



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

Case No: 1426/3/21

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 29 November 2021 under section 192 of the Communications Act 2003 (“the Act”), by CityFibre Limited (“CityFibre”) against a decision contained in a statement made by the Office of Communications (“Ofcom”) dated 30 September 2021 entitled *Openreach Proposed FTTP Offer starting 1 October 2021* (“the Statement”). CityFibre is represented by Bristows LLP of 100 Victoria Embankment, London EC4Y 0DH (reference: Stephen Smith).

CityFibre is an alternative network provider (“altnet”) in the UK of wholesale full-fibre network infrastructure. It does not retail direct to consumers but wholesales fibre services to internet service providers (“ISPs”), which retail them to consumers.

According to CityFibre’s Notice of Appeal (“NoA”), the UK is currently engaged in a major upgrade of its telecommunications infrastructure and Government and Ofcom both recognise that competition at the network level is the most effective way of delivering connectivity fast. Openreach is the incumbent provider of wholesale network access and CityFibre’s ability to build Fibre to the Premises (“FTTP”) services at scale depends on attracting significant volumes from large retail ISPs who have historically relied on Openreach.

The NoA states that, pursuant to Ofcom’s *Wholesale Fixed Telecoms Market Review* statement published on 18 March 2021 (“the WFTMR”), Openreach is required to give Ofcom 90 days’ notice of new commercial offers it intends to make where the price or other contractual condition is conditional on the volume and/or range of services purchased. Pursuant to paragraph 7.154 in volume 3 of the WFTMR, which sets out Ofcom’s proposed analytical framework for considering commercial terms, Ofcom’s starting point is that the creation of any barrier to using altnets would only be justified where (i) the impact on nascent network competitors is unlikely to be material, and (ii) the arrangements will generate clear and demonstrable benefits.

According to the NoA, on 1 July 2021, Openreach notified Ofcom of new proposed pricing arrangements for its FTTP services (“the Equinox Offer”) which offers discounts on Openreach FTTP rental and connection products to ISPs if they achieve specified targets for the proportion of new Openreach orders that are for FTTP rather than legacy products (“the Order Mix Targets” or “OMTs”).

The NoA further states that, on 2 July 2021, Ofcom published a Call for Inputs inviting stakeholders to raise any initial concerns about the Equinox Offer. On 6 August 2021, Ofcom published its consultation document (“the ConDoc”) setting out its provisional view that it should not take any action in respect of the Equinox Offer. On 30 September 2021, Ofcom published the Statement. The Statement explained that Ofcom’s analysis of the Equinox Offer followed the framework established in the WFTMR by considering up to three questions:

- a) Question 1: Do the terms of the Equinox Offer potentially create a barrier to using altnets?
- b) Question 2: If the answer to Question 1 is ‘yes’, are the terms of the Equinox Offer likely to have a material impact on nascent network competitors?
- c) Question 3: Are the terms of the Equinox Offer likely to generate clear and demonstrable benefits?

According to the NoA, Ofcom accepted in the Statement that the OMTs would, in the short term, impact on some ISPs' incentives to use altnets in areas where the altnets' FTTP footprint overlaps with Openreach's footprint. Nonetheless, Ofcom concluded that the OMTs do not create a potential barrier to using altnets. Thus, Ofcom went no further than Question 1 in its analysis to conclude that the Equinox Offer did not raise competition concerns requiring *ex ante* intervention.

The NoA contends that Ofcom's reasoning in support of its conclusion on Question 1, which are summarised at paragraph 3.78 of the Statement, include the conclusions that:

- a) in the next 12-24 months, the overlap of altnets within the Openreach FTTP footprint is likely to be limited ("the Overlap Conclusion"); and
- b) placing FTTP orders with an altnet while continuing to purchase legacy products from Openreach will have an immaterial impact on an ISP's mix of Openreach orders ("the Immaterial Impact Conclusion").

The Equinox Offer came into effect on 1 October 2021, and CityFibre appeals Ofcom's decision contained in the Statement, by which Ofcom declined to exercise its power to direct Openreach to withdraw its commercial terms for the provision of network access.

In summary, CityFibre's grounds of appeal are as follows:

1. Ground 1(a): Ofcom's Overlap Conclusion had no sound evidential foundation and was not a conclusion Ofcom could reasonably draw from the evidence.
2. Ground 1(b): Further or alternatively, Ofcom's Overlap Conclusion was never put to stakeholders in the ConDoc, in breach of Ofcom's duties of fair consultation and reasonable enquiry.
3. Ground 2: Ofcom's Overlap Conclusion does not in any event rationally support the conclusion that OMTs create no potential barrier to using altnets.

As regards the relief sought, CityFibre seeks:

- a) An order quashing Ofcom's conclusion on Question 1;
- b) An order directing Ofcom to conduct an analysis of the Equinox Offer under Questions 2 and 3 in accordance with the analytical framework at WFTMR vol 3, paragraph 7.154;
- c) Such relief as the Tribunal considers appropriate in order to give effect to its judgment; and
- d) Costs.

In addition, CityFibre invites the Tribunal to use its case management powers to ensure that its appeal is conducted with appropriate expedition.

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, Salisbury Square House, 8 Salisbury Square, London, EC4Y 8AP, 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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