



Neutral citation [2008] CAT 16

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1083/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

23 July 2008

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

TELEFÓNICA O2 UK LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

BRITISH TELECOMMUNICATIONS PLC

Interveners

RULING ON REQUEST FOR PERMISSION TO APPEAL

1. In its application made on 17 June 2008, the Appellant (“H3G”) has requested permission to appeal against the Tribunal’s judgment handed down on 20 May 2008 ([2008] CAT 11) in which the Tribunal determined the non price control matters raised by H3G’s appeal (“the judgment”). The background to the appeal was set out fully in the judgment and need not be repeated here. The abbreviations used in this ruling bear the meaning given to them in the judgment.
2. The appeal was brought before the Tribunal under section 192 of the Communications Act 2003 (“the 2003 Act”). Appeals against decisions of the Tribunal under that section can be brought under section 196 of the 2003 Act which provides so far as relevant:

“196. Appeals from the Tribunal

(1) A decision of the Tribunal on an appeal under section 192(2) may itself be appealed.

(2) An appeal under this section-

(a) lies to the Court of Appeal ... ; and

(b) must relate only to a point of law arising from the decision of the Tribunal.

...

(4) An appeal under this section requires the permission of the Tribunal or of the court to which it is to be made.”

3. In considering whether to grant permission, the Tribunal applies the test in CPR r52.3(6). Permission is granted only if the Tribunal considers that the ground has a real prospect of success or that there is some other compelling reason why the appeal should be heard. Rule 59(2) provides that where a request for permission is made in writing, the Tribunal shall decide whether to grant such permission on consideration of the party’s request and, unless it considers that special circumstances render a hearing desirable, in the absence of the parties. The Tribunal has received written submissions from OFCOM and from BT opposing the grant of permission on all grounds. None of the parties requested an oral hearing of the permission application and in the

circumstances of this case the Tribunal does not consider that an oral hearing is necessary or desirable.

4. H3G's appeal before the Tribunal was divided broadly into two parts. The first part was H3G's challenge to the finding by OFCOM that H3G has held and currently holds significant market power in the market for voice call termination on its own network. H3G challenged that finding both in OFCOM's Reassessment Statement concerning the period 2004 – 2007 and in the 2007 Statement which covers the period 2007 – 2011. The second part of H3G's appeal concerned the question whether OFCOM had erred in deciding to impose a price control condition on H3G under section 87 of the 2003 Act. That part concerned only the 2007 Statement.
5. It is common ground that other challenges to the price control imposed on H3G in the 2007 Statement constitute specified price control matters within the meaning of section 193 of the 2003 Act. Those matters have been referred for determination to the Competition Commission in accordance with that provision. The Competition Commission is currently investigating the price control matters although if H3G were to succeed in any of its grounds of appeal, that investigation would become redundant so far as H3G's appeal is concerned, since OFCOM's power to impose a price control would have been undermined.

(a) Grounds of appeal relating to significant market power

6. H3G's proposed grounds of appeal can similarly be divided into two parts. The first two grounds concern the reasoning by which the Tribunal upheld the finding of significant market power in both the Reassessment Statement and the 2007 Statement.
7. The first proposed ground asserts that the Tribunal erred in law in failing to determine the question of what, on a proper construction of the proviso to BT's end-to-end connectivity obligation, was a "reasonable price" which BT could be obliged to pay H3G for MCT. H3G asserts that the Tribunal erred because on a proper analysis of that obligation and of OFCOM's dispute resolution powers under section 185 of the 2003 Act, the Tribunal should have found that BT has sufficient countervailing buyer power to negate the existence of any SMP on the part of H3G.

