Neutral citation [2009] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1027/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

19 November 2009

Before:

VIVIEN ROSE
(Chairman)
MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

VIP COMMUNICATIONS LIMITED
(in administration)

Applicant

-v-

OFFICE OF COMMUNICATIONS

Respondent

supported by

T-MOBILE (UK) LIMITED

Intervener

RULING ON APPLICATION TO AMEND AND STRIKE OUT

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1. The Tribunal has before it two applications in this appeal. The first is an application by VIP Communications to amend its notice of appeal. OFCOM not only opposes that application but has also asked the Tribunal to reject the whole of the existing notice of appeal pursuant to Rule 10 of the Competition Appeal Tribunal Rules 2003 (S.I. 2003/1372). The Intervener, T-Mobile supports OFCOM in opposing VIP's application to amend and in seeking to bring an end to the whole appeal either pursuant to Rule 10 or as an abuse of process.

2. This appeal has a long and complex history. All we need to say here is that the issues raised by the notice of appeal as lodged in February 2004 were in large part the same as those raised by another appeal brought at the beginning of January 2004 by Floe Telecom Limited. It was decided at an early stage that the appeal in the *Floe* case would proceed and that the *VIP* appeal would be stayed pending the determination of the appeal in *Floe*. The stay was granted upon VIP undertaking, through its solicitor, to be bound by the points of law decided by the Tribunal's judgment in *Floe*. The *Floe* proceedings were protracted and, for our purposes, culminated in the judgment of the Court of Appeal in *OFCOM and T-Mobile v Floe Telecom Ltd* [2009] EWCA Civ 47 handed down on 10 February 2009 ("the Court of Appeal judgment"). That judgment was given in appeals by OFCOM and T-Mobile from the Tribunal's judgment in *Floe* of 31 August 2006 reported at [2006] CAT 17 ("the Tribunal's *Floe* judgment"). What we now have to decide is whether, having regard to the findings of the Court of Appeal in that judgment, and bearing in mind VIP's undertaking to abide by the determinations in *Floe*, there is anything that remains or should remain of VIP's appeal.

3. We have received very full written submissions from the parties in respect of both applications and in the circumstances we concluded that there was no need for an oral hearing.

4. VIP's application to amend its notice of appeal is governed by Rule 11 of the Tribunal's Rules which is in the following terms:

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

5. OFCOM's application to reject the notice of appeal is governed by Rule 10, the relevant part of which empowers the Tribunal to reject an appeal, in whole or in part at any stage of the proceedings, if it considers that the notice of appeal discloses no valid ground of appeal.

6. There is some debate in the parties' submissions as to whether VIP's proposed amendments are subject to the exercise of the Tribunal's discretion under Rule 11(1) or whether they seek to introduce a new ground for the purposes of the more stringent test in Rule 11(3). But the main thrust of OFCOM's and T-Mobile's submissions is that the notice of appeal on which VIP now seeks to take the case forward does not disclose any arguable points. Since we are considering the application to reject the existing notice and the application to amend at the same time, and in the rather unusual circumstances of this case, we think it is right to approach our task by asking first whether the notice of appeal would, if the proposed amendments were made, contain any grounds which can properly be pursued by VIP.

7. VIP accept, as they must, the key findings arising from the Court of Appeal judgment (and as applied to the instant case) namely:

   (a) using COMUGs is, under the current state of United Kingdom domestic legislation, an activity for which a licence is required which means that it is a criminal offence to carry on that activity without a licence (paragraph 50 of the Court of Appeal judgment);

(b) the licence granted by OFCOM to Vodafone (and hence also T-Mobile's licence) did not include a licence to use COMUGs (paragraph 96 of the Court of Appeal judgment);

(c) it was therefore not possible for Vodafone to have sub-licensed Floe (or for T-Mobile to have sub-licensed VIP) to use COMUGs under the terms of that licence (also paragraph 96 of the Court of Appeal judgment).

8. It is thus now common ground that VIP had no sub-licence from T-Mobile and further that they were not directly licensed to use COMUGs by OFCOM. VIP say that any direct application to OFCOM for a licence to carry on this activity would have been rejected. OFCOM and T-Mobile argue that it follows from these facts that T-Mobile's refusal in January 2003 to provide services to enable VIP to use the SIM cards for the purpose of carrying on that activity could not have been an abuse of a dominant position. OFCOM was therefore right to reject VIP's complaint of abusive conduct under both the Chapter II prohibition in the Competition Act 1998 ("the 1998 Act") and under Article 82 EC.

