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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1186/3/3/11
1187/3/3/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17 October 2011

Before:

MARCUS SMITH QC
(Chairman)
DR. CLIVE ELPHICK
JONATHAN MAY

Sitting as a Tribunal in England and Wales

BETWEEN:

TALKTALK TELECOM GROUP PLC

Appellant

– and –

OFFICE OF COMMUNICATIONS

Respondent

AND BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

– and –

OFFICE OF COMMUNICATIONS

Respondent

CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Meredith Pickford (instructed by Towerhouse Consulting Limited) appeared on behalf of TalkTalk Telecom Group plc.

Mr. Tim Ward QC and Miss Fiona Banks (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Mr. Josh Holmes (instructed by the Office of Communications) appeared on behalf of the Respondent.

Mr. Stephen Wisking and Mr. John McInnes (of Herbert Smith LLP) appeared on behalf of the potential Intervener, British Sky Broadcasting Limited.

Mr. Nicholas Gibson (instructed by the Competition Commission) appeared on behalf of the Competition Commission.

1 THE CHAIRMAN: I am not sure who is due to start, probably Mr. Ward, or someone from
2 Talk Talk, but I thought it might assist if we raised a couple of points which it would be
3 helpful for the parties to address when they are on their feet. We have read, with thanks, all
4 the letters and communications the parties sent, and really the two points are these: first of
5 all, as we understand it, it is common ground between the parties that the two appeals
6 proceed essentially in parallel on the basis that BT's appeal raises exclusively price control
7 matters, and Talk Talk's raises exclusively non-price control matters. In principle, I do not
8 think the Tribunal would have difficulty with this save as to the inter-relationship between
9 the two and the potential for the CC's time to be wasted in dealing with matters which
10 perhaps might be rendered were Talk Talk's appeal to go one particular way. It would be of
11 considerable assistance if that point could be addressed.

12 In particular, there is this question which troubles us: what would happen to the BT appeal
13 before the Competition Commission were we to find that Talk Talk's appeal was justified
14 and the Ofcom decision, as a result, was to be set aside, what knock-on effects that might
15 have on the Competition Commission proceedings. That was the first point.

16 The second point was really one relating to timing on the Talk Talk appeal. As I understand
17 it from the documents, it is of particular importance to Talk Talk that there be a decision
18 one way or the other before the end of February next year, and we have that well on board.
19 In terms of the timetable that is, as I understand it, agreed between all the parties with a
20 hearing culminating on 19th December with a time estimate of one and a half days we are a
21 little troubled that that might result in a determination that could slip beyond the time for
22 timetable. We were looking to see whether the timetable could be accelerated with a view
23 to having a hearing for two days, with half a day spare, taking place on, say, 1st and
24 2nd December, when the Tribunal is free. Naturally, that would mean contracting the
25 timetable that is envisaged by the parties.

26 I will just float for general consideration the dates we were minded to give, in order to make
27 that timetable. That would be to retain the date of 1st November for Ofcom's defence, but
28 to require Ofcom also to serve its skeleton on that point; to have statements of intervention
29 following, again with skeletons, on 7th November; and for Talk Talk's reply and skeleton
30 argument to be served on 21st November. These are simply in pencil suggestions, but that
31 would enable a hearing to take place at the beginning of December, and then one could
32 anticipate a judgment being handed down either this year or in the course of January.

33 Those were simply the two points that I wanted to flag at the outset. Mr. Ward, I do not
34 know if you want to start.

1 MR. WARD: Sir, thank you for that. Dealing with the second one straight away, we would have
2 no objection to that course of action. The first one perhaps more directly concerns BT, the
3 question of appeals in parallel. As you rightly say, I think there is agreement on this, or, at
4 the very least, Talk Talk said that they are even prepared to consent or would not object, or
5 something along those lines, but there is no sustained effort by any party to argue that the
6 appeals should be heard sequentially. Of course there is a good precedent for that in the last
7 *Carphone Warehouse* case where exactly the same thing happened.

