

**Draft Direction under the provisions of Regulation 6(6) of the
Telecommunications (Interconnection) Regulations 1997**

16 May 2002

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Draft Direction

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Draft direction relating to a dispute between Carrier1 UK Ltd and British Telecommunications plc

Draft Direction pursuant to Condition 45.2 of the Public Telecommunications Licence granted to British Telecommunications plc and Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997

WHEREAS

1. The Secretary of State granted to British Telecommunications on 22 June 1984 a licence ('the BT licence') under section 7 of the Telecommunications Act 1984 ('the Act') for the running of telecommunications systems specified in that licence;
2. By virtue of section 109 of, and paragraph 20 of Schedule 5 to, the Act the BT licence has effect as if granted to British Telecommunications plc ('BT');
3. The Secretary of State granted to Carrier1 UK Ltd ('Carrier1') a licence under Section 7 of the Act for the running of telecommunications systems as specified in that licence;
4. On 1 January 1998 the Interconnection Directive 97/33/EC came into force and was implemented in the UK through the Telecommunication (Interconnection) Regulations 1997 ('the Regulations') and conditions in the licences of operators;
5. Carrier1 entered into a Standard Interconnect Agreement with BT on 17 August 1998;
6. During 2001 BT invoiced Carrier1 for payment of annual charges relating to BT's FRIACO Product;
7. Carrier1 disputed a proportion of these charges;
8. Carrier1 referred this dispute to the Director General of Telecommunications ('the Director'), in a letter of 17 January 2002. First, Carrier1 requested that the Director determine the precise point at which the Digital Local Exchange ('DLE') Flat Rate Internet Access Call Origination ('FRIACO') virtual path charge becomes applicable. Second, Carrier1 asked the Director to determine whether it was obliged to pay the annual pre-paid charges where circuits are not activated and the DLE FRIACO virtual path never used, or the ability to obtain a refund or rebate (adjusted if appropriate) of the annual prepayment where circuits are ceased or cancelled during the annual period;
9. For the reasons given in these recitals and set out in more detail in the Explanatory Memorandum to this Direction, and having considered the representations made in response to the draft of this Direction published on [] 2002, and the matters set out in Regulation 6(8) of the Regulations, the Director believes that it is appropriate to make this Direction.

THEREFORE

Pursuant to Condition 45.2 of the BT Licence and Regulation 6(6) of the Regulations the Director General of Telecommunications makes the following Direction:

1. The provision of the DLE FRIACO virtual path by the Licensee to Carrier1 shall be deemed to have become active on the Ready for Service Date (as defined in the Licensee's standard interconnect agreement) or 30 days after the Ready for Test Date (as defined in the Licensee's standard interconnect agreement) whichever is the earlier, of the associated interconnect link.

2. Circuits cancelled by Carrier1 before the earlier of, the Ready for Service Date, or 30 days after the Ready for Test Date, shall not attract a charge for any portion of the DLE FRIACO virtual path charge.

3. For circuits ceased by Carrier1 after the earlier of, the Ready for Service Date, or 30 days after the Ready for Test Date, the Licensee shall grant to Carrier1 a proportionately adjusted rebate of the DLE FRIACO virtual path charge. Such rebate shall apply irrespective of the period for which the DLE FRIACO product has been utilised.

4. The Licensee shall adjust the level of Carrier1's disputed charges in accordance with this Direction.

5. Except as otherwise defined in this Direction:

5.1 paragraph 4 of the BT Licence shall, with the necessary changes, apply to this Direction as it applies to the BT Licence; and

5.2 terms defined in the BT Licence or in the recitals hereto shall have the same meanings for the purposes of this Direction.

6. Unless otherwise stated this Direction shall enter into force on the date of its publication.

CHRIS KENNY

DIRECTOR OF COMPLIANCE

**A person authorised under Paragraph 8 of Schedule 1 to the
Telecommunications Act 1984**

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Explanatory Memorandum

Chapter 1

Summary

1.1 The Director General of Telecommunications (the “Director”) has issued a draft direction in accordance with the provisions of Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 for the resolution of a dispute between Carrier1 UK Ltd (“Carrier1”) and British Telecommunications PLC (“BT”).

1.2 Carrier1 referred this dispute to the Director on 17 January 2002. The Director has considered the submissions made by Carrier1 and BT, and has issued this draft direction in respect of the dispute. Comments are requested and will be taken into account in making a final direction.

