



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE No 1302/3/3/19

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 15 January 2019 under section 192(2) of the Communications Act 2003 ("the Act") by Virgin Media Limited ("the Appellant") against a confirmation decision ("the Decision") of the Office of Communication's ("Ofcom") under section 96C of the Act, by which it found that the Appellant had contravened General Condition 9.3 ("GC9.3") of the General Conditions of Entitlement between 22 September 2016 and 22 August 2017 ("the Relevant Period"). Ofcom further found that the Appellant had contravened General Condition 9.2(i) ("GC9.2(j)") between 1 September 2016 and 20 March 2017. Ofcom determined that the Appellant must pay a penalty of £7million in respect of those contraventions. The Appellant is represented by Ashurst LLP, Broadwalk House, 5 Appold Street, London EC2A 2HA (reference: Ben Tidswell and Edward McNeill).

The Notice of Appeal states that the contraventions found by Ofcom relate to the Appellant's early termination charges ("ETCs"). These are charges that a consumer must pay to their communications provider ("CP") if they decide to terminate a contract within the "initial commitment period" of their contract: consumers typically enter into a contract with a minimum term of 12 months, which allows them access to more attractive monthly subscription rates during that term than may otherwise be available.

The Notice of Appeal states that, during the Relevant Period, the Appellant mistakenly applied the wrong rate of ETC (and, for some of that period, displayed incorrect and unclear information on its website). The Appellant had not realised in September 2016 that the alignment of its minimum contract term and the period of its time-limited discount (both of which were set at 12 months) had implications for the methodology used to calculate ETCs.

According to the Notice of Appeal, the overcharging error was remedied by the Appellant implementing a revised ETC rate card and calculation methodology on 22 August 2017 and the Appellant's decision to refund the over-recovered portion of ETCs which had been paid by its switching customers with interest, or - in respect of a *de minimis* (less than 2%) amount of the total overcharges refunded - by making an equivalent charitable donation. The Appellant further took the opportunity to implement enhancements to its governance processes, seeking to the extent possible to mitigate any risk that such mistakes could re-occur in the future.

The Notice of Appeal further states that, by the Decision, Ofcom decided to treat the overcharging error as amounting to a contravention of GC9.3, and decided to impose a £7million penalty on the Appellant on top of the other measures that the Appellant had already taken to correct the error. The Appellant argues that Ofcom erred in law in so doing and GC9.3 is not intended to provide a regulatory vehicle to penalise inadvertent errors of this kind.

The Appellant challenges the Decision on the following grounds:

1. In identifying a contravention, Ofcom erroneously extended the reach of regulation in a manner which is neither contemplated nor permitted by the law. In summary, Ofcom erred:
 - (a) in treating GC9.3 as providing a vehicle for a national regulatory authority to penalise a CP should it make a mistake in the calculation of the applicable ETC to which a consumer may be liable under their contract;
 - (b) in interpreting GC9.3 in a manner which duplicates rules which are already applicable to CPs by virtue of other national law and which are not specific to the electronic communications sector;

- (c) in rejecting the Appellant's submission that its interpretation of GC9.3 was contrary to the principle of legal certainty;
 - (d) in concluding that it was not required to identify any material effect on switching rates in order to establish a contravention of GC9.3, and that in any event there had been a material effect on switching rates; and
 - (e) in concluding that the absence of any material effect on competition was irrelevant.
2. Ofcom's decision to impose a penalty of £7million was arbitrary and unfair, and was not adequately reasoned. In short, Ofcom failed to adopt any adequate or transparent process of reasoning in arriving at its decision that a penalty of that size was appropriate for the contraventions identified.
3. The decision to impose a penalty of £7 million is disproportionate to the breach of GC9.3 and GC9.2(j). Contrary to the requirements of the proportionality principle, the penalty is not the lowest penalty that could have been imposed in order to have a deterrent effect on the Appellant; nor was any such deterrent effect even necessary in the circumstances of this case. Also, the penalty is inconsistent with the penalty that Ofcom imposed on EE Limited for a breach of GC9.3 and GC9.2(j) on the same date (but to which Ofcom does not refer in the Decision).

By way of relief, the Appellant asks the Tribunal:

- (a) to allow the appeal;
- (b) to quash the Decision;
- (c) to remit the matter back to Ofcom with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal;
- (d) to make such further or other order that the Tribunal considers appropriate; and
- (e) to order that Ofcom should pay the Appellant's costs of this appeal.

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 email (registry@atribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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