



Neutral citation [2017] CAT 26

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1260/3/3/16

Victoria House
Bloomsbury Place
London WC1A 2EB

20 November 2017

Before:

MR JUSTICE SNOWDEN
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

VIRGIN MEDIA LIMITED

**CP GROUP (TALKTALK TELECOM GROUP PLC, VODAFONE LIMITED,
COLT TECHNOLOGY SERVICES AND HUTCHISON 3G UK LIMITED)**

GAMMA TELECOM HOLDINGS LIMITED

CITYFIBRE INFRASTRUCTURE HOLDINGS PLC

Interveners

Heard in private at Victoria House on 20 November 2017

RULING

APPEARANCES

Mr Daniel Beard QC and Mr David Gregory (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr Mark Vinall and Mr Daniel Cashman appeared on behalf of the Office of Communications.

Mr Paul Stone (of Charles Russell Speechlys LLP) appeared on behalf of Gamma Telecom Holdings Limited.

Mr Tim Ward QC (instructed by Towerhouse LLP) appeared on behalf of TalkTalk Telecom Group plc, Vodafone Limited, Colt Technology Services, Hutchison 3G UK Limited.

Mr Duncan Liddell (of Ashurst LLP) appeared on behalf of Virgin Media Limited.

Mr Aiden Robertson QC and Ms Julianne Kerr Morrison (instructed by Preiskel & Co LLP) appeared on behalf of CityFibre Infrastructure Holdings plc.

1. On 26th July 2017, this Tribunal announced its decision ([2017] CAT 17) in relation to the appeal by British Telecommunications plc (“BT”) against the determinations made by the Office of Communications (“Ofcom”) in a document dated 28 April 2016 and entitled “*Business Connectivity Market Review – Review of competition in the provision of leased lines*” (the “Final Statement”). The Tribunal held that Ofcom had erred (i) in concluding that it was appropriate to define a single product market for CISBO services of all bandwidths, (ii) in concluding that the Rest of the UK and the Central Business Districts of Manchester, Bristol, Birmingham, Glasgow and Leeds comprised a single geographic market; and (iii) in its determination of the boundary between the competitive core segments and the terminating segments of BT’s network. The full reasons for the Tribunal’s decision were made available to the parties in embargoed form on 3rd November 2017, and handed down on 10th November 2017 ([2017] CAT 25).
2. In subsequent correspondence between the parties a draft order has been proposed under which this Tribunal would, as a consequence of its decision, quash the relevant determinations of Ofcom, direct Ofcom to revoke any instruments giving effect to those determinations, and remit the matter to Ofcom for reconsideration. The reason for this form of order being proposed was that Ofcom takes the view that the logical consequence of the Tribunal’s decision is that none of the current regime which has been in force since 1 May 2017 can continue to exist insofar as it relates to the CISBO markets in the UK. This is because its determination to impose remedies depended upon a finding of significant market power (“SMP”), which in turn depended upon Ofcom having correctly determined the relevant product and geographical market definitions. However, the Tribunal has decided that Ofcom erred in its determination of those relevant markets, and that they must be quashed.
3. That draft order gave rise to a question as to what the consequences would be for the future regulation of the leased line market when the current regulatory instruments are revoked. To address the concerns raised by a number of the interveners in correspondence, Ofcom indicated in a letter of 16th November 2017 that it intended to take urgent steps to address what it described as the

‘regulatory lacuna’ which would arise when the current regime was revoked. That letter was circulated by Ofcom on a confidential basis to the lawyers who were the members of the confidentiality ring established for the purposes of BT’s appeal.

4. In its letter, Ofcom indicated that it intends to invoke its emergency powers to impose temporary measures under sections 80A(2), 80(1A), 48A(2) and 49A(2) of the Communications Act 2003 because, having carefully considered matters, it has decided that the circumstances are exceptional and that there is a need to act urgently to safeguard competition and to protect the interests of consumers. Ofcom indicated that it:

“... is intending to publish a notification revoking the SMP services conditions and withdrawing the directions applying to CISBO services. At the same time, Ofcom is intending to publish a statement under which it makes temporary market identifications, market power determinations and imposes temporary SMP conditions and directions to address the regulatory lacuna. This statement will set out Ofcom’s reasoning in full. In the light of the concerns raised by the interveners in the recent correspondence and in the interests of transparency, in summary: Ofcom considers that there is sufficient evidence to conclude that BT has significant market power in relation to CISBO services at and below 1Gbit/s in the London Periphery, the central business districts of Bristol and Manchester, and the rest of the UK (excluding Hull, the Central London Area and the central business districts of Bristol, Manchester, Birmingham, Leeds and Glasgow). Ofcom considers that the competition problems identified in the 2016 BCMR will continue to apply for these services and in those areas and is therefore imposing, on a temporary basis, appropriate regulation on BT, including a charge control and quality of service measures.”