1.3 In summary, Carrier1 requested that the Director issue a determination in relation to:

- the precise point at which a charge for the Digital Local Exchange (“DLE”) Flat Rate Internet Access Call Origination (“FRIACO”) Virtual Path becomes active; and
- Carrier1’s obligation to pay the annual pre-paid charges where;
 - circuits are not activated and the DLE FRIACO Virtual Path is never used; or
 - the ability to obtain a refund or rebate (adjusted if appropriate) of the annual prepayment where circuits are ceased or cancelled during the annual period.

1.4 The details of the Director’s consideration of the submissions made by Carrier1 and BT, together with the reasons why the Director is minded to make this draft Direction, are set out in Chapters 4 and 5.

1.5 After Carrier1 submitted this determination request, and in response to correspondence from the Director, BT stated that it would make provisions for the proportionate refund of the FRIACO Virtual Path charge if an OLO ceases a circuit during the course of any 12-month period.

1.6 In summary, the Director is minded to direct that:

- the disputed charges for the provision of the DLE FRIACO Virtual Path to Carrier1 shall be deemed to have become active on the date that the associated interconnect link is Brought into Service (“BIS”), or 30 days after the Ready for Testing Date (“RFT+30”), whichever is the earlier;

- circuits cancelled before the earlier of the BIS date or RFT+30 do not attract a charge for any portion of the DLE FRIACO Virtual Path charge;
- for circuits ceased after the earlier of the BIS date or RFT+30, operators shall be entitled to obtain a proportionately adjusted rebate of the DLE FRIACO Virtual Path charge, which will apply irrespective of the period for which the DLE FRIACO product has been utilised; and
- BT will adjust the level of Carrier1's disputed charges as appropriate.

1.7 Having considered the facts specific to this dispute and the matters set out in Regulation 6(8) of the Regulations, this draft Direction, in the opinion of the Director, represents a fair balance between the interests of the parties in each case, having regard to the Director's wider duties to promote the development of the telecommunications industry in the UK and to encourage and secure adequate interconnection in the interests of all users in a way that provides maximum economic efficiency and gives the maximum benefit to end users.

Chapter 2

Background

2.1 FRIACO is an unmetered interconnection product available from BT that provides virtual capacity from originating customers to the point of connection of an Other Licensed Operator (“OLO”). An OLO may choose to purchase FRIACO at Digital Local Exchanges (“DLE FRIACO”) or at tandem switches (“ST FRIACO”).

2.2 The creation of this product stemmed from a dispute between MCI WorldCom plc (“WorldCom”) and BT, which was referred to the Director in December 1999. WorldCom complained that BT was supplying unmetered products to consumers, without making available a comparable wholesale product which would enable its competitors to provide equivalent unmetered products. The Director subsequently made a determination on 26 May 2000 requiring BT to provide the FRIACO product.

2.3 It should be noted that Carrier1 has not asked for a determination on the question of whether it should pay for DLE FRIACO annually in advance. Carrier1 has disputed these charges on the basis of the factors set out in paragraph 1.3. The Director’s position on the issue of an equivalent payment terms for metered and unmetered interconnection services was outlined in the Direction following the consultation of 28 January 2002, which was published on 15 May 2002.

Chapter 3

History of the Dispute

3.1 During 2000 and 2001, Carrier1 submitted Advance Capacity Orders to BT.

3.2 During 2001, Carrier1 cancelled certain orders for circuits.

3.3 During 2001, BT invoiced Carrier1 for a total of (...¹) charges relating to the supply of DLE FRIACO. Of these charges, Carrier1 disputed (...¹).

3.4 Carrier1 referred this dispute to the Director in a letter of 17 January 2002. Carrier1 requested that the Director make a determination on the issues outlined in paragraph 1.3. In particular, Carrier1 stated that:

(i) it should be entitled to cancel or cease unwanted DLE FRIACO circuits in accordance with Carrier1's interpretation of Annex A to BT's Standard Interconnect Agreement;

(ii) the payment of the DLE FRIACO Virtual Path charge by Carrier1 to BT should be applicable from the date of Service Activation (and not from RFT + 30), being the date of activation of the circuits and from which service is provided, in accordance with Schedule 393 of BT's Standard Interconnect Agreement;

