



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1281/3/3/18

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 23 January 2018 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 decision made by the Office of Communications (“OFCOM”) in its statement dated 23 November 2017 and entitled “Temporary SMP conditions in relation to business connectivity services” (“the Statement”).¹ BT is represented by Openreach, Legal Risk and Equivalence, 123 Judd Street, London WC1H 9NP (reference: Cecile Plaidy / Sophie Bouckaert).

According to the Notice of Appeal, the Statement purported to impose a number of significant market power (“SMP”) conditions upon BT including: (i) a condition relating to the Quality of Service (“QOS”) which BT was to provide; and (ii) directions made under that QOS condition which included the Minimum Service Level obligations (“MSL obligations”) which BT should attain and Key Performance Indicators (“KPIs”) which BT must collate and publish. These are set out in Annex A1, the Legal instruments to the Statement. BT challenges Ofcom’s decision concerning the MSL obligations.

The QOS Obligations imposed in the Statement were similar to those imposed in Ofcom’s Business Connectivity Market Review published on 28 April 2016 (“the BCMR 2016”). In the BCMR 2016, Ofcom had imposed QOS Obligations on BT as a result of Ofcom’s ruling in April 2016 that: (i) there were various specific markets for contemporary interface symmetric broadband origination (“CISBO”); (ii) that, in certain of those CISBO markets, BT had SMP; and (iii) it was appropriate to impose various ex ante SMP obligations on BT in those markets, including MSL and KPI obligations.

BT appealed Ofcom’s determination of those specific CISBO markets (in the context of an appeal on Dark Fibre Access) to the Tribunal. On 26 July 2017, the Tribunal held in its Ruling ([2017] CAT 17)² that Ofcom had erred in a number of respects in defining the relevant CISBO markets. That initial ruling was supplemented on 10 November 2017 by a detailed Judgment ([2017] CAT 25)³. The Notice of Appeal states that the inevitable consequence of Ofcom’s CISBO market definitions being held to be wrong was that Ofcom’s SMP assessment for those markets was also necessarily wrong and, accordingly, all the SMP remedies were invalid. The Tribunal issued an Order to that effect drawn on 22 November 2017 (“the Order”)⁴.

The day after the Order was drawn, Ofcom sought to impose new QOS SMP obligations upon BT in the Statement. However, BT submits that it did so without any form of prior consultation. The need for consultation with interested parties is a core regulatory prerequisite of the European Common Regulatory Framework (“CRF”) and the Act. In the Statement, Ofcom sought to override this key regulatory prerequisite by claiming reliance on sections 48A(2), 49A(2), 80(1A) and 80A(2) of the Act (“the Cited Sections”). Essentially Ofcom claims it was acting in “exceptional circumstances” and because there was “an urgent need to act in order to safeguard competition and to protect the interests of consumers”.⁵

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

¹ A non-confidential version of the Statement is available on OFCOM’s website at: https://www.ofcom.org.uk/_data/assets/pdf_file/0019/108019/BCMR-Temporary-Conditions.pdf

² A non-confidential version of the Ruling is available on the Tribunal’s website: http://www.catribunal.org.uk/files/1260_BT_Ruling_26072017.pdf

³ A non-confidential version of the Judgment is available on the Tribunal’s website: http://www.catribunal.org.uk/files/1260_BT_Judgment_CAT_25B_101117.pdf

⁴ The Order is available on the Tribunal’s website: http://www.catribunal.org.uk/files/1260_BT_Order_201117.pdf

⁵ See para 1.6 of the Statement.

1. Contrary to the CRF and the Act, Ofcom wrongly, as an error of law or fact, imposed the QOS obligations, and in particular the MSL obligations, in the Statement without any form of prior consultation. Ofcom wrongly relied upon and improperly applied the Cited Sections in circumstances where they were not appropriate.
2. When imposing the MSL conditions in the Statement Ofcom failed, as an error of law or fact, to take into account, or make any proper assessment of, up-to-date information in respect of the MSL obligations and accordingly failed properly to assess whether the statutory criteria for imposing the QOS obligations was met. In particular Ofcom was fully aware throughout 2017 that BT had more up-to-date information and had significant concerns that certain of the MSL obligations were impossible to achieve. However, Ofcom failed to obtain or consider any such clearly relevant information.
3. Having encouraged BT throughout 2017 to be proactive in its discussions with Ofcom, and having specifically represented to BT that it would consider BT representation and more up-to-date information in October or November 2017, Ofcom created a legitimate expectation that it would consult with BT in November 2017 and would not take any further regulatory action until Ofcom had met BT and considered the information BT provided. As an error of law or fact, Ofcom breached that legitimate expectation by failing to consult BT before Ofcom, without any effective warning, imposed the QOS obligations, and in particular the MSL obligations, in the Statement.

BT seeks an Order quashing section 6 of the Statement and:

- (a) Condition 7 in Annex 1 to the Statement; and or
- (b) Schedule 2 to Annex 1 to the Statement.

BT further seeks an Order from the Tribunal remitting the QOS SMP remedies and/or the MSL obligations contained in section 6 of the Statement to Ofcom and for Ofcom to carry out a proper consultation and to reconsider its decision in respect of those matters in light of the responses to such consultation.

BT states that, since December 2017 it has been engaged in discussions with Ofcom as to the concerns BT has over the MSL and KPI obligations imposed by the Statement. To that end BT has supplied Ofcom with the material which BT says Ofcom should have considered before imposing the QOS obligations in the Statement. Because of the Tribunal's strict time-limits on appeal BT has lodged its Notice of Appeal. However, BT has sought a stay of its appeal while Ofcom considers its representations.

On 7 February 2018 the President made an order staying the appeal for a period of six weeks until 21 March 2018.

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 lifting of the stay in these proceedings.

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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