9. The answer that VIP proposes to give is that the current United Kingdom domestic provisions, in particular Regulation 4(2) of the Wireless Telegraphy (Exemptions) Regulations 2003, is inconsistent with the directives which make up the European regulatory framework for telecommunications. They argue that on the proper construction of the relevant European directives, the activity that VIP proposes to carry on, and for which it needs T-Mobile's services, is not and should not be treated as unlawful. They argue that OFCOM, as an emanation of the United Kingdom, is under a duty to disapply national legislation which clearly contravenes Community law.

10. For the purpose of both the applications before us we assume in VIP's favour that it is at least arguable that the relevant United Kingdom domestic legislation is inconsistent with the European regulatory provisions and that VIP might succeed in showing that the United Kingdom has not properly implemented its Community obligations. We do not therefore need to go into further detail about the allegation of improper legislative implementation.

11. VIP's case based on this alleged inconsistency has two limbs, which have been described in the parties' submissions as the 'forward looking' point and the 'backward looking' point. Although these two limbs overlap, it is helpful to address them separately.

The 'forward looking' point

12. Under the forward looking point, VIP argue that the question of the incompatibility of the domestic provisions is "even by itself" a valid ground of appeal (see paragraph 11 of their application for permission to amend). The Tribunal is, according to VIP, perfectly entitled to examine whether or not OFCOM has applied European law as it should have done.

13. On this point we agree with OFCOM and T-Mobile that this Tribunal does not have jurisdiction in the context of this appeal to determine that OFCOM should set aside or disapply the domestic legislation alleged to be inconsistent with the European regulatory framework. This appeal is brought under section 47(1) of the 1998 Act which requires us to identify an "appealable decision" of a kind referred to in that sub-section. The relevant class of decision is that referred to in section 46(3)(c) and/or (d) of the 1998 Act, namely a decision as to whether the Chapter II prohibition has been infringed and/or whether the prohibition in Article 82 EC has been infringed.

14. OFCOM argues that the Tribunal does not have jurisdiction to consider OFCOM's decision to make or not to revoke the relevant domestic legislation because this is excluded from the Tribunal's remit by section 192 of, and Schedule 8 to, the Communications Act 2003. Whether or not this is the case, in our judgment we do not have jurisdiction in the context of this appeal to make some free-standing finding as to what was or was not OFCOM's duty in respect of the domestic legislation. In our judgment, the issue of the alleged inconsistency of our domestic legislation can only be relevant to this appeal if it is relevant to the question whether OFCOM's decision to reject the complaint of abusive behaviour was wrong. We do not consider that the 'forward looking' point can have any part to play in these proceedings.

The 'backward looking' point

15. The backward looking point considers how the alleged illegality of the UK domestic legislation affects T-Mobile and the characterisation of T-Mobile's conduct as abusive under Article 82 EC or the Chapter II prohibition. Would VIP's challenge to the appealable decision be bolstered if VIP succeeded in showing that the UK domestic legislation was inconsistent with the relevant European directives?

16. The decision in question was adopted by OFCOM on 28 June 2005 and called "Re-investigation of a complaint from VIP Communications Limited against T-Mobile (UK) Limited". In that decision, OFCOM made the findings of fact and law that have since been upheld in the Court of Appeal judgment in *Floe*: see paragraph [7], above.

17. OFCOM concluded that VIP's complaint failed for two reasons. First, T-Mobile's conduct was taken outside the ambit of the Chapter II prohibition by paragraph 5(2) of Schedule 3 to the 1998 Act and outside the ambit of Article 82 EC by the corresponding rules of Community competition law. Paragraph 5(2) of Schedule 3 provides that the Chapter II prohibition does not apply to conduct to the extent that it is engaged in to comply with a legal requirement; a principle that also applies in relation to Article 82: see the Court of Justice's judgment in Case C-359 & 379/95 P *Ladbroke Racing v Commission* [1997] ECR I-6265, paragraph 33. The second basis for OFCOM's decision was that T-Mobile's conduct in withdrawing supply from VIP was objectively justified and therefore not abusive because this was a reasonable and proportionate response by T-Mobile as a means of protecting its legitimate commercial interests. T-Mobile had, OFCOM concluded, a "legitimate commercial interest in disconnecting VIP, on the basis of the illegality of VIP's use of [COMUGs]" (paragraph 253 of the decision).

18. OFCOM went on to consider the compatibility of the current United Kingdom legal position with Community law and concluded that the domestic legislation was entirely compatible: paragraphs 174 and 289 of the decision. OFCOM continued (footnotes omitted):

> "289. …. However, even if that were not the case, Ofcom does not consider that this would affect Ofcom's conclusions concerning objective justification. Both the

> obligation on the UK to implement the [relevant European provisions] were obligations on the UK, not on T-Mobile.
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> 290. Ofcom considers that, as a matter of legal certainty, an undertaking is entitled to rely on the national law in force until such time as it has been disapplied by a competent national authority or court".