8 Why we say it makes sense: firstly, of course, as you will have appreciated, these points are
9 of very, very wide significance to BT, beyond the scope of this particular price control
10 because they potentially impact upon the way that all BT's regulated price controls are
11 controlled.

12 That means not only are they important, but there are obvious practical implications of
13 delay here. One is this: there is in the pipeline a further determination by Ofcom in LLU. I
14 understand, although I am sure Mr. Holmes will insist this is not binding, it is expected in
15 December. One can see that precisely the same issues are going to arise in that case. One
16 can, therefore, anticipate there may well be appeals, depending on how it is decided, and
17 there may well be protective appeals. Even if the Competition Commission were to get to
18 work now, and even if it was in some way overtaken by Talk Talk's appeal in terms of the
19 outcome, any work that it was doing would not be wasted and one could envisage those
20 appeals in effect being rolled up together, in practice if not formally. So we do not think
21 there is any real prospect that there would be any wasted work.

22 There was also a concern that if we wait for Talk Talk's appeal, and particularly if it does
23 turn out to be unmeritorious, there will have been a long and really very, very costly delay
24 for BT.

25 The other thing I would respectfully suggest is that there is a real question about what the
26 form of relief would be even if Talk Talk succeed. What they are saying, in essence, if I
27 can just boil it down, is that there were material considerations that were not properly taken
28 into account, or taken into account at all, by Ofcom. It is then a question of what the
29 consequence would be of taking them into account. It is not axiomatic at all that the whole
30 price control would fall over in a way that would undermine the appeal. It may be that a
31 much smaller change, such as, for example, moving some exchanges from one market to
32 another, would do the job. We do not know. I am obviously not making submissions here
33 and now about what would be, but at the very least it is an open question.

1 Finally, if I may, even if one assumes that one reaches where the Tribunal says, “All other
2 things being equal we would like to direct this, direct Ofcom to withdraw the price control”.
3 Of course, the Tribunal cannot itself quash, but it can direct Ofcom to do so. If, by then the
4 Competition Commission is well developed in its work on the price control matters, or
5 could envisage in effect granting a form of interim relief where the price control were
6 suspended, or something of that kind, just to give Talk Talk the benefit of its victory but to
7 prevent the Competition Commission’s work being undermined where there is obviously
8 such a wide interest in deciding those points as quickly.

9 I do not want to in any way prejudice what we may or may not say at that stage, but rather
10 just to suggest that if there are practical issues there they are capable of being overcome.

11 Sir, unless I can assist further that is all I wish to say at this stage.

12 THE CHAIRMAN: That is very helpful, Mr. Ward. Mr. Pickford, would it be helpful to hear
13 you next?

14 MR. PICKFORD: Thank you, sir. On your first question, we also reserve judgment on the
15 precise practical implications for the BT appeal, should we succeed in relation to our
16 appeal.

17 Our position is that we can well see the force in BT wishing to get its appeal under way.
18 Our absolute preference would be for the appeals to go in sequence so that there is no
19 wasted work and indeed so that we do not have to involve ourselves. We entirely see that
20 that would be to delay the start of BT’s appeal. Of course, if we were unsuccessful then it
21 would be to delay it unjustly. So we certainly see the strength in beginning the appeals. If
22 it happens that we are then successful in our appeal we will need to revisit what the
23 implications of that are depending on the precise terms of the Tribunal’s judgment. It may
24 well depend on precisely what the Tribunal decides in relation to our appeal. It is difficult,
25 like for BT, for us to say a lot more about it at this stage, save that we see that it may be that
26 at that stage the parties have to confront that although they have gone so far there is then no
27 extant decision left which has been set aside and they have to pull their stumps and
28 effectively go away and wait until their next appeal comes along in order to re-engage with
29 the CC on those issues. That is what we say in relation to the first point.

