

Delving into the detail: the CAT's scrutiny of cost-benefit analyses ~

Vodafone Ltd v OFCOM [2008] CAT 22

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Whilst the courts can sometimes display reluctance when asked to delve into the technical or financial detail that lies behind public law decision-making, such reluctance is considerably less evident in the Competition Appeal Tribunal ('the Tribunal'). In the case of *Vodafone Ltd v OFCOM* [2008] CAT 22 the Tribunal considered a wide-ranging challenge to the details of OFCOM's cost benefit analysis ('CBA') of proposed changes to the telephone number portability regime. CBAs are a frequent feature of the exercise of public law powers, and the judgment provides a useful insight into the Tribunal's approach.

OFCOM had issued a decision on 29 November 2007 to modify Part 1 and General Condition 18 of Part 2 of the General Conditions regarding telephone number portability ('the Decision'). Number 'porting' is a process which enables consumers who have switched communication provider to keep the same phone number. Although calls to a ported number will generally continue to be routed, in the first instance, to the network of the consumer's original service provider (the 'donor network'), that network will then 'onward route' the call to the network of the new provider (the 'recipient network'). The donor network is entitled to charge the recipient a per minute charge for onward routing the call as a contribution towards the costs of that routing.

The Decision comprised two modifications to the manner in which porting occurs:

- (1) that calls be routed *directly* to the recipient network rather than via the donor network, by the establishment of a central database, initially for mobile ported numbers and later to be extended to fixed line ported numbers; and
- (2) that the process of porting a number should be 'recipient-led' - i.e. that a consumer should be able to initiate the process of porting simply by making a request of the recipient network, without having to contact their existing provider for a Porting Access Code (or 'PAC Code') first.

OFCOM based the Decision on two foundations: a cost-benefit analysis ('CBA') which purported to show that the modifications would have a net benefit to the industry (by avoiding the costs of onward routing), and the risk to consumers who have ported their numbers of the donor network failing (in which case consumers who had ported their numbers from that donor network might unexpectedly find themselves unable to receive calls until they adopted a new phone number). Ofcom estimated that the financial savings to industry would themselves be sufficient to cover the financial costs of implementing the proposed modifications and that, in those circumstances, there was no good reason not to mandate those modifications. Vodafone successfully challenged each of these two foundations of Ofcom's Decision as insufficiently robust.

The Tribunal held that as s 192(2) of the Communications Act 2003 required that the appeal should be decided "on the merits", the standard of review was to be that which it had outlined in Hutchinson 3G UK Ltd v OFCOM [2008] CAT 11, namely whether OFCOM's analysis would stand up to "*profound and rigorous*" scrutiny. In particular, it stated that "*The essential question for the Tribunal is whether OFCOM equipped itself with a sufficiently cogent and accurate set of inputs to enable it to perform a reliable and soundly based CBA.*" (Paragraph 47). Applying this test, the Tribunal proceeded to conduct a penetrating and detailed review, including of the process by which the CBA had been compiled, and of the estimates of cost and benefit which were used as inputs into it.

In respect of the cost inputs the Tribunal held that the estimates in particular of the capital expenditure that would be incurred in establishing the proposed database were inadequate. OFCOM had sought to resist challenges to the sufficiency of its cost estimates on the basis that, *inter alia*, industry participants had not provided more detailed information as to their projected costs, and it was therefore not properly open to them to complain that Ofcom should have carried out a more detailed analysis of those costs. The Tribunal rejected this argument. It held that in this case OFCOM had failed to provide a technical specification when consulting the industry on its proposals, and although it would not be necessary to provide such a specification in *every* case, here the proposals were such that consultees could only provide "*speculative and potentially misleading*" cost estimates, based on their own divergent assumptions as to what the specifications would be. This could have been cured by requiring industry stakeholders to design a provisional solution. In the absence of defined parameters within which industry could provide cost estimates, the inputs OFCOM relied on in the CBA were unreliable. The Tribunal indicated that in future OFCOM should consider whether costing a proposal in an individual case requires that industry co-operate in designing an initial specification.

In respect of the estimated benefits of the proposal, the Tribunal considered that OFCOM had erred in relying on the risk of donor network failure as a consumer protection justification, without first assessing either the likelihood of such a failure, or quantifying the adverse effects on consumers which such a failure would have. Thus, the inputs into the CBA on the 'benefits' side were likewise not robust.

The Tribunal also held that the CBA did not contain sufficient sensitivity testing. Although OFCOM argued that it had adopted conservative estimates and assumptions as to the inputs for the CBA, this did not remove the need to conduct sensitivity analyses. The Tribunal also noted that, although the CBA did include two sensitivity tests, an earlier report on which OFCOM had relied for many of its inputs had included a sensitivity test on *every* input. Though it is not stated explicitly, the suggestion appears to be that a sensitivity test should in future be applied to at least the majority, if not all, of the inputs used by a regulator in its CBAs, at least where considerable uncertainty surrounds the true value of the anticipated costs and benefits represented by those inputs.

Inadequate consultation

The Tribunal went on to find that the deficiencies in the CBA were such as to render OFCOM's consultation process inadequate. Although it acknowledged that the consultation had been sufficient in form, the uncertainties which the Tribunal found were inherent in the proposals (in particular the absence of a technical specification for the proposed database) meant that industry were not able "*fully to provide intelligent and realistic responses*". The consultation was not, therefore, effective within the terms of Lord Woolf MR's test in R v North and East Devonshire Health Authority, ex p Coughlan [2001] QB 213, as it did not enable the industry to provide sufficiently informed views on the likely costs of the proposals.

On the basis of these conclusions, the matter has been remitted to OFCOM. The Tribunal added a recommendation that "*a staged approach to decision making in a matter of such complexity may be advantageous*". The judgment signals a clear willingness on the part of the Tribunal to look at CBAs in depth and not to simply accept that such matters are best left to the discretion of the decision-maker. The judgment is therefore likely to encourage challenges to regulators' decisions which have been taken by reference to CBAs, particularly where the Tribunal is the forum in which the challenge would be heard, and where a "merits" review is required.

Tim Ward appeared for Vodafone
Alan Bates appeared for OFCOM
Meredith Pickford appeared for the Intervener, T-Mobile

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