



Neutral citation [2023] CAT 4

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1382/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13 January 2023

Before:

THE HONOURABLE MRS JUSTICE BACON
(Chair)
PROFESSOR ROBIN MASON
JUSTIN TURNER K.C.

Sitting as a Tribunal in England and Wales

BETWEEN:

CONSUMERS' ASSOCIATION

Class Representative

- v -

QUALCOMM INCORPORATED

Defendant

Heard at Salisbury Square House on 13 January 2023

RULING (APPLICATION FOR DISCLOSURE)

APPEARANCES

Michael Armitage and Ciar McAndrew (instructed by Hausfeld & Co. LLP) appeared on behalf of the Class Representative.

Daniel Jowell KC, David Bailey and Emma Mockford (instructed by Norton Rose Fulbright LLP and Quinn Emanuel Urquhart & Sullivan LLP) appeared on behalf of the Defendant.

A. INTRODUCTION

1. These collective proceedings relate to standalone claims for alleged breaches of Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) and section 18 of the Competition Act 1998 for the period since 1 October 2015 onwards.
2. By an application dated 6 January 2023, the Consumers’ Association, also known as “Which?”, applied for specific disclosure in respect of various documents relating to certain foreign proceedings and or regulatory decisions. By the time of the case management conference (“CMC”) on 13 January 2023, Which? and the Defendant (“Qualcomm”) had reached substantial agreement on disclosure. The residual dispute before the Tribunal relates to Which?’s request for the disclosure of all documents quoted from or cited in Section 9 (Market Definition) and 10 (Dominance) of the confidential version of the European Commission (“Commission”) decision dated 24 January 2018 in Case AT.40220 – Qualcomm (Exclusivity Payments) (the “Decision”), to the extent that they are within Qualcomm’s control.
3. Which? contends that the documents are relevant on the basis that the Commission considered the same market definition and dominance issues as arise in these collective proceedings, during its investigation in respect of part of the relevant period. The Decision under Article 102 TFEU sets out the Commission’s findings in relation to equivalent issues in the present proceedings, and the relevant period overlaps with the period covered by these claims.
4. Qualcomm resists the disclosure of the documents to the extent that the documents were produced by Qualcomm, third parties or the Commission for the purposes of the Commission investigation. An early objection that the Commission’s case file had not been closed, or might not have been closed, has now fallen away. We have seen a response from the Commission to an inquiry by Which?, which confirms that the case file has been closed. Qualcomm maintains, however, three other objections to disclosure.

5. First, Qualcomm says that the Tribunal is bound by the conditions under which the documents were provided to Qualcomm by the Commission. In particular, Qualcomm refers to an extract from the Commission's cover letter accompanying the Statement of Objections dated 8 December 2015:

“You should use the information contained in this Statement of Objections solely for the purpose of judicial or administrative proceedings for the application of Article 101 and Article [102] of the Treaty on the Functioning of the European Union, including proceedings before the national courts. Any such use outside the present proceedings should only be made after the Commission has by decision or otherwise terminated its proceedings against all parties under investigation.

The above paragraph also applies to your reply to the Statement of Objections in so far as it contains information derived from the Statement of Objections or obtained through access to file.”

6. Secondly, Qualcomm maintains that the documents referred to in the confidential version of the Decision contain information relating to third party non-addressees, which may be protected from disclosure: Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse v Commission* EU:T:2007:306 (“*Pergan*”). That case is authority for the proposition that third parties are protected from the disclosure of formal findings of liability for infringement, or allusions thereto, in a final Commission decision in circumstances where they are a non-addressee of that decision and have not had an opportunity to challenge those findings before the European Courts. That principle was applied by the Court of Appeal in *Emerald Supplies v British Airways* [2015] EWCA Civ 1024 (“*Emerald*”). Subsequently, in a very brief interlocutory ruling in *Vodafone v Infineon* [2016] EWHC 1922 (Comm) (“*Vodafone*”), Birss J said that the logic of the Court of Appeal's judgment in *Emerald* meant that protection from disclosure on *Pergan* grounds should also extend to material contained in a Statement of Objections and replies to requests for information.
7. Thirdly, Qualcomm says that it would be unfair to order the disclosure sought in circumstances where the Commission Decision was annulled by the General Court (Case T-235/18 *Qualcomm v Commission* EU:T:2022:358) on grounds which included findings of procedural irregularities.

B. RULING ON DISCLOSURE

8. Our unanimous decision is that we will make the order in the form sought by Which?.
9. As to the first of Qualcomm's objections, we do not need to determine the question of whether we are bound by the conditions under which Qualcomm has received documents on its case file, because in any event those conditions would not be breached by the disclosure here: the present proceedings do claim the infringement of Article 102 TFEU. The conditions are not, in our view, breached simply because these proceedings *also* claim an infringement of the Chapter II prohibition.
10. Secondly, as to the *Pergan* point, the Court of Appeal in *Emerald* emphasised at [89] that the *Pergan* principle protects from disclosure "adverse *findings* by a national or European regulator that there had been an infringement, or *allusions* in the relevant report to the liability of an accused person for an infringement" (see also similar comments at [90]). What is sought here, however, is not the disclosure of any findings in a decision of the Commission, but simply contemporaneous documents such as replies to requests for information.
11. Thirdly, we do not consider that the annulment of the Decision by the General Court necessarily taints the entirety of the documents received by Qualcomm from the Commission file. If there are circumstances referred to by the General Court which Qualcomm says should lead the Court at trial not to place weight on particular documents because of the manner in which they were obtained, then Qualcomm will be able to make that argument in due course. But it does not seem to us that the general basis on which the Decision was annulled should prevent all disclosure of any materials obtained by Qualcomm from the Commission file.
12. In those circumstances, it seems to us right to make the order as sought by Which? but subject to the protection that Mr Armitage has suggested for the rights of third parties; in other words, that the order should provide for third

parties to be able to comment on the order for disclosure and the adequacy of the confidentiality regime put in place in respect of the disclosure given.

C. APPLICATION FOR PERMISSION TO APPEAL

13. Qualcomm seeks permission to appeal the Tribunal's ruling on disclosure on two grounds. First, it contends that these proceedings are not solely for the purposes of the application of Articles 101 or 102 TFEU, such that the conditions under which the information was supplied to Qualcomm are arguably breached. Secondly, Qualcomm relies on Birss J's ruling in *Vodafone* as to the scope of the *Pergan* principle. Qualcomm contends that these two grounds raise points of law that have real prospects of success.
14. The Tribunal unanimously refused Qualcomm permission to appeal. We do not consider that there is any arguable error in the Tribunal's decision as to the conditions under which the relevant documents were provided to Qualcomm, or in the application of the *Pergan* rule.

The Hon Mrs Justice Bacon
Chair

Professor Robin Mason

Justin Turner K.C.

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

Date: 13 January 2023