



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE No 1330/3/3/19

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 August 2019 under section 192(2) of the Communications Act 2003 (“the 2003 Act”) by TalkTalk Telecom Group plc (“TalkTalk”) of 11 Evesham Street, London W11 4AR and Vodafone Limited of Vodafone House, The Connection, Newbury, Berkshire RG14 2FN (“Vodafone”) (together, “the Appellants”). The appeal is against three decisions (together, “the Decisions”) by the Office of Communications (“Ofcom”) set out in its statement dated 28 June 2019 and entitled “Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets” (“the June 2019 Statement”). The Appellants are represented by Towerhouse LLP of 10 Fitzroy Square, London W1T 5HP (reference: Paul Brisby).

The Decisions are contained in “Volume 2: market analysis, SMP findings, and remedies for the Business Connectivity Market Review (BCMR)” (“Vol.2”) and “Volume 3: Leased Line Charge Control (LLCC)” (“Vol.3”) of the June 2019 Statement. Those are the volumes setting out Ofcom’s conclusions and decisions from its review of competition in “business connectivity markets”, including specifically markets for the supply of point-to-point “leased lines” and ancillary services. A “leased line” is a permanently connected communications link between two sites which is dedicated to the customer’s exclusive use. Leased lines constitute vital infrastructure for a wide range of businesses which need to send data from, and/or receive data at, their physical sites. Leased lines are also used by electronic communications network operators for “backhaul”, i.e. linking their “core” network infrastructure to their network infrastructures at other locations.

The Decisions, taken by Ofcom under sections 45 and 87 of the 2003 Act, concern the degree of market power enjoyed by British Telecommunications plc’s corporate group (“BT”) in leased lines markets, and the specific regulatory conditions to which BT should be subject, in relation to those markets, during a 20-month period commencing on 1 August 2019 and ending on 31 March 2021 (“the Relevant Period”). The Decisions concern a particular category of point-to-point leased lines services, namely contemporary interface (“CI”) services. CI services are services based on one of two types of technologies: either Ethernet or WDM (wavelength division multiplex). These are technologies used to provide connectivity at bandwidths of typically between 100 Mbit/s and 400 Gbit/s (and can also provide much higher bandwidths). CI services are distinguished from ‘legacy’ Traditional Interface services, which typically provide connectivity at significantly lower bandwidths.

The Decisions are as follows:

1. Decision 1: The decision that BT does not have significant market power (“SMP”) in the market for “contemporary interface access” (“CI Access”) in the geographic area defined by Ofcom as the “Central London Area” (“CLA”).
2. Decision 2: The decision to set the charge control remedy applicable to BT’s supplies of CI leased line services in the geographic markets identified by Ofcom as “BT Only” and “BT + 1” markets, not as a cost-based price cap (such as a “CPI-X” cap), but rather as a “flat” (or “CPI-CPI”) price cap.
3. Decision 3: The decision not to impose any price cap remedy in respect of BT’s supplies of CI leased line services in the geographic markets (other than the CLA) which Ofcom identified as “high network reach” (“HNR”) markets, instead requiring that BT’s charges in those markets be “fair and reasonable”.

The Appellants are major wholesale buyers of CI services from BT, which they require for providing leased line services to their retail customers’ business sites. Vodafone also operates its own fibre network which it

uses to provide retail and wholesale leased line services. Vodafone is also a Mobile Network Operator and buys BT leased lines for mobile backhaul.

The Appellants challenge all three Decisions. In summary, the principal grounds on which they rely are that:

1. In relation to Decision 1:

- a. Ofcom adopted an erroneous approach, and/or its analysis by which it reached its SMP finding was legally inadequate. In particular:
 - i. Ofcom failed to pay proper regard to the presumption of dominance which applied in circumstances where BT's market share was in excess of 50%. Ofcom did not identify the existence of "exceptional circumstances" to justify failing to apply the presumption.
 - ii. Ofcom relied inappropriately on a "relative" approach, reasoning that BT did not have SMP in the CLA because network infrastructure was denser in the CLA than in the other geographic markets for CI Access. Ofcom thus failed properly to focus on the legally relevant question, which was whether the presumption was displaced by reason of persuasive evidence that BT would in fact be adequately constrained by competition over the Relevant Period.
- b. Ofcom failed to give adequate reasons for its SMP Finding. Its "relative" approach was not a legally sound or sufficient reason; and its reasoning was not sufficient to explain the basis on which the presumption of dominance was displaced.
- c. Further and in any event, the SMP Finding was wrong and/or not one that was properly open to Ofcom on the basis of the available evidence. On the basis of a proper and diligent consideration of the relevant market circumstances, the only correct conclusion was that BT had SMP in the CLA Market.

2. In relation to Decision 2:

- a. Ofcom's reasons for the Decision are legally inadequate (having regard, inter alia, to Ofcom's relevant statutory duties) and/or irrational. That is in particular because:
 - i. Ofcom's assessment that capping BT's prices at the current levels would, as compared with maintaining a cost-based approach, increase certainty and would, for that reason, be more conducive to network investment is misconceived and manifestly unsound; and/or
 - ii. Ofcom had no realistic basis for concluding that capping BT's prices at the current levels would, by allowing BT to charge higher prices than it would have been entitled to charge under the standard approach, materially increase the likelihood of network investments being made.
- b. The Decision was not taken consistently with Ofcom's relevant duties under the 2003 Act, in that Ofcom failed to assess whether such competition and/or customer benefits (if any) as were likely to arise from capping BT's prices at the current levels were likely to be sufficient, in aggregate, to outweigh the costs of that Decision.

3. In relation to Decision 3:

- a. Ofcom's decision that the appropriate price control remedy to impose in relation to the HNR markets was limited to the "fair and reasonable charges" requirement, and that no stronger remedy (such as, for example, a charge control) was appropriate, was vitiated by error, on each and all of the following grounds:
 - i. The decision was not based on any analysis of conditions of competition in those markets which was properly (having regard inter alia to Ofcom's statutory duties in sections 3 and 4 of the 2003 Act) capable of constituting the basis for it.
 - ii. Further or alternatively, the decision was inadequately reasoned.

The Appellants request that the Tribunal:

1. In relation to *Decision 1*:

- a. quash the June 2019 Statement insofar as it concerns the finding that BT does not have SMP in the CLA Market; and
 - b. remit to Ofcom -
 - i. the question of whether BT has SMP in the CLA Market; and
 - ii. if BT does have SMP in that market, the decision as to what regulatory conditions should be imposed on BT in relation to the CLA Market.
2. In relation to *Decision 2*:
- a. quash the June 2019 Statement insofar as it concerns Ofcom's decision to set the charge control remedy applicable to BT's supplies of CI leased line services in the geographic markets identified by Ofcom as "BT Only" and "BT + 1" markets as a "flat" (or "CPI-CPI") price cap; and
 - b. remit to Ofcom the decision as to the design of the price cap, with a specific direction to consider, in accordance with the Tribunal's judgment, the imposition of a cost-based price cap.
3. In relation to *Decision 3*:
- a. quash the June 2019 Statement insofar as it concerns Ofcom's decision not to impose a price cap remedy in respect of BT's supplies of CI services in the geographic markets which Ofcom identified as HNR markets; and
 - b. remit to Ofcom the decision as to the imposition of a price cap remedy in the HNR markets.

The Appellants consider that the issues raised by the appeal in relation to Decisions 2 and 3 are specified price control matters within the meaning of section 193 of the 2003 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.

The Tribunal is also asked to: (a) grant such further or other relief as it thinks just; and (b) order Ofcom to pay the Appellants' costs.

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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