



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003 CASE NO:1047/3/3/04

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar of the Competition Appeal Tribunal gives notice of the receipt of an appeal on 28 July 2004, under section 192 of the Communications Act 2003 (“the Act”) by Hutchison 3G (UK) Limited (“the appellant”) in respect of a determination of the Office of Communications (“OFCOM”) set out in paragraph 2(a) of Annex A to OFCOM’s statement entitled “Wholesale Mobile Voice Call Termination”, dated 1 June 2004 (“the decision”). The decision finds that the appellant has significant market power (“SMP”).

According to the appellant, the decision failed properly to adopt the approach required by the Act (pursuant to Council Directive 2002/21/EC¹ (“the Framework Directive”)) and to assess the appellant’s position against the criteria required by the applicable European Commission’s guidelines and recommendations issued pursuant to the Framework Directive: in particular, the decision failed to give due recognition and weight to: (a) the existence and impact of countervailing bargaining power held by British Telecommunications plc (“BT”) and other purchasers of wholesale mobile voice call termination services from the appellant; and (b) the lack of any evidence of excessive pricing by the appellant or anticipated during the period of OFCOM’s review.

The appellant’s grounds of appeal are as follows:

- (a) the decision failed to analyse properly or give due consideration to the imbalance of bargaining position between the appellant and BT prior to the completion of the appellant’s current interconnect agreement with BT of 13 August 2001 (“the BT Agreement”). According to the appellant, BT held and exercised countervailing buyer power in its negotiations with the appellant to compel the appellant to agree to termination charges;
- (b) the decision failed to analyse properly or give due consideration to the executed terms of the BT Agreement and failed to assess properly their effect on the appellant’s ability to raise its termination charges during the period of OFCOM’s current review; (OFCOM has stated that it will carry out a further review of wholesale mobile voice call termination charges in 18 to 24 months time). According to the appellant, the BT Agreement locks in the imbalance of bargaining position between BT and the appellant and the resulting restrained termination charges for at least the period of OFCOM’s review;
- (c) the decision failed to analyse properly or give due consideration to the relevance and impact of the BT Agreement on the appellant’s ability, in practice, to set higher termination charges in its dealings with other mobile network operators (“MNOs”). According to the appellant, the termination charges agreed between BT and the appellant set a ceiling for the charges (excluding a regulated transit fee) which the appellant can make to the other MNOs, and that this ceiling will continue to be effective for as long as the BT Agreement is in force (at least another 24 months);

¹ Council Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services OJ [2002] L 108/33.

- (d) the decision failed to assess properly or give due consideration to the fact that the appellant's average termination charge is heavily restrained and there was no evidence that it would not remain so for at least two years from 1 June 2004. According to the appellant, the level of termination charges is locked into the BT Agreement and forms a ceiling (excluding a regulated transit fee) for the appellant's charges to other MNOs;
- (e) the decision failed to give proper weight to each of the factors it was obliged to take into account in accordance with Article 8 of the Framework Directive and paragraph 78 of the Commission's Guidelines² in determining that the appellant has SMP.

The appellant seeks the following relief:

- (a) the decision be quashed;
- (b) the decision be remitted to OFCOM for reconsideration;
- (c) costs;
- (d) any other relief.

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

Registrar
4 August 2004

² Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services OJ [2002] C 165/6.