



Neutral citation [2022] CAT 8

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1426/3/3/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

11 February 2022

Before:

BEN TIDSWELL
(Chairman)
DR CATHERINE BELL CB
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

CITYFIBRE LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

Heard remotely on 4 February 2022

RULING (PERMISSION TO INTERVENE)

APPEARANCES

Mr Josh Holmes QC, Ms Jessica Boyd and Ms Isabel Buchanan (instructed by Bristows LLP) appeared on behalf of the Appellant.

Ms Monica Carss-Frisk QC, Ms Naina Patel and Ms Khatija Hafesji (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Robert Palmer QC and Ms Laura John (instructed by Addleshaw Goddard LLP) appeared on behalf of the proposed intervener, British Telecommunications plc.

Mr Philip Woolfe (instructed by Towerhouse LLP) appeared on behalf of the proposed intervener, Sky UK Limited.

Mr Fergus Randolph QC (instructed by TupperS Law) appeared on behalf of the proposed interveners, County Broadband Limited, Jurassic Fibre Limited, Swish Fibre Limited and Zzoomm plc.

A. INTRODUCTION

1. The Appellant, CityFibre Limited (“CityFibre”), filed a Notice of Appeal (“NoA”) on 29 November 2021 under s192 of the Communications Act 2003 against a decision contained in a statement made by the Respondent, Office of Communications (“Ofcom”), dated 30 September 2021 entitled *Openreach Proposed FTTP Offer starting 1 October 2021* (the “Decision”).
2. Requests for permission to intervene in these proceedings were filed, pursuant to Rule 16 of the Competition Appeal Tribunal Rules 2015 (the “Tribunal Rules”), as follows:
 - (1) By British Telecommunications plc (“BT”) on 22 December 2021 in support of Ofcom;
 - (2) By Sky UK Limited (“Sky”) on 23 December 2021 in support of Ofcom; and
 - (3) By a group of mainly vertically integrated alternative network infrastructure providers comprising County Broadband Limited, Jurassic Fibre Limited, Swish Fibre Limited and Zzoomm plc (together the “Altnets”) on 29 December 2021 in support of CityFibre.
3. CityFibre and Ofcom filed written observations in response to these intervention requests.
4. A case management conference (“CMC”) was held remotely on 4 February 2022 where, having read written submissions filed by the parties and proposed interveners in advance of the CMC and hearing oral submissions by counsel at the CMC, the Tribunal unanimously granted BT permission to intervene and refused Sky and the Altnets permission to intervene. These are the Tribunal’s written reasons.

B. THE TRIBUNAL RULES

5. Rule 16 of the Tribunal Rules provides insofar as material that:

“(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings.

...

(6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit. ...”

6. It was common ground that each of the proposed interveners were able to establish a sufficient interest, primarily through their respective commercial interests in the outcome of the appeal. Argument before the Tribunal focused on the exercise of the Tribunal’s discretion under Rule 16(6), both as to whether to permit the interventions and the terms on which that should be allowed.

7. It is clear from previous Tribunal decisions that this discretion is to be exercised in accordance with the governing principles set out in Rule 4 of the Tribunal Rules. See *B&M European Value Retail S.A. v Competition and Markets Authority* [2019] CAT 8 (“*B&M*”), *Sabre Corporation v Competition and Markets Authority* [2020] CAT 16 (“*Sabre*”) and *JD Sports Fashion plc v Competition and Markets Authority* [2020] CAT 17 (“*JD Sports*”).

8. Rule 4 provides:

“(1) The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate—

...

(d) ensuring that it is dealt with expeditiously and fairly; ...”

