



Neutral citation [2015] CAT 13

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1237-1238/3/3/15

Victoria House
Bloomsbury Place
London WC1A 2EB

29 June 2015

Before:

ANDREW LENON QC
(Chairman)
WILLIAM ALLAN
PROFESSOR COLIN MAYER

(Sitting as a Tribunal in England and Wales)

B E T W E E N:

TALKTALK TELECOM GROUP PLC

Appellant in Case 1237
Proposed intervener in Case 1238

BRITISH TELECOMMUNICATIONS PLC

Appellant in Case 1238
Proposed intervener in Case 1237

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

SKY UK LIMITED

Proposed intervener in Case 1238

RULING (Case Management)

APPEARANCES

Mr Meredith Pickford QC and Mr Stefan Kuppen (instructed by TalkTalk Legal) appeared on behalf of the Appellant (TalkTalk Telecom Group Plc).

Mr Rhodri Thompson QC, Mr Nicholas Gibson and Ms Anita Davies (instructed by BT Legal) appeared on behalf of the Appellant (British Telecommunications Plc).

Mr Josh Holmes and Mr Tristan Jones (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Kieron Beal QC (instructed by Herbert Smith Freehills LLP) appeared on behalf of the proposed intervener, Sky UK Limited.

Mr Robert Palmer (instructed by the Competition and Markets Authority) appeared on behalf of the Competition & Markets Authority.

I. INTRODUCTION

1. This Ruling follows the first case management conference (“CMC”) in two related appeals brought under section 192 of the Communications Act 2003 (“the 2003 Act”). The two appeals are brought by TalkTalk Telecom Group plc (“TalkTalk”) and British Telecommunications plc (“BT”), challenging in different respects a decision of the Office of Communications (“Ofcom”) dated 19 March 2015 entitled ‘*Fixed Access Market Reviews: Approach to VULA margin*’ (“the Statement”). In the Statement, Ofcom says that it is concerned that BT could distort the development of competition in superfast broadband by setting an insufficient margin between the price of its wholesale product called VULA (Virtual Unbundled Limited Access), which other operators need in order to access BT’s network, and the price of its retail packages which use VULA as an input. The Statement imposes obligations on BT to regulate that margin and is intended to ensure that other communication providers have sufficient margin to be able to compete with BT in the provision of superfast broadband packages to consumers.
2. In addition to the parties to the two appeals, the CMC was attended by Sky UK Limited (“Sky”), which seeks to intervene in BT’s appeal, and by the Competition and Markets Authority (“CMA”). A number of matters have been agreed between the parties. These are reflected in the draft order accompanying this Ruling.
3. The matters which require a ruling from the Tribunal are, in summary, as follows:
 - a. whether Sky and TalkTalk should be permitted to intervene in BT’s appeal;
 - b. the confidentiality arrangements and the scope of disclosure;
 - c. the classification of the grounds of appeal in BT’s Notice of Appeal as raising either specified price control matters (“specified PCMs”) to be referred to the CMA pursuant to section 193(1) of the 2003 Act or other price control matters (“non-specified PCMs”) to be decided by the Tribunal; and

- d. the timetable for the appeals.
4. This Ruling sets out our unanimous conclusions on these matters.

II. INTERVENTIONS

5. Rule 16 (6) of the Tribunal Rules provides as follows:

“If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit.”

