



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO 1189/3/3/11

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 14 November 2011 under section 192 of the Communications Act 2003 (“the Act”) by Telefónica UK Limited (“Telefónica”) against a determination made by the Office of Communications (“Ofcom”), published on 14 September 2011, of a dispute between Telefónica and each of Vodafone Limited (“Vodafone”) and Hutchison 3G UK Limited (“H3G”) (“the Determination”). Telefónica is represented by Ashurst LLP, Broadwalk House, 5 Appold Street, London EC2A 2HA (reference: Ben Tidswell and Lauren Bernard).

The underlying dispute concerns wholesale voice call termination charges raised by Vodafone and H3G – i.e. charges to Telefónica in respect of voice calls originating from Telefónica’s network and terminating on Vodafone’s or H3G’s networks – in October 2010 (“the October 2010 charges”). Telefónica submits that the Determination is vitiated by a number of errors of law, principally resulting from Ofcom’s failure to follow the approach to dispute resolution explained by the Tribunal in *T-Mobile (UK) Limited v Ofcom* [2008] CAT 12 (“*TRD*”) and *British Telecommunications Plc v Ofcom* [2011] CAT 24 (“*08-numbers*”).

Telefónica contends that the Determination is vitiated by five errors of law:

1. Ofcom proceeded upon the false premise that the significant market power (“SMP”) regime was the *only* applicable regulatory regime at the time the October 2010 charges were imposed: Ofcom’s dispute resolution jurisdiction is one of three regulatory regimes, applicable in addition to *ex ante* regulation by SMP conditions and *ex post* enforcement of competition law.
2. Ofcom failed to consider whether the October 2010 charges were “fair and reasonable” in the sense explained by the judgments in *TRD* and *08-numbers*: i.e. Ofcom failed to consider the appropriateness of the October 2010 charges by reference to all relevant considerations including Ofcom’s own regulatory duties and policy preferences.
3. Ofcom failed to have regard to the matters required by section 190(2A) of the Act, and misdirected itself in law that section 190(2A) was inapplicable to its determination.
4. Ofcom unlawfully attached determinative, alternatively excessive, weight to Vodafone’s and H3G’s putative compliance with the SMP regime.
5. Ofcom had no adequate evidential basis to conclude that Vodafone and H3G had complied with the SMP regime.

Telefónica does not accept the factual findings and discretionary assessments contained in the Determination, but it does not rely upon any error of fact by Ofcom or seek to impugn any exercise by Ofcom of its discretion. Rather, Telefónica submits that this Appeal should be allowed, and the Determination should be remitted to Ofcom, on the grounds of all or any of the above errors of law.

Telefónica requests that the Tribunal:

1. Allow this Appeal.
2. Remit the matter to OFCOM, with directions that OFCOM determine whether the October 2010 charges were fair and reasonable having regard to all relevant considerations including without limitation OFCOM's own regulatory duties and stated policy preferences.

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 publications 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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