



Neutral citation [2008] CAT 23

IN THE COMPETITION
APPEAL TRIBUNAL

1083/3/3/07
1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

23 September 2008

Before:

VIVIEN ROSE
(Chairman)
PROFESSOR ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED
BRITISH TELECOMMUNICATIONS PLC

Appellants

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

TELEFÓNICA O2 UK LIMITED
T-MOBILE (UK) LIMITED
VODAFONE LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Interveners

**RULING ON ADMISSIBILITY OF SUBMISSIONS CONCERNING
DEPRECIATION OF 3G SPECTRUM IN OFCOM COST MODELS**

1. We have before us two applications seeking the Tribunal's ruling on whether an issue – referred to by the parties as “the Depreciation Point” – should be raised in the proceedings currently before the Competition Commission (“the CC”). Those proceedings are to determine the specified price control matters that were referred to the CC by the Tribunal's ruling of 18 March 2008. On 20 May 2008 the Tribunal handed down the main judgment on the non-price control matters raised by the *H3G* appeal: [2008] CAT 11. That judgment set out the background to the proceedings in some detail. In this ruling we use the same abbreviations as were used in the main judgment.
2. The Tribunal has ruled on previous applications to amend pleadings in these appeals. The Tribunal bears in mind the point made in its earlier ruling on H3G's application to amend its Notice of Appeal (see judgment [2008] CAT 10 paragraph 55):

“The Tribunal has stressed on a number of occasions to the parties that the role of the Competition Commission in determining the specified price control matters is not to conduct a completely fresh investigation into all aspects of the price control set by OFCOM. Rather it is to consider the specified price control issues raised by the appellants and determine those issues. The time limits on the Competition Commission's deliberations and the limited scope of any consultation with third parties reflect this limited role.”

The Depreciation Point

3. The price control set by OFCOM in the 2007 Statement is based on cost modelling carried out by OFCOM in the course of its investigation into Market 16 (as it then was). The appellants allege that the cost model was flawed in certain ways and that if those flaws are corrected, the price control would be set at a level different from the level in fact set in the 2007 Statement.
4. One of the most hotly contested bundle of issues is OFCOM's treatment of the value of 3G spectrum used by the MNOs to provide the service for which MCT is charged. Broadly speaking, BT alleges in its appeal that OFCOM was too generous to the MNOs and allowed too large a sum in its cost calculations to represent the costs of 3G spectrum which the MNOs should recover through their

MCT charges. The result of this is, according to BT, that the prices set in the price control are too high. H3G conversely argues that OFCOM was not generous enough and that, so far as the levels set for H3G's MCT charges are concerned, a greater recovery of 3G spectrum costs should have been allowed. H3G argues, therefore, that its prices as set by the price control are too low.

5. OFCOM explained in the 2007 Statement that it had conducted extensive cost modelling to forecast efficient costs under a broad range of different scenarios. The model used was based on the use of technologies and spectrum bands which have been or are currently being deployed in the UK. OFCOM also calculated the investment and operating costs associated with network components, such as base station sites and equipment and network switching equipment. The model considered the costs over the lifetime of the network. For the purpose of the explicit modelling this was taken to be from 1990/91 to 2039/40.
6. It is common ground that as regards the 3G spectrum, OFCOM depreciated the spectrum costs over the period up to 2039/40. According to Vodafone and T-Mobile, there is a fundamental mistake here because OFCOM's approach does not properly take into account the fact that the licences that the MNOs have to use the 3G spectrum expire in 2021/22. They argue that the value of the spectrum should be depreciated over this shorter period that is, up to 2021/22 rather than up to 2039/40. Depreciating the relevant spectrum value over a shorter period would spread that value over fewer years so that the amount to be recovered in each of the years covered by the 2007 Statement price control would be proportionally greater. The effect would be to increase the prices that the MNOs should be allowed to charge overall.
7. The Depreciation Point is therefore the issue whether OFCOM should have assumed in all the scenarios on which the price control was based that the 3G spectrum has a value only during the currency of the licence and that the voice termination share of the overall value should be depreciated over the period ending 2021/2022.