6. Sky and TalkTalk seek permission to intervene in BT’s appeal on the ground that BT’s appeal, if successful, would have a direct impact on them as purchasers of access to BT’s superfast broadband network and on their ability to compete with BT. They are concerned that if the Statement were set aside they would be exposed to a serious risk of a margin squeeze by BT. They submit that they are well placed to assist the Tribunal to understand the superfast broadband market from their perspective as key players in that market.
7. Ofcom does not oppose the proposed interventions. BT does not object to TalkTalk’s intervening in relation to specified PCMs but it questions whether TalkTalk has shown a sufficient interest to intervene in relation to non-specified PCMs. BT does not consider that Sky has shown a sufficient interest to justify intervention in relation to any part of its appeal. BT’s position is that Ofcom is well able to address the legal questions which the Tribunal is called upon to determine, that Ofcom’s role is to represent the interests of consumers and competition generally, that there is a risk of duplication and that if TalkTalk and Sky are permitted to intervene their role should be a circumscribed one.
8. We are satisfied that Sky and TalkTalk, as participants in the superfast broadband market who would be directly affected by the outcome of BT’s appeal, if successful, have a sufficient interest to justify intervention in that appeal. We do not consider that there is any valid reason to limit the interventions to the specified PCMs. Since it is not,

however, yet clear to what extent, if at all, participation by Sky and TalkTalk in the oral hearing is likely to be of assistance to the Tribunal, we direct that Sky's and TalkTalk's interventions, in relation to the non-specified PCMs to be decided by the Tribunal, be limited at this stage to Statements of Intervention (with supporting written evidence). We will decide at a later stage whether, and if so to what extent, their participation should be allowed at the hearing. The extent of the interventions of BT, Sky and TalkTalk in relation to the specified PCMs will be a matter for the CMA to decide in due course. We expect Sky and TalkTalk to limit their interventions to those issues which are of particular concern to them and to liaise with each other and with Ofcom so as to ensure that there is no unnecessary duplication between their written submissions and evidence: we are particularly concerned in the latter respect to avoid duplication of expert evidence.

III. CONFIDENTIALITY AND DISCLOSURE

9. The next issue is as to the directions required to maintain the confidentiality of commercially sensitive material in the Statement itself and in other documents.
10. BT has no objection to confidential material that is relevant to TalkTalk's appeal being disclosed to TalkTalk's external legal and economic advisers, subject to the terms of the order establishing the confidentiality ring being agreed. It also has no objection to two named internal legal advisers of TalkTalk being included in the confidentiality ring, subject to the conditions that: (i) the internal legal advisers of both BT and TalkTalk provide appropriate undertakings that they will not advise on any other matters in relation to which the confidential material they have obtained through the ring is or could be pertinent; and (ii) appropriate additional wording be included in the confidentiality ring order to allow a disclosing party to refuse to make disclosure to specific relevant advisers if that party considers it necessary and appropriate to do so (subject to the requesting party having the right to apply to the Tribunal for disclosure in any event). BT has concerns about the disclosure of any confidential material to Sky, given the acute commercial rivalry between BT and Sky.

11. TalkTalk asks the Tribunal to establish a single confidentiality ring in both appeals. It contends that it is hindered in its ability to understand Ofcom's reasoning in its own appeal, and would not be able to engage effectively in BT's appeal, without full sight of the documentation, which should be available for use in both appeals.
12. TalkTalk seeks disclosure of an unredacted version of the Statement, subject to: (i) Ofcom's right to withhold material confidential to third parties which Ofcom does not consider to be relevant; and (ii) the right of BT and others to apply to the Tribunal for an order that parts of the Statement be withheld from disclosure on the ground of confidentiality or irrelevance. TalkTalk is also seeking disclosure of certain specific documents listed in its Notice of Appeal.
13. Ofcom considers that it would be appropriate to establish a single confidentiality ring (or two rings). It has no objection to the disclosure of relevant confidential material within the confines of the confidentiality ring and no objection to the disclosure of the confidential material sought by BT and TalkTalk. It suggests that a single confidential version of the Statement be prepared for use in both appeals, including relevant confidential material, and with irrelevant confidential material redacted. It is in the process of ascertaining whether agreement can be reached with the parties as to what is relevant, and it has written to third parties concerned to give them an opportunity to raise any concerns about disclosure of their confidential information, which the third parties can, if necessary, then bring before the Tribunal.
14. Sky seeks disclosure of the confidential material in both appeals to a single confidentiality ring of which Sky's external counsel, solicitors and an external expert would be members. It has concerns about the inclusion of in-house lawyers in the ring but proposes that the parties should be left to formulate the form of words that would appropriately protect their commercially confidential interests.
15. It seems to us that an order providing for different scopes of disclosure or different confidentiality regimes in each of the two appeals would be difficult to administer and liable to break down. We therefore consider that a single confidentiality ring should be