(iii) where Carrier1 has cancelled or ceased circuits in advance of the date of Service Activation, it should not be obliged to pay the DLE FRIACO Virtual Path charge;

(iv) where circuits are cancelled or ceased after Service Activation, an operator should be entitled to obtain a rebate of the DLE FRIACO Virtual Path charge, appropriately adjusted where necessary, in accordance with the determination that the Director made on 26 May 2000 following the referral of a dispute by MCI Worldcom;

(v) the cancellation or cessation of the unwanted DLE FRIACO circuits should be deemed to have occurred on dates requested in the relevant cancellation orders, being the date that Carrier1 initially sought to cancel the circuits, and that accordingly Carrier1 should be under no obligation to pay the DLE FRIACO Virtual Path charge or, where appropriate, that the rebate from BT to Carrier1 should reflect this accordingly.

3.7 On 13 February 2002 Carrier1 International S.A. announced that Ernst & Young LLP had been appointed by the High Court as administrators of Carrier1. The administrators confirmed that they wished to continue with the dispute.

¹ Carrier1 has requested that details of these sums of money not be put in the public domain.

Chapter 4

The arguments made by the parties

Carrier1

4.1 In seeking a determination on the issues outlined in paragraph 1.3, Carrier1 has argued that BT's charging is not in line with BT's Standard Interconnect Agreement ("SIA"), and the Director's FRIACO determination, as outlined in paragraph 2.2.

4.2 Carrier1 argues that DLE FRIACO charges should be applicable at the following points in the implementation process

- Data Management Amendments ("DMA") (for which Carrier1 argues there is no charge, as specified in Annex A of BT's SIA);
- Interconnection Circuit ("ICON") (which Carrier1 argues is chargeable from the earlier of BIS of RFT + 30, as specified in 9.13.2 of Schedule 130 to BT's SIA); and
- FRIACO Virtual Path charge (which Carrier1 argues is chargeable on Service Activation, as indicated at clause 5 ("Commencement") of Schedule 393 to the SIA ("Schedule 393").

4.3 Carrier1 argues that Schedule 393 to the BT Standard Interconnect Agreement sets out provisions relating to the commencement of the DLE FRIACO service and the applicable charges. Carrier1 further argues that Clause 5.1 of Schedule 393 states that the service is to be provided on a date that the parties mutually agree in writing. Carrier1 asserts that in some cases RFT + 30 has occurred before BIS. Carrier1 considers that this is a breach of Schedule 393 and the agreed date for activation of circuits.

4.4 Therefore Carrier1 argues that the DLE FRIACO Virtual Path charge should be applicable from Service Activation, which is, in effect, the date when Carrier1 commences service.

4.5 With regard to the issue of whether Carrier1 should be entitled to a rebate where a charge has become active, Carrier1 refers to paragraph 3.5 of the FRIACO determination that the Director made on 27 May 2000. This paragraph states that where "any Point of Connection is made available for the purposes of FRIACO for less than a whole year the Charge shall be reduced proportionately".

BT

4.5 BT states that Schedule 393 sets out the terms and conditions for the supply of DLE FRIACO. BT considers that these standard terms, as applied to Carrier1, have not varied and that BT has consistently provided the same advice on their application since Carrier1 began querying terms and conditions in July 2001. However, BT considers that questions of interpretation regarding start dates for charging have arisen.

4.6 BT states that Carrier1 ceased a number of circuits and refused to pay, asserting that traffic had not flowed.

4.7 BT argues that it has consistently taken the approach that the FRIACO Virtual Path Charge becomes payable on either the date the associated interconnect link is BIS or RFT+30, whichever is the sooner. BT states that this principle has been long established in Schedule 130 (Customer Sited Interconnect) of the SIA. BT also states that it is also included in Schedule 396 of the SIA (ST FRIACO), but has yet to be explicitly incorporated into the DLE FRIACO Schedule or associated Carrier Price List entry.

4.8 With regard to the issue of Carrier1's ability to obtain a refund or rebate (adjusted if appropriate) of the annual prepayment where circuits are ceased or cancelled during the annual period, BT stated that it would be making a revised offer to industry which would propose the application of a proportionately reduced Virtual Path charge. BT's revised offer had not yet been published at the time of publication of this draft direction.

Chapter 5

The Director's decision and reasons

5.1 The Director has considered the arguments submitted by both parties.

5.2 It is apparent that that the principles that govern the supply of DLE FRIACO are not sufficiently clear. The Director is keen to facilitate increased transparency in this area, to avoid further disputes and enhance regulatory certainty.

