



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE NO.: 1211/3/3/13

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 24 May 2013 under section 192 of the Communications Act 2003 (the “Act”) by British Telecommunications plc (“BT”) of 81 Newgate Street, London EC1A 7AJ against the determination by the Office of Communications (“OFCOM”) contained in a document dated 4 April 2013 and entitled “Determination to resolve disputes concerning BT’s tiered termination charges in NCCNs 1101, 1107 and 1046” (the “Decision”)¹. BT is represented by BT Legal, 81 Newgate Street, London EC1A 7AJ (reference: Frederic Dupas / Maria Ouli).

The Decision concerns certain disputes in connection with the wholesale termination charges set by BT for calls to certain non-geographic numbers hosted on BT’s network, as set out in the following network charge change notices (“NCCNs”): 1046, 1101 and 1107. OFCOM concluded that the charges set out in the NCCNs were not fair and reasonable, and directed that BT should withdraw the NCCNs and revert to the terms on which it was trading prior to the coming into effect of the NCCNs. OFCOM also directed BT to repay by way of an adjustment for overpayment any amounts paid under the NCCNs together with interest.

In summary, the principal grounds of appeal on which BT relies are that:

1. OFCOM erred in law in relying on “Principle 2” of its analytical framework, which provides that BT’s pricing changes may only be permitted if shown to be beneficial to consumers. BT contends that, on the correct interpretation of the Common Regulatory Framework, in particular Article 20(3) of Directive 2002/21/EC (the “Framework Directive”) and Articles 5 and 8 of Directive 2002/19/EC (the “Access Directive”), OFCOM had no power to impose obligations on BT, including restrictions on BT’s pricing on the relevant market, save to the extent that such obligations were necessary to ensure end-to-end connectivity, which they were not in this case. By including Principle 2 in its analytical framework, OFCOM unlawfully went beyond what was necessary to ensure end-to-end connectivity.
2. Alternatively, if OFCOM was entitled to rely on Principle 2, it erred in law and/or in the exercise of its discretion and/or acted disproportionately in preventing BT’s price changes where it was merely uncertain as to the impact of price changes on consumers.
3. Again in the alternative, if OFCOM was entitled to rely on Principle 2, it erred in law and fact in its assessment of the nature of the effects on competition of BT’s pricing, and in treating the importance of the benefits of competition as subordinate to consumer interests.
4. Further or in the alternative, OFCOM erred in fact in finding that the price changes give rise to any material risk of future consumer detriment.
5. Further or in the alternative, OFCOM erred in law and fact in its approach to “Principle 3” of its analytical framework, namely that price changes would only be allowed where they were practicable to implement. OFCOM should have recognised that the price changes could not have been prevented merely on grounds of practicality and further should have held that there were no real problems relating to practicality in the case of the NCCNs.

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A non-confidential version of the Decision is available on OFCOM’s website at:
<http://stakeholders.ofcom.org.uk/binaries/consultations/provisional-conclusions/statement/040413.pdf>

In its notice of appeal, BT states that the Decision adopts essentially the same approach to dispute resolution and the same analytical framework as that adopted by OFCOM in the determinations of disputes relating to NCCNs 956, 985 and 986 (the "08x Determinations"). BT successfully appealed the 08x Determinations to the Tribunal (cases 1151/3/3/10, 1168/3/310 and 1169/3/3/10), but the Tribunal's judgment of 1 August 2011 ([2011] CAT 24) was overturned on appeal by the Court of Appeal by its judgment of 25 July 2012 ([2012] EWCA Civ 1002). The Supreme Court granted BT permission to appeal the Court of Appeal's judgment on 12 February 2013, and BT's appeal is listed for a hearing in February 2014.

BT submits that the outcome of its appeal in relation to the 08x Determinations will have an important impact on the merits and course of the present appeal, and has accordingly filed a protective notice of appeal, which only sets out the factual background and grounds of appeal in outline. BT invites the Tribunal to stay its appeal against the Decision until such time as the Supreme Court hands down its judgment in relation to the 08x Determinations, whereupon BT shall have a period of 2 months (or such time as the Tribunal may direct) in which to file a fuller, amended notice of appeal and supporting evidence (if so advised).

Accordingly, BT requests that the Tribunal:

1. Stay all proceedings in this appeal until 14 days after the handing down of the Supreme Court judgment in connection with the 08x Determinations; and/or
2. Set aside the Decision and hold that BT had the right to introduce the NCCNs from the date that they became effective in each case;
3. Direct OFCOM to exercise its power under section 190(2)(d) of the Act to require the mobile network operators to pay the additional termination rates due under the NCCNs (over and above the amounts already paid or payable to BT) from the dates that the NCCNs became effective, together with interest thereon;
4. Direct OFCOM to find that NCCN 1046 is not the successor of NCCN 956 and does not therefore fall within the provisions made in paragraphs 1(6) and 5(2)(ii) of the Tribunal's Order of 12 August 2011 in connection with the 08x Determinations (to the extent that that Order is restored following BT's appeal to the Supreme Court);
5. Alternatively, remit the question referred to in paragraph 4 above to OFCOM for determination;
6. Grant such further or other relief as appears appropriate;
7. Award BT its costs of the appeal.

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, QC (Hon)
Registrar

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