



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE: 1111/3/3/09

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 22 July 2009 under section 192 of the Communications Act 2003 (“the Act”) by The Carphone Warehouse Group plc (“the appellant”) against certain parts of the decision (“the LLU Decision”) made by the Office of Communications (“OFCOM”) contained in a document entitled “A new pricing framework for Openreach”. The LLU Decision was published on 22 May 2009.

Openreach, a division of British Telecommunications Group plc (“BT”), provides a number of wholesale telecommunications services that are required by TalkTalk Group Limited, a wholly owned subsidiary of the appellant. The LLU Decision sets out price controls imposed by OFCOM in respect of two main services provided by Openreach: metallic path facility (“MPF”) and shared metallic path facility (“SMPF”), together with various ancillary services¹.

In summary the principal grounds of appeal on which the appellant relies are that:

1. OFCOM’s (late) decision to set a price cap for MPF and SMPF without setting one for wholesale line rental (“WLR”) is unlawful since it is imperative that the price for MPF and WLR are set simultaneously and consistently with one another so as to avoid distortions of competition.
2. OFCOM erred in estimating BT’s efficient costs in 2012/13 for the services subject to a price control in the following principal respects:
 - (a) The level of efficiency improvement that OFCOM has assumed is not cogently justified. The available evidence overwhelmingly points to higher levels of efficiency improvement being achievable, for which OFCOM should have allowed.
 - (b) OFCOM’s calculation of the true cost of capital for local loop unbundling and WLR services is flawed and inappropriately high.
 - (c) OFCOM’s allocation of costs to WLR, MPF and SMPF (together, the Core Rental Services (“CRS”)) is insufficiently rigorous, leading to:
 - i. An overstatement of the costs properly to be allocated from BT to Openreach and CRS (and insufficient regard to costs to be allocated from Openreach to BT); and
 - ii. An insufficient and economically inefficient difference between the prices of MPF and WLR/SMPF.
 - (d) OFCOM erred in its approach to inflation in several respects resulting in excessively high estimates of costs.

¹ The two services are defined in detail in the “Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002” Statement, 22 September 2005, available at: http://www.ofcom.org.uk/consult/condocs/statement_tsr/statement.pdf

3. OFCOM's specification of the price caps for baskets of ancillary services is flawed:
 - (a) Setting equal price caps for each of the three separate baskets for ancillary services (MPF, SMPF, and co-mingling) has not been properly justified and, in the light of substantial deviations in the relationship between cost and price in relation to each basket, is not justifiable.
 - (b) OFCOM has failed to put in place sufficient or appropriate safeguards to prevent anti-competitive exploitation by BT of the (unjustified) pricing latitude within baskets given to BT.

4. As regards the path of prices over time:
 - (a) For MPF and SMPF:
 - i. There is no adequate justification, in the light of OFCOM's objectives, for departing from a smooth glidepath of equal percentage annual adjustments in real terms towards the final year target average charge.
 - ii. OFCOM's glidepath also appears to have been miscalculated on its own terms.
 - iii. In the event that the appellant is successful in relation to any of its challenges to the final year charge, the price in 2012/13 as well as the path of prices over the intervening years would necessarily fall to be reconsidered afresh by the Competition Commission ("CC"), and the intervening years should be set on the basis of equal percentage annual adjustments in real terms.
 - (b) There is no adequate justification for the one-off adjustments to prices adopted by OFCOM for certain ancillary services.

5. OFCOM's overall process of consultation was inadequate. In particular, notwithstanding the obligation on OFCOM to consult on the draft measure it actually intended to adopt, it instead consulted on a wide range of possible levels for a price control, which undermined the ability of consultees meaningfully to respond. It also made a number of further basic consultative errors – failing to put points on which it placed material reliance in its final decision to consultees.

The appellant identifies the grounds set out at paragraphs 2, 3 and 4 above as price control matters within the meaning of section 193 of the Act.

The appellant asks that the Tribunal:

1. set aside the LLU Decision in its entirety and remit the matter to OFCOM to carry out a proper consultation and take a decision which simultaneously embraces prices for both LLU services and WLR services ("Setting Aside and Remittal");
2. in the alternative, in the event that the Tribunal declines to grant such relief:
 - (a) refer the price control matters arising in this appeal for determination by the CC under section 193 of the Act; and
 - (b) determine the appeal in accordance with sections 193(6) and (7) and 195 of the Act, setting aside the LLU Decision and requiring OFCOM to impose a new price control on BT in respect of LLU services with effect from 22 May 2009 in accordance with the Tribunal's determination;
3. award the appellant its costs of the appeal and reference to the CC; and
4. grant any other relief as may be required.

Further the appellant asks that the Tribunal by way of directions:

1. expedite the appeal so as to minimise the period during which BT continues to set prices on the current erroneous basis;
2. establish a confidentiality ring including OFCOM, those members of the CC and its staff determining the reference under section 193 of the Act, and external legal and economic advisors to the appellant;
3. direct OFCOM to disclose to the confidentiality ring in full an unredacted version of the model it used to calculate its price controls and all supporting information relied upon by OFCOM in determining the price controls;
4. direct that the issue of Setting Aside and Remittal be heard and decided expeditiously before any reference of price control matters is made to the CC (which reference would be otiose in the event that the appellant were successful in obtaining Setting Aside and Remittal).

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
Registrar

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