8. The second proposed ground concerns the Tribunal's findings in relation to OFCOM's second line of defence, namely that OFCOM's dispute resolution powers constituted regulation of both parties to the dispute and as such should be disregarded under the modified greenfield approach when assessing H3G's market power: see paragraphs 95 *et seq* of the judgment.
9. OFCOM and BT opposed the grant of permission to appeal on both these grounds arguing that since the second proposed ground had no prospect of success, the first ground did not really arise for decision.
10. The Tribunal has concluded that it is right to grant permission to appeal on these two grounds. They clearly raise points of law on the proper construction of the 2003 Act and BT's end-to-end connectivity obligation. They also raise fundamental points on the inter-relationship of different aspects of the regulatory framework as set out in the 2003 Act and as derived ultimately from the provisions of the relevant European directives.
11. Although the Tribunal does not necessarily agree with H3G that the grounds have a real prospect of success, the points raised are key to the proper conduct by OFCOM of all future analyses carried out under these statutory provisions not only of this market but of other markets which OFCOM is required by Community law to investigate. We consider that this ground of appeal raises a point of law of fundamental importance which should be settled definitively by a higher court.
12. The Tribunal therefore grants permission to appeal on grounds one and two as set out in the application of 17 June 2008 because there is a compelling reason why an appeal on these grounds should be heard.
13. OFCOM particularly objected to the paragraph in the H3G application which argues that if the Tribunal were correct in finding that OFCOM's dispute resolution powers should be disregarded then OFCOM should also have disregarded the end-to-end connectivity obligation imposed on BT and hence considered the extent of BT's countervailing buyer power in the absence of that obligation. We agree with OFCOM that this appears to be urging the court to do precisely what the European Commission indicated should not be done in the *RegTP* decision discussed at paragraphs 111

onwards of the judgment; that is to apply an unmodified greenfield approach. However, it would be artificial and might prove unhelpful to the Court of Appeal for this Tribunal to slice up the grounds put forward in Ground 2 granting permission for some parts but not for others. So we do not think it is right to treat this paragraph differently from the other paragraphs setting out Ground 2.

(b) Grounds of appeal relating to the lawfulness and proportionality of a price control

14. The third ground put forward in H3G's application concerns the Tribunal's findings as to whether there was "a relevant risk of adverse effects arising from price distortion" for the purpose of section 88 of the 2003 Act. The relevant risk identified by OFCOM and upheld by the Tribunal was a risk of H3G fixing and maintaining prices at an excessively high level.
15. This point raises the same argument as is raised under Grounds one and two, namely that OFCOM's dispute resolution powers effectively prevent H3G from setting a price "at an excessively high level" so that there is no risk of excessively high pricing and hence the condition set by section 88 for the imposition of a price control is not met. The Tribunal acknowledged in paragraph 287 of the main judgment the link between the point made in relation to SMP and the point made in relation to the risk of excessive pricing.
16. If H3G is right that on a proper construction of OFCOM's dispute resolution powers H3G is precluded from charging a price appreciably above the competitive level then there is a question of law as to how, if at all, this affects the application of the section 88 test. It would not be right to preclude H3G from exploring the consequences for the application of section 88 of a different interpretation of the scope of the dispute resolution powers if that is what emerges from the arguments on SMP.
17. H3G's ground of appeal refers to paragraph 287 of the main judgment and on that basis the Tribunal grants permission to appeal on this ground. The appeal is limited to this point of law and should not extend to challenging any other aspect of the Tribunal's decision on the imposition of the price control. In particular, it does not extend to the Tribunal's conclusions that, applying the test which the Tribunal found was the correct

test, there was in fact sufficient evidence of a risk of excessively high prices: see paragraphs 289 *et seq* of the judgment.

