

Joint response from Cable&Wireless Worldwide and Virgin Media

Further submissions in light of the Court of Appeal's Judgment¹ in the PPC case

I Introduction

1. The following submissions are made in connection with the various disputes² currently before Ofcom in response to Ofcom's letter dated 6 August 2012. They are made on behalf of our clients, Cable&Wireless Worldwide and Virgin Media.
2. Our clients welcome the Judgment of the Court of Appeal in the PPC case. In our view, it clearly and unequivocally endorses the approach Ofcom and the CAT took in the PPC case and by extension the approach taken by Ofcom in resolving the Ethernet disputes.
3. Among other things, the ruling confirms that the phrase "*each and every charge offered*", which is also a feature of Condition HH3.1, applies to each discrete service offered by BT. In the case of trunk, that means trunk at each and every bandwidth, e.g. 2Mbit/s trunk. In the Ethernet context, it means each and every Ethernet service and therefore connections and rentals separately, i.e. charges for each of those distinct and functionally different services must be cost-oriented.
4. It also confirms that the burden is and always has been on BT to justify its prices for these regulated services, and it is not for Ofcom to stipulate how compliance might be achieved in each case.
5. The only aspect of the Judgment we propose to comment on in detail is the Court's verdict on the third ground of BT's appeal regarding Ofcom's discretion to award a repayment when resolving a dispute. This is dealt with in Section II below.
6. Whilst our clients have not been asked to comment on it, there is also a further judgment of the Court of Appeal which was handed down in the same week as the Judgment (on 25 July 2012), which also has a bearing on the Ethernet disputes and on Ofcom's provisional decision not to award interest in particular.
7. The Court of Appeal's judgment in the 080, 0845 and 0870 appeals³ deals, among other things, with the weight Ofcom should give to the contractual terms between parties when

¹ Judgment in Case No. C3/2011/1683. Neutral Citation Number [2012] EWCA Civ 1051.

² (1) Disputes between each of Sky, TalkTalk and Virgin Media and BT regarding BT's charges for Ethernet services (Ethernet 1); (2) Dispute between Cable & Wireless and BT about BT's charges for Ethernet services (Ethernet 2); and (3) Disputes between each of Cable & Wireless, Verizon, Virgin Media and COLT and BT regarding BT's charges for PPCs (PPCs 2).

³ Judgment in Case Nos. C3/2011/3121, 3124, 3315, 3316 and 2012/0692. Telefonica O2 UK Limited, Everything Everywhere Limited, Vodafone Limited and Hutchison 3G UK Ltd v British Telecommunications PLC and Office of Communications [2012] EWCA Civ 1002, judgment of 25 July 2012.

resolving disputes. The judgment overturns the earlier judgment of the CAT in August 2011, which gave too much weight to those contractual terms.

8. Ofcom's provisional decision on interest in the Ethernet disputes was presumably made in light of that CAT judgment and therefore needs to be revisited. The impact of the new Court of Appeal ruling on the provisional interest award decision in the Ethernet disputes is dealt with further in Section III below.

II Ofcom's discretion in awarding repayment

The Judgment

9. The Judgment deals in paragraphs 81 onwards with BT's third ground of appeal and the question of Ofcom's discretion in awarding repayment when resolving disputes.
10. In paragraph 82, the Court finds that: "*The express purpose of section 190(2)(d) is to give effect to the determination by Ofcom of "the proper amount" of a charge and to do so by way of adjustment of any underpayment or overpayment*". It is, in the Court's view, neither necessary nor appropriate to try to align section 190(2)(d) of the Communications Act 2003 ("the Act") to English common law causes of action and remedies such as breach of statutory duty or unjust enrichment.
11. Ofcom has a discretion to exercise its powers under section 190(2)(d), but that discretion is not "*an 'all or nothing' discretion*" (paragraph 83). Rather, Ofcom's discretion must be exercised "*in a principled way with a view to achieving [the] objectives [of the CRF]*" and "*the starting point must be, in a case of overcharging in breach of an SMP condition, to order repayment of the amount of the excess charge*" (paragraph 84).
12. However, Ofcom can give a direction for only a partial repayment or make no direction for repayment where "*a payee can show some good reason why a lesser repayment or no repayment at all would better achieve the objectives of the Act and the CRF*" (paragraph 84, emphasis added).
13. The Court also held that "*it is not consistent with the regulatory regime and the objectives of the CRF to leave BT with the benefit of its excessive charging ... in the light of those economic consequences as well as the economic harm suffered by the ultimate retail customers*", and the Court notes Ofcom's conclusion that, in any event, "*it was appropriate, in the light of the regulatory objectives, to direct BT to repay the overcharges even if the Disputing CPs passed on those charges to their customers*" (paragraphs 88 and 89, emphasis added).
14. Accordingly, in our view, BT would have to do more in any given case than just show that it did its best to comply, but failed to do so through some misunderstanding of its obligations, e.g. because it thought that if charges for groups of related services rather than individual services were below DSAC or produced a certain WACC or ROCE

outcome, that would be sufficient. There must be a reason relating to "*the better achievement of the objectives of the Act and the CRF*" for any repayment to be reduced.