5. This indication from Ofcom did not meet with approval from BT or any of the interveners. In essence, what those parties contend is that, rather than an order being made by the Tribunal now in the form which has been suggested, the matter should be deferred and no order should be made until a hearing which is fixed to take place to deal with consequential matters on 4th December 2017.
6. The purpose of that deferral was summarised in a letter from BT’s legal department to Ofcom dated 17th November 2017, which outlined two options. The first was that if an order was not made immediately and Ofcom postponed its planned announcement of the emergency measures, BT would have an effective opportunity to make representations as to: (i) Ofcom’s justification

for the use of emergency powers; and (ii) the need for and content of the measures which are to be put forward under the emergency powers. BT's lawyers pointed out, however, that to have a meaningful opportunity to make representations to Ofcom, they would need to be able to take instructions from a wider number of persons within BT than are currently included within the confidentiality ring. BT offered the giving of confidentiality undertakings to Ofcom to achieve that.

7. Secondly, and in the alternative, BT's letter suggested that Ofcom should publish its intent to introduce emergency measures on a 'minded to' basis. This, it was said, would allow the market at large to know of Ofcom's intent, so that in the intervening two weeks all participants in the market would have the opportunity to make submissions to Ofcom about its intended course of action.
8. Ofcom has rejected those suggestions. In short, Ofcom suggests that the market uncertainty which the Tribunal's decision has caused has gone on long enough and that an order should be made without further delay to give logical effect to the Tribunal's ruling. Ofcom submits that, as to the future, it has reached a decision as regulator as to the appropriate method to deal with the regulatory lacuna which such an order would cause, namely to exercise its statutory powers to put in place an emergency regime without prior consultation, but with the possibility of reconsideration of that decision in light of submissions after the regime has been put in place. Ofcom submits that its decision as regards the replacement regulatory regime is a matter for it as regulator and is not for this Tribunal dealing with an appeal against its earlier decision.
9. Ofcom has also said that it does not consider it appropriate to enter into bilateral confidentiality undertakings with additional persons at BT or any other parties, so as to allow those particular parties to have advance notice of the imposition of the temporary regime and an ability to make representations, neither of which are available to the market in general.

10. Ofcom also submitted that if it were to announce that it was 'minded to' exercise its emergency powers, this would simply attract a large number of representations which Ofcom could not sensibly hope to treat with the seriousness which they would doubtless deserve over a short two week period. Ofcom suggested that such a process would not be a meaningful exercise and that any appropriate consultation process would take much longer and could not be undertaken before the order would have to be made.
11. In these circumstances, I have to decide whether to give effect to the Tribunal's ruling and to make an order which will prompt Ofcom to bring into effect the emergency regime which it has outlined, or whether to allow a further two weeks to pass for the reasons which are urged upon me by BT and the interveners.
12. The essential points that seem to me relevant to this decision are as follows.
13. First, nobody has actually suggested that the draft order which has been produced does not properly give effect to the Tribunal's decision. There is, I think, logical force behind the point made by Ofcom that if, as the Tribunal has held, Ofcom erred in its determination of the product market definition and the geographic market definition and needs to reconsider those market definitions, then the edifice of the finding of SMP and the imposition of remedies which has been constructed upon those determinations must logically fall away. The proposed order is therefore one which it would be appropriate for the Tribunal to make.
14. In that regard, I am not attracted by the suggestion which has been made by some of the interveners that, given a little more time, an alternative and more nuanced or partial quashing of Ofcom's determinations could be devised, which would, in effect, leave standing some of Ofcom's determinations and resultant regulations, whilst striking other parts down. The parties have had both the Final Statement (which is a public document), and the non-confidential version of the Tribunal's reasons for its decision for well over a week, and there has not yet been any suggestion whatever as to how such a

complex regime could be crafted by this Tribunal. Moreover, having seen the complexity of the determinations and directions which are included within Annex 35 to the Final Statement, it seems to me that that would be a complex regulatory task which is well outside the remit of this appellate Tribunal. It would also not be an appropriate enterprise for this Tribunal to embark on, bearing in mind, as has often been said, that the Tribunal is an appellate body and not a duplicate regulator waiting in the wings.