18. The fourth ground proposed by H3G concerns the point dealt with at paragraphs 214 *et seq* of the judgment. The proposed ground is that the Tribunal erred in law in concluding “that Ofcom was entitled to fail to take into account the fact that the imposition of price control on H3G would lead to H3G losing £20-£30 million per year to its competitors because it would not be free to adapt its prices to counteract the acknowledged anomalous effects of the current mobile number portability arrangements.”
19. This proposed ground is, in the Tribunal’s judgment, misconceived. As was explained in the judgment, OFCOM has not “failed to take into account” the “loss” of £20 - 30 million per year. On the contrary, OFCOM recognised in the 2007 Statement that it should have considered whether and how to take this into account in formulating the price control but, because the point arose too late to be incorporated into the price control set by the 2007 Statement, OFCOM decided to deal with it in a separate consultation. That consultation expressly raises the possibility that OFCOM will adapt the price control to remove the “loss”.
20. The Tribunal does not consider that there is a point of law here. Nor in the Tribunal’s judgment is there any prospect of the Court of Appeal coming to the view that making good that “loss” justifies leaving H3G outside the price control which has been set for the other MNOs. We therefore refuse permission for the fourth ground.
21. The fifth ground of appeal concerns whether the Tribunal should have remitted the case to OFCOM to investigate the causes of the traffic imbalance which exists between H3G and the other MNOs. H3G’s complaint about its traffic imbalance refers to the fact that H3G terminates more minutes on the networks of each of the other MNOs than each of the other MNOs terminates on H3G’s network. The Tribunal rejected H3G’s submissions that the current mobile number portability arrangements disadvantaged H3G by making it more difficult for H3G to increase its market share and by creating a traffic imbalance through “second handset behaviour”: see paragraphs 234 to 261 of the judgment. We then considered whether to remit the matter to OFCOM and concluded

at paragraph 265 that there was no reason to investigate further the causes of traffic imbalance or why H3G had not expanded its market share.

22. H3G asserts in the proposed fifth ground of appeal that the paragraphs which follow (paragraphs 266 to 269 of the judgment) explain only why there was no need to investigate further the causes of H3G's slow growth of market share and do not explain why there was no need to investigate the causes of the traffic imbalance.
23. The Tribunal does not consider that there is point of law here or that the ground has a real prospect of success. The point made by the Tribunal in paragraphs 266 to 269 was that the price control must be based on the assumption that H3G will compete as well as the other MNOs over the period of the price control unless H3G puts forward a plausible case that it is impeded from doing so by circumstances outside its control. The reason put forward by H3G during OFCOM's consultation process and before the Tribunal as to why H3G should be treated differently from the other MNOs was because of the disadvantage said to arise from the current number portability arrangements. The Tribunal rejected this on the facts and that finding is not, and cannot be, challenged by H3G. What is said in paragraph 268 of the judgment clearly applies as much to arguments about traffic imbalance as it applies to arguments about market share.
24. There is nothing in the 2007 Statement or in the main judgment to support H3G's contention that on the evidence the "only rational conclusion" open to the Tribunal was that the causes of H3G's traffic imbalance were relevant to the decision to impose a price control on it. The judgment explains why this is not so.
25. Further, the Tribunal noted at the outset of the part of the judgment dealing with the imposition of the price control that many of the arguments raised by H3G overlap and that the judgment must be read as a whole: see paragraphs 165 and 166. Given the links between the traffic imbalance arguments and the other aspects of H3G's case, including its submissions as regards its low market share, the Tribunal considers that it is clear from the judgment read as a whole why the Tribunal decided not to remit the matter to OFCOM. For example, H3G argued that because the price control imposed by the 2007 Statement reduces the differential between the rate H3G charges the MNOs and

the rate the MNOs charge H3G, it has the effect of greatly increasing the monthly payments H3G has to make to the MNOs once the charges are netted against each other. This aspect of traffic imbalance, namely the effect it has on the size of payments moving from H3G to its competitors, is considered by the Tribunal at paragraphs 219 of the judgment onwards.

26. In relation to those grounds of appeal for which permission has been refused, H3G may, if so advised, renew its application for permission to the Court of Appeal within 14 days pursuant to CPR 52.3(3) and paragraph 21.10 of the practice direction on appeals. Should any such application be made, a copy of this ruling together with copies of H3G's letter of 17 June 2008 requesting permission to appeal and BT's and OFCOM's letters of 4 July 2008 opposing H3G's request should be placed before the Court of Appeal.
27. The Tribunal unanimously:
 - (a) grants H3G permission to appeal on grounds 1, 2 and 3 of the application and
 - (b) refuses permission on grounds 4 and 5.

Vivien Rose

Andrew Bain

Adam Scott

Charles Dhanowa
Registrar

Date: 23 July 2008