Communication on the Review of the Regulatory Framework for Electronic Communications.

Procedural aspects, consistency and the tension between EU and national law

Ben Rayment[1]

Introduction

The rules establishing the Regulatory Framework for Electronic Communications make much greater provision for achieving a consistent approach by the NRAs than by the National Courts. In particular, in the absence of Community rules it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, subject to the principles of effectiveness and equivalence.[2] In the UK the Framework is principally implemented by the provisions of the Communications Act 2003 ("the 2003 Act").

My aim is to identify from a UK perspective a few areas where the interrelationship between Community and National law is likely to create tensions and inconsistency in the treatment of appeals and to pose some questions about how these might be addressed. Although the Communication identifies interim measures as a particular problem, at least in some Member States, there are other areas of potential inconsistency that arise in connection with appeals that are worthy of attention.

The nature of an appeal

One of the problems that gives rise to problems of consistency of approach is the difficulty in defining some of the fundamental terms with which one is grappling, such as the concept of an appeal in Article 4 of the Framework Directive. Although Article 4 lays down certain minimum criteria for appeals under the regulatory framework it is not prescriptive and hence permits some latitude as to the nature of the body(ies) and the type of appeal that can be provided.

The following criteria are specified for an appeal body:

- independent of the parties
- has appropriate expertise to enable it to carry out its functions
- the merits of the case are duly taken into account

[1] Barrister, Monckton Chambers. Former legal secretary to the Competition Appeal Tribunal. All views expressed are personal.
[2] Case 33/76 *Rewe Zentralfinanz* [1976] ECR 1989, 1997.

- if not judicial in character it must be subject to review by a court or tribunal.

Jurisdiction to hear appeals under the 2003 Act is conferred on the Competition Appeal Tribunal ("CAT"). For the purposes of Article 4 the CAT is a judicial body and satisfies both the requirements of independence and expertise. It is constituted in panels composed of three members with expertise relevant to economic regulation and competition law. It is clear therefore that as regards its constitution the CAT is a judicial body and satisfies the requirements of Article 4.

Less clear is what precisely the phrase the merits of the case be "duly taken into account" requires. The 2003 Act has provided that the Competition Appeal Tribunal shall decide communications appeals "on the merits". There is no doubt therefore that the current right of appeal allows due account to be taken of the merits. The question is whether that approach goes further than necessary?

In other areas of competition law and economic regulation the UK has not adopted a uniform approach to the scope of the right of appeal. Thus in appeals against decisions made by the competition authorities under Articles 81 and 82 EC and their domestic equivalents under the Competition Act 1998 ("the 1998 Act"), the CAT in relation to infringement decisions hears appeals "on the merits" and has the power on appeal to make any decision the competition authority could have made.[3] On the other hand in relation to merger control and market investigation decisions it has a more limited judicial review jurisdiction under the Enterprise Act 2002 ("the 2002 Act"). In particular, it may be noted that the market investigation powers under part 4 of the 2002 Act can be used to control activity in the communications sector by the NRA. In cases dealt with under this route on appeal the NRA's decision would be subject to judicial review not a merits review. Thus the provision in the 2003 Act for a full "merits" appeal goes beyond what is provided for in relation to measures that might be taken in relation to the communications sector under other pieces of domestic legislation. [4]

---

[3] This particular legislative choice was influenced by the sensitivity of appeal rights in the context of significant penalties imposed by a body not considered 'independent' within the meaning of Article 6 ECHR. On the other hand other decisions made under the 1998 Act such as a decision to accept binding commitments to address competition concerns are only susceptible to judicial review.

[4] See the undertakings accepted from BT in *Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002* (22 September 2005). The undertakings commit BT to substantive changes in its organisation by means of remedies that do not form part of the EU regulatory framework, including a number of structural and governance commitments that BT has made. The undertakings also address a range of other competition concerns through remedies such as equivalence of input. Ofcom considers the undertakings are complementary to the EU Regulatory Framework and that they will help to ensure the effective implementation of the framework, and we expect them to bring about greater competition and deregulation than would be possible otherwise. (at para 7.11) It may be noted that the ultimate structural remedy, the break-up of BT, could be ordered by the CC following a market investigation reference. The only remedy were this ever to be ordered would be an appeal to the CAT by way of judicial review under s.179 of the 2002 Act.

