



Neutral citation [2011] CAT 26

IN THE COMPETITION
APPEAL TRIBUNAL

Case Numbers: 1151/3/3/10
1168/3/3/10
1169/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

12 August 2011

Before:

MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

- and -

EVERYTHING EVERYWHERE LIMITED

Appellants

- v -

OFFICE OF COMMUNICATIONS

Respondent

TELEFÓNICA O2 UK LIMITED
VODAFONE LIMITED
CABLE & WIRELESS UK
HUTCHISON 3G UK LIMITED
OPAL TELECOM LTD

Interveners

RULING (CONSEQUENTIAL ON JUDGMENT)

INTRODUCTION

1. On 1 August 2011, the Tribunal gave judgment in three appeals to the Tribunal, under Case Number 1151/3/3/10, Case Number 1168/3/3/10 and Case Number 1169/3/3/10 ([2011] CAT 24, the “Judgment”). At the same time, a draft Order was circulated to the parties, which sought to give effect to the directions contained in Section N of the Judgment. The parties were invited to comment on the terms of the draft Order, and they have done so. This Ruling deals with a number of points raised by the parties. It is accompanied by an Order (the “Order”) which makes various changes to the draft Order that was circulated with the Judgment.
2. This Ruling takes the Judgment as read and adopts the terms and abbreviations used in the Judgment.
3. The Tribunal has received written comments from OFCOM (in a letter dated 2 August 2011), EE (in a letter dated 3 August 2011), BT (in letters dated 4 and 9 August 2011), Vodafone (in a letter dated 4 August 2011), H3G (in a letter dated 4 August 2011) and O2 (in a letter dated 5 August 2011). The points raised by the parties are as follows:
 - (1) It was asked how NCCN 1007 affected the approach to the calculation of termination charges laid down in the Judgment. The Judgment is confined to a consideration of NCCN 956, NCCN 985 and NCCN 986. NCCN 1007 was introduced by BT following OFCOM’s 080 Determination, with (purportedly) effect from 1 April 2010 (i.e. a date within the Second Period). NCCN 1007 contained a minor error, which was subsequently corrected by NCCN 1046. I shall, for simplicity, refer to both NCCN 1007 and NCCN 1046 as “NCCN 1007”.
 - (2) It was suggested that there was a “lacuna” in the approach proposed for the calculation of the wholesale charge owed to BT in the period following the Judgment.
 - (3) BT invited the Tribunal to make provision to prevent “gaming” by the MNOs in respect of the Second Period.

- (4) Clarification was sought as to the prices to be used when calculating any sums due from the MNOs to BT pursuant to NCCN 956, NCCN 985 and NCCN 986 and the Judgment, in particular when calculating any sums due in respect of the Second Period. Additionally, O2 contended that, given that it had in fact paid all of BT's charges until the dates of the Determinations, it was unfair that O2 "should be penalised for abiding in full by the terms of the [Standard Interconnect Agreement and that it should be ordered to pay all charges owed to BT on the basis of the Period 2 prices".
- (5) As paragraph 455(2) of the Judgment makes clear, termination rates payable for the Second Period are to be calculated by reference to "such prices as are published as being available to callers by the MNOs in accordance with General Condition 10 on 30 August 2011, being a date 28 days from the date of this Judgment, or on such date as is ordered in the final version of the draft order described in paragraph 460 below". It was suggested to us that 28 days was insufficient time for the MNOs properly to assess whether and, if so, how, to adjust their rates.
- (6) It was suggested that the volume of data that would have to be reviewed in order to calculate termination charges payable in respect of the First Period would mean that rather more time would be required than is presently allowed for in the draft Order.
- (7) It was suggested that it would not be possible to calculate termination charges payable in respect of the Second Period within the time frame contemplated by the draft Order.
- (8) Concerns were expressed that the process of calculating termination charges envisaged by the Judgment would involve disclosure of highly confidential material by the MNOs to BT.
- (9) It was requested that the time for any application for permission to appeal be extended.

These points are dealt with in turn below.

