



Neutral citation [2010] CAT 27

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1149/3/3/09

Victoria House
Bloomsbury Place
London WC1A 2EB

11 October 2010

Before:

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

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

RULING ON THE DISPOSAL OF THE WLR APPEAL

Introduction

1. In this Ruling, which is unanimous, we adopt the same abbreviations and terminology as in the Ruling in Case No. 1111/3/3/09 *Carphone Warehouse v OFCOM* [2010] CAT 26 (“LLU Appeal”) also given today. The Ruling disposing of the LLU Appeal contains the background to this matter and this Ruling should be read with it.
2. CPW appealed against certain findings made by OFCOM in a statement, published on 26 October 2010, entitled “Charge controls for Wholesale Line Rental and related services” (“WLR Decision”). WLR is used by communications providers to offer telephone services to consumers over the BT Openreach network. OFCOM decided to replace the previous price controls on residential and business WLR with a single control for Core WLR rental services. The new price controls came into effect on 23 November 2009 and cover the period from that date until 31 March 2011.

Reference of the specified price control matters

3. The WLR Appeal raised “specified price control matters” to be determined by the Competition Commission (“CC”) under section 193 of the 2003 Act. By its Order of 18 February 2010, the Tribunal referred those price control matters to the CC. The reference comprised three questions. Reference Questions 1 and 2 asked the CC to determine whether the WLR price controls had been set an inappropriate level for the reasons given in CPW’s Notice of Appeal. Question 3 asked, in relation to any errors ultimately found in OFCOM’s approach, how any such errors could be corrected and, if possible, what the consequential adjustment to the price control should be. The CC was directed to determine the price control matters in this appeal by 31 August 2010: see paragraph 3 of the Tribunal’s Order made on 18 February 2010.

Non-price control matters

4. In addition to appealing against the price controls set by OFCOM, CPW also challenged the procedures used by OFCOM during its consultations. These were

non-price control matters and the same matters also arose in the LLU appeal. The Tribunal decided to hear argument on this issue in both appeals at a hearing in March 2010. The day before hearing the parties settled the non-price control matters in the LLU and WLR appeals. After considering the application of rule 57 of the Competition Appeal Tribunal Rules 2003 (“the Tribunal’s Rules”), we made a consent order on 26 March 2010 granting CPW permission to withdraw the non-price control matters in both appeals.

CC determination on the price control matters

5. On 31 August 2010 the CC notified the Tribunal of its determination of the questions referred to it in the WLR appeal. The CC rejected all the challenges made by CPW and so did not indicate that any changes were necessary to the price controls established by OFCOM.

Disposal of the WLR Appeal

6. Section 195(2) 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”. The Tribunal’s 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.
7. According to section 193(6) of the 2003 Act, where the CC 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 CC’s determination. 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 the application of those principles: see section 193(7) of the 2003 Act. None of the parties has sought to challenge the CC’s determination.

8. Pursuant to subsection 193(6) of the 2003 Act, the Tribunal has decided that there are no aspects of the CC's determination which fall to be set aside on the application of judicial review principles.
9. Pursuant to subsections 193(6) and 195(2) of the 2003 Act the Tribunal decides that CPW's challenge to the WLR Decision is dismissed and there are no directions needed to OFCOM to give effect to this.
10. The parties have agreed that there should be no order as to costs and we therefore make no order.

Vivien Rose

Antony Lewis

Arthur Pryor

Charles Dhanowa
Registrar

Date: 11 October 2010