



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO: 1237/3/3/15

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 19 May 2015 under section 192 of the Communications Act 2003 (the “Act”) by TalkTalk Telecom Group Plc (“TalkTalk”) against a decision by the Office of Communications (“OFCOM”) contained in its statement dated 19 March 2015 and entitled “Fixed Access Market Review: Approach to VULA margin” (the “Decision”)¹. TalkTalk is represented by its in-house legal team, TalkTalk Telecom Group Plc, 11 Evesham Street, London W11 4AR (reference: Paul Vines/Amy Wells).

The Notice of Appeal states that the Decision was taken under section 45 of the Act and purported to be in accordance with sections 3, 4, 4A, 47, 87 and 88 of the Act, Article 19(2) of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services and Article 3(3) Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications. The Decision imposes certain obligations on British Telecommunications Plc (“BT”) which control the margin between the prices charged by BT for, respectively, wholesale and retail ‘superfast broadband’ (“SFBB”). In particular, the Decision introduces SMP Service Condition 14, which restricts BT’s ability to set the price for its SFBB wholesale product called Virtual Unbundled Local Access (“VULA”). The condition is effective from 1 April 2015 and is intended to cover the current market review period ending 31 March 2017.

TalkTalk contends that OFCOM has erred for the following reasons:

1. **(Ground 1) Portfolio test alone is insufficient:** OFCOM erred in concluding that a product level test (based either on individual products or groups of related products) to complement its portfolio test is unnecessary and therefore disproportionate. A portfolio based margin test alone does not preclude BT from applying a margin squeeze to individual market segments or operators, thereby distorting competition. It is therefore insufficient to achieve OFCOM’s regulatory aim, materially undermining its objectives.
2. **(Provisional Ground 2) Failure to adjust for differences in call revenues:** OFCOM may have erred in not adjusting for the apparent fact that BT benefits from higher call revenues that cannot be replicated by a competitor. Further or alternatively, OFCOM may have erred in not investigating this issue sufficiently and/or in failing to provide sufficient reasons for concluding that an adjustment was not appropriate.

Without prejudice to its general reservation of rights to amend its notice of appeal in the light of disclosure, TalkTalk contends that it is unable properly to assess whether OFCOM has erred in its treatment of call revenues in the absence of disclosure, including of: (i) a confidential version of the Decision that does not contain redactions; and (ii) the underlying material that OFCOM relied upon in deciding not to make an adjustment for BT’s higher call revenues. For that reason, TalkTalk also applies for disclosure into a confidentiality ring of certain of those materials.

TalkTalk contends that Ground 1 and (if pursued) Ground 2 are specified price control matters within the meaning of sections 193(1) and (10) of the Act and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 S.I. No. 2068 of 2004.

¹ A non-confidential version of the Decision is available on OFCOM’s website:
http://stakeholders.ofcom.org.uk/binaries/consultations/VULA-margin/statement/VULA_margin_final_statement.pdf

Accordingly, TalkTalk asks that the Tribunal:

1. establish a confidentiality ring which enables external legal and economic advisers to TalkTalk to have access to BT confidential information on appropriate terms;
2. direct that OFCOM provide copies to the confidentiality ring by not later than 7 days after the making of the order requiring such provision of documents (including where appropriate spreadsheets or other electronic documents);
3. refer the Ground(s) for determination by the CMA under section 193(1) of the Act;
4. determine the appeal in accordance with sections 193(6) and (7) and 195 of the Act, setting aside the Decision and requiring OFCOM to impose a new price control in accordance with the Tribunal's determination in this appeal;
5. award TalkTalk its costs of the appeal and reference to the CMA; and/or
6. 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. 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 22 May 2015