COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE No 1259/3/3/16

Pursuant to rule 14(2) of the Competition Appeal Tribunal Rules 2015 (S.I. No. 1648 of 2015) ("the Rules"), the Registrar gives notice of the receipt of an appeal on 28 June 2016 under section 192(2) of the Communications Act 2003 ("the Act") by TalkTalk Telecom Group PLC ("the Appellant") of 11 Evesham Street, London W11 4AR against a determination made by the Office of Communications ("OFCOM") in its statement dated 28 April 2016 and entitled "Business Connectivity Market Review – Review of competition in the provision of leased lines" ("the Statement").[1] The Appellant is represented by Towerhouse LLP of 10 Fitzroy Square, London W1T 5HP (reference: Paul Brisby / Lucas Ford).

In its Business Connectivity Market Review OFCOM conducted a review of competition in the provision of leased lines to businesses in the UK. Leased lines are high-quality, dedicated, point-to-point data transmission services used by businesses and providers of communications services; they are of relevance to many business information and communication technology services and mobile and residential broadband services. The Statement sets out OFCOM's analysis of the relevant markets, identifies any provider with Significant Market Power ("SMP") and sets out remedies to address competition problems which might otherwise arise from such SMP.

In its Statement OFCOM defined a single product market for Contemporary Interface Symmetric Broadband Origination services (the "CISBO market") and three geographic markets for all CISBO services in the UK: the Central London Area, the London Periphery ("LP") and the Rest of the UK, excluding Hull ("RoUK"). OFCOM went on to find that British Telecommunications plc ("BT") has SMP in the CISBO market in the LP and the RoUK. As a result of these findings of SMP, OFCOM imposed a dark fibre access ("DFA") remedy on BT, which requires it to provide unlit strands of optical fibre to other communication providers ("CPs"); Ofcom also imposed a charge control in respect of DFA.

The Appellant is a provider of communications services to consumers and businesses in the UK. It intends to purchase DFA from BT. The appeal relates to one specific aspect of the Statement, namely the treatment of non-domestic rates ("NDRs") in the calculation of the DFA charge control. The rating authorities have decided that the person who lights the fibre is liable for the NDRs when they put the dark fibre to use. Accordingly, BT is responsible for paying these rates when it provides active services on a wholesale basis (such as 1Gbit/s Ethernet). However, if BT provides a passive service consisting solely of access to dark fibre, the purchaser of such access (who would light the fibre) would pay NDRs. Moreover, due to certain differences in the methodologies used by the Valuation Office Agency, NDRs payable by other CPs are higher than NDRs payable by BT.

OFCOM has decided to set the price for DFA by deducting from the price of BT's 1Gbit/s Ethernet products those costs which are not incurred by BT in providing equivalent DFA, being essentially the costs of active network elements and NDRs. However, Ofcom took the view that the difference between the NDRs payable by other CPs in relation to dark fibre circuits and the NDRs which BT attributes to those circuits could frustrate the effectiveness of the DFA remedy by preventing other CPs from competing for 1Gbit/s circuits even if they have lower costs. OFCOM has therefore recommended to government that the rule for liability for NDRs be changed so that it would be BT rather than the other CP that is liable to pay NDRs in respect of dark fibre circuits provided to other CPs. The government is under no obligation to adopt OFCOM's recommendation. In the event that the recommendation is not adopted, OFCOM's decision is that in deriving the prices for DFA, the NDR costs deducted from the reference active products should be based on an attribution of BT's rates costs to the fibre ("the NDR Decision").

[1] A non-confidential version of the Statement is available on OFCOM's website at: http://stakeholders.ofcom.org.uk/consultations/bcmr-2015/final-statement/.

The Appellant challenges the NDR Decision on the basis of that it is contrary to OFCOM's regulatory objectives because it will distort CP behaviour and competition, disincentivise investment and innovation and prevent the DFA remedy from achieving its aims. This is because the effect of the NDR Decision is that for a CP that is as efficient as BT in respect of the provision of active network elements, it would nonetheless be significantly more expensive for that CP to provide a 1Gbit/s service by purchasing DFA and self-providing the active network elements than it would be to purchase the relevant 1Gbit/s Ethernet service from BT. The Appellant contends that OFCOM erred by not setting a price for DFA by reference to an average of NDRs payable by CPs other than BT.

The Appellant seeks an Order that:

1. quashes the NDR decision; and

2. remits the matter to OFCOM with directions requiring that the active differential should be set by reference to an appropriate measure of access-seekers NDR costs and subject to such adjustments or limits OFCOM may consider appropriate on remittal in order to achieve efficient competition for 1Gbit/s circuits.

The Appellant notes that, in the event that the government decides to accept (and implement) Ofcom's recommendation as to reform of the rating rules prior to the DFA product coming on to the market on 1 October 2017, then the NDR Decision will not actually determine the DFA price. The Appellant states that it has brought this appeal on a protective basis only and that it would not be appropriate for the appeal to progress further at the present time given that there is a realistic prospect that the government will announce whether it will implement the proposed reform prior to the DFA product becoming available. The Appellant therefore requests that the Tribunal stay this appeal with immediate effect until 9 December 2016.

The Appellant also states that the appeal consists of a specified price control matter within the meaning of section 193 of the Act and rule 116 of the Rules and should, accordingly, be referred under section 193 of the Act for determination by the Competition and Markets Authority.

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) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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