



Neutral citation [2019] CAT 24

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1330/3/3/19

Victoria House
Bloomsbury Place
London WC1A 2EB

16 October 2019

Before:

PETER FREEMAN CBE QC (HON)
(Chairman)
PROFESSOR JOHN CUBBIN
PROFESSOR ANTHONY NEUBERGER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) TALKTALK TELECOM GROUP PLC
(2) VODAFONE LIMITED

Appellants

- v -

OFFICE OF COMMUNICATIONS

Respondent

RULING (INTERVENTION)

APPEARANCES

Mr Alan Bates and Ms Imogen Proud (instructed by Towerhouse LLP) appeared for the Appellants.

Mr Josh Holmes QC and Ms Julianne Morrison (instructed by Ofcom Legal) appeared for the Respondent.

Mr Robert Palmer QC and Ms Ligia Osepciu (instructed by BT Legal) appeared for the proposed Intervener, British Telecommunications plc.

Ms Sarah Love (instructed by CMS Cameron McKenna Nebarro Olswang LLP) appeared for the proposed Intervener, CityFibre Infrastructure Holdings Limited.

Ms Emily Neill (instructed by CMA Legal) appeared for the Competition and Markets Authority.

A. INTRODUCTION

1. On 28 June 2019, the Office of Communications (“Ofcom”) published three decisions (together, “the Decisions”) set out in its statement dated 28 June 2019 and entitled “Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets” (the “June 2019 Statement”).
2. The Decisions are contained in “Volume 2: market analysis, SMP findings, and remedies for the Business Connectivity Market Review (BCMR)” (“Vol.2”) and “Volume 3: Leased Line Charge Control (LLCC)” (“Vol.3”) of the June 2019 Statement. Those are the volumes setting out Ofcom’s conclusions and decisions from its review of competition in “business connectivity markets”, including specifically markets for the supply of point-to-point “leased lines” and ancillary services. A “leased line” is a permanently connected communications link between two sites which is dedicated to the customer’s exclusive use. Leased lines constitute vital infrastructure for a wide range of businesses which need to send data from, and/or receive data at, their physical sites. Leased lines are also used by electronic communications network operators for “backhaul”, i.e. linking their “core” network infrastructure to their network infrastructures at other locations.
3. The Decisions, taken by Ofcom under sections 45 and 87 of the Communications Act 2003 (the “2003 Act”), concern the degree of market power enjoyed by British Telecommunications plc’s corporate group (“BT”) in leased lines markets, and the specific regulatory conditions to which BT should be subject, in relation to those markets, during a 20-month period commencing on 1 August 2019 and ending on 31 March 2021.
4. The Decisions are as follows:
 - (1) **Decision 1:** The decision that BT does not have significant market power in the market for “contemporary interface access” (“CI Access”) in the geographic area defined by Ofcom as the “Central London Area” (“CLA”).

- (2) **Decision 2:** The decision to set the charge control remedy applicable to BT's supplies of CI leased line services in the geographic markets identified by Ofcom as "BT Only" and "BT + 1" markets, not as a cost-based price cap, but rather as a "flat" price cap.
- (3) **Decision 3:** The decision not to impose any price cap remedy in respect of BT's supplies of CI leased line services in the geographic markets (other than the CLA) which Ofcom identified as "high network reach" markets, instead requiring that BT's charges in those markets be "fair and reasonable".
5. TalkTalk Telecom Group plc and Vodafone Limited (together, "the Appellants") have appealed against the Decisions pursuant to section 192(2) of the 2003 Act (the "Appeal"). The Appellants' consider that the issues raised by the Appeal in relation to Decisions 2 and 3 are specified price control matters within the meaning of section 193 of the 2003 Act and Rule 116 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Tribunal Rules") and should, accordingly, be referred under section 193 of the 2003 Act for determination by the Competition and Markets Authority (the "CMA").
6. On 10 October 2019 a case management conference ("CMC") took place in relation to the Appeal, at which various case management directions were made, and various intervention applications dealt with.
7. Applications for permission to intervene in the Appeal were made by two parties: (1) BT, whose application was filed on 30 September 2019 (the "BT Application"); and (2) CityFibre Infrastructure Holdings Limited ("CityFibre"), whose application was filed on 1 October 2019 (the "CityFibre Application") (together "the Applications"). The Tribunal received written and oral submissions from the main parties, the proposed interveners and the CMA. Both Applications were made in support of Ofcom. The CityFibre Application was limited to the specified price control matters raised in the Appeal i.e. Decisions

2 and 3. Ofcom supported both Applications. The Appellants did not object to the BT Application, but they opposed the CityFibre Application.

8. Having heard the parties, the Applications were granted at the CMC. This ruling sets out the reasons for granting the CityFibre Application which was contested.

B. THE TRIBUNAL RULES

9. Rule 16 of the 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.

[...]

(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. In order to be granted permission to intervene, an applicant must show a “sufficient interest in the outcome” of the proceedings. As explained by the Tribunal in *Flynn Pharma Limited and others v CMA* [2017] CAT 7, this has been described as the “threshold question” which must be satisfied before the Tribunal may exercise its discretion to permit an intervention (see *Barclays Bank Plc v Competition Commission* [2009] CAT 15).
11. When exercising its discretion, the Tribunal will have regard to its duty to seek to ensure that each case is dealt with justly, expeditiously and at proportionate cost: see Rule 4(1) and (2) of the Tribunal Rules.

