



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003

CASE: 1092/3/3/07

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar gives notice of the receipt of an appeal on 7 September 2007, under section 192 of the Communications Act 2003 (“the Act”) by Cable & Wireless UK, Colt Telecommunications, Gamma Telecom Limited, Global Crossing (UK) Telecommunications Ltd, KCOM Group plc (formerly Kingston Communications (Hull) Plc), Opal Telecom Limited, Thus plc, and Verizon (UK) Limited (together “the appellants”) against the determinations made by the Office of Communications (“OFCOM”) on 7 July 2007 in a document entitled “Disputes between T-Mobile and BT, O2 and BT, Hutchison 3G and BT and BT and each of Hutchison 3G, Orange Personal Communications Services and Vodafone relating to call termination rates” (“the Determinations”).

In summary the appellants submit that, in adopting the Determinations, OFCOM erred in key respects:

- (a) OFCOM did not determine reasonable and proportionate call termination charges. In particular, the effects of the Determinations on the appellants were not considered by OFCOM, properly or at all. OFCOM wrongly treated the interests of British Telecommunications plc (“BT”) as being a proxy for, and entirely congruent with, those of the appellants. Further, OFCOM attached disproportionate weight to the interests of Hutchison 3G UK Limited, Orange Personal Communications Services Limited, O2 (UK) Limited, Vodafone Limited and T-Mobile (UK) Limited. No consideration was given to whether mobile call termination rates that were lower than those proposed by the mobile operators in question would equally have achieved the regulatory objective ostensibly sought by OFCOM;
- (b) The Determinations are based on an error as to OFCOM’s legal powers to resolve disputes under the Act. In particular, OFCOM unlawfully fettered its legal powers to resolve disputes under the Act based on an incorrect interpretation of the relationship between these powers and their power to impose general price controls on undertakings designated with significant market power under the Act;
- (c) The “gains from trade” test applied by OFCOM in the Determinations provides an incorrect basis for resolving the disputes. The test is economically incoherent and flawed. Further, it is contrary to:
 - i. OFCOM’s duties under Article 10 of the Treaty establishing the European Community;
 - ii. OFCOM’s obligations under the Act (and the EU Directives on which the Act is based);
 - iii. OFCOM’s own public statements on the determination of “reasonable” call termination charges; and

- iv. several well established tests for the assessment of reasonable charges that OFCOM could easily have applied;
- (d) OFCOM proceeded on the basis of an error of law in interpreting BT's Standard Interconnection Agreement ("SIA"), and in particular its implications for BT's ability to recover from the appellants with retrospective effect certain costs associated with the disputed mobile call termination charges; and
- (e) The procedure adopted by OFCOM in making the Determinations was unfair in material respects to the appellants.

The appellants seek the following relief:

- (a) the quashing of the Determinations;
- (b) the remittance of the subject-matter of the Determinations to OFCOM with guidance from the Tribunal as to:
 - (i) the principles applicable to the dispute resolution procedure;
 - (ii) the extent to which the End-to-end Obligation was an appropriate basis for resolution of the disputes;
 - (iii) whether the "gains from trade" test was inappropriate in determining mobile termination disputes;
 - (iv) an appropriate approach to determining the reasonableness of the MNOs' termination rates;
 - (v) whether on a proper construction of the SIA, BT would be able to recover from the appellants any amount determined as due to the MNOs pursuant to the Determinations; and
 - (vi) the proper consultation which OFCOM should undertake with the appellants and any other party similarly affected in respect of and prior to issuing the Determinations; and
- (c) an order that OFCOM pay the appellants' costs and other expenses associated with the appeal together with interest (if applicable);
- (d) an order for any other relief considered appropriate.

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

12 September 2007