NCCN 1007

4. The Dispute that OFCOM resolved by way of the 080 Determination was described by OFCOM in paragraph 1.12(i) of the 080 Determination as “whether it is fair and reasonable for BT to impose any termination charge for calls to 080 numbers hosted on its network”. As was described in paragraph 32(2) of the Judgment, the scope of this Dispute was initially unclear to BT: but, during the course of the Dispute Resolution Process, it became clear that BT’s specific 080 charges (as contained in NCCN 956) were being considered by OFCOM. The 080 Determination reached the specific conclusion that NCCN 956 was not fair and reasonable. This is clear, for instance, from the summary of OFCOM’s final conclusions in paragraph 1.24 of the 080 Determination, which refers repeatedly to NCCN 956.
5. Following the 080 Determination that NCCN 956 was not fair and reasonable, BT issued NCCN 1007. NCCN 1007 itself gave rise to a dispute before OFCOM. OFCOM has determined that the scope of this dispute is as follows:¹

“After consideration of the submissions received from EE and BT, the scope of the dispute is to determine whether it is fair and reasonable for BT to apply new termination charges for calls to 080 numbers hosted on its network, which are based on the level of the retail charge made by [originating CPs] for calls to these numbers, as specifically set out in NCCN 1007 (as corrected by NCCN 1046).”

This dispute remains pending before OFCOM.

6. In its letter of 4 August 2011, BT stated that “[a]ny dispute concerning this NCCN [meaning NCCN 1007] was not of course part of the appeal before the Tribunal”. Clearly, this is right: the 080 Determination concerned only NCCN 956; any appeal to the Tribunal is similarly circumscribed, as is any judgment that the Tribunal can give. The dispute regarding the fairness and reasonableness of NCCN 1007 is presently before OFCOM, and is not before the Tribunal in any of these appeals. Again, BT puts the point correctly in its letter:

“...there is to date no decision by Ofcom in respect of NCCN 1007 and thus no decision that is the subject of an appeal to the Tribunal. As such the CAT is not strictly seized of any decision about NCCN 1007.”

¹ The scope of the dispute is stated on OFCOM’s website: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01055 (accessed 9 August 2011).

OFCOM, and not the Tribunal, is seized of the dispute regarding the fairness and reasonableness of NCCN 1007.

7. What is more, so far as the Tribunal can discern, no dispute relating to the inter-relationship between NCCN 956 and NCCN 1007 has even been referred to OFCOM. It may be that the relationship between these two NCCNs is so pellucid that no dispute can exist. It is implicit in BT's letter of 4 August 2011 that NCCN 1007 was intended to replace NCCN 956, given the 080 Determination. The Tribunal has heard no evidence on this point. The implied averment in BT's letter may well be correct. But, given that BT was appealing the 080 Determination in respect of NCCN 956, whilst at the same time issuing NCCN 1007, it may be that the intention was that NCCN 1007 should only replace NCCN 956 if NCCN 956 was found to be not fair and reasonable on appeal. These are matters which were not before the Tribunal, were not the subject of evidence before the Tribunal, and on which the Tribunal can have no view.
8. In these circumstances, the position is as follows:
 - (1) The question of the fairness and reasonableness of NCCN 956 was before the Tribunal. The question of the fairness and reasonableness of NCCN 1007 was not. Neither was any question regarding the inter-relationship between NCCN 956 and NCCN 1007.
 - (2) The Tribunal can only determine issues that are properly before it. The Tribunal has determined that NCCN 956 is fair and reasonable, and that BT had the right to introduce it (paragraph 450 of the Judgment). Although it must be right that there are aspects of the Judgment that will be relevant to questions regarding (i) the validity of NCCN 1007 and (ii) the interrelationship between NCCN 956 and NCCN 1007, the fact is that the first of these questions is before OFCOM and not before the Tribunal, and the second of these questions is a matter for the parties, presently before neither OFCOM nor the Tribunal (in other words, the parties need in this case to consider whether there exists a "dispute" capable of

triggering the Dispute Resolution Process, and must then trigger that process).

