



## COMPETITION APPEAL TRIBUNAL

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

**CASE NO: 1238/3/3/15**

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 British Telecommunications Plc (“BT”) 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”)<sup>1</sup>. BT is represented by its in-house legal team, BT Legal, Governance and Compliance, BT Plc, BT Centre, 81 Newgate Street, London EC1A 7AJ (reference: George Ritchie/Karen Nightingale).

The Notice of Appeal states that, by the Decision, OFCOM purported to exercise its powers under section 87(9) and section 88(1)(a) of the Act by adding a further significant market power services condition, Fixed Access Market Review (“FAMR”) condition 14 (the “Condition”) to the conditions earlier imposed by OFCOM on BT, on 26 June 2014, following the FAMR 2014 Statement<sup>2</sup>. The Condition imposes a specific obligation on BT to maintain a minimum margin between “the price of the wholesale VULA input offered by BT’s access division (Openreach) and the price of those retail packages offered by BT’s retail divisions that use VULA as an input”: see § 1.1 and Schedule 1 of the Decision.

In simple terms, OFCOM (in substitution for the obligations in respect of Virtual Unbundled Local Access (“VULA”) pricing imposed by Condition 1 on 26 June 2014) imposes an obligation on BT to maintain a sufficient margin between its wholesale VULA price and its retail charges for superfast broadband, with the aim of promoting competition “by ensuring that there is no restriction or distortion of competition”: § 1.4 of the Decision.

BT appeals against the Decision on the basis that it is defective in four core respects:

1. The market analysis on which the reasoning of the Decision rests is manifestly inadequate and wrong in principle, rendering the Decision unlawful.
2. The design of the Condition is defective in applying a rigid monthly test, including in particular the recovery of fixed costs of sports content on a ‘bright-line’ basis.
3. Both the above defects reflect a serious failure to take “utmost account” of the views of the European Commission (the “Commission”), contrary to the obligations of the United Kingdom and OFCOM under Articles 7(7), 15(3) and 19(2) of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services.
4. Further, the amendments made in the Decision, constituting OFCOM’s response to the Commission’s specific request to revisit the design of the test, aggravated rather than mitigated the defects in OFCOM’s approach and rendered the application of the Condition wholly unpredictable in its intended operation, contrary to the general principles of EU law including legal certainty and transparency.

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<sup>1</sup> 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](http://stakeholders.ofcom.org.uk/binaries/consultations/VULA-margin/statement/VULA_margin_final_statement.pdf)

<sup>2</sup> A non-confidential version of the FAMR 2014 Statement is available at:  
<http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/specific-conditions-entitlement/market-power/fixed-access-market-reviews-2014/statement/>

According to BT, one consequence of the Decision is that OFCOM is undermining its own attempts to promote competition in relation to pay-TV by introducing a significant regulatory barrier to expansion by BT on the pay-TV markets dominated by Sky Plc at both the upstream (wholesale) and downstream (retail) level, by requiring BT to recover the balance of its fixed costs of sports rights acquisition on a 'bright-line' basis for each month of the period in which the rights are exercised. There is no basis in principle for such an obligation to be imposed on an undertaking that lacks market power on the relevant upstream or downstream market(s) in relation to pay-TV/sports rights. BT argues that an equally efficient/reasonably efficient operator competing with it on the retail broadband market, whether in dual or triple (or quad) play, has no need to incur BT's fixed sports rights acquisition costs and, even if it did choose to incur those costs, it would not need to recover those costs on a rigid monthly or 'bright-line' basis. This core complaint is of particular relevance to the design of the test.

In addition to the grounds of appeal falling within the jurisdiction of the Tribunal, BT's appeal involves specified price control matters within the meaning of section 193(10)(a) of the Act.

By way of relief, BT seeks:

1. a reference pursuant to section 193(1) of the Act of the specified price control matters to the Competition and Markets Authority ("CMA") for determination;
2. a decision of the Tribunal:
  - a) allowing BT's appeal on each of the grounds set out above; and
  - b) subject to section 193(7) of the act, determining the specified price control matters in accordance with the findings of the CMA
3. an order remitting the Decision to OFCOM with directions that OFCOM should amend the Condition and accompanying guidance to reflect the Tribunal's decision;
4. such further or other relief as may be required or appropriate; and
5. an award of BT's costs of the appeal and the reference to the CMA.

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

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