8. All of the parties were content with the Tribunal determining these applications on the basis of written submissions.

The proper forum for determining Vodafone's application

9. In their letter of 29 August 2008, Vodafone asks the Tribunal to direct the CC to take account of Vodafone's arguments in respect of the Depreciation Point. The Tribunal's power to issue directions is conferred by rule 5 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. 2004/2068). This provides that once price control matters have been referred to the CC, the Tribunal "may give directions as to the procedure in accordance with which the Commission are to make their determination".
10. BT and H3G disagree with Vodafone's approach. They argue that the CC should simply decide whether or not it is going to hear the arguments on the Depreciation Point. Once the CC has arrived at its determination of the price control matters, any party which wishes to challenge that determination can raise this point as a ground of challenge pursuant to section 193(7) of the Communications Act 2003. That subsection provides that the Tribunal can disregard the determination of the CC when disposing of the appeal if the determination would fall to be set aside applying the principles of judicial review.
11. T-Mobile's letter of 5 September 2008 is framed in terms of an application to amend their Statement of Intervention in the *H3G* appeal rather than a request for directions. Vodafone accepts in its letter of application that the Depreciation Point is not currently covered by its Statement of Intervention. But it refers in its letter to the Competition Commission of 9 July 2008 to the issue of the expiry of the 3G licences in OFCOM's bilateral meeting with the CC in June and argues that it should be allowed to respond to those comments. Vodafone also argue that it is legitimate for them to raise this point as a response to certain arguments made by BT in its Amended Notice of Appeal and Reply.
12. The Tribunal considers that both the applications by Vodafone and T-Mobile should be treated as applications to amend their respective Statements of Intervention. This is clearly a new point and the parties should not attempt to hang

new points on the hook of comments made in bilateral meetings or in other pleadings without formally amending their initial pleadings. This is not a question, in the Tribunal's judgment, of the CC being asked to interpret whether an existing pleading covers the point. It is therefore appropriate for the Tribunal rather than for the CC to decide the applications and also appropriate for the Tribunal to decide them now rather than once the CC has notified us of its determination.

The test to be applied in considering the applications

13. Statements of Intervention are governed by rule 16 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372). Rule 16(10) provides that rule 11, which concerns amendment of the notice of appeal, applies to the statement of intervention.

14. Rule 11 provides:

“11. - (1) The appellant may amend the notice of appeal only with the permission of the Tribunal.

(2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.

(3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless -

(a) such ground is based on matters of law or fact which have come to light since the appeal was made; or

(b) it was not practicable to include such ground in the notice of appeal; or

(c) the circumstances are exceptional.”

15. Because Vodafone has not framed its application in terms of an application to amend, it has not addressed the question whether the Depreciation Point is a new ground and hence falls to be assessed under the stricter criteria of rule 11(3) rather than the wider discretion allowed by rule 11(1). T-Mobile argues that rule 11(3) is not engaged and, in the alternative, even if that stricter test applies, the test is satisfied in this case.

16. The Tribunal is content to assume, without deciding, that it should approach both these applications applying the broader discretion in rule 11(1) rather than rule 11(3).

Vodafone's application

17. Vodafone submits that the Tribunal should allow the Depreciation Point to be argued for a number of reasons. First, Vodafone states that this is a relatively short point. If Vodafone is permitted to rely on it, it will limit its arguments to those raised in its letter to the CC of 9 July 2008. There is no need for substantial new material or lengthy replies by the other parties.
18. In the Tribunal's judgment, such a submission is wholly unrealistic in the context of this litigation. First, BT has indicated in its response to Vodafone's application that, if Vodafone is allowed to attack the depreciation path used by OFCOM on the basis that it should have used a shorter period, then there are a number of other "serious flaws" in OFCOM's calculations of the economic depreciation of spectrum that should also be taken into account. We do not know whether the other parties would oppose BT's reliance on these other points. Clearly there is the potential either for a widening of the scope of the CC's deliberations to cover a variety of challenges to OFCOM's treatment of depreciation or at least for further dispute between the parties as to whether these other points should be raised – and if so whether yet further points can be relied on to rebut them.
19. Secondly, we also have not heard from the parties or from the CC as to what factors ought to be taken into account in deciding whether the Depreciation Point is right or not. Vodafone's argument appears to be that the very fact that the spectrum licence expires in 2021/22 automatically means that the whole of the amount which represents the appropriate share of the value of spectrum attributable to voice communication should be recovered through MCT charges by the time the licence expires.
20. This is not necessarily the correct way to look at the issue. OFCOM asserts in its letter of 16 September 2008 that its approach to asset depreciation expressly does not guarantee that the cost of a network asset will be recovered during that asset's