5.3 Carrier1 has submitted two principal issues to the Director for consideration. The first concerns the exact time at which a charge becomes applicable, and the second relates to the obligation to pay pre-paid charges or obtain a rebate.

The point at which charges become applicable

5.4 Carrier1 argues that charges should become applicable not when the associated interconnect circuit is ready for service, but when an OLO commences its own service.

5.5 As set out in Chapter 4, Carrier1 has argued that BT's charging is not in line with various provisions of its SIA. The Director has considered the points that have been made in this respect, and is of the opinion that this contractual information leaves scope for interpretation, for example when identifying the relationship between Condition 5 of Schedule 393, and Conditions 7, 10 and 11 of Annex A of BT's SIA.

5.6 Carrier1 has argued that these provisions should be interpreted in such a way as to indicate that charges for the DLE FRIACO Virtual Path should start when it commences service. The Director does not consider that this interpretation is in line with what would be a reasonable charging arrangement, for the reasons set out below.

5.7 It is first necessary to elaborate on the terminology involved. When assessing when a charge becomes active, BT refers to the Ready for Test Date and the BIS date. The Ready for Test Date is the date on which capacity at the associated interconnect link is ready for testing, and the BIS date is the time when the circuit is ready to be used by an OLO. In this context BIS is the date when the associated interconnect link is ready for an OLO to commence service. The circuit cannot become operational until the completion of DMA. It is BT's responsibility to implement the DMA, but it first requires data to be submitted by an OLO.

5.8 It is therefore clear that in this process both parties (ie BT and an OLO) have the ability to influence when service commences. It is important that the principle that governs when a charge becomes active balances the legitimate interests and responsibilities of the parties involved.

5.9 On certain occasions, an OLO's use of a new interconnect circuit is dependent on whether it has secured the necessary business from its ISP customer. In this scenario, an OLO can withhold the DMA until it has secured its ISP business. The circuit would not become operational (BIS) until the DMA order has been made, and

until this time traffic would not flow along the FRIACO Virtual Path. If this were the case, the circuit would not be brought into service and BT would run the risk that although it had endeavoured to provide the circuit, and incurred costs in so doing, an OLO would not be liable for the DLE FRIACO Virtual Path charge. In this scenario an OLO would effectively control when the charge became active.

5.10 In addition to the scenario outlined in paragraph 5.9, another scenario might be where BT experienced delays in implementing DMAs, and therefore took more than 30 days to provide the interconnect circuit. If this were the case, it would be unreasonable to expect an OLO to become liable for the DLE Virtual Path charge when an OLO was not in a position to utilise the DLE FRIACO Virtual Path due to delays by BT. In this scenario BT would effectively control the completion of the work required before the circuit could be used by an OLO.

5.11 A fair balance has to be struck between the interests of an OLO seeking to purchase capacity from BT, and the arrangements that BT has to make in order to provide the requested capacity. Requests for capacity must obviously be based on the most accurate capacity and sales forecasts available. Clearly the purchase of capacity contains an element of risk, as OLOs must forecast effectively in order to ensure that the correct amount of capacity is obtained.

5.12 The Director considers that if a charge for the DLE FRIACO Virtual Path becomes applicable only when an OLO commences service, it would mean that OLOs could submit artificially inflated capacity orders, in the knowledge that no extra risk would be incurred as a result. Circuits could be cancelled by OLOs on the basis that traffic had not flowed, and this would transfer risk to the wholesale provider.

5.13 The Director does not consider that it would be fair to expect the wholesale provider to expend resources in keeping a DLE FRIACO Virtual Path open for third parties without some degree of remuneration, as it is potentially forgoing revenue from other parties.

5.14 Furthermore, charging on the earlier of RFT+30 or the BIS date is consistent with established practice for other similar services, in particular ST FRIACO. In that context this rule is clarified more explicitly, as charging commences at the Ready for Service Date of the associated interconnect link, or 30 days after the Ready for Test Date of the related interconnect link, whichever is the earlier. The term 'Ready for Service Date' has the same meaning as the BIS date.

5.15 The Director considers that a charge becoming active on the basis of the earlier of RFT+30 or the BIS date represents a fair balance, as long as BT has in place the appropriate mechanisms to implement DMAs on a reasonable timescale. As indicated in paragraph 5.13, this is the principle that already governs the supply of ST FRIACO.