- (3) In these circumstances, the Tribunal's Judgment must be confined to the matters that were actually before the Tribunal: that is, the fairness and reasonableness of NCCN 956. Of course, for that very reason, nothing in the Judgment is intended to pre-determine questions regarding the validity of NCCN 1007, nor questions regarding the interrelationship between NCCN 956 and NCCN 1007.
- (4) It follows that such termination charges as are payable pursuant to the Judgment and the Order must be those payable pursuant to NCCN 956, NCCN 985 and NCCN 986 (as the case may be) or such NCCNs as may have been in force during the First Period and the Second Period in succession to NCCN 956, NCCN 985 and NCCN 986. So far as the Tribunal is aware, the only NCCN that can possibly be relevant is NCCN 1007. Nevertheless, paragraphs 1(7), 1(8) and 1(9) of the draft Order (defining the meanings of "NCCN 956", "NCCN 985" and "NCCN 986" respectively) have been amended to reflect the possibility of "successor" NCCNs. To the extent that such successor NCCNs affect the termination charges payable during the First Period or the Second Period, then the MNOs should pay according to these, successor, NCCNs. However, if the question of which NCCN is applicable remains open (in the sense that the parties cannot agree or that a dispute remains undetermined by OFCOM) then NCCN 956, NCCN 985 and NCCN 986 (as the case may be) shall apply for the purposes of determining what termination charges are payable pursuant to the Judgment and the Order.

A LACUNA IN RESPECT OF THE PERIOD FOLLOWING THE JUDGMENT

9. In its letter of 4 August 2011, Vodafone observes:

"...we note that there appears to be a lacuna in the approach proposed for the calculation to the wholesale charge owed to BT in the period following the judgment. Pursuant to the judgment, the applicable retail rates used to determine the wholesale charge payable to BT for Period Two will be those prevailing on a specified date (30 August 2011 or later) (the "Effective Date"). However, it is unclear how charges are

to be calculated for the period between the date of the judgment and the Effective Date, when, pursuant to the reasoning of the Tribunal, BT's NCCNs are operational.”

10. There is a short answer to this point. The Tribunal has found that BT had the right to introduce the NCCNs (paragraph 450 of the Judgment) and that the NCCNs came into force on the dates specified in the NCCNs (paragraph 455(1) of the Judgment). The MNOs should, from these dates, have complied with the provisions of the NCCNs. It is for this reason that the Tribunal has found that termination charges calculated by reference to the NCCNs should be payable during the First Period (paragraph 456(1) of the Judgment).
11. The Second Period constitutes an exception to this approach, simply because the Tribunal has found that the MNOs were entitled to rely on the Determinations of OFCOM (paragraph 456(4) of the Judgment). The Determinations having been found to be wrong, for the reasons given in the Judgment, the NCCNs apply with full effect in the period following the Judgment. In the period following the Judgment, therefore, the NCCNs operate according to their terms, and the MNOs must pay according to the terms of those NCCNs. There is no lacuna.
12. Of course, the question of the effect of NCCN 1007 may remain as a live issue. For the reasons given previously, this is not a matter that is before the Tribunal. As regards 080 calls, the Tribunal has found NCCN 956 to be effective from the date it was introduced by BT. The Tribunal has not – and cannot – make any determination as to whether NCCN 956 has been superceded by NCCN 1007. However, as has been stated, nothing in the Judgment should be taken to predetermine such matters.

PREVENTION OF “GAMING”

13. In its letter dated 4 August 2011, BT makes the following point:

“...BT is concerned that there should be no “gaming” by the MNOs in respect of Period Two. In respect of Period 2 the MNOs can effectively reduce the charges that they must pay to BT by altering their prices as at 30 August 2011 downwards. BT understands the Tribunal’s logic for this, namely that if the MNOs chose to reduce their prices and thereby benefit consumers going forwards, they should not lose out in respect of the period during which they understood that Ofcom had decided in their favour. It would, however, be very unfortunate if the MNOs dropped their prices as at

30 August 2011 in order to retain the money they have already charged their customers in Period Two (and thus not pay BT any, or limited, sums under the NCCNs for that period) but then shortly thereafter (for example at 30 September 2011) increased their retail prices.

Whilst BT hopes that, as reputable entities, the MNOs would eschew any such “gaming” and BT does not wish to fetter the MNOs’ retail prices, BT considers that the additional wording in existing paragraph 2...will remove any concerns:

“...the Prices Charged by the MNOs to callers for 080, 0845 and 0870 calls (as the case may be) as at 30 August 2011, provided that the MNOs do not unreasonably change the Prices Charged as at 30 August 2011 for a sufficient period after that date. Any dispute about what is, or is not, an unreasonable change or a sufficient period to be determined by Ofcom. To the extent that Ofcom considers that there has been an unreasonable change or there has not been a sufficient period of stable prices following 30 August 2011, Ofcom shall determine what it considers to reflect fair figures for determining the Prices to be applied to Period Two.”

