

## ANNEX 2

Date 22 September 2011  
Our ref 306/2244/M17284.24  
Your ref  
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Dear Sirs

**Case 1151/3/3/10 - British Telecommunications plc v. Ofcom (Termination charges: 080 calls)**

**Case 1168/3/3/10 - Everything Everywhere Limited v. Ofcom (Termination charges: 0845/0870 calls)**

**Case 1169/3/3/10 - British Telecommunications plc v. Ofcom (Termination charges: 0845/0870)**

We write in relation to the above case.

As indicated in Telefónica's letter of 20 September 2011, BT, Telefónica and Three were in the process of agreeing a draft order for a partial stay of the Tribunal's Order of 12 August 2011. The parties have now reached an agreement on the terms of the draft order and this is enclosed. This order has primarily been drafted by BT and is consented to by Telefónica, BT and Three.

Please let us know if a hearing is necessary in order for the Tribunal to decide whether to issue this consent order. Please note that Telefónica's senior and junior counsel both have limited availability to attend a hearing next week.

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Yours faithfully



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IN THE COMPETITION APPEAL TRIBUNAL

Cases 1151, 1168, & 1169/3/3/10

BETWEEN:-

(1) BRITISH TELECOMMUNICATIONS PLC  
(2) EVERYTHING EVERYWHERE LIMITED

Appellants / Interveners

-v-

THE OFFICE OF COMMUNICATIONS

Respondent

-and-

(1) TELEFÓNICA O2 UK LIMITED  
(2) HUTCHISON 3G UK LIMITED  
(3) VODAFONE LIMITED  
(4) OPAL TELECOM LIMITED  
(5) CABLE & WIRELESS UK LIMITED

Interveners

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DRAFT ORDER

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UPON hearing the parties [by written representation/oral hearing] and following the Tribunal's Judgment dated 1 August 2011 and its order dated 12 August 2011 ("**the 12.8.11 Order**").

IT IS ORDERED THAT

1. Provided that:

- (i) Any applying MNO ("**the applying MNO**") has written to the Tribunal within 2 working days of the making of this order notifying the Tribunal that it wishes to be

subject to the stay set out below (the “Stay”) and comply with the other relevant terms contained in this order; and

- (ii) That applying MNO:
  - a. makes an application to the Tribunal for permission to appeal in accordance with the correct time period and procedure for that application;
  - b. if such application to the Tribunal is unsuccessful and the MNO wishes to fall within (B) below, that MNO makes an application to the Court of Appeal for permission to appeal (and, if permission is granted, pursues that appeal) in accordance with the correct time period and procedure (which includes for the avoidance of any doubt any renewed application for permission to appeal following a refusal of permission to appeal considered on the papers);

then, in respect of (and only in respect of) any such applying MNO which so complies with those provisos (in the manner described below), the dates prescribed in paragraph 5 (2) (ii) of the 12.8.11 Order for the determination of the termination rates under NCCN 956, NCCN 985 and NCCN 986 (the “NCCNs”) in respect of Period Two under the 12.8.11 Order, be stayed until three months after:-

- A. Insofar as the applying MNO has complied with proviso (i) and (ii) (a), then either:
  - i. the refusal by the Tribunal of permission to appeal; or
  - ii. if the Tribunal grants permission to appeal, the handing down by the Court of Appeal of a final judgment on appeal refusing the applying MNO’s appeal and/or holding that the NCCNs were validly issued in respect of Period Two ; or
- B. Insofar as the applying MNO has complied with proviso (i), (ii) (a) and (ii) (b) either:-
  - i. the refusal by the Court of Appeal of permission to appeal; or

