

Communications Consumer Panel response to BIS' consultation on the appeals framework for regulatory and competition decisions

Introduction

1. The Communications Consumer Panel welcomes this opportunity to respond to this consultation on the appeals framework for regulatory and competition decisions.
2. The Panel is an independent group established under the Communications Act 2003. Its role is to provide advice to Ofcom to ensure that the interests of consumers, including micro businesses, and citizens are central to regulatory decisions. The Panel also provides advice to Government and champions consumers' and citizens' communications interests with industry. The Panel has Members representing the interests of consumers in Scotland, Wales, Northern Ireland and England.
3. Under the Communications Act 2003, Ofcom's principal duties in carrying out its functions are (a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition. The Panel is often described as a 'critical friend' to Ofcom. We provide robust and independent advice that is constructive, realistic and cognisant of the trade-offs which regulatory decisions often involve. This is made possible by the fact that Ofcom shares information and ideas with the Panel early in the regulatory process, before consulting formally with other stakeholders. This enables us to give strategic advice on policies early on in their development to ensure consumer interests are built into Ofcom's decision-making from the outset.

Consultation response

4. By their very nature, regulatory decisions have significant consequences. As such, it is vital that they are based upon transparent, objective, evidence-based and robust consideration of the highest standard. As part of that decision-making process, business also has a responsibility to present evidence during the consideration period that it considers pertinent to the issue under debate.
5. We recognise that such decision-making often involves trade-offs, but what is fundamental is that, in addition to being legal, fair and rational, the decision correctly balances the interests of consumers, citizens and business.

6. Given the importance of such decisions, it is essential that regulators can be held to account and that there is a clear and well-documented mechanism for challenge. However, the Panel believes that the current process for regulatory appeals does not sufficiently take into account the interests of consumers. We are also conscious that, unlike the regulator, the Court does not have an explicit duty to further the interests of consumers and citizens.
7. The communications sector is a particularly fast-moving market. When regulation is developed in order to address market problems specifically affecting consumers, it is in consumers' interests to be able to benefit from such regulatory developments as soon as possible. Lengthy appeals which reopen consideration of the grounds of a decision delay the implementation of regulation - potentially to the detriment of the consumer and citizen.
8. Regulatory certainty also allows business greater confidence to create and invest. In the most general sense, greater competition can lead to improved choice, lower prices and an increased focus on innovation - which are all to the benefit of consumers. A long and unwieldy appeals process and regulatory uncertainty can limit businesses' ability to plan effectively and grow.
9. In addition to our concerns about delays and uncertainties related to the appeals system, we are also conscious of the risk of the inefficient use of resources. There is currently little financial disincentive to large firms to appeal decisions. However regulators such as Ofcom have a limited resource pool and budget. Every year decisions have to be made about which issues are a priority to address in the light of these limitations. While it remains vital that regulators' decisions are open to challenge and scrutiny, defending fewer intensive appeals would allow the reallocation of resources to work aimed to protect and promote the rights of consumers.
10. We would argue that appeals should be limited to where there is genuine concern that a regulator has acted unlawfully, failed to exercise its discretion appropriately, or made a factual or process error. We therefore support the proposal to move to judicial review (or specified grounds) appeals. Such appeals would preserve the required challenge to regulatory decisions but deliver swift and efficient justice for consumers, citizens and small and large businesses alike.