19. The crux of the applications before us is therefore whether OFCOM was right to conclude that the *prima facie* illegality of VIP's activity under domestic law was sufficient to shield T-Mobile from any allegation of abuse when it withdrew supply or whether there is some obligation either on T-Mobile or on OFCOM that makes the alleged inconsistency of that domestic law with European law relevant.

20. In our judgment this issue has been decided in OFCOM and T-Mobile's favour by the Court of Justice in Case C-198/01 *Consorzio Industrie Fiammiferi ("CIF") v Autorita Garante della Concurrenza e del Mercato* [2003] ECR I-8055. That case concerned a Royal Decree dating back to 1923 by which the Italian legislature introduced a regime for the manufacture and sale of matches by establishing a consortium of domestic match manufacturers, the CIF. The decree conferred on the consortium a commercial monopoly consisting of the exclusive right to manufacture and sell matches for consumption on the Italian domestic market. In 1993 new legislation was adopted which, in the view of the Italian court, abolished the CIF's fiscal monopoly. Acting on the basis of a complaint from a German match manufacturer who was alleging that it was experiencing difficulties in distributing its products on the Italian market, the Italian competition authority opened an investigation in November 1998.

21. The Italian authority identified three types of conduct among the CIF's activities: conduct required of it by legislation, conduct which was merely facilitated by legislation and conduct attributable to the CIF's own initiatives. It also distinguished between two periods of time, before and after the changes in the law brought about in 1993. For the period before the 1993 changes, the Authority regarded both the creation of the CIF and the fact that it had been made responsible for the production and marketing of matches as exclusively attributable to the legislative measures. The Authority decided further that the existence and business activities of the CIF, as governed by Royal Decree of 1923 were contrary to Articles 3(1)(g) EC, 10 EC and 81(1) EC because they required CIF to engage in anti-competitive conduct in breach of

Article 81(1) EC. The Authority took the view that the legislative framework had to be 'disapplied by any court or public administration', since it was contrary to those Treaty Articles. That disapplication 'would imply' ('implicherebbe') removal of the 'legal shield' (paragraph 22 of the judgment). CIF appealed to the Tribunale amministrativo per il Lazio which referred two questions to the Court of Justice under Article 234 EC. The first question is the one which is relevant for our purposes:

> "1. Where an agreement between undertakings adversely affects Community trade, and where that agreement is required or facilitated by national legislation which legitimises or reinforces those effects, specifically with regard to the determination of prices or market-sharing arrangements, does Article 81 EC require or permit the national competition Authority to disapply that measure **and to penalise the anti-competitive conduct of the undertakings or, in any event, to prohibit it for the future**, and if so, with what legal consequences?" (emphasis added)

22. The Court of Justice held first that the duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities. The Italian competition authority was thus under a duty to disapply the 1923 Decree. But the Court then went on to deal with the effect of this on the undertakings within CIF:

> "52. As regards, by contrast, the penalties which may be imposed on the undertakings concerned, it is appropriate to draw a two-fold distinction by reference to whether or not the national legislation precludes undertakings from engaging in autonomous conduct which might prevent, restrict or distort competition[1] and, if it does, by reference to whether the facts at issue pre-dated or post-dated the national competition authority's decision to disapply the relevant national legislation.
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> 53. First, if a national law precludes undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition,[2] it must be found that, if the general Community-law principle of legal certainty is not to be violated, the duty of national competition authorities to disapply such an anti-competitive law cannot expose the undertakings concerned to any penalties, either criminal or administrative, in respect of past conduct where the conduct was required by the law concerned.

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[1] Note that the official English translation of the judgment is not as clear as the French text which says "… selon que la législation nationale exclut ou non la possibilité d'une concurrence qui serait encore susceptible d'être empêchée, restreinte ou faussée par des comportements autonomes des enterprises …." which could be translated as "… according to whether or not the national legislation rules out the possible existence of a degree of competition which would still be capable of being prevented, restricted or distorted by the autonomous conduct of undertakings…".

[2] Similarly here the French text says "…si une loi nationale exclut la possibilité d'une concurrence susceptible d'être empêchée, restreinte ou faussée par des comportements autonomes des enterprises…" meaning "if a national law rules out the possible existence of a degree of competition capable of being prevented, restricted or distorted…".