14. The Tribunal is not minded to insert any such wording into the Order. As the Judgment finds, the MNOs are legally unconstrained in the prices that they may charge callers for 080, 0845 and 0870 calls (paragraph 107(1) of the Judgment). Whilst this pricing freedom might allow for “gaming”, gaming will be constrained by two factors:

- (1) In the first place, from the date of the Judgment onwards, termination charges payable by the MNOs will be based upon the NCCNs. If the NCCNs incentivise a downward movement in prices to callers of 080, 0845 and 0870 numbers, as was BT’s case, then that incentive will remain.
- (2) Secondly, termination charges for the Second Period are calculated by reference to the prices published as being available to callers on a specific date (*prima facie*, according to the Judgment, 30 August 2011). Given that this requires prices actually to be published to callers in accordance with General Condition 10, it is unlikely that the MNOs would cause their prices to fluctuate in such a way so as to put off customers or potential customers.

PRICES TO BE USED WHEN CALCULATING TERMINATION CHARGES FOR THE FIRST PERIOD AND THE SECOND PERIOD

15. The prices to callers to be used when calculating termination charges for the First Period and the Second Period are identified in paragraph 455 of the Judgment.
16. As regards the First Period, these prices are, *prima facie*, to be calculated by reference to the prices that were published by the MNOs in accordance with General Condition 10. However, where the MNOs can demonstrate that prices or tariffs were set at bespoke or individual rates (the burden of proof being on the MNOs), then such prices or tariffs shall be used (paragraph 455(1)(ii) of the Judgment). This reflects the fact that termination charges for the First Period are calculated by reference to historic prices.
17. There was some suggestion that this approach did not reflect “average” prices. When considering any average, in this case or any other, a crucial question turns on what prices were charged to which persons. In this case, the *prima facie* position is the published position. However, where bespoke or individual rates are agreed then, provided (i) these rates are proved, and (ii) the volume of such rates as a proportion of the whole is demonstrated (in each case, the burden being on the MNO in question) these are elements that need to be taken into account.
18. Termination charges for the Second Period are not calculated by reference to historic prices, but by reference to future prices i.e. prices as at the “Effective Date” (to use Vodafone’s term), this date *prima facie* having been set at 30 August 2011. There is no place, in this assessment, for a reference to historic prices, whether as previously published in accordance with General Condition 10 or as previously set at bespoke or individual rates. The sole source of prices to callers for the purpose of assessing termination charges in the Second Period is “such prices as are published as being available to callers by the MNOs in accordance with General Condition 10 on [the Effective Date]” (paragraph 455(2) of the Judgment). Where an MNO publishes, on the Effective Date, multiple prices for a given type of call, then an appropriate average of these prices (to be determined by OFCOM if not agreed) should be taken.

19. The definition of “Prices Charged” in paragraph 1(12) of the Order has been amended to make this clear.
20. In its letter to the Tribunal, EE raises the question of how charges to callers by mobile virtual network operators (“MVNO”s) are to feature in these calculations. MVNOs purchase capacity from MNOs, and charge their customers in accordance with rates that they (the MVNOs) set, and which may not be known to the MNOs:
 - (1) As regards the Second Period, MVNO prices to callers are not relevant, because the sole determinant is the price published by MNOs in accordance with General Condition 10.
 - (2) As regards the First Period, the prices charged by MVNOs (even if known by the MNOs) should not form the basis of the termination charges paid by the MNOs. Rather, the prices at which capacity to make 080, 0845 and 0870 calls that is sold to MVNOs should (subject to the evidence, the burden being on the MNOs) be regarded as bespoke or individual prices or tariffs (see paragraph 455(1)(ii) of the Judgment).
21. O2 contended that, given that it had in fact paid all of BT’s charges until the dates of the Determinations, it was unfair that O2 “should be penalised for abiding in full by the terms of the [Standard Interconnect Agreement] and that it should be ordered to pay all charges owed to BT on the basis of the Period 2 prices”. No penalty is involved: BT repaid any monies it received pursuant the Determinations, and there is no injustice in obliging O2 to comply with NCCNs which have now been found to be legal and effective.

