



Determination to give effect to
directions given under section 195(4) of
the Communications Act 2003

Determination

Issue date:

26 July 2012

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Section 1

Explanatory statement

Background

The Disputes

- 1.1 On 5 February 2010 Ofcom made a determination (“the 080 Determination”)¹ resolving disputes between BT and each of T-Mobile, Vodafone, O2 and Orange concerning BT’s tiered, variable termination charges for calls to 080 numbers contained in NCCN 956² and effective from 1 July 2009. Ofcom held that it was not fair and reasonable for BT to apply the charges for calls to 080 numbers contained in NCCN 956.
- 1.2 On 10 August 2010 Ofcom made a determination (“the 0845/0870 Determination”)³ resolving disputes between BT and each of Vodafone, T-Mobile, H3G, O2, Orange and Everything Everywhere concerning BT’s tiered, variable termination charges for calls to 0845 and 0870 numbers contained in NCCNs 985 and 986, and effective from 1 November 2009. Ofcom held that it was not fair and reasonable for BT to apply the charges for calls to 0845 and 0870 numbers contained in NCCNs 985 and 986.

The CAT Appeals

- 1.3 On 6 April 2010 BT registered an appeal against the 080 Determination with the Competition Appeal Tribunal (“CAT”).⁴ On 11 October 2010 BT and Everything Everywhere registered two separate appeals against the 0845/0870 Determination with the CAT.⁵ The CAT subsequently ordered that all three appeals (“the Appeals”) should be heard together.

¹ Ofcom case ref: CW/01036/03/09,

http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_bt_tmobile_vodafone/nonconf.pdf.

² NCCN: Network Charge Change Notice pursuant to paragraph 12 of the Standard Interconnect Agreement.

³ Ofcom case ref: CW/01042/01/10,

http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/761146/Final_Determination.pdf.

⁴ Case number 1151/3/3/10.

⁵ Case number 1168/3/3/10 and 1169/3/3/10.

- 1.4 On 1 August 2011 the CAT gave its judgment in respect of the Appeals (“the CAT Judgment”). The CAT Judgment allowed BT’s appeals⁶ and, in summary held that BT had the right to impose NCCNs 956, 985 and 986 from the date it sought to do so.
- 1.5 On 12 August 2011 the CAT (i) gave a consequential ruling (“the Ruling”) and made an order (“the CAT Order”) giving effect to directions contained in the CAT Judgment and the Ruling.
- 1.6 On 7 October 2011, 28 February 2012 and 2 April 2012 Ofcom made determinations under s.195(4) Communications Act 2003 to give effect to paragraphs 5 and 6 of the CAT Order.

The Appeals to the Court of Appeal

- 1.7 On 2 December 2011 (i) Telefónica O2 UK Limited, and (ii) Everything Everywhere Limited, Hutchison 3G UK Limited and Vodafone Limited (jointly) lodged appeals of the CAT Judgment and the CAT Order with the Court of Appeal. We refer below to Telefónica O2 UK Limited, Everything Everywhere Limited, Hutchison 3G UK Limited and Vodafone Limited together as “the Appellants”.
- 1.8 On 25 July 2012 the Court of Appeal handed down judgment in respect of those appeals (“the Court of Appeal Judgment”). The Court of Appeal allowed the appeals. On the same day, the Court of Appeal made an order (“the Court of Appeal Order”).
- 1.9 The Court of Appeal Order set aside (i) the CAT Order (except for paragraphs 1(2), 1(5) and 4 thereof), and (ii) the determinations made by Ofcom on 7 October 2011, 28 February 2012 and 2 April 2012. It also restored Ofcom’s 080 Determination and the 0845/0870 Determination.
- 1.10 Further, the Court of Appeal Order ordered that the matter should be remitted to Ofcom pursuant to s.195(4) Communications Act 2003 for Ofcom to direct that:
 - i. BT must repay to each of the Appellants within 28 days of the date of the Court of Appeal’s Order, such monies as have been paid by that Appellant to BT pursuant to paragraphs 5 and 6 of the CAT Order and/or the determinations of Ofcom dated 7 October 2011, 28 February 2012 and 2 April 2012 that would not have been paid pursuant to the 080 and 0845/0870 Determinations, including, for the avoidance of doubt, amounts paid by the Appellants in respect of periods since the CAT Order; and
 - ii. BT must pay interest upon the amounts repayable pursuant to paragraph 1.10(i) above, determined in accordance with paragraphs 12.7 and/or 13.13 of the BT

⁶ [2011] CAT 24.