30 THE CHAIRMAN: Thank you.

31 MR. PICKFORD: In relation to the second, we are, in principle, very happy to expedite our
32 appeal on an even faster timetable, but the only practical difficulty that I foresee with the
33 dates that have been suggested by the Tribunal is, in part, a personal one, but it does have
34 knock-on ramifications for my client. I am in a High Court hearing on the dates that have

1 been suggested for the hearing in this matter. It is a relatively small scale appeal, and I have
2 already been involved for my client in developing the notice of appeal and developing our
3 case. I would suggest that it would be disproportionate to require my clients to instruct new
4 counsel in order to take the matter forward, and it would be appropriate, if we could, to find
5 an alternative date when I would be available.

6 That is what we have to say in relation to those matters.

7 THE CHAIRMAN: That is helpful, but just so that we know which dates – if we can fit you in,
8 obviously we would be minded to try – what are your High Court dates?

9 MR. PICKFORD: The High Court dates are 30th November to 2nd December. When we have
10 heard everyone we will obviously retire and consider all these things and that will be one
11 factor that we will consider.

12 MR. PICKFORD: Thank you. There were two further matters that I did wish to make
13 submissions on, but I am happy to allow everyone to make submissions.

14 THE CHAIRMAN: Why do you not do it in all one go, Mr. Pickford.

15 MR. PICKFORD: Thank you. The other two matters were principally dealing with what appears
16 to be an application from the Competition Commission to restrict the terms on which
17 interveners are entitled to participate in the BT appeal. You will have seen in the
18 Competition Commission's written submissions for today's hearing that they ask that
19 statements of intervention be no longer than strictly necessary and in particular limited
20 strictly to essential issues which Ofcom is unable to make in relation to that and we would
21 resist that order for the following reasons. First, we say that that application is for a novel
22 order which seeks to impose limits on the scope of interventions which have not previously
23 been imposed to my knowledge in cases of this type, that is references under s.193.

24 We, of course, entirely accept that interventions need to be proportionate and that we, of
25 course, need to avoid unnecessary duplication and that is something that every intervener
26 that appears before the Tribunal or the Competition Commission is well aware of. But to
27 my knowledge that type of order has not been imposed in this type of case before, and
28 certainly no authority has been cited by the Competition Commission for it. Nor, have they
29 adduced any witness evidence to explain why, in their experience it is particularly necessary
30 for that type of order to be imposed. For example, there is a statement from a senior person
31 at the Competition Commission explaining the problems that have arisen in the past and
32 why they therefore require this kind of order now. That is the first point.

33 Secondly, there appears to be some suggestion that the order is justified in the present case
34 because the intervening parties, Talk Talk and Sky are themselves not the subject of the

1 price control and they say that is what makes it different in this case from other cases.
2 There are two problems in relation to that. First, it does ignore the other cases in which
3 those very same facts have arisen and there has not been that type of order, for example,
4 Sky intervened in support of Talk Talk, Carphone Warehouse, in its appeal of the local loop
5 unbundling case, and no such order was imposed limiting Sky's intervention in that case.
6 Secondly, and rather more importantly, it also ignores the fact that price controls are not
7 imposed by Ofcom simply for their own sake to make life difficult for the regulated entity,
8 they are imposed in order to protect those that purchase the services from the regulated
9 entity from what might otherwise potentially be exploitative or abusive pricing practices .
10 In relation to that Talk Talk is a major purchaser of services from BT of the type that are
11 under consideration in this appeal. Sky is also a major purchaser, and both parties are
12 directly and significantly affected by the terms of the price control, and we say it would be
13 quite wrong to shut both parties out from full and proper participation in a matter which
14 bears directly on their businesses in the way that this particular price control does. We say
15 that our interest in ensuring that Ofcom's decision on the level of the price control is upheld
16 is every bit as valid and important as BT's interest in trying to knock the level down. That
17 is the second point.
18 The third point is that terms of the direction sought by the Competition Commission are
19 themselves deeply problematic. Even on its own terms we say it is unclear and makes no
20 sense. Just to remind the Tribunal it is asked that the extent of the intervention be limited
21 strictly to essential issues which Ofcom is unable to make in its defence. The first point we
22 make is we are not quite sure how interveners or Ofcom make an issue. That is a small
23 point, that might be addressed by drafting, but it is certainly unclear as it currently stands.
24 More fundamentally, there are the following problems. What, for example, if Ofcom is able
25 to address an issue but it does not do so adequately or properly? Is the implication of the
26 order that we are to be shut out from addressing that because it was something that Ofcom
27 could have addressed, but it did not? What if there was useful additional evidence that we
28 can provide further to the evidence that Ofcom adduces in the appeal. Again, are we to be
29 shut out from that because Ofcom was able to address it but did not? We say that would be
30 wholly inappropriate and, indeed, one of the problems with the orders is it actually requires
31 us to try to second guess what Ofcom was or was not able to do, because what we will see is
32 Ofcom's defence. There will be certain points it addresses, there will be certain points
33 perhaps it does not address. We are going to have to try and second guess in relation to
34 those points it did not address did it do that because it chose not to do it or because it

