



Neutral citation [2010] CAT 26

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

Case No: 1111/3/3/09

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

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**RULING ON THE DISPOSAL OF THE LLU APPEAL**

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## *Introduction*

1. In 2007 OFCOM began a review of the maximum prices which Openreach,<sup>1</sup> which is part of British Telecommunications plc (“BT”), may charge for its wholesale services. Openreach is the owner and operator of the local loop to which competing service providers, such as the Appellant (“CPW”), need access in order to provide their own services to retail customers. Openreach’s main network services are ‘local loop unbundling’ (“LLU”) and ‘wholesale line rental’ (“WLR”). LLU enables communications providers to install their equipment in BT’s telephone exchanges to offer their own retail services including broadband internet access. WLR is used by communications providers to offer telephone services to consumers over the Openreach network. OFCOM’s review initially covered the price controls in relation to both LLU and WLR. But in May 2009 OFCOM decided not to change the WLR price controls until it had completed its review of the fixed narrowband wholesale services market.
2. On 22 May 2009 OFCOM published a statement setting out its conclusions on the new price controls for unbundled lines and related services (“the LLU Decision”). These price controls came into effect on 19 June 2009 and cover the period from that date until 31 March 2011. On 22 July 2009 CPW appealed against parts of the LLU Decision pursuant to section 192 of the Communications Act 2003 (“the 2003 Act”).
3. On 26 October 2009 OFCOM published a statement setting out its decision on charge controls for WLR and related services (“the WLR Decision”). OFCOM decided to replace the previous price controls on residential and business WLR with a price control for Core WLR rental services. The approach adopted by OFCOM in deciding what the new price controls should be was similar in both the LLU and WLR Decisions. The WLR price controls came into effect on 23 November 2009 and cover the period from that date until 31 March 2011. On 24 December 2009,

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<sup>1</sup> Openreach was created in January 2006 following OFCOM’s decision to accept undertakings from BT Group plc in lieu of a market investigation reference to the Competition Commission pursuant to section 154 of the Enterprise Act 2002. Openreach is an operationally separate business unit which provides wholesale access telecoms services to all communications providers on an equivalent basis.

CPW appealed against parts of the WLR Decision pursuant to section 192 of the 2003 Act.

*Reference of the specified price control matters*

4. Many of the issues raised in the LLU appeal were “specified price control matters” for the purposes of section 193 of the 2003 Act. On 27 November 2009 the Tribunal referred the specified price control matters to the Competition Commission (“CC”) for its determination. The reference comprised four questions. Reference Questions 1 to 3 asked the CC to determine the price control matters arising in the LLU appeal. Question 4 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.

*Non-price control matters*

5. Some of CPW’s challenges were not specified price control matters. For example, CPW appealed against OFCOM’s decision to set the price controls for WLR separately from LLU and the adequacy of the consultation process carried out by OFCOM. These non-price control matters, together with those arising in the WLR appeal, were set down to be heard on 25 March 2010. The day before the hearing, the parties agreed to settle 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 price control matters*

6. On 31 August 2010 the CC notified the Tribunal of its determination of the questions referred to it in the LLU appeal (“the Determination”).
7. The CC rejected some of the challenges raised by the CPW but found that some of the challenges to the LLU Decision were well founded. The successful challenges were those encapsulated in Reference Questions 1(i), 1(v), and 2. The CC determined in relation to Question 1(i) that OFCOM had materially erred by

underestimating the rate of efficiency savings which Openreach could reasonably be expected to achieve over the period of the price controls. The CC also upheld CPW's challenge when answering Question 1(v) in relation to OFCOM's assessment of inflation of wage and energy costs. The CC determined in response to Question 2 that OFCOM had made certain errors in relation to specifying the price caps for baskets of ancillary services.

