



Neutral citation [2013] CAT 1

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: [unallocated]

21 January 2013

Before:

THE HONOURABLE MR JUSTICE BARLING
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Potential Appellant

- and -

OFFICE OF COMMUNICATIONS

Potential Respondent

RULING (EXTENSION OF TIME)

1. British Telecommunications plc (“BT”) has applied for an extension of time to lodge an appeal against determinations by the Office of Communications (“Ofcom”) of certain disputes between BT and other communications providers (“the Disputing CPs”) concerning BT’s charges for Ethernet services (“the Ethernet Determinations”). The Ethernet Determinations were published on 21 December 2012. BT’s application was made on 9 January 2013.
2. By virtue of rule 8(1) of the Competition Appeal Tribunal Rules 2003 (S.I. 2003, No. 1372) (“the Rules”) an appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date on which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier.
3. Rule 8(2) of the Rules provides that the Tribunal may not extend that time limit “unless it is satisfied that the circumstances are exceptional”.
4. Respect for the time limit for commencing proceedings has been described by the Tribunal previously as “the keystone of the whole procedure” (*Hasbro UK Limited v Director General of Fair Trading* [2003] CAT 1, at page 5).
5. BT calculates that without an extension a notice of appeal must be lodged by 5pm on 21 February 2013.

BT’s application

6. BT’s application seeks an extension of time in two alternative ways. First an extension of indefinite length is sought until a date two months after the date on which Ofcom publishes its determinations of separate disputes regarding BT’s charges for partial private circuits (“the PPC Determinations”). Ofcom has indicated to BT that it is unlikely to publish its PPC Determinations before the first week of February 2013. BT submits that the interrelationship between the Ethernet Determinations and the PPC Determinations, together with the particular circumstances of these investigations and their practical implications for BT, constitute exceptional circumstances justifying an extension of time so as to bring the deadlines for lodging appeals against the two sets of determinations into alignment. In the alternative, BT seeks an extension of two

weeks until 7 March 2013 to file its appeal against the Ethernet Determinations to reflect the circumstances outlined in its application.

7. As far as the interrelationship between the Ethernet Determinations and the PPC Determinations is concerned, BT makes the following submissions:

- (1) First, although there are a number of differences between the factual and legal issues relating to the PPC and Ethernet markets (and the sums involved in the PPC disputes are very much smaller), there are nevertheless overlapping legal and factual issues. BT notes that one of the factors taken into account by Ofcom when considering whether cost methodology adjustments are appropriate in the Ethernet Determinations is the possible effect on approaches to cost accounting previously taken in other markets, including the PPC market.
- (2) Second, BT will need to consider and respond to the legal and factual implications of the Court of Appeal's judgment in *BT v Ofcom (Partial Private Circuits)* [2012] EWCA Civ 1051 ("the PPC Judgment") in both cases, including the Court of Appeal's finding that Ofcom has a public law discretion governed by EU law.
- (3) Third, the interrelationship between the Ethernet Determinations and the PPC Determinations is analogous to the situation considered by the Tribunal in *British Sky Broadcasting Group plc v. (1) Competition Commission (2) Secretary of State* [2008] CAT 1 ("*BSkyB*"). As a matter of fairness, BT should be aware of Ofcom's full factual and legal case in relation to both determinations, and have adequate time to consider the points made against it before submitting either notice of appeal.

8. Turning to the particular circumstances of Ofcom's investigations and their practical implications for BT, BT submits as follows:

- (1) This is a "highly complicated and unique case", due to the length of the Ethernet Determinations, the size of the sums which BT has been ordered to pay to the Disputing CPs, the time expended by Ofcom in dealing with the disputes, the complexity of the accounting and economic issues relating to the prices charged, the fact that the events all relate to the past and not to the terms of current or future service provision, and the need to consider the full legal and factual implications of the judgments in the PPC Judgment. Further, the Ethernet Determinations raise a number of important points of principle concerning the proper interpretation of both the Communications Act 2003 and the EU Directives on which that Act is based, which have very broad and significant implications for BT and for the UK telecommunications sector as a whole.
- (2) The Ethernet Determinations were issued over two years and three months after the opening of the first of the relevant disputes, Ofcom having extended the usual four month time period for resolving the disputes in light of appeals against an earlier determination of disputes relating to the PPC market (which ultimately led to the PPC Judgment). BT submits that, against this background, a short extension for lodging a notice of appeal will not lead to unnecessary delay in hearing BT's appeal, or cause Ofcom or any of the Disputing CPs any prejudice (BT having already credited the Disputing CPs the sums of money due in accordance with the Ethernet Determinations).
- (3) Ofcom's publication of the Ethernet Determinations on 21 December 2012 caused practical difficulties for BT, as a number of BT's key internal employees, external experts and counsel were unavailable on various dates of the Christmas period. Such difficulties could have been avoided had the Ethernet Determinations and PPC Determinations been published together. BT's resources should not be placed under undue pressure, and there could be procedural efficiencies in dealing with the two cases in parallel.

Tribunal's conclusions

9. In my view the factors relied upon by BT, whether individually or in combination, do not amount to exceptional circumstances for the purposes of rule 8(2) of the Rules, so as to justify an extension of the deadline by which BT should lodge an appeal in relation to the Ethernet Determinations.
10. As regards the interrelationship between the Ethernet Determinations and the PPC Determinations, this does not constitute an exceptional circumstance:
 - (1) There have been and, no doubt, will be similar interrelationships between Ofcom's decisions (and subsequent appeals), whether as a result of common principles applied by Ofcom or common issues of law and fact, accountancy and economics. The interrelationship between decisions might potentially be relevant to the question of whether appeals against those decisions should be managed and heard together or consolidated, or whether the parties should be allowed to amend their pleadings in light of matters arising from a later decision. Nor would I wish to exclude the possibility that the interrelationship between two separate decisions could be of such a nature as to amount to an exceptional circumstance, giving rise to the Tribunal's discretion to extend time in order to achieve alignment of the time limits for the respective appeals. However, I am not satisfied that the interrelationship here constitutes an exceptional circumstance.
 - (2) The fact that BT will need to respond to the implications of a particular Court of Appeal judgment when it appeals each set of determinations is similarly not an exceptional circumstance, but rather is a common feature of civil litigation and one that impacts equally on other parties.
 - (3) BT's analogy with *BSkyB* is misplaced, given that the relevant decisions being considered in that case were effectively two stages of a single decision-making procedure such that there was a "structural connection" between them (paragraph 31). There is no such connection between the determinations at issue here, which arise from separate disputes and where, as BT acknowledges in its application, "there are a number of

differences between the factual and legal issues relating to the PPCs and Ethernet markets”. Nor, as suggested by BT, does the principle of fairness require that BT be made aware of Ofcom’s factual and legal case in relation to both determinations before it can commence proceedings in relation to the first; to do so would risk undermining the main purpose of deadlines for commencing proceedings, which is to afford regulator and regulated entities alike with certainty about the status of decisions.

11. Nor do the other factors cited by BT demonstrate exceptional circumstances:
 - (1) The decisions that are subject to appeals before the Tribunal are frequently detailed and complex, are often preceded by a lengthy period of investigation, and often raise issues relating to the proper interpretation of UK and EU legislation, and relevant jurisprudence. As such, the Ethernet Determinations are not exceptional, nor are the particular challenges faced by BT in preparing its appeal. Further, the PPC Judgment was published on 27 July 2012, such that BT has had time to consider its legal and factual implications.
 - (2) Similarly, the fact that Ofcom exceeded the stipulated four month period for determining the disputes, having suspended its investigation pending the appeal of an earlier PPC determination, is not of itself an exceptional circumstance. Nor is the intervention of the Christmas holiday period (see, for example, *BSkyB* at paragraph 30).
12. In light of these considerations, BT’s application for an extension of time (including its application in the alternative) must be rejected. This ruling is obviously without prejudice to any case management directions which the Tribunal might ultimately make to secure the just, efficient and economical conduct of any appeals ultimately filed by BT in relation to the Ethernet Determinations and/or the PPC Determinations.

The Honourable Mr Justice Barling

Charles Dhanowa O.B.E., Q.C. (Hon)
Registrar

Date: 21 January 2013