Standard Interconnect Agreement from the date of each such payment until the date of the repayment by BT.

Determination

- 1.11 Pursuant to the Court of Appeal Order, Ofcom now makes the determination and direction set out in Annex 1 below.

Annex 1

Determination

Determination under sections 188 and 190 of the Communications Act 2003 (“the 2003 Act”) for resolving disputes between:

- i) BT and each of T-Mobile, Vodafone, O2 and Orange concerning BT’s tiered, variable termination charges for calls to 080 numbers contained in NCCN 956; and**
- ii) BT and each of Vodafone, T-Mobile, H3G, O2, Orange and Everything Everywhere concerning BT’s tiered, variable termination charges for calls to 0845 and 0870 numbers contained in NCCNs 985 and 986.**

WHEREAS

- (A)** on 5 February 2010 and 10 August 2010 respectively Ofcom determined disputes between:
 - BT and each of T-Mobile, Vodafone, O2 and Orange concerning BT’s tiered, variable termination charges for calls to 080 numbers contained in NCCN 956 and effective from 1 July 2009; and
 - BT and each of Vodafone, T-Mobile, H3G, O2, Orange and Everything Everywhere concerning BT’s tiered, variable termination charges for calls to 0845 and 0870 numbers contained in NCCNs 985 and 986 and effective from 1 November 2009;
- (B)** on 6 April 2010 BT and Everything Everywhere registered appeals with the CAT against the Determinations;
- (C)** on 1 August 2011 the CAT gave the CAT Judgment allowing BT’s appeals against the Determinations;
- (D)** on 12 August 2012 the CAT issued a Consequential Ruling and CAT Order;
- (E)** on 7 October 2011, 28 February 2012 and 2 April 2012 Ofcom made the Consequential Determinations;
- (F)** on 2 December 2011 (i) O2, and (ii) Everything Everywhere, Vodafone and H3G lodged appeals with the Court of Appeal against the CAT Judgment and CAT Order;

- (G) on 25 July 2012 the Court of Appeal gave Court of Appeal Judgment allowing the appeals by (i) O2, and (ii) Everything Everywhere, Vodafone and H3G against the CAT Judgment and CAT Order;
- (H) on 25 July 2012 the Court of Appeal also made the Court of Appeal Order;
- (I) the Court of Appeal Order (amongst other things) remitted the matter to Ofcom pursuant to section 195(4) of the 2003 Act, with various directions to Ofcom;
- (J) section 195(6) of the 2003 Act requires Ofcom to comply with every direction given by the CAT under section 195(4) of the 2003 Act, and this applies equally to directions given by the Court of Appeal under that section.

NOW, therefore, pursuant to the Court of Appeal's Order dated 25 July 2012 Ofcom determines that —

I Direction

- 1 BT must repay to each of O2, Everything Everywhere, Vodafone and H3G within 28 days of the date of the Court of Appeal Order such monies as have been respectively paid by each of them to BT pursuant to paragraphs 5 and 6 of the CAT Order and/or the Consequential Determinations that would not have been paid pursuant to the Determinations, including, for the avoidance of doubt, amounts paid by each of O2, Everything Everywhere, Vodafone and H3G in respect of periods since the CAT Order.
- 2 BT must pay interest upon the amounts repayable pursuant to paragraph 1 above, determined in accordance with paragraphs 12.7 and/or 13.13 of the BT Standard Interconnect Agreement from the date of each such payment until the date of the repayment by BT.

II Binding nature and effective date

- 3 This Determination is binding on the Parties in accordance with section 190(8) of the 2003 Act.
- 4 This Determination shall take effect on the day it is published.