15. BT is also unable to argue that a repayment should be less than the full amount because disputing CPs have not demonstrated that they suffered economic harm. The Judgment is quite clear that whether (or not) any evidence is presented that disputing CPs suffered harm is not a proper ground for impugning the exercise of its discretion by Ofcom to order repayment in full (paragraph 85).
16. Whilst there is no need to show economic harm, clearly such harm is likely to have occurred given the scale of the overcharging for Ethernet services. Ultimate retail consumers will also have been harmed to the extent that disputing CPs were unable to absorb all of the overcharge themselves.
17. If disputing CPs did pass on some of the Ethernet overcharging to their retail customers, it would still be appropriate to direct BT to make repayments in full - Ofcom's approach to pass-on was not criticised by the Court.
18. There is also no scope for BT to argue that credit must be given by disputing CPs for any 'low' charges for other services taken with the services which were overcharged (perceived 'low' charges being those for terminating services in the case of PPCs and for some connection charges in the case of Ethernet services) (paragraph 86).
19. Finally, in the Ethernet context, which is sufficiently comparable to the PPC case in all material respects, it would be just as inconsistent with the objectives of the CRF to leave BT with the benefit of its excessive charging for those services.
20. In light of all the circumstances of the Ethernet disputes, the Judgment clearly supports the award of repayment in full in these cases and we cannot conceive of any further arguments BT could make to justify the award of either a partial or no repayment.

The draft and provisional determinations

21. In rejecting the suggestion that Ofcom had an "all or nothing" discretion, the Court disagreed with the submissions put forward by Ofcom's Counsel at the hearing. However, it is clear from the draft and provisional determinations in the Ethernet disputes that Ofcom itself did not consider itself constrained by an "all or nothing" discretion and in fact considered a number of points put to it by BT when considering the level of repayment to award (having already found overcharging).
22. In Ethernet 2, for example, Ofcom specifically says that it considered whether to exercise its discretion under section 190(2)(d) to direct BT to make a payment to CWW "*and if so what the level of any such repayment should be*" (paragraph 7.8).

23. In Ethernet 1, Ofcom deals with the question of repayment in paragraphs 14.24 to 14.30 and 14.41 to 14.45, concluding in the opening paragraph that "*BT should not unfairly retain any overcharge, as this could provide a disincentive for it to comply with its obligations*" (paragraph 14.24).
24. That finding is consistent with the Court of Appeal's ruling that it is not consistent with the regulatory regime and the objectives of the CRF to leave BT with the benefit of its excessive charging, the starting point therefore being, in a case of overcharging in breach of an SMP condition, to order repayment of the amount of the excess charge.
25. In line with the CAT's judgment in the PPC case, Ofcom then considers whether BT had sought carefully to apply the relevant SMP conditions applying to Ethernet services and concludes that, as in the PPC case, they had not (paragraph 14.26). There was therefore no reason to reduce the amount of the repayment to reflect any effort to comply, though we would question whether, even if BT had made some effort, it would still be "*achieving the objectives of the CRF*" to award anything other than a full repayment.
26. Ofcom concludes by considering whether the award of a repayment in full would be consistent with its duties under the Act, its regulatory principles of accountability, proportionality and consistency, and with certain aspects of the CRF as reflected in the Act.
27. Ofcom therefore clearly did exercise its discretion in a principled way with a view to achieving the CRF objectives when it provisionally decided to award repayment in full in the Ethernet disputes. Accordingly, we can see no reason why Ofcom should come to a different conclusion now that the Judgment has endorsed its approach and the outcome⁴.
28. To counter likely arguments from BT that Ofcom did not specifically consider in sufficient detail 'the objectives of the CRF', but primarily just considered those objectives as reflected in the Act, Ofcom might consider reframing its considerations on this aspect in the final determinations.

III Weight to be given to contractual provisions on interest on repayments

29. As set out in our clients' individual responses to Ofcom's draft and provisional determinations in the Ethernet disputes, they strongly disagree with Ofcom's provisional decision not to award interest in these disputes simply because "*in this case, the relevant contractual provisions provide that interest will not be payable*" (paragraph 14.37, Ethernet 1). It is clear from the draft and provisional determinations that this was Ofcom's *only* consideration when making its provisional decision on interest, and that approach is, we would submit, clearly wrong.

