



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO.: 1206/3/13

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 19 February 2013 under section 192 of the Communications Act 2003 (the “Act”) by (1) Cable & Wireless Worldwide plc (“CWW”), (2) Virgin Media Limited (“Virgin”) and (3) Verizon UK Limited (“Verizon”, together with CWW and Virgin, the “Appellants”) against the determinations by the Office of Communications (“OFCOM”) contained in a statement 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 “Final Determinations”).¹ The Appellants are represented by Olswang LLP, 90 High Holborn, London WC1V 6XX (reference: Rob Bratby and Oliver Gayner).

In the Final Determinations, OFCOM determined certain disputes brought by the Appellants and also by each of TalkTalk Telecom Group plc and British Sky Broadcasting Limited (collectively, the “Disputing Communications Providers”) against British Telecommunications plc (“BT”). Each of the Disputing Communications Providers contended that BT had overcharged it for various wholesale Ethernet services in breach of a significant market power condition (Condition HH3.1) imposed on BT by OFCOM. OFCOM determined that BT had overcharged the Disputing Communications Providers for a number of wholesale Ethernet services and required BT to make repayments to the Disputing Communications Providers in the full amounts of the overcharges found by OFCOM.

OFCOM also determined, however, that BT should not be liable to pay interest on any of the repayments it was required to make to the Disputing Communications Providers. This was because of a term in each of the relevant contracts between BT and the Disputing Communications Providers (“Clause 12.3”), which excluded the payment of interest on any repayments due to either party as a result of recalculation or adjustment of a charge with retrospective effect under a direction (or other requirement) of OFCOM. OFCOM concluded that the Disputing Communications Providers had not provided strong and compelling evidence that Clause 12.3 is not fair and reasonable, such that OFCOM should intervene in light of its regulatory objectives to set the clause aside. In particular, OFCOM stated that it did not have sufficient evidence before it to decide whether it should award interest, which would involve setting aside Clause 12.3. The Appellants appeal against this decision by OFCOM.

In summary, the principal grounds of appeal on which the Appellants rely are that OFCOM:

1. erred in law and/or in the exercise of its discretion in failing to award interest;
2. erred in law in failing to resolve the disputes as they related to interest;
3. erred in law in directing itself that the Disputing Communications Providers were required to provide “strong and compelling evidence”, in the absence of which it would decline to find in their favour;
4. erred in fact and/or in law in holding that the Disputing Communications Providers had not provided it with sufficient evidence that Clause 12.3 is not fair and reasonable;

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

5. erred in law in directing itself to consider the question of whether Clause 12.3 is “fair and reasonable”, rather than whether the application of Clause 12.3 in this case would be “fair and reasonable”;
6. erred in law in deciding the interest issue against the Appellants (alternatively, in deciding not to decide the issue) without first affording the Appellants any opportunity to provide further information on the issue; and
7. adopted an approach to resolving the disputes that was procedurally unfair and, therefore, unlawful.

Accordingly, the Appellants ask that the Tribunal:

1. determine, pursuant to section 195(3) of the Act, what is the appropriate action for OFCOM to take in relation to the subject-matter of the Final Determinations;
2. (in the event that it upholds the appeal on any of the grounds mentioned above) decide that the appropriate action for OFCOM to take is to award the Appellants interest, based on BT’s weighted average cost of capital, and to make a direction that OFCOM resolve the disputes accordingly; and
3. remit the Final Determinations to OFCOM with such directions as the Tribunal considers appropriate for giving effect to its decision.

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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