- ii. if permission to appeal is granted, the handing down by the Court of Appeal of a final judgment on appeal refusing the applying MNO's appeal and/or holding that the NCCNs were validly issued in respect of Period Two.
- 2. For the avoidance of any doubt, the effect of such stay is as follows (but subject to any order that the Court of Appeal may subsequently make):
  - (a) In respect of any applying MNO which complies only with proviso (i) and (ii) (a) of paragraph 1 above, and the Tribunal refuses permission to appeal, each such applying MNO will then make a decision on the Prices Charged (as defined in paragraph 1(11)(ii) of the 12.8.11 Order) in respect of Period Two and that price shall be deemed to be the price set by the applicable MNO on 31 October 2011 for the purposes of paragraph 5(2)(ii) of the 12.8.11 Order. Each such applying MNO shall notify the Prices Charged for Period Two to British Telecommunications plc ("BT") within three months of the date on which permission to appeal is so refused.
  - (b) In respect of any applying MNO which complies only with proviso (i) and (ii) (a) of paragraph 1 above, and the Tribunal grants permission to appeal but the Court of Appeal hands down a final judgment on appeal refusing the applying MNO's appeal and/or holding that the NCCNs were validly issued in respect of Period Two, each such applying MNO will then make a decision on the Prices Charged (as defined in paragraph 1(11)(ii) of the 12.8.11 Order) in respect of Period Two and that price shall be deemed to be the price set by the applicable MNO on 31 October 2011 for the purposes of paragraph 5(2)(ii) of the 12.8.11 Order. Each such applying MNO shall notify the Prices Charged for Period Two to BT within three months of the Court of Appeal handing down such a final judgment on appeal.
  - (c) In respect of any applying MNO which complies with proviso (i), (ii) (a) and (ii) (b) of paragraph 1 above, and the Court of Appeal either:
    - i. refuses permission to appeal; or

- ii. if permission to appeal is granted, hands down a final judgment on appeal refusing the applying MNO's appeal and/or holding that the NCCNs were validly issued in respect of Period Two

each such applying MNO will then make a decision on the Prices Charged (as defined in paragraph 1(11)(ii) of the 12.8.11 Order) in respect of Period Two and that price shall be deemed to be the price set by such applying MNO on 31 October 2011 for the purposes of paragraph 5(2)(ii) of the 12.8.11 Order. Each such applying MNO shall notify the Prices Charged for Period Two to BT within three months of the date on which either permission to appeal is refused or the handing down of final judgment on appeal.

3. For the avoidance of any doubt, notwithstanding the grant of the Stay:-

- (a) The Stay does not apply to any MNO (as defined in paragraph 1 (5) of the 12.8.11 Order) which has not complied with at least provisos (i) and (ii) (a) in paragraph 1 above, and the dates contained in paragraph 5 (2) (ii) of the 12.8.11 Order continue to apply to such MNO;
- (b) All the MNOs, including any applying MNO, will pay all charges due to BT for Period One (as defined in paragraph 1(9) of the 12.8.11 Order) in accordance with the provisions set out in paragraph 6 of the 12.8.11 Order and, to the extent necessary, as determined by Ofcom.

4. Further as regards any applying MNO the following terms shall apply as part of the Stay:

*(1) Period Two in the interim*

- (a) notwithstanding paragraph 5(2) (ii) of the 12.8.11 Order or paragraph 1 above, an applying MNO will, in the interim, pending any date that permission to appeal is refused by the Tribunal or Court of Appeal, or the handing down by the Court of

Appeal of a final judgment on appeal refusing the applying MNO's appeal and/or holding that the NCCNs were validly issued in respect of Period Two (whichever is later), pay to BT as follows ("**the interim Period Two Charges**"):

- (i) in respect of the 080 termination charges (originally the subject of the 080 Determination), for the period between 6 February 2010 to 1 August 2011 the amount of charges calculated (i) in accordance with NCCN 956 (without prejudice to paragraph 5 of this order) and (ii) by reference to that MNO's prices during that period in accordance with the methodology described in paragraph 1(11)(ii) of the 12.8.11 Order.
  - (ii) in respect of the 0845 and 0870 termination charges (originally the subject of the 0845/0870 Determination), for the period between 11 August 2010 and 1 August 2011 the amount of charges calculated (i) in accordance with NCCN 985 or NCCN 986 (whichever is applicable) and (ii) by reference to that MNO's prices during that period in accordance with the methodology described in paragraph 1(11)(ii) of the 12.8.11 Order.
- (b) The interim Period Two Charges shall be paid by the applying MNOs to BT in accordance with the dates set out in paragraph 6 of the 12.8.11 Order.
  - (c) Once any applying MNO makes a decision on the Prices Charged for Period Two in accordance with paragraph 2 above, then, insofar as there is any difference between the charges thereby fixed for Period Two and the interim Period Two Charges, BT or the applying MNO, as relevant, will refund in full that difference together with interest at the Ofcom Interest Rate as defined in Annex D of BT's PECN C7 Standard Interconnect Agreement.
  - (d) For the avoidance of any doubt the payment under paragraph 4 (1) (a) (i) or paragraph 4 (c) above is entirely without prejudice to paragraph 5 below.