lifetime. BT argues that it is highly unlikely that a reasonably efficient MNO will have to stop providing the services that it currently supplies as soon as the licence expires. BT argues that the efficient operator will find a means of continuing to provide voice and data services after the expiry of the licence and will have a business of considerable ongoing value notwithstanding the expiry of the licence. It would not be right therefore to treat the licence as having no value after 2021/22.

21. Thirdly, if the CC were to agree that depreciation had not been correctly dealt with, it would need to decide what the effect of this was on the model and whether other adjustments to the scenarios (if they decide that OFCOM's reliance on a number of scenarios was appropriate) are needed. There may well be disputes as to what the effect of any such adjustment is on the ultimate level set in the price control.
22. These are some of the issues that the Tribunal can readily foresee might need to be explored if the Depreciation Point is introduced. The Tribunal does not therefore accept that this is a simple point or that, if permission were granted, the point could properly be dealt with by limiting consideration to a few paragraphs in Vodafone's letter.
23. Vodafone's second argument is that the Depreciation Point is a point which Vodafone would have been entitled to raise in its statement of intervention when that statement was originally served. Although Vodafone appears to accept that it is not a point raised by BT in the appeal, Vodafone says that BT has raised other challenges to the valuation of spectrum the effect of which would be to reduce the value of spectrum in the cost model and hence lower the price levels set by the price control. Vodafone argues that it is entitled to respond to the appeal by raising a countervailing point which would, if accepted, cancel out the reduction sought by BT and lead, at the least, to the prices remaining the same.
24. The Tribunal sees the force made in BT's opposing submissions that to allow an intervener to raise a new point simply because that point could counteract an unconnected point raised in the Notice of Appeal would allow the interveners in effect to raise any point they wish. But we are prepared for the purposes of this

application to assume in Vodafone's favour that it would have been able to raise the point in its initial Statement of Intervention.

25. We do not consider, however, that much weight should be attached to this argument. This might be a persuasive argument if permission to amend the pleading was sought soon after it was first served and before the other parties had responded to it. But here proceedings have been underway for a considerable time and the parties have already prepared and served their pleadings and evidence in the CC investigation. Clearly if the point could not have been included in the original pleading, that would mean that it could not be included by later amendment. But that does not mean that the fact that it could have been included originally is a strong pointer to its inclusion now.
26. Vodafone's third argument is that H3G has raised the Depreciation Point in its statement of intervention in the *BT* appeal (H3G being a party to these proceedings not only as an appellant in its own appeal but also as an intervener in the *BT* appeal). H3G concurs with this view. Vodafone and H3G refer to footnote 31 of H3G's Full Statement of Intervention served in the *BT* appeal on 21 April 2008. The footnote is attached to paragraph 5.10 of H3G's pleading. Section 5 of the Full Statement of Intervention is mainly devoted to refuting BT's argument that the MNOs should not be allowed to recover *any* costs for 3G spectrum over and above 2G spectrum costs. H3G also disputes OFCOM's use of a combination of scenarios only some of which allow for the recovery of the full 2000 auction cost of spectrum. H3G argues that the cost model should be based on full recovery of the auction bid price.
27. In paragraph 5.9 of the Full Statement of Intervention, H3G enumerates six reasons why it says that the full amount paid for 3G licences in 2000 should be taken into account in the model, at least in the case of H3G's price control. None of these six reasons deals with depreciation. However in paragraph 5.10 H3G reiterates that the amount paid at auction is the only relevant value and says:

“In addition, as H3G has previously argued³¹, the logic of OFCOM's long run forward looking approach means that a replacement value for the licence also needs to be included in OFCOM's cost model at the date of expiration of the current 3G licences (31 December 2021). H3G considers that the market value, as

evidenced by the 2000 auction price paid should be included in OFCOM's cost model from this date."