1 overlooked the issue? It wanted to do it but it simply failed to do so, or because it was
2 unable to do it? Apparently, according to the direction as sought by the Competition
3 Commission it is only in the latter category that we are to be permitted to intervene. So we
4 say that that is a third reason for not granting the direction.

5 Fourthly, and finally, we do say it is somewhat odd that the Competition Commission,
6 which is not actually a party to these proceedings, should be seeking to limit the basis on
7 which parties to these proceedings can actually participate.

8 THE CHAIRMAN: That is quite a minor point because if there is substance in the point then we
9 are very grateful ----

10 MR. PICKFORD: It is ... and that is my fourth point. Certainly, the first three considerations, we
11 would be very strongly against making the order no matter who advances the submission.
12 Sir, that was all I wanted to say in relation to that issue.

13 Finally, there is one further point that we addressed in our letter where we said that we
14 agreed with the terms of the reference question that had been proposed by BT, that was
15 sincere at the time. It has since been brought to our attention by Sky that there is a potential
16 problem with those terms. We support Sky's position in relation to this. It is perhaps best if
17 I allow Sky to develop it, but just for clarity, we have on reflection modified our position
18 and agree with what Sky will have to say.

19 THE CHAIRMAN: That is helpful, Mr. Pickford, but I think the order that BT was envisaging
20 was that the parties provide at some point in the future, 25th October I think was the date, an
21 agreed draft and so it seems to us that the most appropriate way for dealing with the
22 formulation of questions is not now but for the parties to discuss it and to hopefully submit
23 an agreed draft, but if a draft cannot be agreed then for us to determine that on or shortly
24 after 25th October.

25 MR. PICKFORD: Indeed, I wanted to put the record straight so there was no ----

26 THE CHAIRMAN: No, that is very helpful, Mr. Pickford, I just wanted to make clear where we
27 were coming from in terms of the formulation of the questions.

28 MR. PICKFORD: I am very grateful.

29 THE CHAIRMAN: Would it be useful to hear from Sky next?

30 MR. WISKING: Yes. In relation to the points that have been raised then, Sky's position is that it
31 would be happy to expedite the Talk Talk appeal. In terms of sequencing we do not want to
32 say much about that. It seems to us that logically it would be better if the Talk Talk appeal
33 came first rather than running parallel as contemplated, we can see the complexity that

1 would arise if Talk Talk's appeal is successful and the complexity of the orders that might
2 need to be made, but that is all we need to say about that.

3 The third point I wanted to make was to adopt and add to the submissions Mr. Pickford
4 made in relation to the Competition Commission's application to limit the intervention of
5 Sky and Talk Talk Group.

6 Mr. Pickford has made a number of points which I do not propose to repeat. The additional
7 points I want to make are these: First, Sky has no intention of going beyond the traditional
8 role of an intervener in these proceedings. It has no intention to duplicate what Ofcom does
9 and the timetable allows specifically for that.

10 The second point is that obviously the intervention has to be seen in a wider context. I think
11 it is common ground that the issues in these proceedings are much wider, thereupon the
12 local loop unbundling case.

13 The third point, as Mr. Pickford says, Sky is a customer of BT and therefore has a very real
14 interest in the outcome of these proceedings. It is also a competitor of BT in broadband,
15 and therefore has something to bring to bear on the questions of efficiency, possible
16 distortion of competition which arises in the BT appeal.

