

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

15 July 2002

Contents

Direction

Explanatory Memorandum

Chapter 1 Summary

Chapter 2 Background

Chapter 3 Responses to the draft direction

Chapter 4 The Director's final decision and reasons

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

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 Flat Rate Internet Access Call Origination ('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') 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 16 May 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 circuit.
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**

11 July 2002

Explanatory Memorandum

Chapter 1 Summary

1.1 The Director General of Telecommunications ("the Director") has issued a Direction pursuant to his powers under the Telecommunications (Interconnection) Regulations 1997 ("the Regulations"), for the resolution of a dispute between Carrier 1 and BT under the terms of their Standard Interconnect Agreement ("SIA").

1.2 During 2000 and 2001, Carrier1 submitted Advance Capacity Orders to BT. During 2001, Carrier1 cancelled certain orders for circuits. BT subsequently invoiced Carrier1 for a total of (...¹) charges relating to the supply of Digital Local Exchange ("DLE") Flat Rate Internet Access Call Origination ("FRIACO"). Of these charges, Carrier1 disputed (...¹).

1.3 Carrier1 referred this dispute to the Director in a letter of 17 January 2002. 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 Following this referral, the Director sought the views of the parties to the dispute and considered the submissions made by Carrier1 and BT. The Director issued a draft Direction in respect of these disputes on 16 May 2002 to the industry as a whole for consultation. Comments were requested and have been taken into account in making a final Direction.

1.5 The details of the submissions made in response to the draft Direction, together with the Director's reasons for making his decision are set out in Sections 3 and 4. In summary, the Director General concludes 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 circuit is Brought into Service ("BIS")², 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;

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

² The term 'BIS' has the same meaning as the term 'Ready for Service Date' as defined in BT's SIA.

- for circuits ceased after the earlier of the BIS date or RFT+30, Carrier1 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.

1.6 Having considered the facts specific to this dispute and the matters set out in Regulation 6(8) of the Telecommunications (Interconnection) Regulations 1997, this 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 the development of the Telecommunications industry in the UK and the encouragement of adequate interconnection 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.

Dispute referred to the Director

2.3 Carrier1 referred this dispute to the Director in a letter of 17 January 2002. 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.

2.4 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.

Chapter 3

Responses to the draft Direction

3.1 The main arguments submitted by interested parties in response to the draft Direction are summarised below.

BT

3.2 BT agreed with the Director's proposed decision on when the DLE FRIACO Virtual Path shall become liable for rental charges, and considers that it will encourage sensible ordering behaviour and encourage Operators to submit Data Management Amendments ('DMA') at the same time as ordering a link to carry FRIACO traffic.

3.3 BT acknowledged that it is required to provide proportionally adjusted rebates on unused portions of FRIACO charges, and has provided for this rebate in its amended FRIACO offer to industry. In response to further correspondence from the Director, BT has confirmed that this rebate is calculated on a daily basis.

3.4 BT also acknowledged that it is required to remove any minimum contract period in relation to the ordering of the FRIACO product, and has done so in its amended offer to industry.

Carrier1

3.5 Carrier1 confirmed that it is largely in agreement with the Director's proposed decision as set out in the draft Direction. However, Carrier1 urged the Director to reconsider the decision regarding the point at which charges for the DLE FRIACO Virtual Path become applicable. Carrier1 considered that charges for the DLE FRIACO Virtual Path should become applicable at the date when the circuits are actually activated, being the date from which service is provided, rather than the earlier of the BIS date or RFT+30.

3.6 Carrier1 stated that BT has been inconsistent in advice to Carrier1 regarding when charges become active, and refers to conflicting correspondence from BT on this matter. Carrier1 argued that this correspondence demonstrates that BT's initial analysis of the key issues was the same as Carrier1's.

3.7 Carrier1 also stated that it refused to pay the disputed charges for a number of different reasons, not just on the basis that no traffic had flowed. However, Carrier1 did argue that it should not have to pay for the service where it is not in a position to use it.

3.8 Carrier1 responded to BT's arguments in relation to the contractual provisions which BT relies upon to support its position that charges for the DLE FRIACO Virtual Path become active at the earlier of BIS or RFT +30. BT argued that this position has long been established in Schedule 130 of the SIA, and is also included in

Schedule 396 of the SIA, which governs the supply of Single Tandem ('ST') FRIACO. Carrier1 argued that BT is construing Schedule 130 of the SIA incorrectly. Carrier1 argues that Schedule 130 provides for the payment of connection charge, and stated that the DLE FRIACO Virtual Path charge is not a connection charge.

3.9 Carrier1 further asserted that even if the DLE FRIACO Virtual Path Charge were a connection charge, then in accordance with clause 9.13.1 of Schedule 130, charges for it should fall due on the date of the commencement of service. Carrier1 argued that this is consistent with clause 5.1 of Schedule 393 of the SIA, where it is stated that service is to commence on a date to be mutually agreed in writing. Carrier1 stated that it would be unfair for BT to rely upon Schedule 396 to support its position regarding the supply of the DLE FRIACO Virtual Path to Carrier1.