There is relatively little experience of communications appeals in the CAT to draw on as to how merits appeal will operate in this context. However, in "merits" appeals under the 1998 Act appellants are able to introduce new arguments and evidence not previously raised before the NCA and the issues on appeal have tended to move some way from those addressed in the original decision. Although appeals on this basis are dealt with very thoroughly their scope is wider, they can be more difficult to manage and take longer to determine. The potentially longer time that such appeals may take to determine is mitigated at least to some extent in certain cases by the fact that the CAT has the power to take any decision which the NCA could have made. Thus the CAT can adjudicate on any additional matters raised on appeal without remitting the decision to the NCA. Similar provision has not been made in relation to appeals under the 2003 Act and therefore if the appeal is allowed the decision must be re-taken and the delay that this will involve cannot be avoided.[5] Potentially therefore this arrangement is the worst of both worlds.

The alternative is to apply judicial review principles on appeal. This is in contrast to a review where the challenge is confined to the record before the NRA and the question for the court or tribunal is to determine the more limited issue of whether the NRA in broad terms has committed any error of law or manifest error of appreciation.

As mentioned above the CAT may already in certain circumstances be called upon to apply judicial review principles in communications cases under the 2002 Act. Also worthy of note is that the CAT in the view of many operates quite a "muscular" form of review and will ensure, deploying its own expertise, that there is a proper factual basis for the NRA's decision, that very clear reasons are given and that it is reasonable. It is not clear whether such an appeal complies with the requirement in Article 4 that "the merits of the case are duly taken into account" but it is certainly arguable that it does, particularly if the principles of review applied by the CAT are the same as those applied by the European Court.[6] Of note is that generally-speaking such appeals can be dealt with more expeditiously than appeals "on the merits" without necessarily sacrificing a rigorous form of scrutiny.[7]

In summary, the questions that arise would appear to include the following: first, would something less than a full merits appeal give due regard to the merits for the purposes of

[5] The need for remission is no doubt conditioned by the fact that the CAT would not be equipped to undertake the consultations necessary before a revised decision could be re-taken.

[6] Its approach is influenced by the CFI, but there is not universal agreement that the principles applied by the European Court are identical to those applied by an English court on a claim for judicial review. The UK Competition Commission, for example, has reserved its position as to whether the principles of English judicial review are necessarily in all situations on "all fours" with the principles applied by the European Court in cases such as *Tetra Laval*: see *Somerfield v Competition Commission*; *Stericycle LLC v Competition Commission* available at www.catribunal.org.uk.

[7] The House of Lords Select Committee Sixth Report (Chapter XI) appears to recommend a general merits jurisdiction in respect of appeals against regulatory decisions. It also suggests the possibility of "fast track" appeals. There may be some tensions with this approach and its parallel desire to see appeals dealt with expeditiously.

Article 4? If it would, would this limit the scope of appeals and potentially reduce the time and resources required to deal with them, without sacrificing an appropriate level of judicial control? Secondly, even if Article 4 requires the appeal to be a full merits appeal as to the facts and the law, are there other ways of designing the appeal body's powers so as to help to minimize the length of the appeal proceedings as far as possible, for example by allowing it to make its own decision where possible?[8] Thirdly, imposing limits on the time in which appeals are to be determined may be a good idea but any time limit will have to take account of the nature of the right of appeal. This will be more difficult if rights of appeal vary too widely across the Community.

Price control appeals

The very particular design of the UK appeal structure in relation to price control issues is another area in which questions are likely to be raised as to whether the current UK provisions for appeals strike the correct balance between speed and thoroughness.

Under section 193 of the 2003 Act price control matters that arise in an appeal must be referred by the CAT to the Competition Commission ("CC"). The CC must determine the price control matters that are in dispute between the parties. The CAT is bound by the determination of the CC, unless the determination is flawed applying the principles of judicial review, in which case it can be set aside by the CAT. It can, however, give directions as to the procedure to be followed, including abridging the four-month period within which the CC must reach its determination on the price control matters. The CAT will still have to adjudicate on any non-price control matters raised by the appeal. The reference procedure before the CC is therefore a sort of "play within a play".