17 The final point to make, we can indicate that we will endeavour to make our intervention as
18 efficient as possible, in particular we intend to explore with Talk Talk Group ways in which
19 we can co-operate, possibly in respect of evidence or submissions to minimise the burden
20 on the Competition Commission. Those are the additional points I wanted to make in
21 relation to that issue.

22 In relation to the terms of reference we will make our arguments to the other parties, and
23 hopefully that matter will be resolved.

24 THE CHAIRMAN: Thank you very much. Would it be useful to hear from Ofcom next, and
25 then the Competition Commission.

26 MR. HOLMES: On the first of your points, in parallel versus sequential questions, may I endorse
27 and adopt the submissions of Mr. Ward? The issues raised in the BT appeal are issues of
28 general importance that arise, they are cross cutting issues that arise in relation to a number
29 of price controls which are ongoing. In particular, there are two price controls which will
30 be decided, we hope at the end of this year. No doubt BT in relation to those price controls
31 will put in place protective appeals to protect its position on the issues which are currently
32 before the Tribunal and will be before the CC in the event of a reference in these
33 proceedings. It is therefore highly unlikely, in our submission, that a situation will arise
34 where the CC spends several months considering and then the plug is pulled and all of that

1 time is wasted. There may well be proceedings already on foot in other appeals, and
2 therefore the CC's deliberations could simply continue. Even if there were, at the worst
3 case, a short break in the proceedings, they would resume without that time being wasted.
4 So, in our submission, it is best to get these questions before the CC as soon as possible so
5 that regulatory certainty can be achieved for the industry and everyone knows where they
6 are.

7 On the second issue that you raised, the timing of the Talk Talk appeal, we fully support
8 any move that will get this appeal heard as rapidly as possible. The dates that you proposed
9 work from our perspective. We hear what Mr. Pickford says about his availability, and,
10 subject to the possibility of accommodating him soon after, that is obviously a matter for the
11 Tribunal, but we would have no objection to that.

12 There were two other matters raised by Mr. Pickford. The first concerned the scope of
13 interventions. I will not address you, sir, on the CC's application which is for the CC, but
14 there are two points we would make in relation to the scope of the interventions. The first is
15 that we would endorse what I think was Mr. Pickford's suggestion, that the applications be
16 granted on terms that the interveners liaise with the party that they support in order to avoid
17 duplication. That is a regular feature of the terms on which parties are permitted to
18 intervene by the Tribunal, and it seems a sensible step to us in order to try to avoid
19 unnecessary repetition.

20 Second, as regards Talk Talk's application, we noted that Talk Talk says that there are areas
21 where Talk Talk does not agree with Ofcom entirely. This is given as an argument in
22 favour of allowing its intervention so that it can protect its own separate interests. Sir, that
23 gives us slight cause for concern and we do not press it heavily now. Obviously we will
24 wait to see how they put their intervention, but the scope of BT's appeal is fixed by the
25 notice of appeal and cannot be expanded by an intervener, in our submission. It would
26 therefore not be permissible for Talk Talk to use its intervention in the BT appeal as a
27 platform for advancing additional or supplemental criticisms of Ofcom's price control.
28 Finally, as regards the terms of the reference questions, we were content with the terms, but
29 we understand there may be an issue which we have not yet had an opportunity to discuss
30 with Sky. So, in the light of that, it would probably, in our submission, be best to default to
31 Mr. Ward's proposal that the parties liaise and 25th October seems a sensible date from our
32 perspective.

33 Unless I can be of any further assistance, those are my submissions.

1 THE CHAIRMAN: Thank you very much, Mr. Holmes, that is very helpful. Mr. Gibson, just
2 before you start, our experience is that interveners are quite disciplined in terms of what
3 they add by way or verbosity, in other words, little, but do add in terms of value. If we were
4 minded to insert the requirement that interveners liaise with the party in whom they are
5 intervening to support, would that meet the Competition Commission's concerns?