C. BACKGROUND TO AND NATURE OF THE APPEAL

9. The Decision concerns new pricing arrangements (called the “Equinox Offer”) notified to Ofcom by Openreach (a BT subsidiary) for “Fibre to the Premises” (“FTTP”) broadband services. Openreach is subject to a direction from Ofcom, made pursuant to Ofcom’s Wholesale Fixed Telecoms Market Review 2021-26 (“WFTMR”), to give advance notice to Ofcom of certain types of new commercial terms offered by Openreach. Openreach notified the Equinox Offer to Ofcom on 1 July 2021.
10. Following a call for inputs and a consultation, Ofcom made the Decision complained about in the NoA, which was not to take any further action at the time, because Ofcom assessed that the Equinox Offer would not have a material adverse impact on competition. This included a conclusion that the mechanisms of the Equinox Offer did not create a potential barrier to the use of alternative networks by wholesale customers (the Internet Service Providers, or “ISPs”). As a result, the Equinox Offer came into effect on 1 October 2021 and is expressed to apply for a period of ten years.
11. CityFibre challenges the Decision on the following grounds:
 - (1) Ground 1(a): Ofcom’s conclusion that there would be limited overlap of Openreach’s FTTP footprint by alternative networks in the next 12 to 24 months (the “Overlap Conclusion”) had no sound evidential foundation in the Decision.
 - (2) Ground 1(b): Ofcom failed adequately to investigate or consult on the Overlap Conclusion.
 - (3) Ground 2: The conclusion that the mechanisms of the Equinox Offer did not pose even a “potential barrier” to using alternative networks is not one that can be reasonably drawn on the basis of Ofcom’s own analysis.
12. CityFibre supports its appeal with a witness statement from Mr Dunn, CityFibre’s Chief Financial Officer, in which he provides a view on the likely

level of overlap between CityFibre’s FTTP network and Openreach’s FTTP network in the next 12 to 24 months.

D. THE APPLICATIONS FOR PERMISSION TO INTERVENE

(1) BT’s intervention request

13. Mr Palmer QC made submissions on behalf of BT. As a general point, he submitted that the references in *Sabre*, *B&M* and *JD Sports* to whether an intervener “*added value*” to the issues in the case should not be taken to establish a general test. The circumstances of each case needed to be considered in light of the factors set out in Rule 4. In this case, the fact that the Equinox Offer was a commercial proposition put into the market by BT was highly relevant. In order to take proper account of the requirement for fairness expressed in Rule 4(2)(d), BT should be permitted to intervene.

14. Mr Palmer also sought to distinguish *Sabre*, *B&M* and *JD Sports* as merger cases under the Enterprise Act 2002, where the standard of review for the Tribunal was the application of conventional judicial review principles. By contrast, in this case the Tribunal was required under Article 31 of the European Electronic Communications Code (“EECC”) (previously Article 4 of the Framework Directive) to ensure that the “*merits of the case are duly taken into account*” and that there is an effective appeal mechanism. This is notwithstanding that s194A(2) of the Communications Act 2003 also specifies that the Tribunal must decide the appeal “*by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review*”. These provisions have been the subject of discussion in previous telecommunications cases and *Virgin Media Limited v Office of Communications* [2020] CAT 5 is a convenient recent summary of the authorities on this point.

15. Mr Palmer developed this argument by submitting that:

(1) In this case, the approach taken by CityFibre to base its case on what it described as “narrow judicial review principles” did not relieve

CityFibre of the need to show materiality of any error by Ofcom before the Decision could be remitted. That included an assessment of the evidence advanced by Mr Dunn, which was something that BT was uniquely able to respond to.

- (2) The approach taken by Ofcom in its Defence, and in particular the evidence submitted by Ofcom in support of that Defence, left open the possibility that CityFibre might expand the basis of its appeal in order to sustain its challenge to the application of the “*potential barrier*” test by Ofcom.

16. In support of his argument, Mr Palmer referred us to the following passage from the judgment of Moses LJ in *Everything Everywhere Limited v Competition Commission and Ors* [2013] EWCA Civ 154 (“*EE*”) at [24]:

“The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate decision is based are wrong, and second, it must show that its proposed alternative price control measure should be adopted by the Commission. If the Commission (or Tribunal in a matter unrelated to price control) concludes that the original decision can be supported on a basis other than that on which Ofcom relied, then the appellant will not have shown that the original decision is wrong and will fail.”

