



Neutral citation [2013] CAT 15

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1210/3/3/13

Victoria House
Bloomsbury Place
London WC1A 2EB

27 June 2013

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)
PETER FREEMAN, CBE, QC (Hon)
MARCUS SMITH, QC

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) **VERIZON UK LIMITED**
(2) **VODAFONE LIMITED**

Appellants

- v -

OFFICE OF COMMUNICATIONS

Respondent

RULING (PERMISSION TO INTERVENE)

APPEARANCES

Mr. Philip Woolfe (instructed by Towerhouse Consulting LLP) appeared for the Appellants, Verizon UK Limited and Vodafone Limited.

Mr. Josh Holmes and Mr Mark Vinall (instructed by the Office of Communications) appeared for the Respondent.

Mr. Ewan West (instructed by the Treasury Solicitor) appeared for the Competition Commission.

Mr. Daniel Beard QC and Mr. Nicholas Gibson (instructed by BT Legal) appeared for British Telecommunications plc.

Mr. Meredith Pickford (instructed by Webb Henderson) appeared for British Sky Broadcasting Limited and TalkTalk Telecom Group plc.

1. On 28 March 2013, the Office of Communications (“OFCOM”) determined the product and geographic markets and the charge controls for business connectivity services until 31 March 2016 in a decision entitled “*Business Connectivity Market Review – Review of retail leased lines, wholesale symmetric broadband origination and wholesale trunk segments*” (the “Decision”). In the Decision, OFCOM set the level of the price control on traditional interface (“TI”) services provided by British Telecommunications plc (“BT”) at RPI +2.25%.
2. Verizon UK Limited and Vodafone Limited (collectively, the “Appellants”) appeal the Decision pursuant to section 192(2) of the Communications Act 2003. They do so jointly, and have filed a single Notice of Appeal with the Tribunal (the “Appeal”). The basis for the Appeal is that OFCOM erred in its treatment of certain common costs. Paragraph 4 of the Notice of Appeal states:

“The Appellants’ case is that Ofcom has made a material error in the setting of that price control by deciding not to allocate common costs away from TI services in proportion to all forecast customer migration, rather only in proportion to forecast customer migration from TI services to Ethernet services... Ofcom should also have removed from the TI services basket a proportion of common costs which reflected migration to services other than Ethernet...”
3. According to the Appellants, this error significantly affected the price control for TI services. Had it not been made, according to the Appellants (and, of course, we express no view at this stage), then the price control would not have come to an above-RPI control, but a control significantly below RPI.
4. On 20 June 2013, a case management conference (“CMC”) took place, at which various directions were made, and various applications dealt with. BT – as the subject of the price controls instituted by the Decision – applied for, and was given, permission to intervene pursuant to Rule 16 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) (the “2003 Rules”). British Sky Broadcasting Limited (“BSkyB”) and TalkTalk Telecom Group plc (“TalkTalk”) together also applied to intervene in the Appeal. Both OFCOM and BT resisted that application. The application was refused by us at the

CMC, and we indicated that we would provide our reasons at a later stage. This ruling contains those reasons, and deals only with this particular application.

5. BSkyB and TalkTalk contended that, although they do not purchase TI services, and so cannot be affected by any adjustment in the price control for TI services, they nevertheless have an interest in the outcome of the appeal, sufficient to entitle them to join the Appeal as interveners. The basis for that application was as follows:

- (1) First, although BSkyB and TalkTalk are not purchasers of TI services, they are leading providers of retail fixed telephony and broadband services, which services are provided by them using a combination of Ethernet, local loop unbundling (“LLU”) and wholesale line rental (“WLR”) services purchased by them from BT. Because the Appeal challenged OFCOM’s allocation of common costs, and because common costs have to be allocated somewhere, any allocation away from TI services to other services might potentially affect other price controls in respect of services which BSkyB and TalkTalk do buy. Mr. Pickford, on behalf of BSkyB and TalkTalk, put the point as follows (Transcript, page 6):¹

“...there is simply a general principle about how costs should be allocated in price controls taking account of the fact that there are other price controls going on at different times in relation to which the same costs might or might not be allocated. There is a general point of principle, and we would like to advance our position on that particular issue. That is the first point.”

