



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

Case No: 1299/1/3/18

Pursuant to rule 14 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 12 October 2018 under section 46 of the Competition Act 1998 ("the Act"), by Royal Mail plc ("Royal Mail") against a decision of the Office of Communications ("Ofcom") dated 14 August 2018 entitled *Discriminatory pricing in relation to the supply of bulk mail delivery services in the UK* ("the Decision"). Royal Mail is represented by Ashurst LLP of Broadwalk House, 5 Appold Street London EC2A 2HA (reference: Nigel Parr / Duncan Liddell / Steven Vaz / Christopher Eberhardt).

Royal Mail is a postal operator. In the UK it has been designated as the universal service provider by Ofcom, meaning that Royal Mail is subject to a number of obligations, including collecting and delivering letters six days per week at uniform prices across the UK. Ofcom has also imposed regulations on Royal Mail requiring it to provide downstream access (the delivery of certain types of letters on behalf of other postal operators on fair, reasonable and non-discriminatory terms).

The Decision finds that Royal Mail infringed section 18(2)(c) of the Act and Article 102(c) of the Treaty on the Functioning of the European Union ("TFEU") by issuing Contract Change Notices ("CCNs") on 10 January 2014 announcing that it intended to apply a price differential between different categories of downstream access customers effective from 31 March 2014. The Decision concludes that this infringement lasted until 21 February 2014, when the CCNs were suspended prior to their effective date. The Decision finds that this conduct was price discrimination which abused Royal Mail's dominant position in the market for bulk mail delivery services in the UK. The Decision imposes a fine of £50 million.

Royal Mail appeals the Decision and summarises its principal grounds of appeal as follows:

1. The Decision errs in law in finding that the announcement of future price changes constitutes the "application" of unlawful discriminatory pricing, even where those future prices are never charged or paid. The price differential was suspended by operation of existing contractual provisions before the date on which it was due to enter into effect, and was subsequently withdrawn;
2. The Decision incorrectly finds that transactions between all of Royal Mail's access customers are equivalent, despite recognising that the requirements of different categories of access customers are fundamentally different, and that those differences impose different costs on Royal Mail. Royal Mail is entitled to offer different access terms to different customers on the basis of differences in their requirements;
3. The Decision errs in finding that the price differential was likely to place end-to-end direct delivery competitors at a competitive disadvantage:
 - a) the Decision's conclusions on competitive disadvantage are based on a finding that the price differential would have reduced the profitability of end-to-end competitors, irrespective of whether such rivals were as efficient as Royal Mail. This is inconsistent with established legal precedent that conduct that results in a reduction in a competitor's profitability is insufficient to establish a competitive disadvantage within the meaning of Article 102(c);
 - b) the Decision errs in concluding that the price differential would have had a material impact on an end-to-end competitor or Whistl UK Limited ("Whistl");

- c) the Decision errs in concluding that it is not necessary, appropriate, or even relevant to conduct an "as-efficient competitor test", or any other form of price/cost test, to determine whether a reduction in profitability would, in fact, have resulted in a competitive disadvantage. This is inconsistent with established legal precedent which shows that a price/cost test is appropriate, and is certainly relevant, in respect of pricing practices which are alleged to be capable of foreclosing competition or weakening the competitive position of a dominant undertaking's competitors;
 - d) the Decision errs in failing to have regard to the "as-efficient competitor" analysis submitted by Royal Mail during Ofcom's administrative investigation, contrary to the judgment of the European Court of Justice in *Intel*. This analysis showed that the price differential was not capable of foreclosing an as-efficient competitor from the market for end-to-end delivery; and
 - e) the Decision errs in asserting that its conclusion that the price differential was likely to give rise to competitive disadvantage is "supported" by its finding that the announcement of the price differential was a material contributing factor (amongst other factors) in decisions by Whistl to suspend the planned increase in the roll out of its end-to-end delivery operations and Lloyds Development Capital ("LDC") to postpone its planned investment in Whistl. This finding is factually incorrect, as the Decision fails to consider the impact of other factors on Whistl's and LDC's decision-making. Moreover, the fact that the announcement of a price change may have consequences for third parties says nothing about whether that price change would have been lawful or unlawful if it had been implemented;
4. The Decision errs in finding that Royal Mail's conduct was not objectively justified under Article 102 and/or Article 106(2) by reference to the need to preserve the viability of the Universal Service under economically acceptable conditions;
 5. Ofcom has committed a fundamental procedural error by basing its findings of likely competitive disadvantage in the Decision on evidence and analysis that was not previously put to Royal Mail, or relied upon by Ofcom, and which Ofcom expressly confirmed it would not rely on;
 6. The Decision errs in imposing a fine on Royal Mail, in light of the novel and unforeseeable application of Article 102(c) to prices that were never charged or paid, and which economic analysis showed would be incapable of foreclosing an as-efficient competitor if they had been charged. Royal Mail did not intentionally or negligently infringe Article 102(c), and took all reasonable steps to ensure that its conduct complied with competition law; and
 7. In the alternative, the fine of £50 million is manifestly disproportionate and should be very significantly reduced. The novelty of the infringement, its short duration of only 6 weeks and the efforts Royal Mail made to comply with its legal and regulatory obligations have not properly been taken into account in the Decision.

As regards the relief sought, Royal Mail seeks:

- a) the annulment of the Decision (in whole or in part);
- b) the annulment of the fine or alternatively a reduction thereof; and
- c) an order that Ofcom pay Royal Mail's costs incurred with bringing 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 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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