



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO.: 1205/3/3/13

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 20 February 2013 under section 192 of the Communications Act 2003 (the “Act”) by British Telecommunications plc (“BT”) of 81 Newgate Street, London EC1A 7AJ against the determinations by the Office of Communications (“OFCOM”) contained in a document dated 20 December 2012 and entitled “Disputes between each of Sky, TalkTalk, Virgin Media, Cable & Wireless and Verizon and BT regarding BT’s charges for Ethernet services: Determinations and Explanatory Statement” (the “Decision”)¹. BT is represented by Bird & Bird LLP, 15 Fetter Lane, London EC4A 1JP (reference: Jeremy Sharman).

BT appeals against the Decision, in which OFCOM determined five disputes involving BT and, respectively, TalkTalk Telecom Group plc, British Sky Broadcasting Limited, Virgin Media Limited, Cable & Wireless Worldwide plc and Verizon UK Limited (together, the “Disputing Communications Providers”). The disputes concerned BT’s historic charges for certain wholesale Ethernet services. OFCOM summarised its conclusions in the Decision as follows:

“15.153.1 BT has overcharged for a number of the services which are the subject of these Disputes;

15.153.2 BT has overcharged the Disputing [Communications Providers] a total of £94.8 million during the Relevant Period; and

15.153.3 BT should refund the Disputing [Communications Providers] the amounts overpaid ...”

BT’s notice of appeal states that it challenges each of the above findings both as a matter of fact and of law, and also challenges the directions for repayment as a matter of the exercise of OFCOM’s discretion.

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

1. in relation to OFCOM’s appraisal of BT’s compliance with the significant marker power condition, Condition HH3.1, imposed on it:
 - a. OFCOM misconstrued Condition HH3.1;
 - b. without prejudice to the generality of the first ground of appeal, there are strong economic and factual considerations that reinforce BT’s challenge to the approach adopted by OFCOM in section 8 of the Decision as to its treatment of connections and rentals;
 - c. OFCOM has acted unlawfully in adopting an approach to assessing compliance in the Decision on a basis which had not been specified or made clear to BT before BT came to set the prices in question and/or in adopting a mechanistic approach when assessing compliance with cost orientation;
 - d. OFCOM has not made adjustments to BT’s distributed stand alone costs as stated in its regulatory financial statements, which it plainly ought to have made;
2. in relation to OFCOM’s directions for repayment:

¹ A non-confidential version of the Decision is available on OFCOM’s website at: http://stakeholders.ofcom.org.uk/binaries/consultations/ethernet-services/annexes/Ethernet_FD.pdf

- a. OFCOM has no power to impose a specific obligation on BT requiring repayment of charges that were paid without dispute; and
- b. OFCOM misdirected itself as to the correct approach to the exercise of its discretion under section 190(2)(d) of the Act.

BT submits that the appropriate relief would depend on which (if any) of its grounds of appeal are accepted by the Tribunal such that, in the event that:

1. its first ground of appeal succeeds, the appropriate course would be for the Tribunal to direct OFCOM to recalculate the level of any overcharge in compliance with guidance from the Tribunal as to the proper approach to the aggregation of costs and revenues;
2. its second ground of appeal succeeds, the matter should be resolved in accordance with the approach set out in an expert report lodged by BT with its notice of appeal;
3. either its third or fourth ground of appeal succeeds, the appropriate course would be for the Tribunal to direct OFCOM to recalculate the overcharges in accordance with appropriate guidance from the Tribunal;
4. its fifth ground of appeal succeeds, OFCOM's directions for repayment of the overcharges are unlawful and the relevant parts of the Decision, in particular in Section 15 (Repayments), should be revoked and replaced to reflect the Tribunal's guidance as to the scope of OFCOM's powers under the EU's common regulatory framework for electronic communications and the Act; and
5. its sixth ground of appeal succeeds, OFCOM must be directed to reconsider the issue of repayment in accordance with the Tribunal's guidance as to the factors relevant to the exercise of OFCOM's discretion.

BT additionally seeks to reserve the right to make further submissions as to the appropriate directions to OFCOM in light of the Tribunal's judgment on this appeal and to make an application for its 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 fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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