III Interpretation

- 5 For the purpose of interpreting this Determination:
 - (a) headings and titles shall be disregarded; and

- (b) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

6 In this Determination:

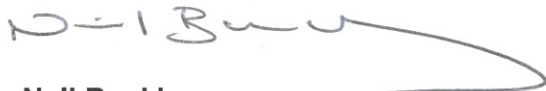
- (a) **“2003 Act”** means the Communications Act 2003;
- (b) **“BT”** means British Telecommunications plc (BT) whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 1159 of the Companies Act 2006;
- (c) **“CAT”** means the Competition Appeal Tribunal;
- (d) **“CAT Judgment”** means the final judgment given by the CAT in respect of case numbers 1151/3/3/10, 1168/3/3/10 and 1169/3/3/10 and dated 1 August 2011;
- (e) **“CAT Order”** means the order given by the CAT in respect of case numbers 1151/3/3/10, 1168/3/3/10 and 1169/3/3/10 and dated 12 August 2011;
- (f) **“Consequential Determinations”** means the determinations made by Ofcom on 7 October 2011, 28 February 2012 and 2 April 2012 under s.195(4) Communications Act 2003 to give effect to paragraphs 5 and 6 of the CAT Order;
- (g) **“Consequential Ruling”** means the ruling given by the CAT in respect of case numbers 1151/3/3/10, 1168/3/3/10 and 1169/3/3/10 and dated 12 August 2011;
- (h) **“Court of Appeal Judgment”** means the judgment handed down by the Court of Appeal in respect of case numbers C3/2011/3121, C3/2011/3124, C3/2011/3315, C3/2011/3316, C3/2012/0692A and dated 25 July 2012;
- (i) **“Court of Appeal Order”** means the order given by the Court of Appeal in respect of case numbers C3/2011/3121, C3/2011/3124, C3/2011/3315, C3/2011/3316, C3/2012/0692A and dated 25 July 2012;
- (j) **“Determinations”** mean both of i) a determination made in respect of Ofcom case ref: CW/01036/03/09 resolving disputes between BT and each of T-Mobile, Vodafone, O2 and Orange concerning BT’s tiered, variable termination charges for calls to 080 numbers contained in NCCN 956; and ii) a determination made in respect of Ofcom case ref: CW/01042/01/10

resolving disputes between BT and each of Vodafone, T-Mobile, H3G, O2, Orange and Everything Everywhere concerning BT's tiered, variable termination charges for calls to 0845 and 0870 numbers contained in NCCNs 985 and 986;

- (k) **"Everything Everywhere"** means Everything Everywhere Limited whose registered company number is 02382161, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 1159 of the Companies Act 2006;
- (l) **"NCCN"** means Network Charge Change Notice, the mechanism by which BT notifies other communications providers of changes to its charges pursuant to paragraph 12 of the Standard Interconnect Agreement;
- (m) **"NCCN956"** means Network Charge Control Notice 956 issued by BT on 3 June 2009 and applicable from 1 July 2009;
- (n) **"NCCN985"** means Network Charge Control Notice 985 issued by BT on 2 October 2009 and applicable from 1 November 2009;
- (o) **"NCCN986"** means Network Charge Control Notice 986 issued by BT on 2 October 2009 and applicable from 1 November 2009;
- (p) **"Ofcom"** means the Office of Communications;
- (q) **"Orange"** means Orange Personal Communications Services Limited whose registered company number is 2178917, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 1159 of the Companies Act 2006;
- (r) **"O2"** means Telefónica O2 UK Limited (O2) whose registered company number is 1743099, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 1159 of the Companies Act 2006;
- (s) **"Parties"** means BT, O2, Everything Everywhere, Vodafone and H3G;
- (t) **"H3G"** means Hutchison 3G UK Limited whose registered company number is 03885486, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 1159 of the Companies Act 2006;
- (u) **"T-Mobile"** means T-Mobile UK Limited whose registered company number is 02382161, and any of its subsidiaries or holding companies, or any

subsidiary of such holding companies, all as defined by Section 1159 of the Companies Act 2006;

- (v) **"Vodafone"** means Vodafone Limited whose registered company number is 01471587, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 1159 of the Companies Act 2006.

A handwritten signature in dark ink, appearing to read 'N. Buckley', with a long horizontal stroke extending to the right.

Neil Buckley

Director of Investigations

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

26 July 2012