AOL

3.10 AOL asked Oftel to use the principle being proposed in the draft Direction to clarify how existing FRIACO circuits, which have been paid for one year in advance, can be refunded for regulated price cuts that occur during the course of that year.

Energis

3.11 Energis supported the Director's proposals set out in the draft Direction regarding the point at which charges for the DLE FRIACO Virtual Path become applicable, and the obligation to pay annual pre-paid charges where circuits are not activated, 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.

3.12 However, Energis considered that the Director's proposals as set out in the draft Direction would benefit from further clarification.

3.13 Energis stated that further clarification was required on what exactly is meant by a proportionately adjusted rebate. It argued that in order for equivalence to be achieved for metered and unmetered FRIACO, proportionate adjustments for ceased circuits should be applied on a daily basis.

3.14 Energis was also concerned about the time period which applies to a request for cessation of a FRIACO Virtual Path. In correspondence from BT to Energis subsequent to the issuing of the draft Direction, BT advised Energis that when a FRIACO Virtual Path is to be ceased, that cessation will occur 30 working days after receipt of written notification. Energis considered that a 5 working day notification period would be more appropriate.

3.15 Energis further stated that when cancelling or ceasing a FRIACO Virtual Path service, the associated interconnect link should be left in place. In correspondence from BT to Energis subsequent to the issuing of the draft Direction, BT stated that when a FRIACO service is ceased the corresponding interconnection link must also be ceased.

Chapter 4

The Director's decision and reasons

4.1 The Director has analysed all the representations made by the parties to the dispute, as well as those representations made by other interested parties. Carrier1 has submitted two principal issues for the Director to determine. The first concerns the exact time at which charges for the DLE FRIACO Virtual Path become applicable, and the second relates to the obligation to pay pre-paid charges or obtain a rebate in respect of the DLE FRIACO Virtual Path.

The point at which charges become applicable

4.2 The arguments submitted by Carrier1 in response to the draft Direction do not diverge from those proposed in its initial submission on this matter. Carrier1 has made representations in relation to when a charge for the DLE FRIACO Virtual Path becomes active, and has stated that this charge should be applicable when the associated interconnect circuit is activated, being the date upon which it is intending to provide service across this circuit. Furthermore, Carrier1 argues that this interpretation is in line with Schedule 393 of the SIA.

4.3 Carrier1's arguments regarding the interpretation of BT's relevant contractual information, and also the lack of clarity regarding these contractual provisions, have been considered. For example, Carrier1 refers to condition 5.1 of Schedule 393 of the SIA, which provides for commencement of service. However, while Condition 5.1 does dictate when service is to commence across a circuit, it does not outline when charging is to commence.

4.4 As BT argues, the principle which outlines when charging is to commence is explicitly outlined in Schedule 396 of the SIA, which governs the supply of ST FRIACO. BT has already taken action to ensure that these terms are explicitly incorporated into Schedule 393 of the SIA. The Director has noted Carrier1's concerns regarding BT's conflicting advice on the issue of when a charge for the DLE FRIACO Virtual Path becomes active, but considers that BT's action to clarify Schedule 393 should ensure that the charging arrangements for the DLE FRIACO Virtual Path are now sufficiently transparent.

4.5 Therefore the Director's position on this matter remains the same as set out in the draft Direction, as the Director still does not consider that Carrier1's interpretation of these contractual provisions would be consistent with what would be a reasonable charging arrangement. The Director's reasoning behind this decision is set out below.

4.6 As set out in the draft Direction, when assessing when a charge becomes active, BT refers to the Ready for Test date and the BIS date. The term 'BIS date' has the same meaning as the 'Ready for Service 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.

4.7 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.

4.8 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.

4.9 In addition to the scenario outlined in paragraph 4.8, 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.

4.10 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.

4.11 The Director considers that if a charge for the DLE FRIACO Virtual Path were to become 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.

4.12 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.

4.13 Furthermore, and as set out in paragraph 4.4, 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 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. If it became clear 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 were inappropriate on account of unreasonable delays by BT in implementing DMAs, the Director would review the suitability of this principle.

Additional representations made by interested parties

4.14 As set out in section 3, Energis submitted certain representations regarding the point at which charges for the DLE FRIACO Virtual Path become active. The representations that Energis made in this regard are outside the scope of this Direction, as they concern issues on which the Director was not asked to determine.

Obligation to pay/rebate

4.15 In response to the draft Direction, BT stated that it would offer a rebate on unused portions of FRIACO charges, and that this rebate would not incorporate any minimum contract period. BT has also confirmed that this proportionately adjusted rebate would be calculated on a daily basis, which addresses an issue that Energis raised in response to the draft Direction. In conclusion, the Director considers that BT's rebate addresses Carrier1's concerns in this regard.

4.16 In response to the draft Direction, and as set out in section 3, AOL asked the Director to clarify how existing FRIACO circuits, which have been paid for one year in advance, can be refunded for regulated price cuts that occur during the course of the year. However, this aspect of AOL's response is outside the scope of the matters that the Director was asked to determine, and so this representation will not be addressed in this document.

The Director's decision

4.17 Having considered the arguments for and against Carrier1's request, the Director is directing 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 circuit 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, Carrier1 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.
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