



Neutral citation [2010] CAT 10

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Number: 1111/3/3/09

Victoria House  
Bloomsbury Place  
London WC1A 2EB

17 March 2010

Before:

VIVIEN ROSE  
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

**THE CARPHONE WAREHOUSE GROUP PLC**

Appellant

- supported by -

**BRITISH SKY BROADCASTING LIMITED**

Intervener

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

- supported by -

**BRITISH TELECOMMUNICATIONS PLC**

Intervener

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**ORDER OF THE CHAIRMAN (DISCLOSURE)**

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## THE CHAIRMAN:

1. By a letter dated 9 March 2010, the Appellant (“CPW”) applied for disclosure of unredacted versions of certain documents which were produced to it in redacted form on 4, 5 and 9 February 2010. The application arises in the context of an appeal under section 192 of the Communications Act 2003 (“the 2003 Act”) against the price controls imposed by OFCOM on Openreach, a division of BT Group, in relation to unbundled local loops and related services (“the Decision”). The procedure to be followed in appeals brought under section 192(2) is an unusual one. If an appeal raises any “specified price control matters”, then those matters are to be referred by the Tribunal to the Competition Commission (“CC”). Matters raised by an appeal which are not specified price control matters are to be decided by the Tribunal. Once the CC have notified the Tribunal of their determination of the price control matters referred to it, the Tribunal must then decide the appeal on the merits and, in relation to the price control matters, must decide those matters in accordance with the determination of the CC, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the determination would fall to be set aside on such an application.
2. On 25 September 2009 the Tribunal established a confidentiality ring for this appeal. That ring includes the legal advisers and external economic and other expert advisers to the parties and operates both in relation to the price control matters before the CC and in relation to the non-price control matters currently before the Tribunal.
3. Three of the issues raised in CPW’s LLU appeal are specified price control matters. Putting the matter very broadly, CPW argues that OFCOM erred in a number of respects with the result that it set price controls for fully unbundled lines, shared unbundled lines and for bundles of ancillary services that were too high. In accordance with section 193(1) the Tribunal referred these matters to the CC: see the Tribunal’s Order of 27 November 2009, as amended on 18 February 2010. Since that reference was made the CC have been holding plenary and bilateral sessions with the parties and receiving and evaluating many files full of written submissions and evidence. One of the issues referred to the CC is whether OFCOM

erred in its estimation of the level of efficiency improvements that might reasonably have been expected to be achieved in respect of Openreach's costs and/or BT Group's costs allocated to Openreach, for the reasons set out in the relevant paragraphs of the Notice of Appeal.

4. The redacted documents which are in dispute have been disclosed to the confidentiality ring in the context of the CC's investigation into the price control matters. The documents consist of Openreach's internal documents including Openreach Executive Committee papers, BT plc Board papers, and BT plc Operating Committee papers. They principally concern Openreach's internal targets for making efficiency gains. These documents, together with other evidence, were used to inform OFCOM's approach to estimating anticipated efficiency gains, as explained more fully in Annex A to OFCOM's amended Defence on the price control matters (dated 11 January 2010).
5. The disputed redactions are said to take two forms:
  - (a) "Category A" redactions which were made by BT before documents were submitted to OFCOM at the administrative stage leading up to the adoption of the Decision. These redactions were made to exclude information outside the scope of OFCOM's information requests (under section 135 of the 2003 Act) and for reasons of legal professional privilege. CPW does not request the disclosure of privileged information.
  - (b) Further, "Category B" redactions which BT made before the documents were disclosed in this appeal to the members of the confidentiality ring established by the Tribunal's Order. These redactions were primarily made, according to BT, to exclude information that did not relate to the subject-matter of this appeal and were thus irrelevant, but also to protect the confidentiality of information belonging to Openreach's customers.
6. In support of its application CPW advances four main arguments. CPW submits, first, that the redacted documents were relied on by OFCOM in reaching its Decision and are highly relevant to CPW's grounds of appeal. Of particular relevance are the grounds challenging the way in which OFCOM assessed BT's

achievable future efficiency gains and allocated costs as between BT Group and Openreach. CPW's second argument is related to its first: the CC can only determine whether OFCOM's assessment of efficiency gains was correct if the CC has been provided with the fully unredacted versions of the documents at issue. This approach has a further benefit: should the CC conclude that OFCOM has erred in some respect, it would be able to put right the error without the need for a further investigation by OFCOM. Third, CPW complains about the scale of the redactions which make it virtually impossible for CPW to know whether or not the redacted information is indeed relevant to its case. Fourth, CPW notes that in its letter to the parties dated 22 February 2010 the CC said that "within the confidentiality ring, we would expect to see few, if any redactions." CPW therefore sees no good reason for BT not disclosing the documents to the members of the confidentiality ring, the terms of which will afford sufficient protection to BT and/or its customers.

7. The application is opposed by BT, primarily on the basis there is no purpose in the requested disclosure of irrelevant material, whether to a confidentiality ring or not (citing *GE Capital Corporate Finance v Bankers Trust Co* [1996] 2 All ER 993). Here BT claims that the requested documents were either redacted because they were not relevant to the charge controls imposed on Openreach in relation to unbundled local loops and related services or because they related to customer confidential information. As to the former BT does not understand why CPW says, for example, that information relating to efficiency plans for parts of the BT business other than Openreach should now be unredacted. As to the latter, BT considers that it is not in a position to disclose confidential customer data in the absence of a specific direction from the Tribunal. BT therefore characterises CPW's application as a "fishing expedition".
8. OFCOM and Sky made no submissions on CPW's application.
9. The parties appear to agree that only the Tribunal has the necessary powers to order disclosure of the documents. The provisions in the 2003 Act which govern the split appeal procedure do not confer any powers or prescribe any procedure for the CC to follow - section 193(2)(b) and (c) simply provides that subject to the Tribunal's

rules and any directions given to them by the Tribunal, the CC must determine the price control matters using such procedure as they consider appropriate.