established for the two appeals and that the documents disclosed in one appeal should be available for use in the other. We accept that Sky should be party to the ring, provided that its participation is limited to external legal advisers and an expert, as it proposed. Whilst we recognise that documents in TalkTalk's appeal will be disclosed to Sky which Sky does not need for the purposes of its intervention in BT's appeal, we consider that BT's interests are sufficiently protected by the fact that Sky's in-house lawyers will not be admitted to the ring. We also bear in mind that where a party has concerns about disclosing particularly sensitive information into the ring, an application may be made to the Tribunal under the liberty to apply provision to be included in the confidentiality ring order.

16. At their suggestion, we leave it to the parties to finalise the terms of the confidentiality ring order, subject to the Tribunal's approval. We agree with TalkTalk's contention that the second of the two conditions proposed by BT (by which a disclosing party may refuse to make disclosure to relevant advisers if that party considers it necessary and appropriate, subject to the right of the requesting party to apply to the Tribunal) would be better framed as a condition permitting the party to whom the request is made to apply to the Tribunal for permission to withhold the disclosure.
17. We also leave it to the parties, with Ofcom taking the lead, to reach agreement on which parts of the Statement and which of the underlying documents are relevant to the appeals and which should, therefore, be disclosed into the confidentiality ring.

IV SPECIFIED PRICE CONTROL MATTERS

18. The appeals are brought pursuant to section 192(2) of the 2003 Act which provides that a person affected by a decision to which section 192 applies may appeal against it to the Tribunal. Sections 193 to 195 of the 2003 Act set out the procedure to be followed in appeals brought under section 192(2). Broadly speaking, those provisions require the Tribunal to identify whether and to what extent an appeal raises specified PCMs. To the extent that an appeal raises specified PCMs, those matters must be referred by the Tribunal to the CMA for determination. Matters which are not specified PCMs are to be

decided by the Tribunal. Once the CMA has notified the Tribunal of its determination of the specified PCMs referred to it, the Tribunal must decide the appeal on the merits and, in relation to the specified PCMs, must decide those matters in accordance with the determination of the CMA, unless the Tribunal decides, applying the principles applicable on an application for judicial review, that the CMA's determination would fall to be set aside on such an application.

19. Section 193 (1) provides as follows:

“Reference of price control matters to the CMA

(1) Tribunal rules must provide in relation to appeals under section 192(2) relating to price control that the price control matters arising in that appeal, to the extent that they are matters of a description specified in the rules, must be referred by the Tribunal to the CMA for determination.”

20. Rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No. 2068) (the “2004 Rules”), which is the relevant rule, provides as follows:

“3. Reference of price control matters to the Competition Commission

(1) For the purposes of subsection (1) of section 193 of the Act, there is specified every price control matter falling within subsection (10) of that section which is disputed between the parties and which relates to-

(a) the principles applied in setting the condition which imposes the price control in question,

(b) the methods applied or calculations used or data used in determining that price control, or

(c) what the provisions imposing the price control which are contained in that condition should be (including at what level the price control should be set).”

21. The Tribunal considered these provisions in *Hutchison 3G UK Limited (“H3G”) v Office of Communications* [2007] CAT 27 when ruling that a question as to whether a price control imposed by Ofcom was an appropriate and proportionate response to a finding by Ofcom of significant market power, or whether a remedy short of price control would be sufficient, was not a specified PCM. The Tribunal ruled that, on the

correct construction of the 2003 Act and the 2004 Rules, specified PCMs are limited to matters relating to the principles applied, methods used and provisions contained in a condition where a price control has in fact been imposed and thus do not include the prior question of whether a price control should be imposed at all.