17. Mr Palmer also referred us to *British Telecommunications plc v Office of Communications and Ors* [2011] EWCA Civ 245 (“*BT v Ofcom*”) and *R (oao Hutchison 3G UK Limited) v Office of Communications* [2017] EWHC 3376 (Admin) (“*H3G*”), both of which he said supported his argument that the merits of the underlying issues needed to be considered in order properly to assess the materiality of an error.

18. The material which BT proposed to put forward as an intervener to support Ofcom’s position in the appeal can be summarised as follows:

- (1) A response to the material submitted by Mr Dunn, insofar as that relied on assumptions about Openreach’s likely footprint.

- (2) Addressing any attempt by CityFibre to expand its appeal to a more “merits” based challenge, with particular reference to the test applied by Ofcom (the argument at [15(2)] above).
 - (3) Assisting the Tribunal in understanding the Equinox Offer and the commercial and market context of that.
 - (4) Responding to any material submitted by the Altnets, should they be permitted to intervene.
19. Mr Holmes QC, for the Appellant, submitted that BT should be refused permission to intervene, on the basis that no question of the merits arose in the case, which was a “traditional” judicial review. Any question of materiality of an error by Ofcom should be dealt with in the same way as in any other judicial review. Mr Holmes referred us to s31(2A) of the Senior Courts Act 1981, which requires the court to take account of whether the outcome would be different if the conduct complained of (i.e. the error) had not occurred.
20. In relation to Mr Dunn’s evidence, Mr Holmes said this was directed at the challenge to the consultation and merely made good the point that CityFibre would have had something meaningful to say if it had been properly consulted. Overall, BT was unlikely to be able to add value to the proceedings, and allowing the intervention risked detrimentally affecting the efficiency of the case and the need for expedition, given that the Equinox Offer was in the market and, CityFibre believed, risked causing serious harm to network competition.
21. Ofcom took a neutral position on the application to intervene.

(2) The Altnets’ intervention request

22. Mr Randolph QC, counsel for the Altnets, adopted Mr Palmer’s submissions on the legal principles relating to intervention. He emphasised that the Altnets would not act in a way that would impact on the efficiency and timing of the case and that they intended to be as efficient as possible. Mr Randolph also

noted the commercial impact on the Altnets of the Equinox Offer, which was live in the market already.

23. In terms of areas where the Altnets proposed to focus their intervention, Mr Randolph identified the following:
 - (1) Evidence on the overlap between Openreach's footprint and those of the Altnets, which is relevant to an assumption by Ofcom that this overlap occurred in few locations.
 - (2) Ofcom's reliance on assumptions about FTTP network overbuild and the Altnets' decision making.
 - (3) The fundamental flaw in Ofcom's focus on overlaps within the 12 to 24 month period only, despite the ten year duration of the Equinox Offer.
 - (4) Evidential flaws in Ofcom's conclusions about network build in a specifically defined market area ("*Area 3*").
 - (5) Factual evidence about the lack of consultation with the Altnets, including in relation to expected overlap between their alternative networks and Openreach's networks over 12 to 24 months and beyond that and the Altnets' plans to offer wholesale services in the same periods.
 - (6) Evidence about the rationality of Ofcom's conclusions in relation to potential barriers to the Altnets, in particular in Area 3 and even in locations where there is no current overlap with Openreach. Mr Randolph identified paragraph 3.47 of the Decision as an example.
 - (7) A perspective from vertically integrated market participants and how they might be affected by the Equinox Offer.
24. Mr Randolph noted that Mr Dunn's evidence, on behalf of CityFibre, referred to Openreach's network build projections for Q4 in 2026, which suggested that

a period beyond 12 to 24 months was inevitably going to be relevant to the appeal.