THE DATE USED TO DERIVE PRICES FOR CALCULATING TERMINATION CHARGES PAYABLE IN RESPECT OF THE SECOND PERIOD

22. As paragraph 455(2) of the Judgment makes clear, termination rates payable for the Second Period are to be calculated by reference to such prices as are published as being available to callers by the MNOs in accordance with General Condition 10 on the Effective Date. The Tribunal has suggested in the Judgment that the Effective Date should be 30 August 2011, being a date 28 days from the

date of the Judgment. In its letter to the Tribunal, EE strongly submitted that this date should remain as 30 August 2011.

23. The other MNOs – Vodafone, H3G and O2 – stated that an Effective Date of 30 August 2011 allowed insufficient time for them properly to assess whether and, if so, how, to adjust their rates. Although 28 calendar days represents the period of notice that BT must give in order to vary its charges pursuant to paragraph 12 of the Standard Interconnect Agreement, it is fair to say that MNOs can – in the light of such a notice – decide to vary their own charges in their own time (i.e. on a date after the expiration of the 28 day notice period). Accordingly, the Tribunal has some sympathy with the MNOs’ point that an Effective Date of 30 August may simply not be long enough to consider the implications of the NCCNs.
24. That said, EE has firmly stated its preference for 30 August 2011. Accordingly, the draft Order has been varied so as to provide for an Effective Date selected by each MNO, provided (i) that date is before 31 October 2011 and (ii) 7 days notice of any date earlier than 31 October 2011 is given by the MNO to both OFCOM and to BT.
25. One concern that the Tribunal had was that an extended Effective Date would give BT time to introduce a further NCCN, to which the MNOs might need to react. The implication in BT’s letter of 4 August 2011 is that no such change was contemplated, and that implication has subsequently been made express in a letter from BT dated 5 August 2011. BT’s position is that its termination charges for 080, 0845 and 0870 calls are as stated in NCCN 1007, NCCN 985 and NCCN 986, respectively.
26. Were BT to introduce a new NCCN relating to 080, 0845 or 0870 charges prior to the Effective Date, then this would have the effect of complicating the calculation mandated for the Second Period. BT’s letter of 5 August 2011 made clear that BT “has no intention of trying to “game” the MNOs by such a price change”; but, in any event, BT’s ability to do so is inhibited by the variable Effective Date described in paragraph 24 above.

**THE TIME NEEDED TO CALCULATE TERMINATION CHARGES PAYABLE
IN RESPECT OF THE FIRST PERIOD**

27. H3G has suggested that the calculations that must be done for the purpose of assessing termination charges during the First Period cannot be done within the time frame laid down in paragraph 3(1) of the draft order (within 14 days of 30 August 2011). The 30 August 2011 date is now extended to 31 October, giving the MNOs until the middle of November to carry out their calculations. Furthermore, the 14 day period in the draft Order is extended to 28 days in both paragraphs 5(1) and 5(2) of the Order.

**THE TIME NEEDED TO CALCULATE TERMINATION CHARGES PAYABLE
IN RESPECT OF THE SECOND PERIOD**

28. The same point was made by H3G in respect of the time needed to calculate the termination charges in respect of the Second Period. The extension in paragraph 27 above deals with this concern.

CONFIDENTIALITY

29. The calculation of termination charges, both pursuant to Section N of the Judgment and generally for the future, may involve the provision of information by the MNOs to BT, which may be confidential. For the future, that is a matter that BT and the MNOs must resolve as between them, but plainly BT must ensure (and must satisfy the MNOs) that any information provided by the MNOs is used only for the purposes of calculating termination charges and is not used for any collateral purpose.
30. For the purposes of the calculation of termination charges pursuant to Section N of the Judgment, the solution is to keep in place the confidentiality ring imposed by the Tribunal in these proceedings, and for all information provided pursuant to the Order to be treated as confidential and as subject to the confidentiality ring. It is to be anticipated that some variation to the confidentiality ring may be required, in particular as regards the persons within the ring. That, however, is a matter that can be dealt with pursuant to the liberty to apply.

EXTENSION OF TIME FOR PERMISSION TO APPEAL

31. It was rightly pointed out that the Judgment is long and was handed down at what is, for many, the beginning of the holiday period. The parties clearly need to consider their position as regards any appeal. Accordingly, it is directed that there be an extension of time for requesting permission to appeal: time under rule 58(1) of the Tribunal Rules is extended to allow two months from the date of the Judgment to seek permission to appeal.

Marcus Smith QC

Charles Dhanowa
Registrar

Date: 12 August 2011