The CC must determine the price control matters that are in dispute, but the precise scope of its task in this context is not clearly defined. It has been noted that the CC does not typically act as an arbitrator, but rather as an investigative body with the expertise to decide on issues of substance with the responsibility if it sees fit to form views that are different from those of both the regulator and the regulated.[9] A full appeal on the merits implies not only that the appellant could raise new issues in the appeal but also that in the course of determining any price control matter referred to it the CC acting inquisitorially could itself introduce further new material and issues into the process, which could become quite protracted.[10] Following the CC's determination the appeal would then

[8] Where decisions require consultation with the EC Commission and other NRAs this is not something the CAT could carry out, so the option of the CAT taking its own decision seems unlikely to be available.
[9] Paul Geroski, Appealing to the Competition Commission, Utilities Policy 2004, vol 12, issue 2, pp 77-81. Re-printed in Essays in Competition Policy (Competition Commission, August 2006).
[10] A reference from the CAT in relation to price control matters under the 2003 Act is a matter for investigation according to the CC. A different approach applies in relation to energy code modification appeals under the Energy Act 2004, which must be completed within 12 weeks. Here the CC has said it will carry out a merits-based review of Ofgem's decision but without an investigation. The Act requires the CC to decide whether Ofgem's decision is right or wrong. In reaching its decision, the CC will not carry out an investigation, or hold what is effectively a re-run of the process by which Ofgem reached its decision. Instead, the CC will review Ofgem's decision.

resume before the CAT which potentially might have to hear a challenge to the CC's determination as well as any other issues it may be required to decide in the appeal.

As outlined above, there is a balance to be struck between having a relatively streamlined appeal process and one that is wider in scope but which takes longer. This is an issue that necessarily has to be set in the context of the subject-matter and what is at stake from the point of view of all concerned, including the need for regulatory accountability and interests of consumers.

That said, does an appeal structure that (following a potentially lengthy administrative investigation) allows the possibility of an appeal from an expert NRA, followed by a further full review on the merits either by the CAT and/or (in relation to price control matters) the CC strike the right balance? While it is probably true that the CAT is not as well-equipped as the CC to determining price control matters on the merits, the CC on the other hand arguably lacks the specialized legal skills to deal with many of the other issues that are likely to arise in appeals under the 2003 Act. However, if an appeal on the basis of judicial review was consistent with Article 4, the CAT would not have to go into price control matters "on the merits". Instead there would simply be an appeal by way of judicial review to the CAT from the decision of the NRA (also an expert body), which might be sufficient in terms of Article 4.

Inconsistent decisions

There is the obvious danger in a devolved system that different appeal bodies will take decisions that are not informed by approaches being taken by other NRA's and appeal bodies with the risk that decisions will be inconsistent with each other.

As a last resort the possibility of making an Article 234 reference to the ECJ exists as a means of ensuring consistency. Making a reference is unfortunately likely seriously to delay the speed with which the appeal can be determined. To this extent sensitivity by appeal bodies to developments elsewhere in the Community are likely to be an extremely important part of attempting to ensure consistency via "soft" methods.

In the recent *Hutchison* appeal the CAT considered of its own motion the decision of the Irish appeal body which was considering a case raising similar issues. In reaching its decision the CAT also took into account a decision of the German Regulator, the Commission's decision vetoing the German Regulator's decision and its reconsidered decision.

However, although those other decisions were helpful to the CAT, the decision of the EC Commission and the judgment of the Irish appeal body were relatively accessible. Taking into account other developments in EU countries is likely to be more difficult. It is arguable that it is easier in this context for a specialist appeal body to keep abreast of developments with a view to fostering consistency.

The possibility of the EC Commission submitting an 'amicus' brief in cases before national appeal bodies may be another method by which those bodies can maintain an overview of developments elsewhere in the Community thereby helping to assist consistency of approach.

Interim measures

The specific problem identified in the Communication (at para 5.3.2) and commented on in the Staff working document (at para 5.2) is the routine suspension of NRA decisions pending the outcome of appeals in systems that take years to reach a final outcome. The staff working document comments that "Pending the outcome of such an appeal, the regulator's decision should in principle be maintained." The staff working document comments that delaying the application of regulatory measures can hinder the development of competition in the relevant market and encourages use of the appeal process as a delaying tactic.

The proposed solution is to introduce legal criteria based on EC case law that national courts must use in deciding whether to suspend NRA decisions, notably introducing the requirement that "serious irreparable harm" must be threatened in order to justify suspension.

I have outlined below the CAT's approach to interim measures for those not familiar with it.[11] I have also thought this worthwhile because the CAT's approach is inspired by the approach of the CFI and appears to be similar to that contemplated by the Commission's Staff Working Paper. It is therefore relevant to the question whether such an approach is likely to address the problems perceived in relation to interim relief in appeals under the Framework.

Where the CAT considers that it is "necessary", as a matter of urgency, for the purpose of preventing serious, irreparable damage to a particular person or category of person or protecting the public interest, the CAT may give such directions as it considers appropriate for that purpose. In exercising its powers to grant interim orders the CAT must take into account "all the relevant circumstances", including (a) the urgency of the matter; (b) the effect on the party making the request if the relief sought is not granted; and (c) the effect on competition if the relief is granted. The applicant will usually be required to confirm the date by which it intends to file the main appeal.