C. THE CITYFIBRE APPLICATION

12. As set out in its application, CityFibre is the UK’s leading alternative provider of wholesale full-fibre network infrastructure. It is a key competitor to BT in the provision of contemporary interface leased lines (“CI Services”). CityFibre is currently implementing a £2.5 billion major fibre infrastructure investment programme that competes with BT’s CI Services across more than 50 UK towns and cities. In her oral submissions for CityFibre, Ms Love contended, in

summary, that CityFibre had a sufficient interest in the outcome of the Appeal because:

- (a) CityFibre competes directly with BT in the provision of the very services that are the subject of the Appeal, namely CI Services;
- (b) CityFibre, as a relatively new market entrant, has to price below BT's regulated prices when it sells comparable CI Services to non-residential users;
- (c) this is not a point on which CityFibre has a realistic commercial choice;
- (d) the Appellants' case is that Ofcom should have imposed more stringent controls/caps on BT's prices for CI Services – in other words, that BT should be subject to greater downward pressure on its prices for CI Services than is now the case; and
- (e) it follows that if the Appeal succeeds, CityFibre will also face greater downward pressure on its prices for CI Services.

13. In short, Ms Love submitted that the determination of the Appeal will inevitably and directly affect CityFibre.

14. In support of the CityFibre Application, Mr Holmes QC for Ofcom considered that, given the matters in issue, the CMA should hear from an investor in new infrastructure. Moreover, the evidence that CityFibre can provide is likely to be of particular benefit to the CMA decision-making. Ms Neill for the CMA did not object to CityFibre's intervention.

15. The Appellants objected to the CityFibre Application. In summary, Mr Bates submitted that CityFibre's asserted interest in the outcome of the Decisions 2 and 3 is, in essence, that more stringent regulation of BT's prices could have knock-on effects on the prices that can, in practice, be charged by it. The Tribunal has previously made clear that a possibility that the outcome of an

appeal might give rise to certain indirect/consequential effects for a particular enterprise is not a sufficient basis for granting permission to intervene: see *Verizon and Vodafone v Ofcom* [2013] CAT 15 at para [8]. CityFibre's infrastructure investment decisions will be based on long-term projections of whether those investments will earn a reasonable rate of return in the future, and therefore will not be materially affected by changes in BT's prices during the 20-month period ending in March 2021.

16. Even if CityFibre clears the threshold criterion, the Tribunal has a discretion to permit the intervention and the appropriate way to exercise that discretion is to ask itself whether additional evidence is needed and why it would be needed. In the Appellants' submission, CityFibre's intervention would generate unnecessary additional material, leading to increased costs and delay. Moreover, the CMA being itself a regulator is particularly well placed to examine in detail all the material that is put before it by Ofcom that was generated from the Ofcom consultation process.

D. REASONS FOR GRANTING THE CITYFIBRE APPLICATION

17. As set out above, pursuant to Rule 16(6) of the Tribunal Rules, the Tribunal may permit a party to intervene where 'it is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest in the outcome of the proceedings'.
18. This involves a two-stage process. So far as concerns the threshold question, we conclude that CityFibre has a sufficient interest in the outcome of the Appeal. Any reduction in BT's regulated prices will affect CityFibre's business and if the Appeal succeeds, the eventual price cap reductions for BT's CI Services will oblige CityFibre to reduce its competing prices to various customer classes. The fact that review period for the June 2019 Statement is less than two years does not change the negative commercial effects on CityFibre that may follow.
19. As regards the second stage (whether we should exercise our discretion to permit CityFibre's intervention) we are mindful that the main focus of the CityFibre Application is to assist in relation to Decisions 2 and 3. At the CMC

the parties were in agreement that these issues are specified price control matters which should be referred to the CMA for determination. We need therefore to be satisfied that CityFibre can assist the CMA's process.

20. We are satisfied that this is so and that it would be right to exercise our discretion to permit CityFibre to intervene in these proceedings for the following reasons:

- (1) CityFibre will be able to submit important evidence which is likely to be of benefit to the CMA. CityFibre is not just the leading alternative supplier of full-fibre CI Services but it is the only operator competing with BT at the network level that has requested to intervene. CityFibre is also one of the very investors in new networks that Ofcom intended to encourage – and thought would be encouraged – by the combination of unrestricted physical infrastructure access and more ‘headroom’ to set wholesale prices. CityFibre is thus uniquely placed to explain first-hand, from a non-BT perspective, the case in favour of relaxation and the extent to which the information that was before Ofcom in support of relaxation reflects CityFibre's direct, real-world experience. At the CMC, Ms Neill confirmed that the CMA did not object to the Applications.
- (2) The Appellants' fears of CityFibre's intervention adding to the length and complexity of the Appeal are, in our view, unfounded. In its written submissions, CityFibre has indicated that it will not duplicate other parties' evidence or submissions and that it will liaise with Ofcom to seek to ensure that its statement of intervention and supporting evidence neither diverge in scope from the grounds of appeal nor duplicate material that is already before the CMA. CityFibre has also indicated that it would be amenable to reasonable page limits on both its statement of intervention and the supporting evidence. Plainly the onus is on the CMA to decide how and to what extent it would like CityFibre's assistance.

E. CONCLUSION

21. Accordingly, we unanimously grant CityFibre's application.

Peter Freeman CBE QC (Hon) Professor John Cubbin Professor Anthony Neuberger
Chairman

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

Date: 16 October 2019