(2) "Period Three"

- (e) Further as regards any applying MNO, for the period between 2 August 2011 and either the date that permission to appeal is refused by the Tribunal or the Court of Appeal or the Court of Appeal hands down a final judgment on appeal refusing the applying MNO's appeal and/or holding that the NCCNs were validly issued in respect of Period Two (whichever is later) ("**Period Three**") any applying MNO will pay BT, in accordance with BT's PECN C7 Standard Interconnect Agreement, all charges immediately as they arise calculated in accordance with (i) NCCNs 956, 985 and 986 (but entirely without prejudice to paragraph 5 below) and (ii) the methodology described in paragraph 1(11)(i) of the 12.8.11 Order. For the avoidance of any doubt, if any applying MNO is unsuccessful in its application for permission to appeal or if any final judgment of the Court of Appeal refuses the applying MNO's appeal and/or holds that the MNOs are validly issued, subject to any contrary order from the Court of Appeal, no such applying MNO will seek to recover any charges paid to BT in respect of Period Three regardless of what prices such MNO sets for Period 2 in accordance with paragraph 2 of this order (save in the event of a clearly proven error in payment).
5. Nothing in this order shall affect the rights of any party in relation to NCCN 1007. For the avoidance of doubt, this order is without prejudice to:-
- (i) the right of any party to make any arguments, before Ofcom or any appellate court or tribunal, including without limitation: (1) on the validity of NCCN 1007 or, (2) in the event that there is a Ofcom determination holding NCCN 1007 to be valid (**the "NCCN 1007 determination"**), arguments as to whether payments to be made under NCCN 1007 should be based on a price to be set following the NCCN 1007 determination (or any judgment on appeal) or based on the Prices Charged (as defined in paragraph 1(11)(i) of the 12.8.11 Order) by the MNOs to callers in the period between the date on which NCCN 1007 was issued and the date of the

NCCN 1007 determination, or any appeal following the NCCN 1007 determination (whichever is later) or (3) the interrelationship of otherwise of the 12.8.11 Order and NCCN 1007; and

- (ii) any subsequent adjustment that may become necessary (subject of course to (i) above) to the charges paid by any MNO by reason of any NCCN 1007 determination (or any judgment on appeal).
6. In the event that permission to appeal is granted and the Court of Appeal hands down a final judgment on the appeal holding that the NCCNs were not validly issued, and subject to any contrary order from the Court of Appeal, BT will refund to the MNOs (as defined in paragraph 1 (5) of the 12.8.11 Order), with interest at the Of tel Interest Rate as defined in Annex D of BT's PECN C7 Standard Interconnect Agreement, all termination payments calculated by reference to the NCCNs, made to it prior to the Court of Appeal judgment, in accordance with the terms of that judgment.
7. Further this order records that the parties recognise that if permission to appeal is granted, then, other than in the event of the Court of Appeal simply refusing any MNO's appeal, it is difficult to prejudge the precise consequences upon any payments that may have been made prior to sight of any such judgment. Accordingly the parties have agreed that, in the event that the Court of Appeal allows any part of any appeal, nothing in this order shall affect any party's right to make whatever submissions to the Court of Appeal that such party considers appropriate as to the order that the Court of Appeal should make consequent on the judgment of the Court of Appeal, including for the avoidance of doubt (but not in any way limited to), any order that BT should refund the MNOs any appropriate sum in light of such judgment as the Court has given.
8. Unless otherwise defined, all specific terms used in this order have the same meaning as set out in paragraph 1 of the 12.8.11 Order.

9. There shall be no order as to costs.

**Marcus Smith QC** Chairman of the Competition Appeal Tribunal

Made: [ ] September 2011  
Drawn: [ ] September 2011