- (2) BSkyB’s and TalkTalk’s second point was related to their first. If the Appellants were successful in persuading the Competition Commission (it is common ground between the parties that the questions in the Appeal are all price control matters within the meaning of section 193 of the Communications Act 2003 and Rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068)) that common costs should be allocated away from

¹ The version of the transcript quoted in this Ruling may be subject to correction.

TI services, the Appellants might contend – and the Competition Commission might decide – to allocate these costs to a service in which BSkyB and TalkTalk had an interest as a purchaser. Mr. Pickford put the point as follows (Transcript, page 7):

“The second point is more specific to this particular appeal, which is that one of the implications of the Vodafone/Verizon appeal is that it is concerned that the TI services are not picking up these common costs. They should be going, in particular, to other services and including services that my clients buy in very large quantities, namely LLU, WLR services... So we are concerned in that context to protect our interest to ensure that no findings are made, or anything is established by the Competition Commission, that would lead to the conclusion that the appropriate place for those costs to end up are the services that we are purchasing because we say that the cost of those services already reflects an appropriate apportionment of those costs.”

In short, BSkyB and TalkTalk were intervening in order to persuade the Competition Commission, if it were minded to state where the common costs were to be allocated if not to TI services, to allocate those costs away from BT services in which BSkyB and TalkTalk had an interest, as purchasers of those services.

- (3) BSkyB’s and TalkTalk’s third point was that there was a potential inconsistency – as regards the treatment of common costs – between a charge control previously imposed by OFCOM in respect of LLU and WLR services, and the charge control the subject of this Appeal. Essentially, the point was that some or all of the common costs presently allocated to this charge control were (in the LLU/WLR charge control) being recovered elsewhere. This point was subject to the following exchange (Transcript, pages 12 to 13):

Mr. Pickford “...we believe that they [that is, the common costs presently allocated to TI services] are likely to be being recovered directly through a price control in relation to LLU/WLR. That is clearly a highly material and important consideration. If we are right, then it would be quite wrong for the Competition Commission to be considering these issues on the assumption that these costs are not being picked up elsewhere, when in fact that is incorrect and they are being picked up elsewhere.

Mr. Freeman So what is the effect on your clients of this further factual error – alleged factual error, I should say?

Mr. Pickford In this context, in relation to TI services, none, which is again why we did not appeal. We did not appeal it because we do not purchase TI services.

Mr. Freeman If Mr. Duckworth [BSkyB’s and TalkTalk’s expert] is right, then presumably something is wrong with the WLR/LLU price control – is that right?

Mr. Pickford No, we would say that, if Mr. Duckworth is right, something is wrong with the TI price control, because it proceeds on an assumption –

The President They may both be wrong, but is Mr. Freeman not right that there is too much cost in the WLR and the LLU price control?

Mr. Pickford The WLR and LLU price control is not being appealed here.”

6. In order to be granted permission to intervene, an applicant must show a “sufficient interest in the outcome” of the proceedings (Rule 16(1) of the 2003 Rules). In this case, as Mr. Pickford candidly accepted, BSkyB and TalkTalk have no interest in the outcome of the Appeal: whether the price control for TI services (which is the subject-matter of the Appeal) goes up, down or stays the same is matter of indifference to BSkyB and TalkTalk, since they do not purchase these services.

7. The question is whether the risk that the Competition Commission might find, in the course of this Appeal, that the common costs presently allocated to TI services should be allocated to a service in which BSkyB and TalkTalk are interested as purchasers, creates a sufficient interest for the purposes of intervention. We have no doubt that it does not:

(1) Although a responsible regulator like OFCOM will seek to achieve consistency amongst the various price controls that it imposes, including consistency as to the calculation and allocation of common costs, each decision by OFCOM to impose a price control is a separate and distinct decision, which must be based on the evidence before OFCOM in relation to that decision, on which evidence interested parties will be

able to comment during the consultation stages built into OFCOM's decision-making processes.

