



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1154/3/3/10

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 26 May 2010 under section 192 of the Communications Act 2003 (“the Act”) by Telefónica O2 UK Limited (“O2”) against a failure by the Office of Communications (“OFCOM”) to grant O2’s application for a variation, with effect from 9 May 2010, of the terms of O2’s Public Wireless Network Licence numbered 249663 (“the Licence”). O2 is represented by Ashurst LLP, Broadwalk House, 5 Appold Street, London EC2A 2HA.

The Licence permits O2 to establish, install and use radio transmitting and receiving stations and/or radio apparatus, subject to its terms. The variation sought by O2 is to allow it to deploy UMTS technology in certain bands of spectrum frequencies, namely the 900MHz and 1800MHz Bands. O2 considers that it has a directly effective right to deploy UMTS in the 900MHz and 1800MHz Bands, derived from two sources:

- (i) Council Directive 87/372/EEC on the frequency bands to be reserved for the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, as amended by Directive 2009/114/EC of the European Parliament and of the Council (“the Amended GSM Directive”); and
- (ii) Commission Decision 2009/766/EC dated 16 October 2009 on the harmonisation of the 900MHz and 1800MHz frequency bands for terrestrial systems capable of providing pan European electronic services in the Community (“the 900/1800MHz Decision”).

Under clause 7 of the Licence and paragraph 3 of Schedule 1 to the Licence, O2 may only operate radio equipment under the Licence which complies with Interface Requirement IR 2014 – Public Wireless Networks. IR 2014 prescribes the standards for equipment operating a 2G GSM mobile network. By a letter to OFCOM dated 2 March 2010, enclosing an application for a licence variation pursuant to paragraph 6 of Schedule 1 to the Wireless Telegraphy Act 2006, O2 applied for a variation to the Licence to permit it to deploy UMTS in the 900 and 1800MHz Bands. OFCOM responded to O2’s letter on 22 April 2002 stating that OFCOM was not proposing to taken in action in relation to the licence variation request at that time.

O2 appeals against OFCOM’s failure to grant its application for a licence variation on the ground that O2 has a directly effective right to deploy UMTS in the 900 and 1800MHz Bands pursuant to the Amended GSM Directive and the 900/1800MHz Decision, and OFCOM is obliged to give effect to that right. By Article 3 of the Amended GSM Directive, Member States are required to implement the Directive by 9 May 2010.

In its notice of appeal, O2 submits as follows:

- (i) Where the provisions of a directive are unconditional and sufficiently precise, they may, if the directive is not implemented in the prescribed period, be relied upon against any national provision which is incompatible with the directive, i.e. they have direct effect. Decisions may be relied upon against the addressee of the decision under the same conditions. O2 considers that these conditions are readily satisfied.
- (ii) OFCOM was obliged to give effect to O2’s directly effective rights, and the United Kingdom’s obligations to make available the 900 and 1800MHz Bands for UMTS, by granting O2’s application for a licence variation prior to 9 May 2010.

- (iii) No other considerations are relevant to OFCOM's or the Tribunal's decision regarding O2's licence variation application.

O2 requests that the Tribunal make directions for the expeditious determination of its appeal, uphold the appeal and remit the matter to OFCOM with a direction to take appropriate steps to give effect to O2's directly effective rights.

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 by 5pm on **7 June 2010**. The three week period referred to in rule 16(2) has been abridged by a direction of the President dated 26 May 2010.

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
Registrar

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