



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1169/3/3/10

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 11 October 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 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”). BT is represented by BT Legal at the above address (reference: 0845 / 0870 Appeal).

The Determination concerns a dispute between 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” and, together, “the NCCNs”)) 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, BT submits that the Determination is unlawful and unfair to BT and constitutes a failure to resolve the dispute properly in accordance with OFCOM’s obligations under sections 185 to 192 of the Act. BT advances the following main grounds of appeal:

- (a) OFCOM failed to give sufficient weight to the fact that its own policy preference is that 0845 and 0870 call prices should be aligned to geographical call prices, and that the NCCNs redressed an acknowledged market failure. Given these factors, OFCOM’s starting point should have been that the NCCNs were “fair and reasonable”, unless and until it concluded that there were good grounds for believing the contrary. Instead, OFCOM conducted a flawed analysis, attached insufficient weight to the benefits achieved by the NCCNs and its methodology lacked transparency. As a result, OFCOM has committed errors of law, fact and/or appreciation.
- (b) OFCOM’s approach was not objective, failed to consider the merits of the dispute appropriately and was biased against a non-regulatory solution to the problems caused by the MNOs’ retail pricing policies. There were a number of features of the investigation and of the Determination, which rendered the dispute resolution process unfair. In particular, OFCOM wrongly, as a matter of law or appreciation:
 - a. placed an unrealistically high burden on BT to demonstrate what the precise effects of its NCCNs would be;
 - b. raised additional hurdles every time BT succeeded in showing the flaws in OFCOM’s approach;

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

- c. took into account and/or placed too much emphasis on the fact that it is currently conducting a review into non-geographic call services;
 - d. contrasted the merits of the NCCNs with the merits of a possible future regulatory solution;
 - e. ignored the merits of passing through revenue to terminating communications providers (“TCPs”) and via TCPs to service providers in a manner which was inconsistent with OFCOM’s previous practice;
 - f. attached importance to minor matters and unsubstantiated difficulties which it concluded gave rise to risks of competitive distortion and implementation difficulties.
- (c) OFCOM’s approach to assessing consumer benefits was flawed as a matter of law, fact and/or appreciation. In particular, the approach was bound to lead to the rejection of the NCCNs because of material flaws in its cost benefit analysis. In particular, OFCOM attributed weight incorrectly to various factors, under-weighting the benefits which arise in cases where prices fall, and over-weighting the “mobile tariff package effect” (“the MTPE”). Amongst other things, OFCOM ignored the difference between efficiency and distributional factors which should have led it to treat the MTPE as being only of secondary importance with no particular detriments. OFCOM also took a narrow and inadequate view of the benefits to all originating communications providers and all service providers of the MNOs complying with OFCOM’s policy preference. Further, its final conclusions failed to show how the magnitudes of different effects depended on the retail price set by MNOs, blurring the distinctions between different scenarios and leading it to reach the incorrect conclusion that there was material uncertainty and a potential overall risk of harm to consumers. OFCOM raised a number of insignificant objections to BT’s analysis to justify its conclusion that it could not say that the NCCNs would be likely to lead to price reductions in a significant number of cases. These were minor technical criticisms or arguments, which lacked substance and OFCOM was wrong to rely on them.

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

- (a) Set aside the Determination in its entirety.
- (b) Declare that BT is entitled to charge the MNOs an additional charge for terminating calls to 0845 and 0870 numbers originated on the MNOs’ networks, that the charges under NCCNs 985 and 986 are fair and reasonable and/or that the MNOs are liable to pay all monies due and owing under NCCNs 985 and 986 from 1 November 2009.
- (c) Refer the matter back to OFCOM with directions to do one or more of the following:
 - a. order that the charges in NCCNs 985 and 986 are fair and reasonable;
 - b. order that NCCNs 985 and 986 remain operative and the MNOs are liable to pay all monies due and owing under NCCNs 985 and 986 from 1 November 2009;
 - c. reconsider the dispute, taking proper account of the matters referred to in BT’s appeal, and having full regard to:
 - i. OFCOM’s stated regulatory preference that calls to 0845 and 0870 numbers should be charged for at the same rates as geographic local and national calls;
 - ii. the fact that NCCNs 985 and 986 are likely to incentivise a significant reduction in the charges to 0845 and 0870 callers charged by MNOs;
 - iii. the overall likelihood of the benefits from NCCNs 985 and 986 significantly outweighing any putative objections and uncertainties from their introduction; and/or

iv. ensuring a proper, fair and reasonable division of the revenues, which the MNOs derived from charging callers to 0845 and 0870 numbers, between the MNOs and the terminating network operators.

(d) Order OFCOM to pay BT's costs.

(e) 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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