25. Ofcom did not oppose the application by the Altnets to intervene, but Ms Carss-Frisk made submissions encouraging the Tribunal to limit the scope of any intervention permitted. This was on the basis that many of the matters which the Altnets wished to pursue went beyond the scope of the case advanced by CityFibre and were not relevant to the Overlap Conclusion. In particular:

- (1) Ofcom was concerned that the Altnets sought to raise the issue of pricing, which was referred in their application at least in relation to sufficiency of interest and perhaps more. Pricing was not in issue in the appeal in any way.
- (2) There was no challenge in the NoA to the selection of the 12 to 24 month period and the suggestion that Ofcom should have focused on a different period was outside the scope of the appeal.
- (3) Ofcom had not addressed differences between Area 3 and other geographical 'Areas' and CityFibre made no complaint about that in its appeal. Paragraph 3.47 of the Decision was about pricing, not the Overlap Conclusion.
- (4) The assumptions Ofcom made about the likely change of strategy of many of the Altnets from a retail business to a wholesale business were similarly not in issue in the appeal.
- (5) Overall, the expansive approach taken by the Altnets would considerably widen the scope of the appeal beyond the grounds set out in the NoA and threaten the efficient, proportionate, expeditious and fair disposal of the proceedings. Accordingly, the Tribunal should impose restrictions on the scope of the Altnets intervention, if they were permitted to intervene.

26. CityFibre opposed the application by the Altnets to intervene. Mr Holmes adopted the submissions made by Ms Carss-Frisk in relation to the scope of the proposed intervention by the Altnets. If the Altnets wanted to run the arguments they were identifying in the proposed interventions, then they could have brought a self-standing appeal in the way CityFibre has. He also expressed concern about the impact of any intervention on the timetable up to and including the final hearing, set for 11/12 May 2022, as well as the impact on costs.

(3) Sky's intervention request

27. Mr Woolfe, for Sky, also adopted Mr Palmer's submissions on the legal principles. In relation to the governing principles set out in Rule 4, Mr Woolfe submitted that Sky's commercial interest in the Equinox Offer also raised questions about fairness in considering its application to intervene.

28. In relation to the question of "merits review", Sky's written skeleton referred to *EE* and said that the Tribunal would need to understand and form a view on "*the robustness of Ofcom's chain of reasoning regarding the incentives of ISPs*".

29. Mr Woolfe then made two points, based on the Decision itself:

(1) On Ofcom's case, as expressed in its Defence, the Overlap Conclusion is one of a number of factors which justify Ofcom's conclusions about the Equinox Offer. The other factors, identified in the Defence, are matters which intimately involve the ISPs. Sky, as a significant ISP, would be able to assist the Tribunal in consideration of the significance of those other factors, as and when that issue arises.

(2) More narrowly, paragraph 3.87 of the Decision, which is part of Ofcom's reasoning in reaching the Overlap Conclusion, expressly refers to the likely actions of ISPs in certain conditions. Sky is well placed to provide evidence about that issue.

30. CityFibre opposed the application by Sky to intervene. Mr Holmes submitted that Sky would not be able to assist the Tribunal in relation to any relevant matter and that Ofcom was sufficiently well placed to deal with any matters involving the relative weight of factors which underpinned its Decision. Allowing Sky to intervene would simply add cost and cause delay.
31. Ofcom was neutral in relation to Sky's application to intervene.

E. ANALYSIS

32. We agree with Mr Palmer that the application of Rule 4 may differ depending on the nature of the case. We do not read *Sabre*, *B&M* or *JD Sports* as saying anything to the contrary. The use of the expression "added value" in each case seems to us merely to be shorthand for the Tribunal assessing the benefit (if any) to be obtained from the participation of the intervener, as part of the exercise of seeking to ensure that the proceedings are dealt with justly and at proportionate cost, whilst deciding the appeal by reference to the grounds set out in the NoA (in accordance with s194A(2) of the Communications Act 2003).
33. This assessment forms an intrinsic aspect of case management in accordance with the principles set out in Rule 4 and we do not consider that it assists to make distinctions between different categories of case, such as for example appeals of merger decisions under the Enterprise Act 2002 or appeals under s192 of the Communications Act 2003. Each situation will involve balancing a variety of factors, including the range of considerations set out in Rule 4(2) as they may apply in a particular case.
34. Similarly, we do not consider that the debate about whether and to what extent this appeal may or may not engage Article 31 EECC, and therefore the requirement that the "*merits of the case are duly taken into account*", provides assistance in determining any of the intervention applications.
35. It is correct that some appeals under s192 might, depending on the way the appellant puts its case, require a detailed assessment of underlying merits in relation to the question of materiality of an error. However, that is not the

position in this case. CityFibre’s appeal is expressly put as one which does not invite the Tribunal to conclude that the Decision was wrong on the merits. In this regard, we should point out that:

