



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003 CASE NO:1025/3/3/04

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 7 January 2004, under section 192 of the Communications Act 2003 (“the Act”) by **British Telecommunications plc** (“BT”) in respect of a notification dated 7 November 2003 (“the Notification”) given by the **Director General of Telecommunications** (“the Director”) under section 94 of the Act.¹

In the Notification the Director finds that there are reasonable grounds for believing that BT is contravening General Condition 1.2 (“GC 1.2”) set pursuant to section 45 of the Act. General Condition 2.1 provides that:

“where [a] Communications Provider acquires information from another Communications Provider before, during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiations or arrangements, the Communications Provider shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage.”

In summary, as stated by the appellant, the principal grounds of appeal relied on are:

1. The information that a customer is switching over is not given *in confidence* to the losing Communications Provider, as required by GC1.2. The customer has a contractual relationship with the losing Communications Provider in relation to the services in question. The Communications Provider is therefore entitled to expect the customer to notify it that he or she wishes to cease receiving those services from it. The system in place simplifies the procedure and saves the customer the task of notifying *directly* the losing Communications Provider, because the new Communications Provider does it on his or her behalf. Under the old system in place the customer used to notify BT directly through the use of the reply slip. The removal of the reply slip did not change the fundamental facts that the Communications Provider provides the information on behalf of the customer and that the information cannot be confidential as between the receiving Communications Provider and the customer.

¹ Under section 408(5) of the Act and Article 3(2) of the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No.2) Order 2003 SI no 3142 anything which was done by the Director prior to 29 December 2003 is to have effect after that time as if it had been done by the Office of Communications (“OFCOM”).

2. The reality of the situation described above is that the information in question is not information acquired from *the new Communications Provider as such*. The latter is simply passing on information as agent for the customer, who is the actual provider of that information. This is clear from the provisions of the former section 50A of BT's licence which provided that the "Licensee shall provide Carrier Pre-Selection ... to any of its subscribers who notify the licensee in writing that they require it to provide Carrier Pre-Selection" and from the provisions of the Industry End to End process.
3. The Director has himself recognised that the information can be passed by BT Wholesale to BT Retail for the purpose of sending the Notification of Transfer letter, which would presumably not be the case if the information truly fell within GC 1.2. The Director has sought to draw artificial distinctions as to the purposes for which information may be received and used by BT. These distinctions are not grounded in the wording of GC 1.2 and they undermine the logic of the Director's approach.
4. GC 1.2. is concerned with information acquired from a Communications Provider solely in connection with *the process of negotiating network access or interconnection arrangements*. It covers technical or other information about that Communications Provider, its network, product or services, which the other Communications Provider is to be forbidden from using, other than for the purposes for which it is provided. Such information might come from and concern either party to the negotiations and it is by its very nature confidential. By contrast the information that a particular customer is switching from one Communications Provider to another does not fall within this category. It is information about the customer himself or herself and is not connected with the process of negotiating network access or interconnection arrangements.
5. GC 1.2 prohibits the passing on of information covered by the provision to others for whom such information could provide *a competitive advantage*. This provision, and the similar wording in the Access Directive², underscores the points already made as to the proper construction of the restriction. The type of information which would be capable of conferring a competitive advantage would be, for example, confidential information about network configurations, a competitor's requirements or his services. Information which the losing Communications Provider acquires about its own customer's apparent intention no longer to require the provision by it of certain services is clearly not confidential information as between the losing Provider and the new Provider. Similarly, this information cannot possibly confer a competitive "advantage" on the former. The losing Communication Provider can expect to receive this information, and it would be received by that Communications Provider in any event.
6. For the reasons summarised above BT submits that the Director is mistaken in his interpretation of GC1.2 as prohibiting save activity and winback activity. Such an interpretation would, if correct, bring GC1.2 into conflict with the requirements of section 47 of the 2003 Act, (and of underlying general principles of EC law) and would render the condition unlawful, ultra vires and unenforceable. In particular the condition would be disproportionate to any legitimate aim, would discriminate against losing Communications Providers in relation to marketing, and would not be objectively justifiable.
7. The Director's interpretation of GC1.2 and the measures taken in the Notification are incompatible with Article 10 ECHR and therefore unlawful under section 6 of the

² Directive 2002/19/EC of March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

Human Rights Act 1998, because they unduly and disproportionately restrict BT's rights to receive information and to impart it to a customer and the customer's right to receive that information.

8. BT contends that the discretion afforded to the Director under section 94 of the 2003 Act has not been properly exercised. The Director's duty under section 3(3) of the 2003 Act is to have regard in all cases to the principles of good regulation, in particular the principle that regulatory activities should be targeted only at cases in which action is needed. BT contends that, in the case of Save Activity, there is significant consumer benefit resulting from BT's save call and letter and that this should have formed part of the Director's assessment as to what, if any, action was needed, and that in this respect the Director failed to discharge his section 3(3) duty. The Director also has an overall duty under section 3(1)(b) of the 2003 Act, in carrying out OFCOM's functions, to promote the interests of consumers. BT contends that the Director has also failed to discharge this duty, in that the save activity serves an important consumer protection function, namely that of not only confirming with the customer that he has agreed to switch to the CPS operator but also ensuring that the customer is able to make a fully-informed choice of Communications Provider.
9. For these reasons BT submits that the conditions for the issuing of the Notification have not been satisfied, and that there are no reasonable grounds for believing that the Save Activity of BT constitutes a contravention of GC1.2; alternatively, GC1.2 is unlawful, ultra vires and unenforceable as failing to satisfy the requirements of section 47 of the 2003 Act and/or of underlying principles of EC law. Accordingly the Notification should be set aside as being unlawful, and BT should be entitled to continue with Save Activity without threat of enforcement action or penalty under sections 95 and 96 respectively of the Act. Further, BT submits that the same applies to BT's winback activity.

The appellant seeks the following relief:

1. a finding that the Director did not have reasonable grounds for believing that GC 1.2 was being contravened by BT in the manner alleged, and/or a finding that GC 1.2 has not been contravened by BT in the manner alleged; alternatively, if the Director's interpretation of GC 1.2 is held to be correct, a finding that GC 1.2 conflicts with the requirements of section 47 of the 2003 Act and/or with general principles of EC law, is unlawful, ultra vires and unenforceable and/or a finding that the Director's act in setting GC 1.2 and/or in seeking to enforce it is incompatible with BT's rights under Article 10 of the ECHR and therefore unlawful by virtue of section 6 of the Human Rights Act 1998;
2. a finding that the Notification cannot stand;
3. a finding that the Director or OFCOM as the case may be is not entitled to issue an enforcement notification under section 95 of the Act nor to impose a penalty on BT under section 96 in respect of BT's Save Activity;
4. an order remitting the matter to the Director or OFCOM as the case may be with the following directions:
 - (a) that the Notification be withdrawn;
 - (b) that no enforcement notification be issued under section 95 of the Act in respect of BT's Save Activity;

- (c) that no penalty be imposed on BT under section 96 of the Act in respect of BT's Save Activity;
 - (d) such further or other directions as the Tribunal may feel appropriate in order to give effect to its findings.
5. that the Tribunal make the same findings and directions *mutatis mutandis*, in respect of BT's Winback Activity.
6. that the Director or OFCOM as the case may be pay BT's costs of this appeal.

BT also requests that the Tribunal hear and determine the appeal on an expedited basis.

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, New Court, 48 Carey Street, London WC2A 3BZ, 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 7271 0395) or fax (020 7271 0281). Please quote the case number mentioned above in all communications.

Charles Dhanowa

Registrar
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