



Neutral citation [2010] CAT 23

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1112/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

20 September 2010

Before:

VIVIEN ROSE
(Chairman)
THE HON ANTONY LEWIS
DR ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

CABLE & WIRELESS UK

Appellant

-supported by-

VERIZON UK LIMITED

Intervener

-v-

OFFICE OF COMMUNICATIONS

Respondent

-supported by-

BRITISH TELECOMMUNICATIONS PLC

Intervener

RULING (DISPOSAL OF THE APPEAL)

1. This appeal, lodged on 2 September 2009, was brought under section 192 of the Communications Act 2003 (“the 2003 Act”). It raises a number of challenges to a statement by OFCOM entitled “Leased Lines Charge Control – a new charge control framework for wholesale traditional interface and alternative interface products and services”, published on 2 July 2009 (“the LLCC Statement”).
2. It was agreed at an early stage of the proceedings before the Tribunal that all the issues raised in the appeal were specified price control matters within the meaning of section 193(1) of the 2003 Act and of Rule 3(1) of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004. On 16 December 2009, therefore, the Tribunal referred questions to the Competition Commission for their determination pursuant to section 193(2) of the 2003 Act (“the Reference Questions”).
3. On 30 June 2010 the Competition Commission notified the Tribunal of its determination of those questions (“the Determination”).
4. The Competition Commission rejected many of the challenges raised by the Appellant but found that some of the challenges to the LLCC Statement were well founded. The successful challenges were those encapsulated in Reference Questions 2(aa), 3(c), 4(a)(i), 4(a)(iii) and 4(b)(i).
5. Section 195 of the 2003 Act requires the Tribunal to decide this appeal “on the merits and by reference to the grounds of appeal set out in the notice of appeal”. Our decision must include a decision as to what (if any) is the appropriate action for OFCOM to take in relation to the subject-matter of the decision under appeal. We must then remit the decision under appeal to OFCOM with such directions (if any) as we consider appropriate for giving effect to our decision.
6. According to section 193, where the Competition Commission has determined specified price control matters, the Tribunal must, in deciding the appeal on the merits, decide those price control matters in accordance with the Competition Commission’s determination. However, that does not apply to the extent that 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: see section 193(7) of the 2003 Act.

7. Following the publication of the Determination, the Tribunal asked the parties to indicate whether they contended that any of the answers to the Reference Questions fell to be set aside on the application of judicial review principles. Initially the Intervener, BT, indicated that it wished to challenge the Commission's determination of Reference Question 2(aa). However, after lengthy negotiations among the parties, BT has withdrawn that challenge.
8. In the light of that and pursuant to section 193(6) of the 2003 Act, the Tribunal has decided that there are no aspects of the Determination which fall to be set aside on the application of judicial review principles.
9. Pursuant to sections 193(6) and 195(2) of the 2003 Act the Tribunal therefore decides that those grounds of the Appellant's appeal which were encapsulated in the Reference Questions 2(aa), 3(c), 4(a)(i), 4(a)(iii) and 4(b)(i) are upheld to the extent set out in the Determination. The other grounds of appeal are dismissed.
10. In addition to determining that OFCOM had erred in some respects, the Competition Commission set out its conclusions as to how those errors should be corrected: see the determination of Reference Question 5(a) at paragraphs 6.6 to 6.119 of the Determination. It also answered Reference Question 5(b)(i) as regards what adjustments should be made to the relevant price controls in order to implement the corrections needed because of the errors identified: see paragraphs 6.120 to 6.217 of the Determination.
11. As regards the Competition Commission's answers to Question 5(b)(i) relating to the errors identified in response to Reference Questions 4(a)(i), 4(a)(iii) and 4(b)(i) there is no difficulty in the Tribunal directing OFCOM to take the action described by the Competition Commission. However, shortly before the Tribunal made an order remitting the unchallenged price control determinations to OFCOM, BT raised a further point. Although it did not challenge either the Competition

Commission's determination that there had been an error in respect of Reference Question 3(c) or the Competition Commission's conclusions about how this error should be remedied, BT asserted that the reduction of £24.74 which the Competition Commission determined should be made (see paragraph 6.212 of the Determination) was based on calculations originally made by OFCOM in error. In essence, BT contended that the calculations performed by OFCOM, and subsequently relied upon by the Competition Commission in the Determination, include revenue reductions that have already occurred.

12. A number of meetings have been held between the parties and there has been considerable further correspondence. OFCOM, Cable & Wireless and Verizon now all agree with BT that an error was made in the Competition Commission's calculation and that the figure of £24.74 should therefore not stand. There has been some dispute between OFCOM and BT as to the correct substitute figure. But happily now all the parties are agreed that the amount by which the price for 2Mbit/s local end rentals needed to be reduced to correct the errors found in respect of Reference Questions 2(aa) and 3(c) is £116.76. This is the right figure provided that OFCOM implements our directions on 1 October 2010.

