



## COMPETITION APPEAL TRIBUNAL

### NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

#### CASE NO.: 1221/3/3/13

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) (the “Rules”), the Registrar gives notice of the receipt of an appeal on 15 October 2013 under section 192 of the Communications Act 2003 (the “Act”) by TalkTalk Telecom Group PLC (“TalkTalk”) against the determination (the “Determination”) by the Office of Communications (“OFCOM”) contained in a statement issued on 15 August 2013 and entitled “Dispute between TalkTalk Telecom Group PLC and Openreach relating to whether Openreach offered MPF New Provide to TalkTalk on fair and reasonable terms and conditions” (the “Statement”). TalkTalk is represented by its in-house legal team, TalkTalk Telecom Group PLC, 11 Evesham Street, London W11 4AR (reference: Neil Farquharson / Rickard Granberg).

TalkTalk is a provider of retail fixed line rental, voice calling and broadband telecommunication services in the United Kingdom. In order to supply those services, TalkTalk and other communications providers (“CPs”) purchase wholesale local loop unbundling (“LLU”) services from British Telecommunications plc (“BT”) and, more particularly, from that part of BT known as ‘Openreach’. BT has significant market power (“SMP”) on a number of wholesale telecommunications markets in the United Kingdom and is subject to certain SMP conditions imposed on it by OFCOM under the Act. Condition FAA9 requires it to supply LLU services to rival CPs, including TalkTalk, on fair and reasonable terms, conditions and charges.

LLU is the process of a rival CP to BT putting its own equipment into BT’s telecommunications exchanges and taking full or shared control of the ‘copper loop’ or ‘line’ from a BT local exchange to the premises of the CP’s customer. The copper loop remains owned by BT but is rented to the rival CP. A key service, enabling the CP to provide both broadband and voice calling, is called ‘metallic path facility’ (“MPF”). ‘MPF New Provide’ is the service of provisioning a new copper line for this purpose.

According to the Notice of Appeal, Openreach purported to give effect to its obligations under Condition FAA9 by amending the Access Network Facilities Agreement (the “ANFA”) offered by BT to CPs, including TalkTalk, on 2 April 2012 (the “April 2012 ANFA”). The April 2012 ANFA made the supply of MPF New Provide subject to a service level agreement (the “SLA”) and service level guarantees (“the SLG”) – commitments to pay pre-determined compensation (“SLG payments”) in the event that services were delivered later than the SLA stipulated. TalkTalk did not agree to the April 2012 ANFA.

When a CP places an order for MPF New Provide, Openreach offers the CP an appointment date for an Openreach engineer site visit to install the product at that CP’s customer’s premises. According to the Statement, TalkTalk contended that for orders placed between 1 June 2012 and 31 August 2012 (the “Relevant Period”), the number of working days that Openreach was on average late in delivering MPF New Provide (compared with an expected service performance of 12-14 working days) was around 25-26 working days. TalkTalk therefore sought compensation from Openreach in October 2012. Openreach rejected this claim considering that, as TalkTalk had not accepted the April 2012 ANFA, there was no obligation on Openreach to make SLG payments for lack of appointment availability.

On 18 December 2012, TalkTalk referred the dispute between it and BT to OFCOM, pursuant to the Act. According to the Statement, TalkTalk argued that the terms and conditions pursuant to which Openreach supplied MPF New Provide were not fair and reasonable on the basis that compensation should have been payable where service levels fell below acceptable levels. TalkTalk argued that this amounted to a breach by BT of Condition FAA9, which included a requirement to provide LLU services on fair and reasonable terms and conditions. OFCOM accepted the dispute and defined its scope as being to determine (i) whether Openreach offered MPF New Provide to TalkTalk on fair and reasonable terms and conditions during the

Relevant Period as required by Condition FAA9.2 and (ii) any appropriate exercise by OFCOM of its powers under section 190(2) of the Act as part of its determination resolving the dispute.