22. It is common ground in the present case that the price control condition which has been imposed on BT by the Statement (“the Condition”) was a price control authorised by section 87(9) of the 2003 Act and that each of the grounds of appeal raised by BT and TalkTalk in their Notices of Appeal is therefore a “price control matter” as defined in section 193(10).
23. It was also common ground between the parties that, consistently with the Tribunal decision in *H3G v Ofcom*, the classification of grounds of appeal as raising either non-specified or specified PCMs is to be made on the following basis.
 - i. A ground of appeal which questions whether the imposition of any price control is an appropriate or proportionate response to the finding of significant market power (“SMP”), i.e. a ground which questions whether any price control should have been imposed at all, does not give rise to a specified PCM.
 - ii. A ground of appeal which does not challenge the imposition of a price control but which questions the design or content of that price control does give rise to a specified PCM.
24. BT and Ofcom also suggested that grounds of appeal raising discrete points of law, more suitable for determination by the Tribunal than the CMA, should be classified as raising non-specified PCMs. We do not accept this suggestion. A system of classification based on a distinction between points of law and points of factual detail is not borne out by the legislation.
25. There is no dispute that the two grounds of appeal raised by TalkTalk, namely a complaint as to the make-up of the product level test applied by Ofcom and a complaint

as to a possible error by Ofcom in its treatment of call revenues, raise specified PCMs which are to be referred to the CMA for determination.

26. The classification of the grounds of appeal raised by BT in its Notice of Appeal proved to be more controversial. Those grounds of appeal are, in summary, as follows.

27. **Ground 1** The Statement fails to make out a “relevant risk of adverse effects arising from price distortion” for the purposes of sections 88(1)(a) and 87(9) of the 2003 Act and is accordingly *ultra vires* section 88(1)(a) of the 2003 Act in that:

1(A) the market analysis in section 3 of the Statement is wholly inadequate to withstand “*profound and rigorous scrutiny*”.

1(B) the market analysis in section 3 of the Statement, on the basis of which the Condition was imposed, is based on an error of law in failing to take into account the regulatory constraints acting on BT.

1(C) Ofcom also fails to give any or any sufficient weight to:

- constraints of competition law on BT; and/or
- historic evidence of BT’s conduct since 2010, including the outcome of a competition law investigation of a complaint by TalkTalk.

28. **Ground 2** Contrary to Ofcom’s obligations under the Framework Directive and the 2003 Act, the Statement fails to take “utmost account” of the views of the European Commission (the “Commission”), Commission Recommendations and other relevant guidance and the Commission’s comments on the draft version of the Condition as set out in its letter dated 13 February 2015. In that letter the Commission requested Ofcom to re-visit the six monthly period for applying the Condition, which it considered was too short. In its Statement, Ofcom indicates that the Condition will be applied on a monthly basis (i.e. an even shorter period) but it fails to offer any convincing reasons for doing so.

29. **Ground 3.** The Statement fails to comply with EU legal principles of transparency, certainty and consistency. The uncertainty stems from Ofcom’s response to the Commission’s concerns regarding the lack of flexibility in the Condition, as expressed in the Commission’s letter of 13 February 2015. In its response, Ofcom stated that there was sufficient flexibility built into the test in the event of a “*material change in circumstances*” to allay the Commission’s concerns. However, the additions made by Ofcom to the Final Statement have left it uncertain as to: (a) when it may consider that there has been a change in circumstances of sufficient materiality to justify a departure from the rigidity of the Condition and associated guidance; and (b) how (if it decides that there has been a “material change in circumstances”) it will in fact vary the application of the Condition by departing from the approach set out in its associated guidance which is to be taken in normal circumstances.
30. **Ground 4** The Statement contains errors in respect of the methods applied, calculations used and/or data used in determining the Condition. In particular:
- 4(A) Ofcom erred in implementing an unduly stringent costs test, requiring each cohort of customers (in each period under consideration) to contribute a defined amount to costs that are not incremental to the supply of superfast broadband bundles to that cohort.
 - 4(B) The monthly assessment period applied by Ofcom compounds the impact of that rigid approach.
 - 4(C) Ofcom was also wrong to apply a static approach to the design of the test, taking no account of reasonably anticipated future changes in margin across the customer life.
 - 4(D) The adjustment to average customer life used in the test was erroneous.
 - 4(E) All these errors are compounded by Ofcom’s decision to apply the test on a ‘bright-line’ basis in any given month.

