Neutral citation [2011] CAT 31

IN THE COMPETITION APPEAL TRIBUNAL

Case Numbers: 1180/3/3/11
1181/3/3/11
1182/3/3/11
1183/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

17 October 2011

Before:

MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED
HUTCHISON 3G UK LIMITED
VODAFONE LIMITED

Appellants / Interveners

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

TELEFÓNICA UK LIMITED

Intervener

RULING OF THE CHAIRMAN ON ADMISSIBILITY OF EVIDENCE

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1. By an order made on 30 June 2011, the Tribunal referred certain questions to the Competition Commission and ordered the Competition Commission to determine those questions. The Competition Commission is presently considering these questions, and has been directed to determine them by or before 9 February 2012.

2. During the course of proceedings before the Competition Commission, a question regarding the admissibility of certain evidence relied upon by Vodafone Limited ("Vodafone") has arisen. This evidence comprises certain survey evidence, which was included with Vodafone's Notice of Appeal ("the Evidence").

3. The objection to the Evidence was made in paragraph 162 of Annex A to the Defence served in the proceedings by the Office of Communications ("OFCOM").

4. This matter has been dealt with on the papers. No party has suggested an oral hearing to be necessary; and having considered the matter on the papers, the Tribunal has concluded that no oral hearing is necessary to resolve this matter.

5. Vodafone has explained the relevance and importance of the Evidence in correspondence to the Tribunal. The Tribunal invited the other parties to comment on the question of admissibility. Telefónica UK Limited ("Telefónica") and OFCOM have both done so.

6. In its letter to the Tribunal dated 14 October 2011, Telefónica stated:

> "Telefónica ... agrees with Vodafone that the evidence will be valuable to the Competition Commission in reaching a view on the effects of LRIC+ and it would therefore be inappropriate to exclude such evidence."

7. In its letter to the Tribunal, also dated 14 October 2001, OFCOM made clear that it was taking a purely formal position, contending for an invariable rule that where a party seeks, in proceedings before the Tribunal, to adduce new evidence, an application to admit such evidence must be made by the party seeking to adduce that evidence. OFCOM's letter concludes:

> "In this particular instance, if the Tribunal agrees with Ofcom that it is for Vodafone to apply to adduce [the Evidence], then Ofcom would not contest that application.
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> However, this should not detract from what Ofcom considers to be an important point of principle that an application for permission should be made by Vodafone and properly considered. Ofcom takes the view that, irrespective of the merits of the application, it is important for good order that the parties do not adduce (substantively) new evidence without first seeking permission to do so and without demonstrating that there is good reason why the Tribunal should admit the evidence. This is particularly the case in the context of price control appeals which must be tightly managed so that they can be disposed of within reasonable timescales."

8. The Tribunal does not agree with OFCOM's approach. The Tribunal does not consider that there is any general rule requiring the party adducing evidence to apply to the Tribunal, as opposed to the party objecting to the evidence applying to have the evidence excluded. There is nothing in the primary legislation, nor in the Tribunal's procedural rules, to suggest any such general rule.

9. In its Defence, when objecting to the evidence, as well as in its letter to the Tribunal, OFCOM relied upon the following passage in the judgment of Toulson LJ in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245 at paragraph 72:

> "The court was asked by Ofcom to give clear guidance to the CAT about the exercise of its power to admit fresh evidence. Before the CAT there was argument whether it was for the party seeking to adduce fresh evidence to show why it should be given permission to do so, or was for the opposing party to show why permission should not be granted. Since the introduction of fresh evidence is not a matter of right, in the event of a dispute about its admission I would regard it as the responsibility of the party who wants to introduce it to show a good reason why the CAT should admit it. The question for the CAT would be whether in all the circumstances it considers that it is in the interests of justice for the evidence to be admitted. I would not attempt to lay down any more precise test, nor would I attempt to lay down a comprehensive list of relevant factors or suggest how they should be balanced in a particular case…"

10. This passage simply says that <u>where there is a dispute about the admissibility of new evidence</u>, it is for the party adducing that evidence to explain why it should be admitted. The passage says <u>nothing</u> about <u>who</u> should make an application to the Tribunal regarding the evidence, and it is significant that Rule 22 of the Competition Appeal Tribunal Rules 2003 SI 2003/1372 ("the Tribunal Rules") is framed both in terms of admission and exclusion of evidence.

11. Whether an application regarding the admissibility of evidence is framed as an application to admit or an application to exclude evidence is a question that is likely to turn on the circumstances, and ought to be a question of limited importance. There is no general rule of practice: rather, where it is clear that there is going to be a dispute about admissibility, it is for the parties to act responsibly to ensure that the matter is brought swiftly to the attention of the Tribunal. That may mean that the person adducing the evidence should make the application, where (for instance) it is plain that there will inevitably be an objection. On the other hand, where the situation is less clear-cut, it may well be appropriate for the party objecting to the evidence to make the application, so that the grounds for objection are clearly stated at the outset. Plainly, circumstances will vary from case to case, and there can be no hard and fast rule. The Tribunal considers that it should be wary of seeking to give general guidance as to what approach might be appropriate in specific cases: it is the essence of admissibility applications that each must be considered in the light of its own specific circumstances.

12. However, whilst there is no general rule as to who should make an application, what is clear from the judgment of Toulson LJ in *British Telecommunications plc v Office of Communications* is that the Tribunal should only be troubled with applications regarding the admissibility of evidence where there is a genuine dispute regarding the admissibility of that evidence ("Since the introduction of fresh evidence is not a matter of right, in the event of a dispute about its admission I would regard it as the responsibility of the party who wants to introduce it to show a good reason why the CAT should admit it").

13. Nothing in this Ruling should be taken as diminishing the importance of the Tribunal's own role in controlling the evidence before it. However, the Tribunal certainly wishes to discourage the making of formal applications to admit evidence where there is in fact no substantive dispute between the parties as to the question of whether the evidence should in fact be admitted.

14. That appears to be the position here: a purely formal objection has been taken by OFCOM, with the result that the Competition Commission has suggested to Vodafone that it apply to the Tribunal for a direction to admit the evidence

under Rule 22 of the Tribunal Rules, and Vodafone has (whilst respectfully disagreeing as to the need for such an application) made the application.

15. It must be stressed that applications regarding the admissibility of evidence should not arise out of arid debates as to who should be making an application to admit/exclude evidence, where there is no substantive objection to the evidence. This application has been provoked by precisely such a debate, as is clear from both OFCOM's letter of 14 October 2011 and Vodafone's letter to the Tribunal dated 7 October 2011. In this latter letter, Vodafone stated:

> "Ofcom has asserted at paragraph 162 of Annex A to its Defence in these proceedings and in its letter of 30 September 2011 that, because the survey evidence is "new" evidence which was not before Ofcom when it made its decision, Vodafone requires permission from the Tribunal to rely on this evidence...In light of the correspondence between Vodafone and Ofcom, the Competition Commission has indicated in its letter of 3 October 2011 that Vodafone should apply to the Tribunal for a direction in accordance with its powers to admit evidence under Rule 22 of the Tribunal's Rules.
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> Vodafone respectfully disagrees with Ofcom that it requires permission from the Tribunal in order to rely on new evidence in support of its Notice of Appeal. The proper course of action in these circumstances should have been for Ofcom to apply to the Tribunal for a direction under Rule 22 that the evidence be excluded. Ofcom has not done so."

16. In these circumstances, this has been an unnecessary application. For the reasons given above, the Tribunal directs that the Evidence is admitted.

Marcus Smith QC

Charles Dhanowa
Registrar

Date: 17 October 2011