Brexit: telecoms and the courts

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Telecoms

- Life outside the Common Regulatory Framework: hopes and fears
- Will Brexit lead to less regulation, or more?
- Rights of appeal

The Common Regulatory Framework

- Four principle Directives: Access 2002/19/EC, Authorisation 2002/20/EC, Framework 2002/21/EC and Universal Service: 2002/22/EC.
- They are single market measures adopted pursuant to Art 95 EC [now Art 114 TFEU].
- The purpose is to provide a substantially harmonised framework for competition across the EU.

Key features of the CRF

- Each MS has a national regulatory authority.
- NRA must give effect to general duties of promoting undistorted competition etc.
- Harmonised system of access and interconnection.
- System of general authorisation rather than licensing.
- Requirement for period market reviews to determine whether "significant market power".
- Ability to impose price controls where SMP.
- Harmonised universal service obligations.

UK telecoms sector is international

- BT provides services in every EU country, and is 12% owned by Deutsche Tel.
- O2 is owned by Telefonica.
- Vodafone earns half its revenue in the EU.

To state the obvious: effective cross border interconnection and market access is important for the UK.

High level policy

- “the United Kingdom does not seek membership of the single market..
- We know that we will lose influence over the rules that affect the European economy. We also know that UK companies will, as they trade within the EU have to align with rules agreed by institutions of which we are no longer a part.
- We should begin technical talks on detailed policy areas … we propose a bold and ambitious Free Trade Agreement.”

Art 50 Notice leter, 29 March 2017

Impact of the Great Repeal Bill

- The CRF is largely implemented in the UK by primary legislation: Communications Act 2003.
- But in any event: “legal rights and obligations in the UK should where possible be the same after we have left the EU as they were immediately before we left”: White Paper.

But…

CRF includes various roles for the Commission or Body of European Regulators ("BEREC"):

- Commission decisions on further harmonisation: Art 19 FWD.
- Resolution of cross border disputes by BEREC: Art 21 FWD.
- Information exchange between States: Art 23 FWD and Art 15 Access Dir.
- Notification requirements: Art 16 Access Dir
- Periodic CRF review.

Standard Setting?

Art 17 FWD:

The Commission shall draw up non-compulsory standards and specifications as a basis for encouraging harmonisation.

MS shall encourage their use "to the extent strictly necessary to ensure interoperability of services and to improve freedom of choice for users".

Ofcom's view

- Ofcom (Sharon White on 01.12.2016) hopes to:
  - Retain what works in the EU framework
  - Improve it, where it may be deficient
  - Avoid making things worse, by inadvertently weakening powers or protections

Ofcom's view

- Improve on the framework where deficient, but "not regulatory creep"
  - Telecoms CRF is under review
    - Longer than current 3 yearly market reviews
  - Mergers and takeovers
    - Domestic merger law for future takeovers: no more one-stop shop
    - Introduce policy or public-interest concerns. (H3G - 02 merger was blocked by Comm)
    - Concurrent jurisdiction with the Commission
    - New protections to protect UK consumers from oligopoly.

And more…

- Retail regulation
    - Current review into landlines without broadband
    - Compare Commission's plan to ban retail regulation by 2020.
- An opportunity for deregulation.
    - Eg: State aid rules, to enable public funds for roll out of broadband.

“Avoid making things worse”

- Mobile roaming charges – requires agreement between the UK and EU:

  “*Otherwise our mobile operators may be exposed to unfair costs, and our people and businesses could end up paying more than our European neighbours.*”

- Ofcom currently enjoys powers under EU law to require structural separation of BT and its wholesale broadband division, Openreach. Wishes to ensure those powers are unaffected.

Rights of appeal

- Art 4 of the FWD requires a right of Appeal against the decision of an NRA "in which the merits of the case are duly taken into account".

- Current Digital Economy Bill abolishes right of appeal "on the merits" in most cases.

- Tribunal must instead decide the appeal by applying the same principles as would be applied by a court on an application for judicial review.

Brexit and the national courts and regulators

- EU law is supreme and conflicting national measures must be set aside.
- National courts give effect to EU law, and refer a handful of cases each year under Art 267.
- CMA carries out an analogous function to the Commission in competition cases, under legislation modelled on EU law: Competition Act1998.
- NRAs apply EU sectoral regulation.

The Courts and the Great Repeal Bill

- The Great Repeal Act will enshrine – and fossilise – EU law (2019 edition) in UK domestic law.

- EU law will no longer be "supreme". But:

  "The legal rights and obligations in the UK should where possible be the same after we have left the EU as they were immediately before we left."

- Domestic courts will "look to the Treaty provisions in interpreting EU laws that are preserved".

- "t]here are rights in the EU treaties that can be relied on directly in court by an individual, and the Great Repeal Bill will incorporate those rights into EU law."

So what will change?

- EU law is fossilised: only old judgments are binding.
- No more references to the CJEU.
- The Supreme Court will be able to depart from CJEU “when it appears right to do so”.
- The Supreme Court will be final – save only for individual petition to the ECHR.
- Measures given effect by the GR Bill can be amended.
  - That will reduce the value of both CJEU and UK precedent based upon it.
- Doctrine of implied repeal:
  - Newer legislation “will take precedence” over preserved EU law.
  - But old EU-derived law will take precedence over other old law.

Attitude of Courts

Art 1 of Protocol No 20 entitles the UK to “exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary for the purpose.”

R(McCarthy) v Secretary of State: [2012] EWHC 3368:

“the language of the Frontiers Protocol [No 20] is broad and permissive: the UK is granted the widest possible discretion to impose *"such controls…as it may consider necessary".* It effectively sweeps EU law aside as an obstacle to the exercise of the discretion.”

Compare C -202/13 *McCarthy*: Protocol allows UK to verify whether a person in fact fulfils the conditions of entry at the border, but does not permit the UK to refuse entry of persons with a right to enter under EU law.

R(HS2 Alliance) v Secretary of State [2015] UKSC 3

"The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689 , the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972 , the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation." (emphasis added)

After Brexit?

- Courts may seek to minimise the impact of EU law arguments – particularly in cases where points of principle are at stake.

- But ECJ case law will remain crucial to the interpretation of EU-derived law.

- Some judges will be even less enthusiastic than now about applying it.

- But other judges will want to know about post-Brexit developments in interpretation of EU law.

The role of the Commission?

- The CMA fulfils the same function as the Commission now, with regard to distortions of competition in UK markets.
- It will have more merger work to do.
- Sectoral regulators will carry on, but may be emboldened.
- But they will also be at risk of abolition…

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