10. So far as the CC's own powers and procedure are concerned, the CC's Rules of Procedure 2006 (CC1, March 2006) apply to "special reference groups" which includes groups hearing price control references: see paragraphs 17.1 to 17.2 and paragraph 19A(9) of Schedule 7 to the Competition Act 1998. The CC Rules are supplementary to any statutory provisions which apply to the CC. They provide for an administrative timetable, the notification of provisional findings and remedies to the main parties and consultation with the main parties to an inquiry on both.

11. In addition section 193(8) of the 2003 Act provides:

"Section 117 of the Enterprise Act 2002 (c 40) (offences of supplying false and misleading information) shall have effect in relation to information supplied to the Competition Commission in connection with their functions under this section as it has effect in relation to information supplied to them in connection with their functions under Part 3 of that Act."

12. The CC's investigation powers when carrying out merger and market investigation references are contained in sections 109 to 110 of the Enterprise Act 2002. Those powers enable the CC to require persons to give evidence and to provide specified documents or information for the purposes of a merger or market inquiry. But there is apparently no statutory provision providing a clear read-across enabling the CC to use the Enterprise Act powers in the course of determining price control matters referred to them under section 193(1) of the 2003 Act.

13. CPW's application for disclosure thus creates something of a dilemma. It is clear from the conflicting submissions of the parties that in order to decide whether the unredacted documents should be disclosed, the Tribunal would need first to see the full versions of the documents and then consider –

(a) whether the redacted material is being relied on by OFCOM in its defence to the price control matters in this appeal;

(b) if so whether OFCOM is or may be right so to rely;

(c) whether, even if this is not information on which OFCOM relied in coming to its decision, it is nonetheless information which is relevant to the CC's determination of whether the conclusion that OFCOM came to in relation to its estimation of efficiency gains is the right conclusion; and

(d) if it is so relevant, whether the importance of CPW's advisers within the confidentiality ring having an opportunity to see and comment on this information outweighs any interests of the customers whose confidential information is, according to BT, incorporated in the redacted material.

14. Such an investigation by the Tribunal creates both a practical and a substantive problem. The practical problem is that in order to come to conclusions on these issues the Tribunal would need to gain a full understanding of much of what has passed between the parties and the CC since 27 November 2009, effectively duplicating the work that has been undertaken for the price control part of the appeal. Embarking on such an exercise simply to determine whether redacted material should or should not be disclosed would, in my judgment, be clearly contrary to the goal of securing the just, expeditious and economical conduct of the proceedings, referred to in rule 19 of the Tribunal's Rules which contains the power to order disclosure. The process of putting the Tribunal in a position to decide this disclosure application would not only be expensive and time-consuming but would risk derailing the timetable for the hearing of the non-price control issues currently set down for 25 and 26 March 2010. By contrast the CC is much better placed to consider the relevance of the redacted documents in the context of the procedure that has so far taken place.

15. The substantive problem is that it may well prove difficult to come to a conclusion on these issues without making findings or expressing opinions which trespass on the territory that Parliament has clearly allocated to the CC and not to the Tribunal.

16. In order to ensure that the requested disclosure application is disposed of efficiently, and having due regard to the different functions of the Tribunal and the CC in this appeal, the Tribunal therefore at this stage directs BT to disclose the documents in full to the CC having redacted only those passages which enjoy legal professional

privilege. The CC must then write to the Tribunal indicating: (1) whether they consider that the newly disclosed passages are relevant to their investigation and (2) whether, having regard to the specified price control matters, to the course of their investigation and to the extent to which the unredacted passages disclose information which is confidential to BT's customers, the CC consider that these versions of the documents should be disclosed to the members of the confidentiality ring in order for the CC's procedure to be fair.

17. Such an approach avoids the practical and substantive problems I have described and also guards against CPW seeking documents simply in the hope of discovering some defect which may give rise to a ground of challenge.

18. BT should be able to provide the unredacted versions of the documents to the CC within a few days. It is difficult to predict how long it will take the CC to come to a view on what should be done; it may be immediately apparent what the right course is or it may not. If the CC need more time to deliberate than is allowed in the following directions, an application may be made for a further direction.

19. Accordingly, the Tribunal:

**DIRECTS THAT:**

(a) save in respect of legally privileged information, BT provide to the CC no later than 5pm on 22 March 2010 fully unredacted versions of the documents provided to CPW by OFCOM on 4, 5 and 9 February 2010;

(b) the CC write to the Tribunal by no later than 5pm on 30 March 2010 stating

(i) whether they consider that the newly disclosed passages are relevant to their investigation of the matters referred to them by the Tribunal in this appeal by the order of 27 November 2010 (as amended); and

(ii) whether, having regard to the specified price control matters, to the course of their investigation into those matters and to the extent to which the unredacted passages disclose information which is confidential to

BT's customers, they consider that these versions of the documents should be disclosed to the members of the confidentiality ring established by the order of 25 September 2009.

**Vivien Rose**  
Chairman of the Competition Appeal Tribunal

Made: 17 March 2010  
Drawn: 17 March 2010