31. **Ground 5** The Statement contains errors in respect of the methods applied, calculations used and/or data used in determining the Condition. In particular:

5(A) Ofcom was wrong to consider that any additional regulation was required beyond the existing regulation maintained under the 2014 Fixed Access Market Review.

5(B) Ofcom made a number of errors of principle in the design of the VULA margin control.

5(C) The design of the VULA margin control is contrary to the statutory principles applicable to all SMP conditions in that it is not objectively justified by, or proportionate to Ofcom's stated aim, it fails to promote competition, efficiency or consumer benefits, unduly discriminates against BT and lacks proper transparency.

32. **Ground 6** The Statement contains errors as to the terms of the price control contained in the Condition including the level at which the price control should be set.

33. The parties' positions with regard to the classification of these grounds are, in summary, as follows.

34. BT contends that Grounds 1 to 3 relate to non-specified PCMs and Grounds 4 to 6 relate to specified PCMs, although it concedes that some of the material in Ground 2 sits more happily within Ground 5.

35. Ofcom contends that Grounds 1, 2 and 5A do not raise specified PCMs and that Grounds 4, 5B and 6 do so. Ofcom reserves its position with regard to Ground 3, pending BT's possible amendment of this Ground following the consultation exercise which in which Ofcom is currently engaged, and with regard to 5C, as it considers it to be unclear whether BT is complaining about the design of the Condition or asserting that there should not be a condition at all.

36. The CMA contends that Ground 1 and 5A relate primarily to non-specified PCMs and that all the other Grounds relate to specified PCMs, with the exception of certain parts of Ground 6 that, in the CMA's view, restate the claims made in Grounds 1 and/or 5A and should accordingly be treated as non-specified PCMs. TalkTalk's position is the same as the CMA's.
37. Following the approach to classification set out at paragraph 23 above, we find that BT's grounds of appeal are to be classified as follows.
38. We agree with the parties that **Ground 1**, which raises the question whether Ofcom was justified in imposing any price control at all, does not raise a specified PCM.
39. The essential complaints under **Ground 2** are as to Ofcom's adoption of a monthly assessment period and as to its failure to take utmost account of the Commission's views. These complaints relate to the design of the Condition, rather than to the question of whether it was appropriate to impose the Condition at all. We therefore consider that Ground 2 raises a specified PCM.
40. **Ground 3** is concerned with the drafting of the Condition and associated guidance, not with whether it was appropriate to impose the Condition at all and therefore raises a specified PCM. We agree with the parties that **Ground 4** is concerned with the design of the Condition and as such raises a specified PCM.
41. The debate over the classification of **Ground 5A** highlights the potential overlap between specified and non-specified PCMs and the need to analyse closely both the nature and context of an appellant's case in order to determine on which side of the line a ground of appeal falls. BT submits that Ground 5A (like Ground 6) raises an issue of proportionality, calling into question whether the regulatory status quo, including the fair and reasonable condition imposed by the Fixed Asset Market Review 2014 (the "FRAND measure"), is a sufficient form of price control. It contends that that question of proportionality is a matter of design and that Ground 5A therefore raises a specified PCM.