In its First Provisional Conclusions on the dispute, OFCOM determined that the terms and conditions offered by Openreach in respect of MPF New Provide were not fair and reasonable, and amounted to a breach of Condition FAA9 because an SLG payment should be based on a pre-estimate of an average CP's losses and the SLG payment offered was not sufficient as such a pre-estimate. In its Second Provisional Conclusions, however, OFCOM determined that the SLG fell within a plausible range of values for pre-estimates of losses and, therefore, that the terms and conditions were fair and reasonable. According to the Notice of Appeal, the Determination, contained in the Statement, maintained the essential position that OFCOM had adopted in the Second Provisional Conclusions. Although OFCOM materially altered its view on the appropriate range for what constituted a fair and reasonable estimate of loss, this did not alter the outcome.

TalkTalk states that its ultimate concerns in referring the dispute to OFCOM were that it believed that (i) Openreach's service levels for the provision of MPF New Provide during the Relevant Period were inadequate and, therefore, contrary to Condition FAA9.2, and (ii) Openreach should be required to pay TalkTalk compensation for the inadequate services provided during the Relevant Period, since there was no SLG in place at that time to automatically address such compensation.

On this appeal, TalkTalk states that it is not clear how OFCOM considered that the Determination related to the scope of the dispute referred to it. According to the Notice of Appeal, the appeal is brought on a protective basis on the assumption that it is OFCOM's position that the Determination and Statement represent its determination of the entirety of the matters ultimately in dispute between TalkTalk and Openreach. If, however, OFCOM accepts that there remain relevant matters in dispute which it has yet to determine, then it is likely that the appeal can be stayed pending OFCOM's determination of those matters and, depending on OFCOM's decision, the appeal may ultimately be withdrawn.

On the assumption that OFCOM contends it has decided all relevant matters in dispute, TalkTalk submits that it erred for the following reasons:

1. (Ground 1) OFCOM erred in law in deciding that the underlying dispute between TalkTalk and Openreach could be determined solely by reference to whether Openreach was complying with Condition FAA9 in the level of SLG payment offered. Had OFCOM directed itself properly and more generally to the question of whether Openreach's performance fell below adequate standards during the Relevant Period, it would have appreciated that the service levels offered breached Condition FAA9.2 and that, since there was no SLA or SLG in place, Openreach should be obliged to pay compensation to TalkTalk based on the best available estimate of the damage caused to TalkTalk by Openreach's breach.
2. Alternatively, if OFCOM was correct to base compensation on an estimate of a reasonable SLG payment, notwithstanding that there was none in place during the Relevant Period, it should have been based on an SLG payment of a particular rate per day being the mid-point of OFCOM's range for a reasonable SLG payment.
3. If the Tribunal finds that OFCOM was compelled to ignore the underlying matters in dispute between the parties by reference to a narrow decision on the scope of the dispute, OFCOM erred in law in deciding the scope of the dispute.
4. (Ground 2) Even if, contrary to Ground 1, OFCOM was correct to determine the dispute by reference to whether Openreach offered to supply MPF New Provide services on terms and conditions that were compliant with Condition FAA9, OFCOM should nonetheless have determined that Openreach pay compensation to TalkTalk at a rate per day equivalent to the SLG offered by Openreach in the April 2012 ANFA. OFCOM's reasons for not doing so, based on its analysis of the parties' incentives, were flawed and in consequence it exercised its discretion incorrectly.

Accordingly, TalkTalk asks that the Tribunal:

1. determine the appeal in accordance with section 195 of the Act, setting aside the decision contained in the Statement (or directing OFCOM to withdraw the same) and requiring OFCOM to order that

BT should compensate TalkTalk for its poor performance during the Relevant Period, together with interest;

2. award TalkTalk its costs of the appeal; and/or
3. grant any other relief as may be required.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to The Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://www.catribunal.org.uk). Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE, QC (Hon)*  
Registrar

Published 17 October 2013