



Neutral citation [2012] CAT 8

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number:1186/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

21 March 2012

Before:

MARCUS SMITH Q.C.
(Chairman)
CLIVE ELPHICK
JONATHAN MAY

Sitting as a Tribunal in England and Wales

BETWEEN:

TALKTALK TELECOM GROUP PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH SKY BROADCASTING LIMITED
BRITISH TELECOMMUNICATIONS PLC

Interveners

RULING ON PERMISSION TO APPEAL

Introduction

1. On 10 February 2012 the Tribunal received a written application from the Appellant, TalkTalk, for permission to appeal the Tribunal's judgment of 10 January 2012 dismissing its appeal ([2012] CAT 1) ("the Judgment"). This ruling should be read together with the Judgment, and it adopts the terms and abbreviations defined in the Judgment. None of the parties requested an oral hearing and in light of the helpful written submissions we have received from the parties, the Tribunal is able to deal with this matter on the papers.
2. The Judgment concerned TalkTalk's appeal in respect of OFCOM's WBA Charge Control Decision. The appeal to the Tribunal was made under section 192 of the 2003 Act. The Tribunal's decision can itself be appealed to the Court of Appeal (when the Tribunal is sitting in England and Wales, as here) under section 196 of the 2003 Act, provided the appeal raises a point of law and either the Tribunal or the Court of Appeal gives permission.
3. TalkTalk requests permission to appeal on three grounds. The first ground is that the Tribunal erred in finding that OFCOM's definition of Market 1 in the WBA Market Power Determination included "exchanges where only BT is present or forecast to be present or where, during the period of the market determination, TalkTalk may (at some point in the future) be present": paragraphs 110 and 114 of the Judgment. The second ground is that the Tribunal erred in failing to recognise that the new information on TalkTalk's rollout plans constituted a material change under section 86(1)(b) of the 2003 Act. The third ground is contingent on the success of at least one of the other two and repeats Ground A of TalkTalk's appeal.
4. OFCOM, supported by BT and Sky, opposes TalkTalk's application. It submits that TalkTalk's intended grounds would have no real prospect of success and that there is no other compelling reason for an appeal going ahead.

Tribunal's analysis

5. We are not persuaded by the submissions made on TalkTalk's behalf either that an appeal would have a real prospect of success or that there is any compelling reason why the appeal should be heard (applying, by analogy, CPR 52.3). We consider briefly below each of TalkTalk's proposed grounds of appeal.
6. The first ground raises a question of construction of the WBA Market Power Determination. This ground focuses on the wording of paragraph 1.19 and footnote 6 of the WBA Market Power Determination, and fails to consider the decision as a whole. For the reasons given in the Judgment, in particular in paragraph 108, we consider that the decision needs to be considered as a whole, and that when the decision is considered as a whole, its meaning is clear.
7. Reading the decision in this light, it is plain that OFCOM knew of, considered, and took into account TalkTalk's roll-out proposals, including the proposal to roll out exchanges in Market 1, and nevertheless decided to allocate these exchanges to Market 1: see paragraph 109 of the Judgment. As was noted in paragraph 110 of the Judgment, it is obvious that when considering the substance of the decision, something has gone wrong in the drafting of the *summary* of the Market 1 definition that is contained in paragraph 1.19 of the decision. The body of the WBA Market Power Determination makes clear that OFCOM factored TalkTalk's intended roll-out of local loop unbundling into its Market 1 definition. We consider that the first ground has no real prospect of success; nor is there any other compelling reason why the appeal should be heard.
8. TalkTalk's second ground of appeal alleges that the Tribunal erred in failing to recognise that the new information on TalkTalk's roll-out plans amounted to a material change within the meaning of section 86(1)(b) of the 2003 Act. This ground has no real prospect of success and no important point of principle or point of law arises. OFCOM's definition of Market 1 (in terms of the identity of the various exchanges falling within it) remained unchanged because OFCOM considered that even if TalkTalk unbundled a significant number of Market 1 exchanges early on, BT's market share in those exchanges would remain so great

that some form of price control would remain appropriate: see paragraph 109 of the Judgment.

9. As stated above, TalkTalk also seeks permission to appeal contingently on Ground A, namely OFCOM's alleged failure properly to consult. TalkTalk contends that if it were to be granted permission to appeal, and were to succeed on appeal in respect of the market definition and/or material change grounds, this would resuscitate its allegation of procedural deficiency in this case. It follows that as we have refused TalkTalk's first two grounds we should also refuse its third ground of appeal.

Conclusion

10. For these reasons, the Tribunal unanimously

ORDERS THAT:

TalkTalk's request for permission to appeal be refused.

Marcus Smith QC

Clive Elphick

Jonathan May

Charles Dhanowa
Registrar

Date: 21 March 2012