#### *Disposal of the LLU Appeal*

8. 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.
9. 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. 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 the application of such principles: see section 193(7) of the 2003 Act. None of the parties has sought to challenge the CC's Determination.
10. Pursuant to subsection 193(6) of the 2003 Act, the Tribunal has therefore decided that there are no aspects of the Determination which fall to be set aside on the application of judicial review principles.
11. Pursuant to subsections 193(6) and 195(2) of the 2003 Act the Tribunal therefore unanimously decides that those grounds of CPW's LLU appeal which were encapsulated in the Reference Questions 1(i), 1(v), and 2 are upheld to the extent set out in the CC's Determination. The other grounds of appeal covered by the Determination are dismissed.

*Directions giving effect to the Tribunal's decision*

12. In addition to determining that OFCOM had erred in some respects in the LLU appeal, the CC set out its conclusions as to how those errors should be corrected: see the determination of Reference Question 4(i) at paragraphs 5.246 to 5.234 of the Determination. It also answered Reference Question 4(ii) and 4(ii)(a) as regards what adjustments (if any) should be made to the relevant price controls in order to implement the corrections needed because of the errors identified: see paragraphs 5.239 to 5.360 of the LLU Determination.
13. As regards the CC's answers to Question 4(i) relating to the errors identified in response to Reference Questions 1(i), 1(v) and 2 there is no difficulty in the Tribunal directing OFCOM to take the action described by the CC. Reference Question 4(ii) required the CC to determine what impact these remedies would have on the price controls. The CC determined what the price controls should have been during the relevant period but for OFCOM's errors in relation to efficiency, wages and energy inflation and in setting equal price caps for ancillary services. The CC did not consider that the other error it identified – OFCOM's failure to provide sufficient safeguards to prevent Openreach from manipulating prices to its commercial advantage – necessitated any changes to the price controls.
14. The CC determined in relation to Reference Question 4(ii)(b) that for the Metallic Path Facility and Shared Metallic Path Facility rentals the size of the additional consequential adjustment to the price control applicable during the unelapsed period would need to be calculated once the effective date of the determination is known, that is after the Tribunal's ruling disposing of the LLU Appeal (paragraph 5.364). The CC set out a proposed methodology for this adjustment (paragraph 5.381). The CC determined that there should be no unelapsed period adjustment in relation to the errors relating to the ancillary service baskets (paragraphs 5.399-5.401).
15. According to section 195(6), OFCOM's duty is to comply with the directions we give. We have not set a time by which OFCOM must adopt the revised price controls but we expect that, as it has done in previous appeals, OFCOM will be able to adopt the new controls very soon after this judgment is handed down. We

certainly encourage OFCOM to do so as soon as possible. Once the price controls are adopted, BT will be bound to comply with their terms. Given that the parties have known of the CC's Determination for some time now, we do not see that there would be any justification for introducing a transitional provision delaying the full implementation of directions set out in the Annex.

16. As part of the relief sought in its Amended Notice of Appeal, CPW 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 controls have been in operation whilst this appeal has been pending and the errors now identified mean that CPW has been paying too much for some Openreach services over that period. CPW has decided not to pursue its request for such an adjustment and therefore wishes to re-amend its Amended 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.

17. We are therefore able now to dispose of the entire LLU appeal. Having regard to paragraphs 5.1 to 5.324 of the LLU Determination and in the light of the reasoning set out above, the Tribunal decides that the appropriate action for OFCOM to take in relation to the LLU Decision is the action set out in the directions in the Annex to this Ruling.

18. The Tribunal, therefore, hereby –

(a) upholds those grounds of the appeal which were encapsulated in the Reference Questions 1(i), 1(v), and 2, to the extent set out in the CC's Determination and dismisses the other grounds of appeal covered by the Determination;

(b) remits the LLU Decision 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;

(c) grants permission to CPW to re-amend its Amended Notice of Appeal dated 7 December 2009 by deleting paragraphs 130.4 and 130B.2;

(d) makes no order as to costs;

(e) grants liberty to apply.