6 MR. GIBSON: May I just take instructions?

7 THE CHAIRMAN: Please.

8 MR. GIBSON: (After a pause) Sir, can I start on that point?

9 THE CHAIRMAN: Whichever order you wish.

10 MR. GIBSON: Perhaps I can deal very briefly with the two other points raised. In relation to the
11 second, the details of the Talk Talk appeal, the Commission does not have any particular
12 comment to add.

13 In relation to the first point, particularly on the point of the possibility of there being wasted
14 Competition Commission time in the event that the timetable plays out in the way you posit,
15 it could theoretically do so.

16 We can see the merit of moving the Talk Talk appeal as quickly as possible, not least
17 because if the Tribunal is able to achieve a judgment in the time that you propose, that
18 would of course mean that there would be a very minimal amount of time spent by the
19 Competition Commission in relation to its process, and therefore the risk of waste becomes
20 largely minimal.

21 We would, however, express some support for the view taken by BT in Mr. Ward's
22 submissions, that the principles that can be discussed in relation to BT's appeal are not
23 solely related to the WBA matter and therefore whilst there may be some question of waste
24 in his appeal evidence and on a technical basis the waste is unlikely to be of general concern
25 because of the broader application of those principles.

26 Turning to the statement of intervention point, we are grateful in the submissions of both
27 Sky and Talk Talk for the acknowledgement that interveners should limit themselves
28 strictly to what it is necessary to do. It seems that that general point of principle perhaps is
29 the one that we really wanted to ensure that everybody was mindful of.

30 We obviously can only speak for the Competition Commission's experience of the
31 statements of intervention, and we have unfortunately found in some circumstances that
32 some of the interventions have been somewhat longer than we would consider necessary
33 and perhaps touching on issues that we felt slightly overlapped with issues that Ofcom had
34 brought to bear.

1 That was the genesis for our comment in our note. We would say that the note of caution
2 that Ofcom sounded in relation to some of the comments made by Talk Talk is perhaps the
3 understandable concern of the interveners to make sure that their voice is heard, but it must
4 be done through the prism of the mechanism and process that is available to them.

5 We would agree that inserting wording to the effect that you suggested about liaison should
6 not only give us some cause of comfort, but also would address one of the concerns that
7 Mr. Pickford raised around the inability to know what Ofcom is unable to know, if I can put
8 it that way. We would think that liaison would be quite an effective way of them finding
9 out what Ofcom felt its limitations were. Indeed, in a particular instance where they had
10 better or more specific evidence, the Competition Commission has no desire to shut out
11 evidence that is going to assist it in arriving at a proper determination of the matters in
12 dispute. Indeed, that is precisely the type of intervention that we would welcome. What we
13 were trying to avoid is the extraneous information that one would not wish to receive and to
14 make sure that it is limited in terms to the scope of the notice of appeal.

15 As to this particular point, we were not intending to draft specifically, although we would
16 say that the “unable” language is probably appropriate in the light of the liaison process that
17 has been proposed. We would say that in all the circumstances, if the parties indeed accept
18 that the nature of an intervention is that it should be strictly limited to that which is
19 necessary we do not really see that it is that controversial to include that wording in the
20 order explicitly, if it is just a reminder and guidance that allows us to remind the parties in
21 the course of our proceedings as to the Tribunal’s intentions, that would be of great
22 assistance to us.

23 As regards the points about the natural justice of the situation, we have no desire to prevent
24 parties making points within the prism of the notice of appeal that they properly feel they
25 ought to make, but we also recognise that Ofcom acts to ensure that a decision is taken in
26 the interests of the whole industry, and indeed through the liaison process could no doubt
27 ensure that it brings to bear the points that it should properly make in the context of its
28 defence.

29 Unless there is anything further, those are our submissions.

30 THE CHAIRMAN: No, Mr. Gibson, thank you very much, that was very helpful. I do not know
31 whether BT or Talk Talk has anything by way of reply. Mr. Pickford?