> 54. The decision to disapply the law concerned does not alter the fact that the law set the framework for the undertakings' past conduct. **The law thus continues to constitute, for the period prior to the decision to disapply it, a justification which shields the undertakings concerned from all the consequences of an infringement of Articles 81 EC and 82 EC and does so vis-à-vis both public authorities and other economic operators.**
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> 55. As regards penalising the future conduct of undertakings which, prior to that time, were required by a national law to engage in anti-competitive conduct, it should be pointed out that, once the national competition authority's decision finding an infringement of Article 81 EC and disapplying such an anti-competitive national law becomes definitive in their regard, the decision becomes binding on the undertakings concerned. From that time onwards the undertakings can no longer claim that they are obliged by that law to act in breach of the Community competition rules. Their future conduct is therefore liable to be penalised." (emphasis added)

23. The Court therefore answered the first question referred by the Italian court by saying that the national competition authority (i) has a duty to disapply the national legislation; (ii) may not impose penalties on the undertakings concerned in respect of past conduct when that conduct was required by the national legislation; and (iii) may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once that decision has become definitive.

24. In the present case there has been no disapplication of the relevant UK domestic legislation – OFCOM does not accept that there is any need for any such disapplication. We accept, as was stated in the Tribunal's *Floe* judgment, that if legislation is incompatible with EC rules, then OFCOM is under a duty to disapply that legislation. But whether or not OFCOM's failure to disapply the relevant UK provisions is right does not, in our judgment, concern us because it is clear from *CIF* that unless or until that issue is resolved and the decision to disapply the law becomes definitive, T-Mobile is shielded from all the consequences of an infringement of Articles 81 EC and 82 EC vis-à-vis both public authorities and other economic operators. As regards the conduct which was the subject of the complaint and to which OFCOM's decision relates, T-Mobile cannot be held liable under Article 82 or the Chapter II prohibition. Although the passage quoted from the Court's judgment above refers to imposing "penalties" it is clear from the passage as a whole[3] that this is not saying that undertakings are shielded

[3] Again, the French text is clearer here as it refers to "des sanctions" rather than "une amende", the latter being the term generally used to refer to fines.

only from the imposition of fines but from any administrative or judicial sanction for their conduct.

25. VIP's proposed notice of appeal raises certain factual allegations which, they say, mean that T-Mobile does not benefit from this "shield". First, they point out that T-Mobile held a dominant position and thus, according to well-established Community case law, has a "special responsibility" not to impair competition on the relevant market: see Case 322/81 *Michelin v Commission* [1983] ECR 3451, paragraph 57. Whilst that is undoubtedly true, we do not consider that a dominant undertaking's special responsibility extends to providing services to a customer which enable that customer to carry on activity which is contrary to domestic law, even if there is a question mark over the compatibility of that law with EC directives. We do not consider that VIP's assertions that T-Mobile were aware that the provision making COMUGs a licensable activity was about to be repealed takes the matter any further. The dominant undertaking is not an emanation of the State and the *CIF* judgment, though it relates on its facts to agreements under Article 81, expressly applies to conduct under Article 82 as well. The fact that T-Mobile or VIP might have been able to defend themselves against a criminal prosecution by arguing the incompatibility of the domestic legislation does not, in our judgment, affect T-Mobile's position in this case.

26. We do not therefore accept that the amendments that VIP wishes to make alleging a duty on T-Mobile to connect VIP's gateways and keep them connected (or to allege that T-Mobile was under apparently conflicting duties and so should have referred the matter to the regulator before withdrawing supply) can possibly succeed.

27. Secondly, VIP alleges that T-Mobile's real motivation in ceasing supply was not its concerns about the legality of VIP's activity but to stem losses from competition. T-Mobile did not, VIP wish to assert, really regard the activity as unlawful, as evidenced by the fact that it continued to collect monies from COMUGs operators for services provided before its withdrawal of supply, "showing it believed the collection was lawful and the monies collected not proceeds of crime" (paragraph 5 of the Appendix to VIP's re-amended notice of appeal). Again, we do not consider that even if this was established, it would affect T-Mobile's ability to rely on the prima facie illegality of unlicensed COMUGs as a defence to the allegation of abusive conduct. There is no

suggestion in *CIF* that it is relevant to consider the undertakings' state of knowledge of the legal position or their subjective motivation for complying with the domestic law as it exists. In our judgment those allegations are not relevant to the appeal.

28. In the light of the above, the Tribunal unanimously orders that

    (a) VIP's application to amend its notice of appeal is dismissed and

    (b) the notice of appeal is rejected pursuant to Rule 10 of the Tribunal's Rules.

Vivien Rose Michael Davey Sheila Hewitt

Charles Dhanowa
Registrar Date: 19 November 2009