



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE: 1085/3/3/07

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar gives notice of the receipt of an appeal on 29 May 2007, under section 192 of the Communications Act 2003 (“the Act”) by British Telecommunications Plc (“the appellant”) against a decision (“the Decision”) of the Office of Communications (“OFCOM”) contained in OFCOM’s statement entitled “Mobile call termination” published on 27 March 2007. In the Decision OFCOM defined markets for wholesale voice call termination for each of the five mobile network operators – Hutchison 3G UK, O2, Orange, T-Mobile and Vodafone (“the MNOs”), made the assessment that each MNO has significant market power (“SMP”) in the relevant market and imposed SMP service conditions on each of the MNOs.

The SMP service conditions set by OFCOM include the imposition of price controls on the supply of mobile call termination (“MCT”) services by each of the MNOs in respect of supplies to Communications Providers other than themselves. Those price controls operate for four years from 1 April 2007.

The appellant challenges the levels chosen by OFCOM in setting the prices which the MNOs are permitted to charge for MCT under the price controls imposed by the SMP service conditions. According to the appellant, in selecting those levels, and choosing and applying the methodology and principles to arrive at them, OFCOM has made a number of errors of fact and/or law, and/or has wrongly exercised its discretion and, as a result, the levels are far too high.

The appellant contends that the various detrimental effects of failing to regulate MCT charges identified by OFCOM (at paragraphs 7.32 to 7.73 of the Decision) also arise in relation to regulated MCT charges which, though regulated, are permitted to be too high and which are not cost reflective.

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

- (a) In setting MCT charges which are above a reasonable cost-oriented level, and/or in making allowances in relation to spectrum costs and/or non-network costs (i.e. administration costs), and/or the network externality and/or in disregarding network sharing efficiencies, OFCOM has erred in law and/or fact and/or failed to have regard to those considerations which it was required to have regard and/or wrongly exercised its discretion, in that the price controls imposed:
 - i) Do not promote efficiency, sustainable competition and confer the greatest possible benefits on the end consumers of public electronic communications services contrary to section 88(1)(b) of the Act;
 - ii) Do not promote competition in the relevant markets and/or distort such competition contrary to section 3(4)(b) and 4(3)(a) of the Act;
 - iii) Do not encourage investment and innovation in the relevant markets, and in particular the market for fixed telephony services, contrary to section 3(4)(d) of the Act;
 - iv) Do not further the interests of consumers, and in particular consumers of fixed telephone services, in respect of choice, price, quality of service and value for money contrary to section 3(5) of the Act;
 - v) Do not contribute to and/or jeopardise the aims of the European internal market contrary to section 4(4) of the Act;

- vi) Favour one form of electronic communications network, electronic communications service or associated facility or one means of providing or making available such a network service or facility over another when it was not practicable to do so contrary to section 4(6) of the Act; and
- vii) Do not encourage the provision of network access and service interoperability for the purpose of securing efficiency and sustainable competition in the markets for electronic communications networks and electronic communications services and the maximum benefit for the persons who are customers of communications providers and persons who make such facilities available, contrary to section 4(7) of the Act.

Further or alternatively OFCOM have,

- (b) made errors of law and/or fact and/or economic appraisal and/or taken into account irrelevant considerations and/or ignored relevant considerations in their assessment of the allowances for spectrum costs and/or non-network costs (administration costs) and/or the network externality;
- (c) failed to take the utmost account of comments provided by the European Commission contrary to the provisions of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services the Framework Directive and, in particular Article 7(5);
- (d) failed to adopt a regulatory approach that is transparent, accountable, proportionate and consistent as required by section 3(3) of the Act in that their approach is flawed in the ways identified by the appellant in the notice of appeal and/or their methodology and justifications underlying their Decision are not transparent or adequately reasoned;
- (e) failed to adopt an approach which is consistent with the regulatory practice(s) adopted when regulating the appellant;
- (f) adopted an approach which is lacking in neutrality and/or unreasonable and/or irrational.

The appellant seeks an order from the Tribunal and/or the Competition Commission that:

- (a) OFCOM's price controls in paragraphs MA.3 and MA.4 of the Decision be set aside;
- (b) The price controls be substituted by SMP price control conditions set at a level lower than the current figures contained in the Decision and which are appropriate for fulfilling the purposes of section 88(1)(b) of the Act;
- (c) Such further or other findings be made or such other relief be granted as the Tribunal and/or the Competition Commission consider appropriate;
- (d) OFCOM pay the appellant's 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
Registrar
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