



## COMPETITION APPEAL TRIBUNAL

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

#### CASE NO 1212/3/3/13

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 28 May 2013 under section 192 of the Communications Act 2003 (“the Act”) by Colt Technology Services (“Colt”) against a decision made by the Office of Communications (“Ofcom”) in its statement dated 28 March 2013 and entitled “Business Connectivity Market Review – Review of retail leased lines, wholesale symmetric broadband origination and wholesale trunk segments” (“the Decision”).<sup>1</sup> Colt is represented by Baker & McKenzie LLP, 100 New Bridge Street, London, EC4V 6JA (reference: Richard Pike / Martin Montague).

The Decision found that British Telecommunications plc (“BT”) has significant market power (“SMP”) in various business connectivity markets. As a result of this SMP, Ofcom imposed remedies on BT, which included a charge control but no “passive remedies”. The Appellant’s appeal is concerned with Ofcom’s decision not to impose passive remedies.

Broadly, the Appellant considers that Ofcom has erred in not requiring BT to give other communications providers (“CPs”) access to its ducts and/or dark fibre<sup>2</sup> for the purpose of their provision of business connectivity services. The Appellant contends that this has the effect of requiring more extensive price controls in future periods than would otherwise be necessary by rejecting an important opportunity for enhanced competition that could have been provided through passive remedies. The Appellant submits that this is detrimental to the interests of consumers, who could benefit substantially from the innovation, enhanced services and costs savings made by passive remedies.

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

1. Ofcom was wrong to view passive and active remedies as necessarily alternatives and to reject passive remedies as a result. There is nothing in economic theory, law or practical experience to suggest that they cannot co-exist, indefinitely if necessary. The particular practical issues identified by Ofcom are of no real significance.
2. Ofcom erred as a matter of law and/or assessment in not proceeding from the starting point that it should regulate as far upstream as possible. Economic theory strongly favours regulating as far as possible up the value chain because it will increase competition and innovation. This is also reflected in the relevant legislation and in Ofcom’s previous statements.
3. Ofcom was wrong as a matter of assessment to believe that active remedies are likely to promote innovation and competition at least as effectively as passive remedies. Consistent with what would be expected on the basis of economic theory, there is evidence to show that there are substantial benefits that can only be achieved with passive remedies and not active remedies. The concerns raised by Ofcom as to possible adverse consequences of passive remedies are without justification.
4. Ofcom is wrong as a matter of fact and/or assessment to reject passive remedies on the basis of a supposed lack of demand for them. Ofcom was wrong as a matter of fact to say that there was no evidence of demand as there was and is plenty of evidence of demand but, in any event, it was

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<sup>1</sup> A non-confidential version of the Statement is available on Ofcom’s website at:

<http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/>

<sup>2</sup> Ducts are the underground casings through which fibre optic cables can be run. Dark fibre is optical fibre that is currently in place but is not being used.

wrong of OFCOM to insist on evidence of demand as a condition precedent to the imposition of passive remedies.

The Appellant requests that the Tribunal:

1. determine the appeal in accordance with section 195 of the Act, setting aside the Decision and requiring:
  - a. OFCOM to impose an obligation or obligations on BT to provide other CPs with access to its ducts and dark fibre *inter alia* for the purpose of providing business connectivity services:
    - i. at cost-oriented prices; and/or
    - ii. on fair and reasonable terms including charges; or alternatively
  - b. OFCOM to reconsider and/or re-consult on its decision on passive remedies in accordance with such directions as the Tribunal considers appropriate;
2. order OFCOM to pay its costs of the appeal; and
3. grant any other relief as may be required.

Further, the Appellant asks that the Tribunal by way of directions:

1. establish a confidentiality ring to include external legal and economic advisers to the Appellant;
2. direct OFCOM to disclose to the confidentiality ring in full an unredacted version of the Decision and all supporting information relied upon by OFCOM in reaching its decision on passive remedies including unredacted versions of consultation responses.

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](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, QC (Hon)*  
Registrar

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