



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1168/3/10

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 11 October 2010 under section 192 of the Communications Act 2003 (“the Act”) by Everything Everywhere Limited (“EE”) of Hatfield Business Park, Hertfordshire, AL10 9BW against a determination made by the Office of Communications (“OFCOM”) contained in a document dated 10 August 2010 and entitled “Determination to resolve a dispute between BT and each of Vodafone, T-Mobile, H3G, O2, Orange and Everything Everywhere about BT’s termination charges for 0845 and 0870 calls”¹ (“the Determination”). EE is represented by its regulatory counsel at the above address (reference: Robyn Durie / Robert Wells).

The Determination concerns a dispute between British Telecommunications Plc (“BT”) and each of Vodafone Group Services Limited, T-Mobile (UK) Limited, Hutchison 3GUK Limited, Telefónica O2 UK Limited and Orange Personal Communications Services Limited (together, the “Mobile Network Operators” or “MNOs”). The dispute concerns the introduction of additional termination charges by BT for calls to 0845 and 0870 numbers hosted on its network (pursuant to Network Charge Change Notices 985 and 986 (“NCCNs 985 and 986”)) with effect from 1 November 2009. According to the Determination, OFCOM concluded that it was not fair and reasonable for BT to apply the new termination charges for calls to 0845 and 0870 numbers hosted on its network as set out in NCCNs 985 and 986, and that the parties to the dispute should revert to the terms on which they were trading prior to the imposition of NCCNs 985 and 986. OFCOM also concluded that it was appropriate and proportionate to exercise its powers under section 190(2)(d) of the Act to require BT to repay any additional amounts paid to it by the MNOs under NCCNs 985 and 986, over and above those charges applicable immediately prior to NCCNs 985 and 986, together with interest.

In summary, EE submits that OFCOM’s reasoning in the Determination is seriously flawed. EE advances the following main grounds of appeal:

- (a) OFCOM should have rejected NCCNs 985 and 986 on the basis of its findings about the essential model of competition existing in the market for number translation services (“NTS”) calls. According to its own description of the model of competition, OFCOM considers that it is EE and the other MNOs that supply the relevant service (call origination) to BT, not BT which supplies a service to the MNOs. Given that position, there should be no basis for BT increasing charges for call termination, since the logical implication of OFCOM’s position is that there should be no charges by BT at all.
- (b) Even if OFCOM had found that BT was providing a service to MNOs, potentially justifying a charge for that service, OFCOM failed to have sufficient focus on the costs of such provision. Rather, it embarked on a misconceived approach based on its “3 principles” set out at paragraph 1.18 of the Determination.
- (c) OFCOM’s placed an unjustified reliance on a “policy preference” which gave relatively less weight to the Mobile Tariff Package effects as compared to Direct effects.
- (d) OFCOM erred in finding it was practicable and appropriate for EE to provide BT with the information BT required about retail pricing for 0845/0870 calls.

¹ http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/761146/Final_Determination.pdf?bcsi_scan_A78203C66AB420A2=0&bcsi_scan_filename=Final_Determination.pdf

- (e) OFCOM's procedure was unfair. OFCOM erred during the dispute in failing to provide the MNOs with a proper opportunity to respond to BT's submissions.

As regards the relief sought, EE asks that the Tribunal:

- (a) set aside the challenged decision;
- (b) direct OFCOM to take a new decision in accordance with its judgment on the appeal;
- (c) award EE its costs; and/or
- (d) grant such further or other relief as may be 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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