



Neutral citation [2016] CAT 17

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1259/3/3/16

Victoria House
Bloomsbury Place
London WC1A 2EB

29 September 2016

Before:

MR JUSTICE SNOWDEN
(Chairman)

Sitting as a Tribunal in England and Wales

B E T W E E N:

TALKTALK TELECOM GROUP PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS

Respondent

RULING (PERMISSION TO INTERVENE)

1. I have an application before me on behalf of Vtesse Harlow Limited, which is represented today by Mr. Aidan Paul, a director of the company, to intervene in the appeal brought by TalkTalk. The relevant aspect of the “Business Connectivity Market Review” statement of Ofcom dated 28 April 2016 (“the Statement”) which is the subject of TalkTalk’s appeal, and the grounds for that appeal, are summarised in a notice issued by the Registrar on 7 July 2016.
2. Vtesse Harlow Limited represents former shareholders of a company called Vtesse Networks Limited, which operated in the communications industry until it and/or its business was sold in 2014. The communications business which it formerly carried on is currently being carried on by a company called Interoute Vtesse Limited. Vtesse Harlow Limited apparently acts as some sort of agent to assist the former shareholders of Vtesse Networks Limited to pursue a dispute in relation to recovery of some part of the non-domestic rates that Vtesse Networks Limited paid in the past, and also acts as an agent or adviser to Interoute Vtesse Limited in relation to proceedings in the Ratings Tribunal in relation to the payment of non-domestic rates by Interoute Vtesse Limited.
3. What Mr. Paul wishes Vtesse Harlow Limited to be able to do is to intervene in the TalkTalk appeal and to raise the question of legality of the current non-domestic rates regime, which he contends improperly differentiates between BT and other operators, and amounts to the giving of unlawful state aid to BT.
4. Given that intention, it is important to understand the basis and scope of the relevant Ofcom decision and the TalkTalk appeal against it. Ofcom recognises in its Statement that it would prefer to see the current non-domestic rates regime change, and has lobbied the Government to that end. However, Ofcom has, for the purposes of its decision to impose a dark fibre access (“DFA”) remedy and a charge control in respect of it, accepted the current non-domestic rates regime for what it is. Ofcom has formulated its charge control for DFA for the period from 1st October 2017 on the assumption that the current non-domestic rates regime is unchanged.
5. TalkTalk’s appeal is against Ofcom’s design of the DFA charge control and is also mounted on the assumption that the current non-domestic rates regime

remains unchanged. TalkTalk contends that given the structure of the current regime, Ofcom's design of the price control is wrong and should have been done differently. It is common ground that if the Government changes the current non-domestic rates regime in response to Ofcom's lobbying, TalkTalk's appeal will fall away. On any view, as set out in the Notice of Appeal, neither Ofcom's decision, nor TalkTalk's appeal, raise the question of whether the current non-domestic rates regime amounts to unlawful state aid.

6. Against that background I have to look, first, at the Tribunal's jurisdiction and, secondly, the basis upon which a third party can intervene in proceedings before the Tribunal.

7. The Tribunal's jurisdiction is given by s.192 of the Communications Act 2003. In relation to the discharge of that jurisdiction, s.195(2) provides that:

“The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.”

8. Accordingly, the Tribunal's jurisdiction to decide TalkTalk's appeal is circumscribed by TalkTalk's Notice of Appeal. As I have indicated, that does not extend to questioning the legality of the current non-domestic rating regime on the grounds of unlawful state aid.

9. Rule 16 of the Competition Appeal Tribunal Rules provides for intervention in the following terms:

“(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings.”

Then, under sub-rule (6):

“(6) 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.”

10. Mr. Paul candidly acknowledged in his letter to the Tribunal and in his oral submissions that Vtesse Harlow Limited has no direct interest in the outcome of these proceedings. He puts Vtesse Harlow Limited's interest as a more general

interest, which he says would be to assist the Tribunal in addressing what he says is the fundamental problem underlying Ofcom's decision and TalkTalk's challenge to it, namely, the legality (or, as Mr. Paul sees it, the illegality) of the non-domestic rates regime.

11. It seems to me, however, that this does not give Vtesse Harlow Limited a sufficient interest in the outcome of this appeal by TalkTalk. As I have indicated, the Tribunal is constrained by the grounds of TalkTalk's appeal against the DFA charge control decision by Ofcom. Since neither Ofcom's decision, nor TalkTalk's challenge to it, raise the issue of whether the current non-domestic rates regime amounts to unlawful state aid, I cannot see how the appeal will require the Tribunal to address the issue that Mr. Paul wishes to pursue.
12. The historical rates liabilities of Vtesse Networks Limited are also not part of, or affected by, the Ofcom decision or the appeal by TalkTalk. If and to the extent that Interoute Vtesse Limited, as a current operator, has a financial interest in challenging its liabilities for non-domestic rates under the current regime, that is an interest which it can pursue in other fora, whether by proceedings in this jurisdiction in accordance with national law, or in the European forum. These proceedings under the Communications Act 2003 and the Tribunal Rules are plainly not the appropriate forum for that challenge.
13. There was a second ground, which Mr. Paul only faintly advanced to justify Vtesse Harlow Limited's intervention, which was that it would like to have access to the documents in these proceedings, to assist its other endeavours on behalf of Vtesse Networks Limited and/or Interoute Vtesse Limited. That is not an interest in the outcome of the TalkTalk appeal within the meaning of the Tribunal Rules, but is an extraneous interest. It is also an exercise in bootstrapping. In order to have access to the documents in these proceedings, Vtesse Harlow Limited would, first, have to have a sufficient interest in the outcome to warrant its intervention. Only then would it obtain access to any of the documents. It cannot rely upon its desire to gain access to the documents to give it a sufficient interest to intervene.

14. I therefore reject the application by Vtesse Harlow Limited to intervene.

The Honourable Mr Justice Snowden
Chairman of the Competition Appeal Tribunal

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

Date: 29 September 2016