32 MR. PICKFORD: Thank you, sir, I do have just a couple of short points in reply. It was
33 suggested by Ofcom, I think, that we were suggesting that the order permitting our
34 intervention should be made subject to what Mr. Holmes described as a “usual order

1 requiring liaison”. There are two points in relation to that. We were not suggesting that.
2 Indeed, to the best of my knowledge, most of the orders granting intervention are not made
3 on that basis. It is often reflected by the Tribunal in its ruling that it is appropriate for liaison
4 to take place as much as possible, but rarely an actual term of the order granting
5 intervention.

6 One of the reasons one can see for that is that it may lead us to some difficulties if it is
7 formally the basis on which we are permitted to intervene. As I understand it, it has been
8 suggested that we are supposed to liaise with Ofcom. Presumably that then requires Ofcom,
9 for example, to show us its draft defence in order for us to be able to liaise effectively with
10 it. There are sometimes concerns raised by Ofcom about appearing too close to certain
11 parties in the litigation and so whilst obviously we will do our best to liaise amongst
12 ourselves in as much as is practicable, there are limits to how formalised that process can be
13 and so that is what we have to say in relation to that point.

14 Mr. Holmes’ second point about the scope of interventions, it raises the old chestnut which
15 so far the Tribunal has never actually had to decide, which is quite how far can an
16 intervener go in presenting its own perspective on matters that are raised by an appeal. We
17 obviously accept that any intervention needs to be within the four corners of an appeal, but
18 where the lines are is a matter, we say, that should be addressed once our intervention has
19 been seen. If anyone has any problems with it then obviously the matter could be raised
20 then, but it is quite hard to deal with in the abstract.

21 THE CHAIRMAN: You cannot deal with it in the abstract, no. It is something that requires a
22 particular example, though I am not welcoming such an example, let me say that now.

23 MR. PICKFORD: Sir, that is all we want to say in reply.

24 THE CHAIRMAN: I am grateful, Mr. Pickford. Mr. Holmes, just to ask you, were we to insert
25 into an order a paragraph simply requiring the interveners and Ofcom to liaise, would that
26 cause Ofcom any difficulty?

27 MR. HOLMES: Sir, I will just take instructions to be sure. (After a pause): Yes, my instructing
28 solicitor helpfully points out that I do not think that we envisaged, when we made this
29 proposal, that there would be an exchange of drafts of the defence in advance. We think
30 rather that we would be very happy to liaise with Sky and Talk Talk to explain the broad
31 lines of defence that we propose to take and to hear what they propose to bring to the appeal
32 in order to avoid duplication. The order has certainly been made in a number of previous
33 appeals. I have not, I must confess, done a head count of recent appeals, but it is a fairly
34 standard order and it has worked without difficulty with other regulators in the past; I am

1 sure that Ofcom can work effectively together with Talk Talk and Sky in order to avoid
2 unnecessary duplication.

3 THE CHAIRMAN: I am grateful, thank you. In that case we will rise for 10 minutes and give a
4 ruling after that.

5 (Short break)

6 THE CHAIRMAN: We have considered our decision and let me take you through the order that
7 we are mind to make. First, not discussed but I think not controversial, these are
8 proceedings to be treated as proceedings in England and Wales.

9 Secondly, the request for permission to intervene we are going to grant – not a part of the
10 order, but simply as a clear indication we expect interveners to behave in the way
11 interveners ordinarily do, and to avoid duplication. However, we are going to make as a
12 separate order an order that the interveners and Ofcom liaise as appropriate to avoid any
13 unnecessary duplication.

14 As regards Talk Talk's appeal we are minded to impose the time table that we discussed
15 with the parties, that is to say 1st November, 7th November, 21st November for the pleadings
16 with skeletons.

17 As regards the time for the substantive hearing as regards Mr. Pickford's position, we can
18 accommodate the parties on 5th and 6th December, and if everyone can make that date then
19 that is the date that we are minded to impose. But if anyone else has a problem on that date
20 then we will revert back to the dates that we floated beforehand. I am assuming silence
21 constitutes consent, then we will order 5th and 6th December for the hearing.

