



## COMPETITION APPEAL TRIBUNAL

### NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

#### CASE 1172/3/3/10 (Ethernet Extension Services)

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 15 November 2010 under section 192 of the Communications Act 2003 (“the Act”) by British Telecommunications Plc (“BT”) of 81 Newgate Street, London, EC1A 7AJ against a decision (“the Decision”) made by the Office of Communications (“OFCOM”) under section 186 of the Act that it was appropriate for OFCOM to handle alleged disputes between BT and each of British Sky Broadcasting Limited (“Sky”), Talk Talk Telecom Group Plc (“Talk Talk”) and Virgin Media Limited (“Virgin”). BT is represented by CMS Cameron McKenna LLP, Mitre House, 160 Aldersgate Street, London EC1A 4DD (reference: Chris Watson / John Markham).

The alleged disputes concern claims for reimbursement of alleged overpayments relating to historic charges which BT had raised for backhaul extension services (“BES”) and wholesale extension services (“WES”) in connection with provision of Ethernet facilities (“the alleged overcharge claims”).

The Notice of Appeal states that all parties and OFCOM were aware there are a number of similarities with a pending appeal before the Tribunal relating to a separate determination concerning Partial Private Circuits (“PPC Appeal”) (Case No. 1146/3/3/09), although BT maintains that there are a number of important distinctions between the PPC products and the relevant Ethernet services.

In summary, BT contends that OFCOM should have found that there will remain considerable scope for commercial relations in relation to the alleged overcharge claims after the Tribunal has given judgment in the PPC Appeal, and that no dispute therefore arose within the meaning of the Act, and/or that there were alternative and more suitable means for resolving the dispute, namely by further negotiations. BT advances four grounds of appeal against the Decision:-

- (a) OFCOM erred in concluding that there was a dispute for the purposes of sections 185 to 191 of the Act. OFCOM should have considered that there was no “dispute” within the meaning of sections 185 to 191 of the Act and/or that it was not obliged to intervene. OFCOM ought to have found it was appropriate to judge whether the negotiations had completely failed at the time that OFCOM was deciding whether or not there was a dispute. It should have held at that stage that there remained considerable scope for resolution of the issues in relation to the overpayment claims between BT and Sky, Talk Talk and Virgin and/or that negotiations had not been exhausted, on the basis that the parties to the negotiations will be able to resume those negotiations following the PPC Appeal. Further, or alternatively, OFCOM erred in failing to take the fact of the PPC Appeal sufficiently into account in reaching its conclusion that there was a dispute.
- (b) OFCOM erred in holding that OFCOM was obliged to handle the “disputes” in relation to the overpayment claims. OFCOM ought to have considered instead that there were alternative means for resolving the dispute in the shape of further negotiations following the outcome of the PPC Appeal; and ought therefore to have decided, pursuant to sections 186(2) and (3) of the Act, that it was not appropriate for it to handle the dispute.

- (c) OFCOM erred in holding that OFCOM was obliged to handle the “disputes” in relation to the overpayment claims. OFCOM ought to have considered instead that there were alternative means for resolving the dispute in the form of an investigation into alleged past non-compliance with a regulatory condition conducted under the enforcement provisions contained in sections 94 to 103 of the Act, together with civil proceedings brought in accordance with section 104 of the Act. OFCOM ought therefore to have decided, pursuant to sections 186(2) and (3) of the Act, that it was not appropriate for it to handle the dispute.
- (d) OFCOM erred in deciding, notwithstanding there are “exceptional circumstances” in the present case within the meaning of the phrase used in section 188(5) of the Act, entitling OFCOM to defer their determination of the “dispute” beyond the four month period referred to in that subsection, that OFCOM should still progress some aspects of the dispute resolution process.

BT seeks an order under section 195 of the Act from the Tribunal as follows:

- (a) Setting aside the Decision; and/or
- (b) Declaring that there was no “dispute” within the meaning of sections 185 to 191 of the Act or that it was not appropriate for OFCOM to handle any dispute and/or that OFCOM ought not to have concluded that it should seek to progress the dispute resolution proceedings before the Tribunal’s judgment in the PPC Appeal; and/or
- (c) Referring the matter back to OFCOM with directions to reconsider the questions of whether it was appropriate for it to handle the “disputes” and/or whether it should not seek to progress the dispute resolution proceedings before the Tribunal’s judgment in the PPC Appeal; and/or
- (d) Ordering OFCOM to stay the dispute resolution proceedings until it has been able to consider the Tribunal’s judgment in the PPC Appeal and decide how to appeal.
- (e) Ordering OFCOM to pay BT’s costs.
- (f) Ordering such further or other relief as the Tribunal may consider appropriate.

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 by 5pm on 13 December 2010.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://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). Please quote the case number mentioned above in all communications.

*Charles Dhanowa OBE*  
Registrar

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