



## COMPETITION APPEAL TRIBUNAL

### NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

#### CASE NO: 1215/3/13

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 17 June 2013 under section 192 of the Communications Act 2003 (the “Act”) by The Number (UK) Limited (the “Appellant”) of Fusion Point, Tresillian Terrace, Cardiff, Wales CV10 3DA against a decision by the Office of Communications (“OFCOM”) contained in a document dated 15 April 2013 and entitled “Simplifying Non-Geographic Numbers” (the “Decision”)<sup>1</sup>. The Appellant is represented by Matthew Arnold & Baldwin LLP, 85 Fleet Street, London, EC4Y 1AE (reference: Ted Mercer).

According to the Notice of Appeal, the Decision that is the subject of this appeal relates to the implementation of certain key “minded to” or “provisional” decisions set out in the document described above, which were intended to provide for greater transparency for consumers in relation to calls to non-geographic numbers (“NGNs”). In particular, these included decisions that:

1. The tariff structure of most NGNs should be unbundled so that the charges levied by the originating call provider (“OCP”) are shown separately to the charges levied by the terminating call provider (“TCP”).
2. There should be a cap on the maximum service charge levied for calls to NGNs other than directory inquiry (“DQ”) services.
3. There should be one access charge per tariff package for calls to all such unbundled NGNs, set at a simple pence per minute rate.
4. Each individual NGN should have a service charge applicable to all calls at all times, whether from fixed line or mobile phones.

The Notice of Appeal indicates that the Decision under challenge, which appears final (see further below), is a consequential matter affecting how the key decisions set out above are implemented. According to the Notice of Appeal, in order to implement its key decisions as to how unbundling is to be effected, OFCOM has decided that:

1. In order to limit implementation costs without unduly constraining the available range of service charge price points<sup>2</sup>, OCP’s billing systems will be required to accommodate a minimum of 100 service charge price points, with 80 being made available upon implementation and a further 20 twelve months later (the “Price Points Limitation”).
2. Such common set of price points will be set by the industry for all of the industry, such price points being in increments of no less than 1p (the “Price Point Setting Process”). According to the Appellant, this means that, in real terms, OFCOM envisages such common price points will emerge from multiple *bilateral* discussions between OCPs and TCPs, which operators alone will decide upon the range of the 100 tariffs to be offered across the spectrum of NGNs for all types of NGN services. Service providers will have no direct feed into or role in this process; at best they will be

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<sup>1</sup> A non-confidential version of the Decision is available on OFCOM’s website at:  
[http://stakeholders.ofcom.org.uk/binaries/consultations/simplifying-non-geo-no/summary/Part\\_A.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/simplifying-non-geo-no/summary/Part_A.pdf)

<sup>2</sup> A “price point” describes the combined tariff of the service charge, e.g. £1 per minute and £1 per call are two distinct “price points” or tariffs.

able to exert weak indirect influence through their TCP providers in these bilateral discussions, whereas historically and currently (see paragraph 9.109 of the Decision) they are free to select any price point they require simply by requesting it from BT, with the result that there are now currently more than 300 different tariffs/price points for NGNs.

According to the Appellant, the combined effect of the Price Points Limitation and the Price Point Setting Process, together with certain other restrictions on the price points that may be set (which together comprise the Decision), is to:

1. Substantially ossify the existing market tariff structure to the particular detriment of DQ services and competition in the DQ market. As these services are not price capped, DQ service providers should benefit most from the freedom to price as they see fit. However, OFCOM has introduced a de facto cap because: (i) DQ services account for just 1% of NGN traffic, and yet OFCOM envisages that the tariffs should be broken down broadly by reference to tariffs used for existing volumes of traffic; and (ii) DQ services have the greatest ability to use a range of tariffs, given the absence of a cap.
2. Place the ability of service providers like the Appellant, which are neither OCPs nor TCPs, substantially in the hands of entities which are either its competitors (running their own DQ services) or which have no real interest in accommodating innovative pricing points. In short service providers have entirely lost the ability to set the price points they want and have very little influence on the price points that will be made available.
3. Leave no or no clearly discernible or predictable role for OFCOM in either setting, policing or approving the selection of and/or replacement of price points by OCPs and TCPs.
4. Be unworkable and incapable of protecting the Appellant and other independent DQ providers from the conflicting interests of integrated DQ providers.

In summary, the Appellant contends that these combined effects of the Decision are unlawful for the reasons set out below:

1. They discriminate against DQ providers, given the particular features of the market for DQ services which differentiate it markedly from other NGN service markets, whilst frustrating OFCOM's statutory objectives to promote competition;
2. They entrench the tool of using Price Points Limitations and a market Price Point Setting Process for the long term, when such solutions should be, at most, short term solutions; and
3. They lead to a Price Point Setting Process that is both practically unworkable and contrary to general competition law.

The Appellant states that the appeal is brought on a protective basis, as it is unclear from the qualified nature of document containing the Decision whether the Decision itself is final, or whether OFCOM remains willing to reconsider the matter. By way of relief, the Appellant invites the Tribunal:

1. To allow the appeal;
2. To remit the Decision to OFCOM, with directions:
  - (a) To adopt a Price Point Setting Process that: (1) guarantees service providers due input into the process of setting price points; (2) insulates service providers from OCPs and TCPs taking decisions upon price points that advance their interests, whether because the decisions upon the price points set are taken by OFCOM or by some third party adjudicator independent from TCPs and OCPs or are otherwise insulated from conflicts of interest;
  - (b) To consider in such process how many price points from any "price points minima" OFCOM sets to reserve to DQ service providers in view of the special characteristics of the market for DQ services.

- (c) To direct OFCOM to consult upon the imposition of obligations on OCPs to put in place billing systems (in a time frame to be decided by OFCOM after consultation) that are designed so as to accommodate at minimum cost price point charges by NGN service providers flexibly, from time to time, so as to minimise the extent to which billing barriers limit service providers' flexibility in setting service charges.

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](http://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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