5.16 Although charges become due on either the date the associated interconnect link is RFT+30 or BIS, whichever is sooner, there should be no undue delay in the provisioning of DLE FRIACO. The Director is aware of another OLO that has commented on apparent delays by BT in the provisioning of DLE FRIACO, although in this case the matter was resolved directly with BT. If it became clear that to the

Director that the principle of the DLE FRIACO Virtual Path charge becoming active on the earlier of RFT+30 or the BIS date is inappropriate on account of unreasonable delays by BT in implementing DMAs, the Director would review the suitability of this principle.

The obligation to pay/Rebate

5.17 This relates to the obligation to pay the annual pre-paid charges where circuits are not activated and the DLE FRIACO Virtual Path is never used, or the ability to obtain a refund or rebate (adjusted if appropriate) of the annual prepayment where circuits are ceased or cancelled during the annual period.

5.18 As a charge becomes active on the earlier of RFT+30 or the BIS date, Carrier1 will not be obliged to pay disputed charges that relate to circuits cancelled before the earlier of RFT+30 or the BIS date.

5.19 However, where Carrier1 has ceased circuits once the DLE FRIACO Virtual Path charge has become active, Carrier1 has stated that it should be entitled to a proportionately adjusted rebate of its prepayment. BT initially refused to provide a refund of the DLE FRIACO Virtual Path charge where circuits were ceased during the annual period.

5.20 As stated in paragraph 1.5, BT has now proposed that an OLO will be entitled to a rebate for any unused elements of DLE FRIACO Virtual Path circuits.

5.21 The Director considers that the 26 May 2000 Determination is clear on this issue. As Carrier1 has noted, paragraph 3.5 of this determination states that where:

“any Point of Connection is made available for the purposes of FRIACO for less than a whole year the Charge shall be reduced proportionately”.

5.22 The Director does not consider that there are any reasons why this principle should not still apply. Correct application of the rules that govern the supply of DLE FRIACO, as outlined earlier in this Chapter, should ensure that both an OLO’s interests, and BT’s interests, are appropriately balanced. The Director therefore considers that where Carrier1 has ceased circuits for which the DLE FRIACO Virtual Path charge has become active, Carrier1 should receive a proportionately adjusted rebate of its prepayment.

The proposed decision

5.23 Having considered the arguments for and against Carrier1’s request, the Director is minded to direct that:

- the disputed charges for the provision of the DLE FRIACO Virtual Path to Carrier1 shall be deemed to have become active on the date that the associated interconnect link is Brought into Service (“BIS”), or 30 days after the Ready for Testing Date (“RFT+30”), whichever is the earlier;

- circuits cancelled before the earlier of the BIS date or RFT+30 do not attract a charge for any portion of the DLE FRIACO Virtual Path charge;
- for circuits ceased after the earlier of the BIS date or RFT+30, operators shall be entitled to obtain a proportionately adjusted rebate of the DLE FRIACO Virtual Path charge, which will apply irrespective of the period for which the DLE FRIACO product has been utilised; and
- BT will adjust the level of Carrier1's disputed charges as appropriate.

Chapter 6

Consultation and timetable for responses

6.1 The Director General's draft decision is being made available to interested parties, together with the Director General's reasons, so that they may have a reasonable opportunity to make representations.

6.2 Please e-mail or send comments in writing to:

Robert MacDougall
OfTel
50 Ludgate Hill
London
EC4M 7JJ

Telephone: (020) 7634 8726
Fax: (020) 7634 8738
E-mail: robert.macdougall@oftel.gov.uk

6.3 Comments on this consultation must be sent to OfTel by 13 June 2002. OfTel does not intend on this occasion to hold any comments-on-comments phase during which observations may be made on the representations made by others. Nevertheless, in the interests of transparency, all non-confidential representations will be published.

6.4 Confidential responses should not be sent via e-mail. Written comments will be made publicly available in OfTel's Research and Intelligence Unit, except where a respondent indicates that a response, or part of it, is confidential. Respondents are therefore asked to separate any confidential material into a clearly marked annex. In the interests of transparency, respondents are asked to avoid confidential markings wherever possible.

6.5 The final Direction will be made as soon as possible after the end of the above mentioned consultation period.