Vivien Rose

Antony Lewis

Arthur Pryor

Charles Dhanowa  
Registrar

Date: 11 October 2010

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Appellant

- supported by -

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**ANNEX TO RULING (DISPOSAL OF THE APPEAL):**

**DIRECTIONS TO OFCOM**

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1. For the purposes of these Directions:

- (a) “Ancillary Services” means all those services that support or otherwise relate to, but are not comprised within, the Metallic Path Facility and Shared Metallic Path Facility services and in relation to the provision of which British Telecommunications plc has significant market power;
- (b) “the Act” means the Communications Act 2003;
- (c) “BT” means British Telecommunications plc;
- (d) “Bulk Retermination Services” means ancillary services offered by BT to communication providers to change or modify the MPF or SMPF tie-pair or digital subscriber line access multiplexer port of an existing service;

- (e) “Co-Mingling Ancillary Services” means those services listed from time to time for the purpose of Part 3 of the Annex to Condition FA3(A);
- (f) “CPW” means The Carphone Warehouse Group plc;
- (g) “the Commission” means the Competition Commission;
- (h) “the Determination” means the Commission’s determination, dated 31 August 2010, of the Reference Questions;
- (i) “LLU Cease Services” means the services for disconnecting a local loop unbundling line from BT’s access network;
- (j) “LLU Statement” means OFCOM’s Statement entitled “A New Pricing Framework for Openreach”, on LLU rental services and related services provided by BT in the market for wholesale local access services in the UK (but not including the Hull Area), published on 22 May 2009;
- (k) “LLU” means local loop unbundling;
- (l) “MPF” means the Metallic Path Facility service, a type of copper access line between the end-user premises and serving BT exchange;
- (m) “MPF Ancillary Services” means all of the products and/or services listed from time to time for the purpose of Part 2 of the Annex to Condition FA3(A);
- (n) “MPF New Provide” is the new connection of an MPF line to BT’s access network and shall be construed as having the same meaning as “MPF Connection – New Provide – Standard” has for the purpose of Part 2 of the Annex to Condition FA3(A);
- (o) “Condition FA3(A)” means the significant market power services condition, set pursuant to section 45 of the Act, contained in Schedule 1 to the statutory

notification published under sections 48(1) and 86 of the Act at Part I of Annex 3 to the LLU Statement;

(p) “Reference Questions” means the questions referred to the Commission in paragraph 2 of the Order dated 27 November 2009 (as amended on 18 February 2010), setting out the specified 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);

(q) “SMPF” means the Shared Metallic Path Facility service, a type of copper access line between the end-user premises and serving BT exchange;

(r) “the Tribunal” means the Competition Appeal Tribunal;

(s) “the unelapsed period of the price control” means the period from the date when OFCOM adopts a revised price control Condition FA3(A) to 31 March 2011.

2. In relation to the errors found in Reference Questions 1(i) and 1(v), the Tribunal directs OFCOM to adopt a revised price control Condition FA3(A) in which:

(a) For MPF services the annual rental charge for the unelapsed period of the price control is £89.10; and

(b) For SMPF services the annual rental charge for the unelapsed period of the price control is £15.04.

3. In relation to the errors found in Reference Question 2, the Tribunal directs OFCOM to adopt a revised price control Condition FA3(A) in which:

(a) The ancillary service MPF New Provide is moved out of the basket of MPF Ancillary Services;

- (b) The MPF New Provide charge for the unelapsed period of the charge control is £62.11;
- (c) No other adjustments are made to the ancillary services baskets used by OFCOM in the LLU Statement, as indicated in paragraph 5.324(b)(ii) of the Determination;
- (d) BT is prohibited from making further upward changes to the price of any product in the Co-Mingling Ancillary Services basket or to the price of the Bulk Retermination and LLU Cease Services during the unelapsed period of the price control, as indicated in paragraph 5.234(c) of the Determination.

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

Made: 11 October 2010  
Drawn: 11 October 2010