13. As part of the relief claimed in its Notice of Appeal, Cable & Wireless asked that the package of remedies granted if its appeal was successful should be given retroactive effect, whether by a larger reduction in future prices or otherwise. This arises from the fact that the price control has been in operation whilst this appeal has been pending and the errors now identified mean that Cable & Wireless has been paying too much for some BT services over that period. This raised the question whether the Tribunal has power to direct OFCOM to adjust the price control for the remaining period after remittal in order to reflect that overpayment has been referred to by the parties. Cable & Wireless has decided not to pursue its request for such an adjustment and therefore wishes to amend its Notice of Appeal by deleting that request. The other parties do not object to that amendment and we therefore grant permission for that amendment under Rule 11 of the Tribunal's Rules.

14. The parties have also agreed that there should be no order as to costs.

15. We are therefore able now to dispose of the entire appeal. Having regard to paragraphs 6.120 to 6.217 of the Determination and paragraphs 11, 12 and 13 of this Ruling, and pursuant to section 195(3) of the 2003 Act, the Tribunal decides that the appropriate action for OFCOM to take in relation to the LLCC Statement is the action set out in the directions in the Annex to this Ruling.

16. The Tribunal, therefore, hereby –

(a) remits the LLCC Statement to OFCOM pursuant to section 195(4) of the 2003 Act with the directions set out in the Annex to this Ruling, those being the directions which are appropriate for giving effect to our decision;

(b) grants permission to Cable & Wireless to amend its Notice of Appeal by deleting paragraph 7.7.

Vivien Rose

Antony Lewis

Arthur Pryor

Charles Dhanowa
Registrar

Date: 20 September 2010

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ANNEX TO RULING (DISPOSAL OF THE APPEAL):
DIRECTIONS TO OFCOM

1. For the purposes of these Directions:

- (a) “the Act” means the Communications Act 2003;
- (b) “Base Year Costs” mean BT’s costs in 2007/08, that is, in the period from 1 April 2007 to 31 March 2008;
- (c) “BT” means British Telecommunications plc;
- (d) “C&W” means Cable & Wireless UK;
- (e) “the Commission” means the Competition Commission;

- (f) “the Determination” means the Commission’s determination, dated 30 June 2010, of the Reference Questions;
- (g) “LLCC Statement” means OFCOM’s Statement entitled “Leased Lines Charge Control – a new charge control framework for wholesale traditional interface and alternative interface products and services”, published on 2 July 2009;
- (h) “OFCOM” means the Office of Communications;
- (i) “PoH” means Points of Handover;
- (j) “Reference Questions” means the questions referred to the Commission in paragraph 2 of the Tribunal’s order dated 16 December 2009 (as amended on 30 March 2010), setting out the price control matters to be determined by the Commission pursuant to section 193 of the Act (and each reference to a numbered “Reference Question” shall be interpreted accordingly);
- (k) “Relevant Year” means any of the three periods of 12 months beginning on 1 October starting with 1 October 2009 and ending on 30 September 2012;
- (l) “the Tribunal” means the Competition Appeal Tribunal;
- (m) “Verizon” means Verizon UK Limited.

2. Subject to paragraph 3 below, in relation to the errors found in Reference Questions 2(aa) and 3(c), the Tribunal directs OFCOM:

- (a) to implement a reduction in the price for 2Mbit/s local end rentals of a total £116.76, as indicated in Table 6.6 of the Determination; and
- (b) to amend the price control in paragraph G4.5, GG4.5, GH4.5 and H4.5 of Schedules 1, 2, 3 and 5 respectively of Annex 9 to the LLCC Statement, so that the Controlling Percentage for the TI Basket specified in paragraphs G4.1(a), GG4.1(a), GH4.1(a), H4.1(a) respectively shall be adjusted in the

Relevant Years 2010/2011 and 2011/12 to RPI reduced by 1.75 percentage points, as indicated in Table 6.6 of the Determination.

3. In the event that the implementation of the remedy in paragraph 2 above does not occur on or before 1 October 2010, the Tribunal directs OFCOM that instead of making the adjustments set out in paragraph 2, it should recalculate the 2 Mbit/s local end price adjustment and the new value of X in accordance with the methodology set out in paragraph 6.187 of the Determination.
4. In relation to the error found in Reference Question 4(a)(i), the Tribunal directs OFCOM to assess the reasonableness of the revised BT estimated costs and the determination of the appropriate figure for the new PoH charges.
5. In relation to the error found in Reference Question 4(a)(iii), the Tribunal directs OFCOM to assess the various regulatory options for implementing new PoH charges in the light of the matters set out in the Commission's assessment of Reference Questions 4(a)(ii), (iii) and (iv) and in a manner which puts OFCOM in a position to satisfy its relevant statutory obligations.
6. In relation to the error found in Reference Question 4(b)(i), the Tribunal directs OFCOM to decide how PoH costs should be recovered in the light of the matters set out in the Commission's assessment of Reference Question 4(b)(i).
7. There shall be no order as to costs.
8. There shall be liberty to apply.

Vivien Rose
Chairman of the Competition Appeal Tribunal

Made: 20 September 2010
Drawn: 20 September 2010