



Neutral citation [2017] CAT 17

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1260/3/3/16

Victoria House
Bloomsbury Place
London WC1A 2EB

26 July 2017

Before:

MR JUSTICE SNOWDEN
(Chairman)
DR CLIVE ELPHICK
PROFESSOR JOHN CUBBIN

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

Interveners

Heard at Victoria House on 10-13 and 24-27 April, 4-5, 8-10, 17-18 and 24 May 2017

RULING (MARKET DEFINITION)

APPEARANCES

Mr Daniel Beard QC, Mr Robert Palmer, Ms Ligia Osepciu and Mr David Gregory (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr Josh Holmes QC, Mr Mark Vinall, Mr Tristan Jones and Mr Daniel Cashman appeared on behalf of the Office of Communications.

Ms Sarah Love and Mr Tim Johnston (instructed by Charles Russell Speechlys) appeared on behalf of Gamma Telecom Holdings Limited.

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

Ms Sarah Ford QC (instructed by Ashurst LLP) appeared on behalf of Virgin Media Limited.

1. This Ruling sets out the Tribunal’s findings in relation to the market definition issues arising in this appeal. The Appellant (“BT”) challenges certain 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”).
2. In overview, in the Final Statement Ofcom defined a single product market for contemporary interface symmetric broadband origination (“CISBO”) services of all bandwidths; and four separate relevant geographic markets: the Central London Area; the London Periphery; Hull; and the Rest of the UK (“RoUK”). Ofcom also made determinations concerning the extent of BT’s core network. Ofcom proposed a package of remedies including a so-called passive remedy allowing Communications Providers to lease only the fibre element of the leased lines from BT, allowing them to attach equipment of their own choosing at either end to “light” the fibre. This remedy is referred to as Dark Fibre Access (“DFA”) and is due to be implemented in October 2017.
3. BT appealed against the determinations in the Final Statement on a number of grounds, which can be grouped as alleged errors concerning market definition and alleged errors concerning the remedies imposed. In April 2017 the Tribunal ordered that the market definition issues be heard first and the remedies issues be held over to a separate hearing. This was as a result of certain findings, with implications for the DFA remedy, made by the Competition and Markets Authority (“CMA”) arising in a separate appeal concerning a particular aspect of the Final Statement (see the CMA’s Final Determination of 10 April 2017 in Case 1259/3/3/16 *TalkTalk v Ofcom*).
4. The market definition issues were heard over sixteen sitting days during April and May of this year and the parties were invited to reserve dates in September 2017 for the hearing of the remedies issues. This period was reserved so that the remedies issues could, if appropriate, be considered before the implementation date of the DFA remedy. Importantly, however, the imposition of the DFA remedy is contingent on the correctness of Ofcom’s market definition analysis.

5. The Tribunal is in the process of preparing its judgment on the market definition issues, but it is aware that the parties would soon have to start expending substantial resources preparing for the remedies hearing. The Tribunal is concerned to assist the parties and to avoid unnecessary costs from being incurred, and has therefore determined to give its decision on the market definition issues now with its reasons for that decision to follow in writing later.
6. The Tribunal finds unanimously that:
 - (1) Ofcom erred in concluding that it was appropriate to define a single product market for CISBO services of all bandwidths;
 - (2) Ofcom erred in concluding that the RoUK comprises a single geographic market; and
 - (3) Ofcom erred in its determination of the boundary between the competitive core segments and the terminating segments of BT's network.
7. Ofcom's decisions in respect of all three matters will therefore be quashed. However, as will be explained in the full reasons, the Tribunal is not in a position to substitute its own findings in relation to any of the above matters. The matters will therefore be remitted to Ofcom for reconsideration.
8. Pursuant to Rules 19(2) and 107(1) of the Competition Appeal Tribunal Rules 2015 (2016 S.I. 1648) the Tribunal extends time for the making of any request for permission to appeal until three weeks after the notification of the Tribunal's written reasons.

Mr Justice Snowden
Chairman

Dr Clive Elphick

Professor John Cubbin

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

Date: 26 July 2017