28. Footnote 31 then sets out a passage taken from H3G's Response to OFCOM's September Consultation in which H3G asserts that there is a "basic logical error" in OFCOM's modelling arising from the fact that the model assumes that a significant percentage of the cost of the spectrum will be recovered in a period after the licence to use the spectrum expires.
29. It is therefore not at all clear, in the Tribunal's opinion, whether H3G is in fact relying on the Depreciation Point in its own intervention in the *BT* appeal. The fact that it is raised only in a quotation from an earlier document set out in a footnote, rather than as one of the number of reasons listed in section 5 might well indicate that it is not intended to be raised as a separate issue in the appeal. Further, as OFCOM points out in its letter to the Tribunal of 16 September, the Depreciation Point was raised more directly by H3G in response to the September 2006 Consultation (see paragraph A5.174 of the 2007 Statement which records H3G as having argued that 3G spectrum costs should be fully recovered by 2021/22 when the licences expire) and answered more directly by OFCOM (see paragraph A5.186 where OFCOM concludes that the approach advocated by H3G would be inconsistent with the approach to cost recovery of other assets in the cost model). If H3G had intended to raise the Depreciation Point as part of its intervention in *BT*'s appeal, one would have expected to see those paragraphs expressly referred to in the Full Statement of Intervention.
30. Certainly the CC appears to have interpreted the reference in H3G's footnote 31 as H3G merely pointing out that it has been consistent in arguing throughout that OFCOM must include the whole value of the 3G spectrum in the cost model. The CC notes that OFCOM did in fact respond to the point raised by H3G in its response to the September Consultation. In paragraph 9.55 of the 2007 Statement OFCOM says:

"[...] Comments made in H3G's response to the September 2006 Consultation also prompted consideration of whether estimates of the MFLOC based upon the 2000 auction payments capture the opportunity cost of 3G spectrum in 2021 and beyond (since the current 3G licences expire in that year). It is appropriate to consider costs over the lifetime of the network, and hence Ofcom agrees that it is

appropriate to consider whether the opportunity cost of 3G spectrum after 2021 is appropriately reflected in Ofcom's cost benchmarks. **The opportunity cost from 2021 may already be reflected in the scenarios considered by Ofcom.** Alternatively, as an upper bound and in the absence of any reasonable estimates of the potential opportunity cost of 3G spectrum in 2021 and beyond, Ofcom has considered a scenario in which it is assumed that MNOs incur a payment in 2021 equal in real terms to the payments made in 2000. Ofcom considers this to be an extreme upper bound." (emphasis added)

31. In paragraph A14.94 of the 2007 Statement OFCOM also refers to its agreement with the point raised by H3G and states that it has adjusted the model to reflect this; scenario 4 modifies scenario 3 to reflect the assumption that MNOs incur a "renewal payment" in 2021 equal in real terms to the payments made in 2000. OFCOM considered that the other scenarios under consideration reflect the alternative possibility that no further adjustment was needed in order to reflect the opportunity cost of 3G spectrum in 2021 and beyond.
32. In other words, OFCOM accepted the point raised by H3G and scenario 4 was devised to meet it. Section 5 of H3G's statement of intervention does not refer to these paragraphs or take issue with what OFCOM has done, other than as part of the more general challenge to the appropriateness of relying at all on other scenarios which do not allow for full recovery of the 2000 auction bid prices.
33. The question whether H3G has actually raised the Depreciation Point in its intervention in the *BT* appeal is a question for the CC to determine, not for this Tribunal to decide in response to these applications. In any event, the Tribunal agrees with BT's submission in its letter of 12 August 2008 that the statements of intervention in the appeal do not "amount to a collective pool of arguments into which all parties can dip at their option". If H3G wishes to pursue the point and the CC concludes that the point already forms part of H3G's case, the CC will need to determine whether it wishes to hear submissions from the other parties on the point. But this is not a reason either for or against allowing Vodafone to raise the point, at this late stage of the proceedings, as another intervener in the same appeal.
34. Fourthly in support of its application, Vodafone argues that no material prejudice would be caused to the other parties if it is now allowed to rely on the Depreciation