- (2) A finding by OFCOM during the course of a previous price control (or, for that matter, a finding of this nature by the Competition Commission) can at best be only of limited relevance in determining what a later price control in respect of a different product should be. That is because (quite apart from any change in circumstances) the parties interested in that later price control would, rightly, expect OFCOM to determine the appropriate price control based upon the evidence before OFCOM as part of that process.
- (3) In the case of this Appeal, the Competition Commission will be determining whether common costs have appropriately been allocated to the TI service. In considering this question, the Competition Commission may well have regard to alternative services to which such costs might be allocated: but that is not the issue before the Competition Commission, and the Competition Commission will not be making findings in this respect. The only factual point being determined by the Competition Commission in this Appeal is whether common costs should have been allocated to TI services in the manner decided by OFCOM.
- (4) In short, we do not accept Mr. Pickford's basic contention that there is so fundamental a connection between one price control and another, that a finding of fact in one feeds through so as to determine another, later, price control. Mr. Holmes, counsel for OFCOM, put the point correctly, when commenting upon Mr. Pickford's suggestion that this Appeal might affect or somehow determine issues in a future price control coming before OFCOM (Transcript, page 26):

“...this concerns a separate price control which will shortly be the subject of consultation and on which his [Mr. Pickford's] client will have a full right of appeal, and will not be precluded from taking any points. Insofar as the Competition Commission reaches conclusions that are *per incuriam* because particular issues relevant to another price control appeal have not been fully ventilated before them, they will have a full

right of appeal, and it is much more appropriate for good order, and a manageable appeal process, to take price controls one by one and not try to enlarge the Competition Commission's task to consider the implications of this price control for other price controls that can be appealed later."

- (5) The point may be illustrated in the following way as regards previously determined price controls. Suppose, as Mr. Pickford contended (see paragraph 5(3) above), there was an inconsistency between the TI charge control (the subject of the present Appeal) and the prior LLU/WLR charge control (which was the subject of now-concluded, appeals brought by BT and by BSkyB and TalkTalk (jointly)), but that (contrary to Mr. Pickford's contention) this inconsistency was because of a possible error in the LLU/WLR charge control. It would be contrary to legal certainty to suggest – and, significantly, Mr. Pickford did not so suggest (see the exchange quoted in paragraph 5(3) above) – that this already determined charge control could be re-opened, for the matter to be examined. Of course, it could not, and this only serves to underline the separateness of OFCOM's charge control decisions, both as regards past price controls and price controls to be determined in the future.
8. All three of BSkyB's and TalkTalk's contentions founder on this fundamental point. Practically speaking, this must be the right approach. By their own admission, BSkyB and TalkTalk have no direct interest in the outcome of the Appeal: what concerns them is possible "knock-on" effects. Were intervention to be permitted on this basis, the number of interveners in appeals, and the number of points taken, would have the potential to increase dramatically. As the Tribunal notes in *British Broadcasting Limited v Office of Communications* [2012] CAT 18 at [5], when considering whether to allow an intervention, the Tribunal must consider not only whether there is a "sufficient interest", but also "whether allowing the intervention would be consistent with the just, expeditious and economical conduct of the proceedings". In this case, it clearly would not be.
9. We do note that BSkyB and TalkTalk may have identified an error in the present TI charge control, that is not raised by the Appeal. We go no further

than to note the possibility of an error. It is undesirable for a price control to be imposed on a false basis. If – during the course of the appeal process – an unequivocal error is identified, then clearly it ought to be corrected. However, as Mr. Holmes noted (Transcript, page 24), it is OFCOM’s practice “where a material factual error is identified incidentally in the course of proceedings, to correct it, and where it is feasible to do so, to correct it immediately before the exhaustion of the appeal, and if it gives the Tribunal any comfort, that would be our course in this case as well”. We do take comfort from this, and have no doubt that, as in other appeals, OFCOM will correct any incidentally identified material factual error in this Appeal.

The President

Peter Freeman, CBE, QC
(Hon)

Marcus Smith, QC

Charles Dhanowa, OBE,
QC (Hon)
Registrar

Date: 27 June 2013