15. Secondly, as to the suggestion that I should simply defer the making of the order, it seems to me that the essential answer was given by Ofcom in a letter sent to BT earlier today. The question of how Ofcom should respond to the quashing by the Tribunal of its earlier decisions is one which is for Ofcom to answer as regulator. It is not an issue which falls within the scope of this Tribunal's jurisdiction on the appeal against the earlier decision. Moreover, this Tribunal simply does not have the evidential basis upon which to decide how to direct Ofcom to respond to the quashing of the earlier decision.
16. Likewise, the purposes which BT and the interveners contend would be served by a deferral (i.e. to give them an opportunity to consult with their clients outside the existing confidentiality ring, and then to persuade Ofcom to adopt a different course in its regulatory response to the Tribunal's ruling) are not matters falling within the appellate jurisdiction of this Tribunal.
17. As I think was essentially acknowledged by all the parties, including Ofcom in its letter of 20th November 2017, if the participants in the industry believe that Ofcom is acting inappropriately in imposing the emergency regime which it envisages, it is for those participants to seek to take proceedings in front of another Tribunal or in a court on a judicial review challenge.
18. Thirdly, although it was suggested to me that I should exercise my discretion to delay the making of the remittal order because Ofcom is obviously proposing to act in breach of natural justice or procedural fairness, I am, I think, in no position at this hearing to form a view as to whether Ofcom is or is not justified in acting as it proposes, and specifically whether Ofcom is or is

not acting in breach of its statutory mandate or natural justice. Those would again be matters for another Tribunal or court.

19. Finally, and in any event, I do not believe that there is any legal basis upon which I can achieve a result that would in practice allow any substantive advance on the current position to be made in the next two weeks. That is because, as all parties accept, an advance will only be made from the current position if the legal teams for BT and the interveners are able to consult more widely within their client organisations about Ofcom's proposals in the course of that two week period and then make representations to Ofcom accordingly.
20. For its part, Ofcom has made it clear, for the reasons that it has indicated, that it does not wish to embark upon a series of bilateral confidentiality agreements to enable that extended consultation to happen. For my part, I consider that the existing confidentiality ring was established for the purposes of protecting confidential information in the papers for this appeal, and I do not think that it is within my powers on this appeal to order Ofcom either to agree to extend that existing regime or to agree to a new and extended confidentiality regime for a very different purpose.
21. In those circumstances, it does seem to me that simply deferring making the order for two weeks in the hope that Ofcom might change the course of action that it has decided to embark upon would be pure speculation.
22. Accordingly, it seems to me that this Tribunal's job on the appeal has been done. A decision has been made for the reasons which have been given and the appropriate step is, without any further delay, to make a remission order on the terms which have been proposed, subject to any minor drafting observations which I will invite the parties to make shortly. It will then be for Ofcom to respond to the revocation of the current regime in such way as it deems appropriate as regulator and to take whatever consequences may ensue.

Postscript

23. After giving my ruling, I heard brief submissions from the parties as to the timing of the publication of this Ruling and the Tribunal's order.
24. To allow BT an opportunity to consider whether to make an urgent application for judicial review, Ofcom gave an undertaking to the Tribunal not to implement its revocation of the existing regulatory instruments and not to announce its emergency measures until shortly before the markets open (i.e. 7a.m.) on Thursday 23 November 2017.
25. To facilitate that timetable, although my decision to make an order giving effect to the Tribunal's decision is made today, the formal order will not be drawn and published on the Tribunal's website until after the markets close on the evening before Ofcom's announcement (i.e. 5pm on Wednesday 22 November 2017).
26. After Ofcom's announcement has been made, I will release a copy of this Ruling for publication and lift the confidentiality restrictions attaching to the transcript of the hearing (which was held in private).

Mr Justice Snowden
Chairman

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

Date: 20 November 2017