42. We accept that, if there were no existing FRAND measure and BT's complaint was that Ofcom had erred in imposing the Condition rather than the FRAND measure, that would be a design question raising a specified PCM. In that context, the prior question would be as to whether there was a need for any price control at all (a non-specified PCM): but, in view of BT's acceptance of the need for the FRAND measure, that question would not be raised. In the present context, the prior question is (as the CMA submitted) whether, given the existence of the FRAND measure, there is an outstanding problem that needs to be remedied by an enhanced price control. Ground 5A essentially raises that question and is therefore not a specified PCM.
43. We agree with the CMA that **Grounds 5B, 5C and 6** are concerned with aspects of the design of the Condition and therefore raise specified PCMs, with the exception of those portions of Ground 6 that restate the claims made in Grounds 1 and/or 5A and which should, accordingly, be treated as non-specified PCMs. We consider that the latter point only affects paragraphs 260(a) and 262 of BT's Notice of Appeal and that the other paragraphs identified by the CMA (paragraphs 257 and 258 of BT's Notice of) are only intended to provide a general introduction to Ground 6.
44. It follows that **Grounds 1 and 5A** of BT's Grounds of Appeal (including the issues raised in paragraphs 260(a) and 262 of BT's Notice of Appeal) are to be determined by the Tribunal. The other grounds are to be referred to the CMA pursuant to section 193(1) of the 2003 Act.

V TIMETABLE

45. Ofcom, the CMA and Sky submit that it would be appropriate for the Tribunal to delay making a reference to the CMA until the Tribunal has reached conclusions upon the non-specified matters for the following reasons.
46. First, if BT succeeds in its appeal to the CMA, the Statement will be set aside and the specified PCMs will be academic. If a reference was made to the CMA before the

conclusion of the appeal to the Tribunal, the CMA Panel, the parties and interveners would have expended a great deal of time and expense for nothing.

47. Second, the overlap between BT's various grounds of appeal (including Grounds 1 and 5B) make it desirable for the non-specified PCMs to be determined by the Tribunal before the reference to the CMA because the CMA will then have the benefit of the Tribunal's analysis which may be relevant to the specified PCMs and there will no risk of conflicting conclusions as between the Tribunal and the CMA.
48. TalkTalk and BT submit that their references to the CMA should be made together as soon as possible and should not await the determination of BT's non-specified PCMs by the Tribunal. TalkTalk points out that the current period is particularly important in terms of the transition from standard to superfast broadband and that it is in the interests of all parties for any uncertainty as to the price control to be resolved as soon as possible so as not to weaken investment incentives and delay the development of a properly competitive market. It also points to the possibility of appeals from the Tribunal's decision with the possible consequence that the specified PCMs would not even begin to be determined for several years, by which time the damage would have been done, and it would be left without an effective remedy. This would be inconsistent with TalkTalk's and BT's right as a matter of Community law to an effective appeal. TalkTalk contends that it is inherent in any case where there are potential preliminary issues that deciding those issues first may lead to a cost saving but at the risk of very considerable delay in the determination of the other issues. It contends that the overlap between the specified and non-specified PCMs is not significant.
49. We accept that BT's and TalkTalk's appeals need to be determined without avoidable delay for the reasons advanced by TalkTalk. In our view this consideration outweighs the risk that resources will be expended on a reference to the CMA which may turn out to be academic. We therefore consider that a reference should be made to the CMA as soon as practicable and without awaiting the Tribunal's decision on the non-specified PCMs. We do not consider that there would be significant benefit to the CMA from a prior decision by the Tribunal on the two grounds of appeal raising non-specified PCMs, given that there appears to be limited overlap between the two sets of issues, but

if, as anticipated in BT's draft timetable, a hearing can be fixed in October 2015, the Tribunal decision may well be issued before the CMA's determination in any event.

Andrew Lenon Q.C.

William Allan

Professor Colin Mayer

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

Date: 29 June 2015