- (1) In the prayer for relief in the NoA, CityFibre seeks an order that Ofcom proceed to a further stage of review of the Equinox Offer, as if its Decision was wrong (as opposed to simply seeking a remittal). In the course of oral argument Mr Holmes conceded that this was not the correct approach and indicated that this request would be withdrawn in CityFibre’s Reply.
- (2) CityFibre has introduced factual evidence, in the form of Mr Dunn’s statement, that was not available to Ofcom when it made the Decision. Mr Holmes explained that this is to demonstrate that CityFibre would have had something meaningful to say if it had been consulted.

36. Apart from these points, we have seen nothing in the NoA that would suggest that the Tribunal is being asked to embark on an exercise of considering underlying merits, as opposed to making an assessment of whether any error by Ofcom is, on the face of the Decision, a material one justifying remittal.
37. Similarly, Ofcom takes the view that it is not necessary in this case to address the precise impact of Article 31 EECC and Ms Carss-Frisk noted that this was not a case where a broader “merits” challenge (such as in *EE*) arose.
38. We do not consider that *EE* provides any support to Mr Palmer’s position (or Mr Woolfe’s) on this point. *EE* was a case where a “merits review” was required to be carried out under the relevant legislation, which dealt with price control in mobile telephony. The Competition Commission was required to review an Ofcom decision and the case concerned the adequacy of that exercise, given the requirement to consider the merits. The observations of Moses LJ in relation to the materiality of a defect in a decision need to be read in that light.
39. Nor do *BT v Ofcom* or *H3G* assist Mr Palmer. *BT v Ofcom* was an appeal on the merits, prior to the introduction of s194A of the Communications Act 2003.

In *H3G*, the claimant had advanced a “hybrid” challenge to the regulator’s decision, including both “traditional” judicial review grounds and a “merits” challenge. The observations of Green J (as he then was) at [44] explain how the judge intended to approach the evaluation of the evidence in the case, given that consideration. In our view, nothing in that case alters the normal approach to assessing materiality in the context of a judicial review challenge.

40. It is possible, as Mr Palmer submitted, that the position might change, should CityFibre or Ofcom choose to approach the case in a different way in the future, as may be permitted by the Tribunal Rules and the Tribunal. However, it is not the Tribunal’s task to anticipate that, but rather to exercise its case management discretion on the basis of the pleaded case before it.

(1) BT’s intervention

41. We grant BT permission to intervene because:

- (1) We accept that the immediacy of BT’s commercial interest in the outcome of the appeal (given that it has published to the market the Equinox Offer, which is the subject of the appeal) warrants that, as a matter of fairness.
- (2) There is new factual material before the Tribunal, in the form of Mr Dunn’s statement. We note what CityFibre say about the relevance of that being confined to the consultation issue, but it appears to us that it might be useful to have the assumptions made by Mr Dunn about Openreach’s plans for network overbuild confirmed (or contradicted), even in those limited circumstances.
- (3) We anticipate that it would be useful to have BT’s input in the event that it considers that the Equinox Offer has been mischaracterised in any material respect in these proceedings.

42. That is not an invitation for BT to approach its intervention in the wider terms set out in its initial application, or even the narrower terms suggested by

Mr Palmer at the CMC. It is a condition of our permission that the intervention should be strictly confined to matters pleaded in the NoA. As noted above, we do not agree with Mr Palmer's submissions about the materiality of any error by Ofcom in relation to the Overlap Conclusion necessarily engaging a "merits review". We trust that BT will adapt its approach to take account of this Ruling, and our view of the scope of the appeal (as currently pleaded), to ensure that any evidence filed is admissible and that its submissions are relevant and focused.

