



## COMPETITION APPEAL TRIBUNAL

### NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

#### CASE NO 1146/3/3/09

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 14 December 2009 under section 192 of the Communications Act 2003 (“the Act”) by British Telecommunications Plc (“BT”) of 81 Newgate Street, London, EC1A 7AJ against a determination made by the Office of Communications (“OFCOM”) contained in a document dated 14 October 2009 and entitled “Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and COLT and BT regarding BT’s charges for partial private circuits”<sup>1</sup> (“the Determination”). BT is represented by BT Legal, 81 Newgate Street, London, EC1A 7AJ (reference: PPC Appeal).

The Determination concerns certain disputes between BT and each of Cable & Wireless UK, THUS plc, Global Crossing (UK) Telecommunications Limited, Verizon UK Limited, Virgin Media Limited and COLT Telecommunications (“the Disputing Communications Providers”), in respect of BT’s historical charges for the underlying trunk and terminating components of partial private circuits (“PPCs”) for the period between 24 June 2004 and 30 September 2008. PPCs are a generic term used to describe a category of private circuits that terminate at a point of connection between two communications providers’ networks. Communications providers purchase PPCs to provide connectivity between their existing “core” networks and their end-user customers in locations where they have no direct access network.

According to the Determination, OFCOM concluded that BT had overcharged the Disputing Communications Providers by £41.688 million for certain PPC services and that BT should refund this money, plus interest.

BT advances five main grounds of appeal:

- (a) OFCOM has misused its dispute resolution powers in investigating “retrospective” disputes which seek to challenge BT’s historical charges and which should more properly be the subject of a compliance investigation as an alternative mechanism to dispute resolution.
- (b) OFCOM has failed to take proper account of “economic harm” considerations, i.e. the need to ensure maximum benefit to users and to avoid any distortion or restriction of competition in the electronic communications sector.
- (c) OFCOM’s consideration of trunk and terminating segment services on a disaggregated basis was flawed and improper.
- (d) OFCOM has erred in its approach to cost orientation by relying on an unlawful and inappropriate rule for cost recovery and cost orientation (the distributed stand alone costs (“DSAC”) test).
- (e) OFCOM has misapplied its discretion under section 190(2)(d) of the Act, in particular because there are fundamental flaws in OFCOM’s approach, OFCOM applies a mistaken analysis of economic harm and OFCOM ignores other factors that mitigate against the directions which OFCOM proposes.

BT seeks an order from the Tribunal which:

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<sup>1</sup> [http://www.ofcom.org.uk/consult/condocs/draft\\_deter\\_ppc/PPC\\_final\\_determination.pdf](http://www.ofcom.org.uk/consult/condocs/draft_deter_ppc/PPC_final_determination.pdf)

- (a) sets aside the Determination in its entirety and orders the Disputing Communications Providers to repay the sum of £41.688 million plus interest to BT in the proportions indicated in Table 8.1 of the Determination;
- (b) declares unlawful the retroactive application of the DSAC test and/or the imposition of DSAC on any basis other than as an initial screening test;
- (c) refers the matter back to OFCOM with directions that it dismiss the dispute requests as being an inappropriate process for dispute resolution;
- (d) refers the matter back to OFCOM with directions that OFCOM should not use its powers under section 190(2)(d) of the Act to order any repayment or, alternatively, that OFCOM should only order a repayment at the level determined by the Tribunal;
- (e) further or in the alternative, refers the matter back to OFCOM with directions that OFCOM conduct a full and proper economic assessment of the cost orientation methodology that it intends to apply by reference to the economic context; conduct a proper consultation process in respect of such methodology; conduct any necessary investigation into BT's compliance with its cost orientation obligations pursuant to sections 94 to 97 of the Act; and ensure that any order for reimbursement reflects the statutory requirements in respect of penalties for non-compliance, is proportionate to the actual economic loss incurred, and takes account of all mitigating circumstances;
- (f) orders OFCOM to pay BT's costs;
- (g) orders such further or other relief as the Tribunal may consider appropriate.

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](http://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*  
Registrar

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