22 As regards the BT appeal, we found this the most troubling issue, but we are minded to
23 order concurrent appeals on the basis of the timetable floated by BT and, as I understand it
24 from a recent communication that I heard the five month period for the Competition
25 Commission to reach its conclusions is now all agreed, and that will be the timetable that
26 we will be minded to impose when we make a second order embodying the agreed
27 questions that the parties will be formulating before 25th October. There will be liberty to
28 apply.

29 Is there anything that I have forgotten that other parties would want me to raise?

30 MR. PICKFORD: Sir, there is simply the matter of establishing confidentiality orders to ensure
31 that the parties can exchange confidential versions of their pleadings. We provided a draft
32 order in the ordinary terms both to the other parties and to the Tribunal and I am happy to
33 co-ordinate in relation to our appeal.

1 THE CHAIRMAN: I had not seen that I do not think. I will look at it after this hearing and I will
2 make an order if it is appropriate, and I am sure it will be, in those terms, but I cannot do so
3 immediately, but it will be done as soon as possible.

4 MR. WARD: Sir, on that subject Mr. Wisking has made a suggestion we think is helpful, namely
5 to have a single confidentiality order for both appeals, just because it makes it
6 administratively much simpler in terms of both documents coming and going but also if
7 amendments are needed as they often are then they can all be done in one go.

8 The only other matter I was going to mention, if I may, is the question of exchange of
9 bundles both inside and outside the confidentiality ring. The timetable that you have set for
10 the Talk Talk appeal is, of course, a tight one. We have been talking informally whilst you
11 were out of the room, and Mr. Pickford has assured me, and I have assured him that bundles
12 can be exchanged relatively quickly, but it might help focus minds if we have an order to do
13 so by the end of the week on the assumption that the confidentiality ring is in place.

14 THE CHAIRMAN: Is that agreed, Mr. Pickford?

15 MR. PICKFORD: Sir, we are content with that.

16 THE CHAIRMAN: Very well, we will make an order to that effect, and I think, Mr. Ward, your
17 suggestion about one ring rather than two is a sensible one, it is what we have done before
18 in similar cases, and it makes matters a lot easier.

19 MR. HOLMES: In relation to the wording of the confidentiality ring, I know that Talk Talk
20 helpfully circulated a draft, I think there were a couple of tweaks proposed to that draft to
21 reflect the position that Ofcom's officials do not ordinarily enter into confidentiality rings,
22 because they will subject themselves to statutory rules which avoid the disclosure of
23 confidential information. I think there is consensus on that but the wording, I believe, has
24 been tweaked to reflect that and I just wanted to make sure that that was the case.

25 MR. PICKFORD: The version of the order that I believe has been circulated already reflects
26 Ofcom's concern, so that hopefully has been addressed.

27 THE CHAIRMAN: Well Mr. Bailey will check that we have the right order to make and if it is
28 one which reflects all the parties' agreement then I will happily make it, and if it does not
29 then we will come back and you can sort out what problem there is. Mr. Bailey reminds
30 me though that we ought perhaps to make provision for authorities and hearing bundles. I
31 do not know if the parties have a suggestion as to when that might best be done in the light
32 of a hearing on 5th and 6th December – we do need some pre-reading time. We were
33 thinking either 25th November or 28th, perhaps. Do the parties have any views on that?

1 MR. WARD: Sir, just a thought on that. The appeal bundles are not too voluminous; Mr.
2 Pickford has shown me there are a mere six files and it may be that given the very tight
3 timetable we could simply add an additional bundle for Ofcom and an additional bundle for
4 the interveners, rather than then having another set, otherwise there will be the inevitable
5 discussion about which set of bundles are we in? I am anticipating that Mr. Pickford will
6 have filed authorities to accompany his appeal ----

7 MR. PICKFORD: That is correct.

8 MR. WARD: And we, as the intervener on Ofcom's side, will be happy to undertake to do the
9 same. The danger, of course, is you will not end up with a single consolidated bundle of
10 authorities, but of course we will be happy to undertake and will, in any event be careful to
11 avoid just offering duplicates of some of the well-worn authorities.

12 THE CHAIRMAN: That sounds sensible, in that case we will leave it there and I can trust the
13 parties to do the necessary. Thank you all very much.

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