



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1260/3/16

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 British Telecommunications plc (“BT”) of 81 Newgate Street, London, EC1A 7AJ 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 BT is represented by BT Legal at the above address (reference: Frederic Dupas / Sophie Thomson).

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 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 (“CLA”), the London Periphery (“LP”) and Rest of the UK, excluding Hull (“RoUK”). OFCOM went on to find that BT has SMP on 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 Leased Lines Charge Control (“LLCC”), i.e. a price cap.

BT challenges the Statement. In summary, the principal grounds of appeal on which BT relies are that:

1. OFCOM was wrong as a matter of fact and/or assessment to define a single CISBO market. Instead, OFCOM should have defined separate lower bandwidth (i.e. for services up to and including 1 Gbit/s) and very high bandwidth product markets (i.e. for services over 1 Gbit/s).
2. OFCOM erred as a matter of fact and/or assessment in its geographic market definition. OFCOM applied a ‘boundary test’ in defining the geographic markets. OFCOM erred in treating the satisfaction of the test as a necessary – not merely sufficient – condition for a finding of effective competition. BT also contends that OFCOM erred in several respects in its application of the boundary test. In particular, the test was subject to overly stringent conditions.
3. OFCOM erred in its assessment of the extent of the competitive core network. BT contends that there is a high risk that OFCOM has materially understated the extent of core conveyance exchanges and, therefore, retained unnecessary regulation for a number of competitive connections.
4. OFCOM erred in making its decision to impose the DFA remedy for the following reasons:
 - a. the remedy is flawed and disproportionate because it targets only the most competitive segment of the market;

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/>

- b. no account was taken of the impact of Directive 2014/61/EU (“the Civil Infrastructure Directive”) and, in particular, no consideration was given to the extent to which the claimed benefits of the DFA remedy would be achieved in any event following the implementation of the Civil Infrastructure Directive with effect from July 2016; and
- c. the cost-benefit analysis of the DFA remedy was flawed. In particular, OFCOM: (i) overstated the benefits of dark fibre; (ii) understated the risks of dark fibre; (iii) adopted an inconsistent approach to the timeframes for assessment of benefits and risks; (iv) failed to take into account the difficulty and costs of reversing the DFA remedy once implemented; and (v) failed to undertake a proper balancing exercise of the benefits and risks of the DFA remedy.

BT requests that the Tribunal:

1. quash the Statement insofar as it concerns the definition of the product market for CISBO services and remit the question of product market definition to OFCOM with instructions to correct any errors specifically identified by the Tribunal;
2. quash the Statement insofar as it concerns the definition of the geographic market for CISBO services and remit the question of geographic market definition to OFCOM with instructions to correct any errors specifically identified by the Tribunal;
3. set aside OFCOM’s decision to impose the DFA remedy and remit the issue of appropriate remedies for any identified SMP (assuming correctly defined markets) to OFCOM for reconsideration;
4. quash those paragraphs of the Statement that depend upon or relate to the product and/or geographic market definition and/or the decision to impose the DFA remedy
5. grant such further or other relief as the Tribunal may consider appropriate; and
6. order OFCOM to pay BT’s costs of the appeal.

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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