



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1151/3/3/10

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 6 April 2010 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 5 February 2010 and entitled “Determination to resolve disputes between BT and each of T-Mobile, Vodafone, O2 and Orange about BT’s termination charges for 080 calls”¹ (“the Determination”). BT is represented by BT Legal, 81 Newgate Street, London, EC1A 7AJ.

The Determination concerns disputes over whether (i) T-Mobile, Vodafone, O2 and Orange (“the 2G/3G MNOs”) should pay BT charges for BT terminating or transiting 080 calls which were originated on each of the 2G/3G MNO’s networks or (ii) whether BT should pay an origination charge to the 2G/3G MNOs for BT receiving those calls. In the Determination, OFCOM concluded that the parties should revert to the trading conditions which had applied before the introduction by BT of Network Charge Change Notice 956 (“NCCN 956”). BT was also ordered to repay to the 2G/3G MNOs any payments made from 1 July 2009 following the introduction of NCCN 956, together with interest.

BT considers that the Determination is unlawful and unfair to BT, for the following reasons:

- (a) In applying its dispute resolution powers under sections 185-191 of the Act, OFCOM failed to consider the true merits of the context in which NCCN 956 was introduced, and failed to do so in a manner that was fair, reasonable, proportionate and consistent. Further, OFCOM failed to carry out any proper analysis of proportionality before ordering BT to reverse the NCCN 956 charges and repay the contractual monies paid. OFCOM’s failures were exacerbated by imposing the burden, not upon the parties raising the dispute with OFCOM (the 2G/3G MNOs), but upon BT.
- (b) OFCOM’s principle that the 2G/3G MNOs should not be denied the opportunity to recover their efficient costs of originating calls to 080 numbers hosted on BT’s network (“Principle 1”) is a principle that is doubtful as a general principle, and in any event was applied in an unjust fashion. Principle 1 lacks proper legal basis and the way in which it was applied was incorrect.
- (c) In applying the principle that charges should provide benefits to consumers and avoid a material distortion of competition (“Principle 2”), OFCOM (a) placed an unlawful onus on BT to demonstrate clearly a positive benefit to consumers and no detriment to competition, and (b) failed to conduct a proper analysis of the effects on consumers and competition, the analysis being superficial and seriously flawed.
- (d) Having expressly stated that the scope of the dispute did not include a consideration of the specific charges introduced by BT in NCCN 956, OFCOM went on to do precisely that, and determined that the parties should revert to the trading conditions that applied before the particular charges in NCCN 956 came into effect. This was unjustified, inconsistent with the scope of the dispute and with OFCOM’s guidelines, it gave an unjust negotiating advantage to the 2G/3G MNOs and was unfair to BT.

BT seeks an order under section 195 of the Act for the Tribunal to do the following:

¹ http://www.ofcom.org.uk/consult/condocs/draft_deter_bt_tmobile_vodafone/nonconf.pdf

- (a) set aside the Determination in its entirety save for OFCOM's conclusion that the 2G/3G MNOs are not entitled to charge BT a charge for originating calls to 080 numbers when such calls are originated on the 2G/3G MNOs' networks and terminated on BT's network;
- (b) declare that BT is entitled to charge the MNOs (alternatively the 2G/3G MNOs) a charge for terminating calls to 080 numbers originated on the MNOs' (alternatively the 2G/3G MNOs') networks, that the charges under NCCN 956 are fair and reasonable and/or that the 2G/3G MNOs are liable to pay all monies due and owing under NCCN 956 from 1 July 2009;
- (c) refer the matter back to OFCOM with directions to do one or more of the following:
 - (i) order that the charges in NCCN 956 are fair and reasonable;
 - (ii) NCCN 956 remains operative unless and until commercial negotiation breaks down, a further dispute has been referred to OFCOM and OFCOM sets NCCN 956 aside;
- (d) OFCOM should reconsider the dispute within the scope originally defined by OFCOM;
- (e) OFCOM should reconsider the dispute, taking proper account of the principle of proportionality;
- (f) order OFCOM to pay BT's costs; and
- (g) order 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. 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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