



Neutral citation [2019] CAT 2

**IN THE COMPETITION
APPEAL TRIBUNAL**

Case Nos: 1274-1275-1276/1/12/17

Victoria House
Bloomsbury Place
London WC1A 2EB

23 January 2019

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL LOMAS
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED**

Applicants in Case No: 1274/1/12/16 (IR)

Appellants in Case No: 1275/1/12/17

Interveners in Case No: 1276/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

AND BETWEEN:

**(1) PFIZER INC.
(2) PFIZER LIMITED**

Appellants in Case No: 1276/1/12/17

Interveners in Case No: 1275/1/12/17

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

RULING (PERMISSION TO INTERVENE)

INTRODUCTION

1. This Ruling, which adopts the same defined terms as the Tribunal’s judgment of 7 June 2018 in the appeals in Cases 1275/1276 ([2018] CAT 11) (the “Judgment”), concerns an application made by the Office of Communications (“Ofcom”) on 18 December 2018 (the “Application”) for permission to intervene for the purposes of making submissions on costs.
2. The parties filed written submissions on costs (including costs schedules) on 17 September 2018 and responsive submissions on 9 October 2018.¹ Following the Court of Appeal’s decision in *British Telecommunications plc v Office of Communications* [2018] EWCA Civ 2542 (the “BCMR costs judgment”), at the Tribunal’s invitation, the parties on 11 December 2018 filed further submissions.

OFCOM’S APPLICATION

3. Ofcom submits that it has a significant and direct interest in intervening for two reasons.
 - (1) First, Ofcom asserts that the decision of the Tribunal on costs in these proceedings is likely to have a direct effect on Ofcom in the future due to Ofcom’s concurrent jurisdiction (with the CMA) to make enforcement decisions pursuant to the prohibitions under CA 98 and Articles 101 and 102 TFEU.
 - (2) Secondly, Ofcom argues that the Tribunal’s decision in these proceedings could also affect Ofcom’s position on costs in relation to appeals against its regulatory decisions taken under the Communications Act 2003 as it would be the first occasion on which the Tribunal would be asked to consider and apply the BCMR costs judgment.²

¹ Further to a direction of the Tribunal, Pfizer filed a more detailed costs schedule on 28 September 2018.

² BT, the applicant for costs in the proceedings that led to the BCMR costs judgment (the “BCMR proceedings”) decided on 5 December 2018 not to pursue its application for costs on remittal.

4. Further, Ofcom invites the Tribunal to grant an extension of time for its application due to the delay in Ofcom becoming aware that the parties had been invited to make submissions on the BCMR costs judgment.
5. On 19 December 2018, the Tribunal wrote to the parties enclosing Ofcom's request and inviting written observations.
6. On 21 December 2018, the CMA wrote to the Tribunal confirming that it had no written observations on the request. The CMA said it was a matter for the Tribunal to decide.
7. On 27 December 2018, Pfizer responded to the Tribunal's letter. Pfizer objected to Ofcom's application. Pfizer submitted that there was nothing that Ofcom could add to the Tribunal's understanding of the BCMR Costs Judgment and that its presence as a party conferred no unique understanding as to its meaning, which the Tribunal was well equipped to understand. The possible application of the the BCMR Costs Judgment to CA 1998 cases was already well covered in the submissions of the CMA which, as the lead competition authority, was best placed to deal with that issue. There was no necessary implication that the Tribunal's decision in the present case would affect future regulatory rulings.
8. On 4 January 2019, Flynn wrote to the Tribunal. Flynn also submitted that the Tribunal should refuse Ofcom's application. As regards Ofcom's first reason, Flynn argued that Ofcom's interests are already adequately protected by the CMA, the UK's lead competition authority, which is fully capable of making submissions on the treatment of costs relating to appeals under the CA 98. Flynn further submitted that Ofcom should not be granted a special status to intervene merely because it was a party to the BCMR costs proceedings. In relation to Ofcom's second reason, Flynn said this was best dealt with in the context of the BCMR proceedings.³

³ The Tribunal notes that it has subsequently become clear that those proceedings are not progressing further (see footnote 2 above).

THE TRIBUNAL RULES

9. The Tribunal’s powers regarding requests for permission to intervene are governed by rule 16 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Tribunal Rules”) which provides, so far as is relevant:

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

[...]

(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.”

REASONS FOR REFUSING OFCOM’S APPLICATION

10. The Tribunal refuses Ofcom’s application to intervene. We do not consider that Ofcom can demonstrate that it has a sufficient interest as required by Rule 16(6).
11. While it may be useful for Ofcom’s own future activity to have participated in this case, that does not, in itself, give Ofcom a sufficient interest, for the purpose of Rule 16(6), to intervene in support of the CMA in the present case. In the light of the the BCMR Costs Judgment, we do not see that Ofcom has any particular arguments or submissions on the issue before us that could not adequately be made by the parties.
12. In relation to the possible award of costs in appeals under the CA 98, as Flynn points out, Ofcom’s interests, as a regulator with concurrent competition powers, are already adequately protected by the position that is adopted by the CMA which, if upheld, would apply equally to Ofcom. The Tribunal’s ruling will in due course be published and will then be available to Ofcom and other regulatory authorities with concurrent powers.
13. As regards Ofcom’s interest in future regulatory appeals under the Communications Act 2003, the present case is not such a regulatory appeal and the issue of how costs should be awarded in such cases is not obviously within the scope of the issues before the Tribunal. Whilst it is correct that this case may be the first time the Tribunal is called on to make a decision on costs after the BCMR Costs Judgment, that does not in itself create a sufficient interest for Ofcom in intervening.

14. We therefore do not think that Ofcom has shown a sufficient interest in being allowed to intervene in this case.
15. In any event we do not think that allowing Ofcom's intervention request would be consistent with the just and proportionate conduct of these proceedings. We are concerned to keep the scope of these proceedings in relation to costs within reasonable bounds and to avoid expanding their scope unduly. If we were to grant permission to Ofcom to intervene, it would be hard to resist similar applications from other regulatory authorities or private parties who might also claim to have an interest in the outcome of our deliberations on the same basis. We are concerned to avoid so far as possible the incurring of further costs in a dispute about costs.

Peter Freeman CBE QC (Hon)
Chairman

Paul Lomas

Prof. Michael Waterson

Charles Dhanowa OBE QC (Hon)
Registrar

Date: 23 January 2019