



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPEAL UNDER SECTION 192 OF THE COMMUNICATIONS ACT 2003 CASE NO: 1040/3/3/04

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 9 July 2004, under section 192 of the Communications Act 2003 (“the 2003 Act”), by **British Telecommunications plc** (“BT”) in respect of a notification dated 11 May 2004 (“the Notification”) given by the **Office of Communications** (“OFCOM”) under section 94 of the 2003 Act.

In the Notification OFCOM 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 2003 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 as follows:

1. The information that a customer is switching over is not acquired by BT “from” the gaining Communications Provider (“CP”), as required by GC 1.2. The customer has a contractual relationship with BT in relation to the services in question (“the Retail Contract”). It is a term of the Retail Contract between BT and the customer that the customer will notify BT if it wishes to terminate the contract. Under the contract BT may accept instructions from a person who BT thinks, with good reason, is acting with the customer’s permission, thus simplifying the procedure. BT’s practice has thus been to accept lodging of a Wholesale Line Rental (“WLR”) order by the gaining CP as instructions from the gaining CP acting as agent for the customer to provide notification of termination for the purposes of the Retail Contract.
2. OFCOM accepts that BT Retail may use such information for marketing purposes if it is acquired from a source other than the gaining CP. This is in fact what happens: the reality of the situation described above is that the information in question is not information acquired from the gaining CP as such. The latter is simply passing on information as agent for the customer, who is the actual provider of that information.
3. GC 1.2 is concerned with information acquired from a CP solely in connection with the process of negotiating network access or interconnection arrangements. It covers technical or other information about that CP, its network, product or services, which the other CP is 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 CP 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.

4. The information that a customer is switching over is not confidential information as required by GC 1.2. It is not information passed to the gaining CP in confidence. Nor does it acquire a cloak of confidentiality by operation of GC 1.2.
5. OFCOM has itself recognised that the information can be passed by BT Wholesale to BT Retail for the purpose of sending the Advice of Transfer letter. However, the Advice of Transfer letter does not as such facilitate the transfer process. Hence on OFCOM's construction of GC 1.2, generating the Advice of Transfer letter would be a prohibited use of the information. OFCOM's position on the Advice of Transfer letters demonstrates the fallacy of its interpretation, and is further indication that the information is not within the scope of GC 1.2.
6. Furthermore, it does not seem to be disputed by OFCOM that if the customer responds to an Advice of Transfer letter by calling BT with questions, BT is entitled to answer the customer's questions. It is illogical that a conversation BT is entitled to hold on an incoming call is prohibited on an outgoing call.
7. BT submits that OFCOM is mistaken in its interpretation of GC 1.2 as prohibiting save activity and winback activity. Such an interpretation would, if correct, bring GC 1.2 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.
8. In particular, OFCOM's interpretation renders GC 1.2 disproportionate to any legitimate aim and would discriminate unfairly against all losing CPs (not just BT Retail) in relation to marketing. It is also an interpretation that renders it potentially applicable to a vast spectrum of information that is exchanged by CPs, which would invariably lead to unintended and perverse outcomes.
9. OFCOM'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 Human Rights Act 1998 ("HRA"), 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.
10. BT contends that the discretion afforded to OFCOM under section 94 of the 2003 Act has not been properly exercised. OFCOM'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 calls and that this should have formed part of OFCOM's assessment as to what, if any, action was needed, and that in this respect OFCOM failed to discharge its section 3(3) duty. OFCOM also has an overall duty under section 3(1)(b) of the 2003 Act, in carrying out its functions, to promote the interests of consumers. BT contends that OFCOM has also failed to discharge this duty.
11. 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

BT's marketing activity constitutes a contravention of GC1.2; alternatively, GC1.2 is unlawful, *ultra vires* and unenforceable as it fails to satisfy the requirements of section 47 of the 2003 Act and/or of underlying principles of EC law and/or by virtue of section 6 HRA.

The appellant seeks an order from the Tribunal:

1. finding that on its true construction GC 1.2 does not apply to the information as to the identity of BT's retail customer transmitted to BT by the gaining CP in the circumstances set out in BT's notice of appeal;
2. finding that OFCOM has erred in law in interpreting GC 1.2 as applying to such information;
3. finding that OFCOM did not have reasonable grounds for believing that GC 1.2 was being contravened by BT in the manner alleged;
4. finding that GC 1.2 has not been contravened by BT in the manner alleged;
5. alternatively, if OFCOM's interpretation of GC 1.2 is held to be correct, finding that
 - (a) GC 1.2 conflicts with the requirements of section 47 of the 2003 Act and/or with general principles of EC law, and is unlawful, *ultra vires* and unenforceable; and/or
 - (b) OFCOM's act in setting GC 1.2 and/or in seeking to enforce it is incompatible with BT's rights under Article 10 ECHR and therefore unlawful by virtue of section 6 HRA;
6. finding that the Notification is unlawful and *ultra vires*;
7. finding that OFCOM is not entitled to issue an enforcement notification under section 95 of the 2003 Act nor to impose a penalty on BT under section 96 in respect of the activity purportedly prohibited by the Notification;
8. remitting the matter to OFCOM with the following directions:
 - (a) that the Notification be withdrawn forthwith;
 - (b) such further or other directions as the Tribunal shall consider appropriate in order to give effect to its findings.
9. that OFCOM pay BT's costs of this appeal;
10. such further or other findings or other relief (including interim relief) as the Tribunal shall consider necessary or 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.

Registrar

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