⁴ The Court found that "*on the facts as found by the Tribunal, I can see no proper basis for reaching a different conclusion from both Ofcom and the Tribunal on the remedy they considered appropriate*" (paragraph 84).

30. Since those draft and provisional determinations were published, the Court of Appeal has given judgment in the 080, 0845 and 0870 appeals⁵ which deal, among other things, with the weight Ofcom should give to the contractual terms between parties when resolving disputes.
31. That judgment overturns the earlier judgment of the CAT, which gave too much weight to those contractual relations and in particular to BT's contractual rights.
32. The Court found, in particular, that "*the NRA's powers must enable it to override the contractual rights of one party (or even those of both parties). There is no place for any kind of presumption either way as to the position of one party or the other"... "while the previous position under the contract (if there is one) is no doubt relevant [...], and while upholding contractual rights, thereby favouring commercial certainty, can be a relevant consideration for the regulator to bear in mind, neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance" (paragraph 74, emphasis added).*
33. In light of that judgment, we are now even more strongly of the view that Clause 12.3 of the *Backhaul and Wholesale Extension Services* contract should have very little, if any, weight attached to it when determining whether interest should be payable on repayments awarded in the Ethernet disputes. It should certainly not be determinative as it currently is.
34. Any proper consideration of what is fair as between the parties and reasonable from the point of view of Ofcom's regulatory objectives must, according to the Court of Appeal, go beyond looking merely at what the contract says. It is therefore incumbent upon Ofcom to consider the interest issue afresh and to carry out a proper assessment of what is fair and reasonable in the circumstances.
35. In our view, that should lead Ofcom to conclude that interest must be paid by BT for all the same reasons that Ofcom have provisionally decided that an order for repayment should be made.
36. Our clients made a number of submissions previously about the circumstances which led to clause 12.3 being in the contract, about Ofcom's section 3 duties and about the regulatory incentives on BT to comply with its SMP obligations. We would respectfully request that Ofcom reviews those parts of our clients' previous submissions again in light of this judgment.

⁵ Judgment in Case Nos. C3/2011/3121, 3124, 3315, 3316 and 2012/0692. *Telefonica O2 UK Limited, Everything Everywhere Limited, Vodafone Limited and Hutchison 3G UK Ltd v British Telecommunications PLC and Office of Communications* [2012] EWCA Civ 1002, judgment of 25 July 2012.

37. In particular, Ofcom should bear in mind that the contract was effectively imposed on CWW, Virgin Media and the other CPs by BT and is heavily weighted in BT's favour (clause 12.3 in particular was not individually negotiated at the time the agreement was entered into and has been disputed ever since).
38. As the Court of Appeal confirmed in its Judgment in the PPC case, "*it is not consistent with the regulatory regime and the objectives of the CRF to leave BT with the benefit of its excessive charging*" (paragraph 88). Not awarding interest on the repayment absolutely leaves BT with the benefit of its excessive charging.
39. Fairness (and the CAT's PPC Judgment at paragraph 338(2)⁶) also dictates that CWW, Virgin Media and the other CPs should be put in the position in which they would have been had BT complied with its SMP obligations from the outset, and this requires that BT should have to pay interest on the amounts it has overcharged.
40. As our clients argued in their previous submissions, there would be a fundamental dilution of BT's incentive to comply with its regulatory obligations in future if it is not to be required to account for interest in the context of the Ethernet Disputes and in any future disputes where the relevant contractual terms which it has imposed on its customers happen to be in its favour. Such terms, given the circumstances in which they come into existence, should be disregarded, and the Court of Appeal's recent judgment has confirmed that.
41. Therefore, for all the above reasons, and particularly in light of the Court of Appeal's overturning of the CAT judgment in the 080, 0845 and 0870 appeals, our clients strongly urge Ofcom to reconsider its provisional decision on interest in the Ethernet disputes and to order that interest should be payable.

23 August 2012

⁶ From paragraph 338(2): "*Given this conclusion, it is plain that the Altnets have overpaid in respect of 2 Mbit/s trunk, and that BT has had the benefit of such overpayments. Repayment is simply putting the parties in the position they would have been in had Condition H3.1 been complied with. Failure to do so would undoubtedly signal that compliance with SMP conditions is not rigorously policed and that – we consider – is an inappropriate signal to send.*" BT v Ofcom [2011] CAT 5, judgment of 22 March 2011.