective adjustment (see Scott 2104)

### Why do appeals matter to the industry players

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- The amounts that players pay to each other are in millions and in billions in gross terms
- In billions of transactions, a fraction of a penny on a price can translate into millions of pounds
- Even in London the legal fees are dwarfed by the amounts at stake
- In *ex ante* remedies repayments are not in play and interest is not payable in respect of past regulatory error

### Moral hazards in wholesale pricing

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- Where a supplier operates at retail as well as wholesale levels in a market
  - There is a danger of margin squeeze
- Even where a supplier does not at retail as well as wholesale levels in a market
  - There is a danger of effective cross-subsidies occurring for commercial or regulatory reasons
- Modelling costs is not a value free science

### UK's bifurcated appeal system

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- SMP Appeals come to the CAT (Chairman plus 2)
  - Price control matters are referred to the Competition and Markets Authority (CMA);
    - A panel (Chairman plus 3/4) considers the grounds and makes a determination;
    - Determination subject to judicial review by the CAT
- The CAT hears an appeal on other matters on the merits



We only have some of the pieces in  
each national jurisdiction

### Limitations on case law as a guide

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- Judgments do not provide a comprehensive guide to dispute resolution
- Circumstances matter – and circumstances change
- Some grounds prove superfluous and are not resolved
- We are all learning and getting pieces of a jigsaw

### Further appeals & references on points of law

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- A minority of CAT judgments are appealed on points of law to the Court of Appeal of England & Wales
- No appeals, to date, in Scotland or in Northern Ireland
- One further level appeal to the UK Supreme Court
- Permission is required for the Court of Appeal and for the UK Supreme Court
- No references so far on an SMP case to the EUCJ

### The Administrative Appeal Phase

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- Conducted on price control matters
- By a panel of the Competition and Markets Authority
- Governed by the grounds of appeal
- Questions from the CAT
- Profound and rigorous scrutiny – but see 1.33
- *Subject to judicial review by the CAT*

### Non-price control matters

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- For example:
  - The Market(s)
  - SMP
  - Whether a price control was required
  - What Ofcom (the NRA) should be told to do
- An appeal on the merits within the grounds of appeal

### Hutchison 1 – mobile call termination

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- Suggested that the existence of a remedy meant a higher standard of proof than balance of probabilities
- New entrant challenged the finding of SMP
  - On grounds of the incumbent fixed line operator's countervailing buyer power;
  - On the basis of regulatory and competition law curbing its market power; and
  - No demonstration of excessive pricing

### Hutchison 1 – findings

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- The existence of a remedy did not mean a higher standard of proof than balance of probabilities
- The review of BT's, the incumbent fixed line operator's, countervailing buyer power had been inadequate but one should take account of regulatory requirements on BT;
- To argue that that regulatory and competition law curbed Hutchison's market power would be circular – hence *modified greenfield*; RegTP decision applied;
- No demonstration of excessive pricing is necessary to find SMP

### Hutchison 2 – findings

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- In an appeal on the merits, the CAT is not concerned with adequacy of reasoning but with correctness under *profound and rigorous scrutiny*
- Finding of SMP upheld;
- The then Competition Commission's view of its role;
- BUT the Court of Appeal set aside the CAT's efforts to provide some retrospective relief – *ex ante SMP* remedies are always *ex ante* their date
- CONTRAST with dispute resolution – Scott (2014)



### Wholesale Broadband Access – findings

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- The existence of different markets depending on dynamic local scenarios
- Had there been a material change given the delay between the market analysis and the price control decision – judicial views diverged – the Court of Appeal 2:1;
- Was Ofcom wrong – not was the CAT wrong – [68];

### Mobile call termination – round 3

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- Exemplifies questions from the CAT to the now CMA
- 555 pages of answers to the CAT questions
- Court of Appeal on an appellant's task
  - Show that Ofcom was wrong in its decision;
  - Not wrong in its reasoning; but
  - Remit if the decision has been fatally undermined

## Coming up !

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- Virtual Unbundled Local Access
  - Appeals currently *sub judice*
  - Interesting grounds of appeal
  - So watch this space
- Wholesale dark fibre
- Mobile call termination – round 4

## Reflections

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- Appeals governed by the grounds - not duplicating Ofcom
- Burden on the appellant to show that Ofcom was wrong
- Profound and rigorous scrutiny in the appeal
- There will be ongoing arguments about costing
- Though SMP settled down, markets may now need segmentation to distinguish areas of effective competition from those where competition has yet to become effective

## An engineering economist looks ahead

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- Appeals may continue to delay better *ex ante* remedies
- Is it right to deny retrospection of SMP price controls ?
- The CRF system should at best encourage and, at worst, not deter investment and innovation
  - What about free riders as we move on ?
  - What about an imaginative approach to risk sharing ?
  - Should *ex ante* wholesale price controls apply to any demand ?

## Thank you and any questions

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- My text will be developed as an EUI working paper so queries, comments and corrections would be welcomed
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