(2) The Altnet's intervention

43. We refuse permission for the Altnets to intervene. In our view, the value that the Altnets could add to the issues in the case (as set out in the NoA and the Defence) is limited. While they might be able to provide some evidence on their intended strategies for developing their networks, this is unlikely to add materially to information already available to the Tribunal from the face of the Decision.

44. Moreover, it was apparent that most of the points that the Altnets intended to advance in their intervention were outside the scope of CityFibre's appeal. In particular, Ofcom's treatment of the period after 24 months following the commencement of the Equinox Offer, the treatment of Area 3, the strategies to move from largely retail to wholesale sales and the absence of consultation of the Altnets on these issues all fall outside the scope of the NoA. In addition, we do not accept that the reference in Mr Dunn's statement to Openreach's Q4 2026 network build projections opens up the relevant period in issue in the appeal beyond 12 to 24 months. That information is merely used by Mr Dunn as a reference point to extrapolate back to the 12 to 24 month period.

45. Mr Randolph conceded that it was not open to an intervener to attempt to widen the scope of an appeal beyond that pleaded by the Appellant. However, it appeared that this was precisely what the Altnets intended to do. We understand that Mr Randolph's clients feel strongly about a number of aspects of the Decision, but they are not aspects raised by CityFibre in its appeal. As

Mr Holmes observed, if the Altnets wanted to pursue those matters then they ought to have brought their own appeal.

46. We are concerned that any intervention by the Altnets is likely to widen the scope of both the arguments and the evidence beyond those in issue in this appeal, leading to further rounds of evidence and submission, with the parties incurring material additional cost and a real risk that the hearing time allocated for the hearing of the appeal in May will prove insufficient, requiring a new (later) hearing date or leaving the case part heard. Balancing this concern with the limited value which the Altnets could add by their intervention through the points in [23], we consider that the correct course in order to ensure that this appeal is dealt with justly and proportionately, in accordance with Rule 4, is to refuse the Altnets permission to intervene.

(3) Sky's intervention

47. Sky is not directly affected by the appeal in the same way as BT. Sky is a wholesale purchaser from Openreach. It does not currently purchase from any of the alternative networks (including CityFibre). We do not consider that these circumstances give rise to any requirement to permit the intervention as a result of "fairness".
48. It was not clear to us that Sky would add any value to the consideration of the issues before us. The Decision and the WFTMR are significant documents, recording the detailed review of the market by Ofcom. We anticipate that Ofcom is well placed to deal with all of the issues on which Sky proposed to put forward material. If for some reason it is not, and if it is appropriate for Ofcom to submit further evidence relating to ISPs, then Ofcom will no doubt be able to seek assistance from Sky (and other ISPs) in that regard.
49. We do not accept that the question of the materiality of any error by Ofcom in reaching the Overlap Conclusion assists Sky's argument, for the reasons set out above in relation to the submissions of Mr Palmer. Nor do we see any basis on which the reference to ISPs in Ofcom's reasoning for the Overlap Conclusion

(for example, paragraph 3.87 of the Decision) justifies Sky's intervention, either as a matter of fairness or to add value to the proceedings.

50. We therefore anticipate that allowing Sky's intervention will add additional argument and evidence, additional cost and potential delay in the proceedings, none of which can be justified by the limited value (if any) their intervention is likely to add. We consider that the correct course in order to ensure that this appeal is dealt with justly and proportionately, in accordance with Rule 4, is to refuse Sky permission to intervene.

F. CONCLUSION

51. For the reasons set out above, we grant BT permission to intervene, on the condition that its intervention should be strictly confined to matters pleaded in the NoA. We refuse the applications by the Altnets and Sky to intervene in this appeal.

Ben Tidswell
Chairman

Dr Catherine Bell CB

Professor Michael Waterson

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 11 February 2022