In most cases, the CAT's approach involves asking five questions:[12]

(1) Are the arguments raised by the applicant as to the merits of its substantive appeal, at least prima facie, not entirely ungrounded, in the sense that the applicant's arguments cannot be dismissed at the interim stage of the procedure without a more detailed examination?

[11] The CAT's power to grant interim measures is contained in rule 61 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372)
[12] See *Genzyme v OFT (Interim Relief)* [2003] CAT 8.

(2) Is urgency established?

(3) Is the applicant likely to suffer serious and irreparable damage if interim relief is not granted?

(4) What is the likely effect on competition, or relevant third party interests, of the grant or refusal of interim relief?

(5) What is the "balance of interests" under heads (3) and (4)?

It may in some cases be necessary to go some way into the merits of the case in order properly to appraise the situation. The CAT will if necessary make a prima facie assessment of the strength or weakness of the applicant's case on the merits. In most cases however, the CAT has held that this is likely to be undesirable and impracticable.

As to the meaning of "serious and irreparable damage", irrecoverable financial loss does not by itself generally constitute serious and irreparable damage unless the survival of the undertaking is in question. Changes to the structure of the market brought about by the imposition of a decision whose effects might be very difficult if not impossible to reverse if the appeal were eventually successful, may constitute serious and irreparable damage. The fact that implementation of the contested decision will restrict an appellant's freedom to define its business policy may also be a relevant consideration, for example a requirement to offer an "unbundled" price.

As mentioned above, it would appear from this outline of the CAT's approach to the grant of interim relief is largely in conformity with the Working Paper's suggested approach.

However, a note of caution may need to be sounded. Even though a decision of the NRA is not automatically suspended by the making of any appeal[13], from a judicial perspective it is not at all clear that the relevant starting point or presumption is perhaps quite the same as that in the staff working paper, namely that "the regulator's decision should in principle be maintained."[14] Courts instinctively do not like deciding issues that may change the *status quo ante* without having fully gone into all the facts, especially in relation to cases which are complex. A number of competition appeals in the UK brought by under-resourced appellants which at first sight have appeared rather weak and disorganized have turned out following an in-depth examination to be rather more meritorious than they initially appeared. If anything, it is arguable that in such cases the appellant requesting interim relief starts with a slight advantage over the NRA that is likely to be trying to change the status quo.

In relation to an issue such as interim measures it is generally recognized that the criteria imposed cannot be too prescriptive. Courts must necessarily retain considerable discretion and flexibility in this area to deal with individual cases justly. Of course

[13] As it is in the case of appeals in competition cases against any penalty imposed.
[14] The author is of course not a judge but this statement has been read by one without critical comment.

unmeritorious cases should not be allowed to be used as a vehicle for delaying tactics but in the 'real world' it is sometimes quite difficult at an interim stage to weed out all but the most obvious cases in an area of some complexity, or at least not without a significant deployment of judicial resources at the interim stage. This increases the allocation of judicial resources that must be allocated to that case and tends to slow down the resolution of other cases.

Although promulgating a uniform set of criteria may help in ensuring greater consistency it should not be assumed that it will automatically lead to a significant reduction in the number of suspended decisions. National Courts will necessarily still retain considerable discretion in practice and Courts will always be somewhat cautious at an interim stage until they feel they have a better grasp of the overall case, for the reasons I have tried to explain. The discretion they will continue to enjoy may also mean that the national way of doing things may reassert itself. In competition cases the CAT has been relatively cautious and has either ordered the suspension of the measure in question, or has helped to "broker" interim arrangements between the parties, or the parties themselves have reached agreement on arrangements that should apply pending the outcome of the proceedings. In the UK the question of interim relief has yet to arise in the context of appeals under the 2003 Act.

Many courts, and perhaps many parties, would find it generally more efficient and satisfactory (if at all possible) to have the appeal decided in full within a relatively short period rather than have to determine an interim application followed by a further substantive hearing at some rather distant period in time. The greater the delays in the appeal system the greater the need for interim measures. It is arguable therefore that in addition to a set of uniform criteria for interim relief as much attention as possible should also be focused on what steps can be taken to reduce the time within which appeals are determined. One of those issues is that already discussed, which is trying to sort out what an appeal in the context of the Framework ought to consist of?