Point and that the point will not delay the conclusion of the CC proceedings. If the point is excluded, Vodafone asserts, there is a real risk that the CC's determination will be erroneous, will be unfair to some or all of the MNOs and will be contrary to the public interest.

35. As to the question of prejudice and delay, for the reasons set out in relation to the question whether this is in truth a short point, the Tribunal has real concerns that allowing it to be raised will disrupt these proceedings. These applications come nearly seven months after the reference of the price control matters to the CC and nearly 16 months after the appeals were first lodged. The CC is preparing to issue consultation documents in both appeals shortly. Although the deadline for the CC to deliver its determination of the price control matters to the Tribunal has recently been extended, that is not to be taken as indicating that the Tribunal will be sympathetic to new points being raised.

36. As to the question of unfairness and the possibility of the CC's determination being erroneous, the Tribunal reiterates the point made in its earlier ruling on H3G's application to amend its Notice of Appeal (see judgment [2008] CAT 10 paragraph 55) cited in paragraph [2] above. As the Tribunal made clear in that judgment (see for example paragraph 11 in addition to paragraph 55), questions as to the merits of a proposed new point are irrelevant to the question whether the application to amend should be allowed, unless the parties opposing the application assert that the point is devoid of merit. No one has made such an assertion in relation to this application. The question for the Tribunal is whether it is appropriate to allow the interveners at this stage to introduce the Depreciation Point. These are multi-party proceedings where the parties have had a full opportunity to set out their cases in the pleadings; where the issues for reference to the CC have been delineated by the Tribunal in consultation with all parties; and where the CC is mid-way through its investigation of those issues. By the time the CC reports in January 2009 we will be almost two years into a four-year price control. The Tribunal has unanimously decided that it is too late to raise the Depreciation Point.

T-Mobile's application

37. T-Mobile's application is framed in terms of amending its statement of intervention. T-Mobile seeks to introduce five additional paragraphs and an Annex containing a further 15 paragraphs into its statement of intervention in the *H3G* appeal.
38. As with the Vodafone application, the Tribunal is content to consider the application on the basis of rule 11(1) rather than rule 11(3) without deciding whether the Depreciation Point is a new ground or not or whether it can in principle be legitimately raised by an intervener in the *H3G* appeal.
39. T-Mobile argues that this is a discrete point which is "akin to an arithmetical error". The Tribunal considers this point is unfounded. It is plain from the passages quoted from the 2007 Statement earlier in this ruling that it was not through inadvertence that OFCOM treated the life of the radio network created as a consequence of receiving the spectrum licence as extending to 2039/40. The MNOs were of course well aware that their licences expire at the end of 2021.
40. T-Mobile also argues that the Depreciation Point was not apparent from reading the 2007 Statement and that that Statement was misleading on this point. Vodafone takes a different stance, accepting that the point was identifiable "from a careful reading" of the Statement. Again, in the light of the paragraphs in the 2007 Statement which are referred to or set out above, we do not accept the submission made by T-Mobile in this regard.
41. The other points relied on by T-Mobile mirror the points already considered in relation to the Vodafone application and are rejected for the same reasons.

Conclusion

42. The Tribunal unanimously rejects both Vodafone's and T-Mobile's applications.

Vivien Rose

Andrew Bain

Adam Scott

Charles Dhanowa
Registrar

Date: 23 September 2008