



Neutral citation [2013] CAT 8

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Numbers: 1192/3/3/12  
1193/3/3/12

Victoria House  
Bloomsbury Place  
London WC1A 2EB

29 April 2013

Before:

VIVIEN ROSE  
(Chairman)  
JONATHAN MAY  
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

**(1) BRITISH SKY BROADCASTING LIMITED**  
**(2) TALKTALK TELECOM GROUP PLC**

Appellants

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

- v -

**OFFICE OF COMMUNICATIONS**

Respondent

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**RULING ON DISPOSAL OF THE APPEALS**

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1. On 7 March 2012, the Office of Communications (“OFCOM”) published a decision entitled “Charge control review for LLU [Local Loop Unbundling] and WLR [Wholesale Line Rental] services: Statement” (the “Statement”). Pursuant to sections 45 and 87 of the Communications Act 2003 (the “Act”), the Statement imposed certain charge controls on Openreach,<sup>1</sup> a division of British Telecommunications plc (“BT”), in relation to the supply by it of LLU and WLR services. As the Tribunal explained in a previous judgment concerning LLU and WLR services:

“LLU enables communications providers to install their equipment in BT’s telephone exchanges to offer their own retail services including broadband internet access. WLR is used by communications providers to offer telephone services to consumers over the Openreach network.” (*The Carphone Warehouse Group plc v Office of Communications* [2010] CAT 26 at [1]).

2. The Statement contains OFCOM’s decision setting charge controls for metallic path facility (“MPF”) and shared metallic path facility (“SMPF”) rental (MPF and SMPF rental are the two main types of LLU services), WLR services, and ancillary services.
3. British Sky Broadcasting Limited (“Sky”) and TalkTalk Telecom Group plc (“TalkTalk”) brought an appeal challenging certain aspects of the Statement pursuant to section 192(2) of the Act (the “Sky TalkTalk Appeal”). BT also lodged an appeal (the “BT Appeal”). The Appellants were granted permission to intervene in each other’s appeals and Everything Everywhere Limited (“EE”) was granted limited permission to intervene in both appeals.
4. Section 193(1) of the Act and the rules made thereunder require that where an appeal against a decision of OFCOM raises specified price control matters, those matters must be referred by the Tribunal to the Competition Commission (the “Commission”) for determination. It was common ground that both the Sky

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<sup>1</sup> Openreach was created in January 2006 following OFCOM’s decision to accept undertakings from BT Group plc in lieu of a market investigation reference to the Competition Commission pursuant to section 154 of the Enterprise Act 2002. Openreach is an operationally separate business unit which provides wholesale access telecoms services to all communications providers on an equivalent basis.

TalkTalk Appeal and the BT Appeal raised price control matters (although the precise scope of matters to be referred to the Commission was contested).

5. By a Reasoned Order made on 24 July 2012 the Tribunal referred questions to the Commission in the BT Appeal and on 28 September 2012 ([2012] CAT 26) the Tribunal referred questions to the Commission in the Sky/TalkTalk Appeal. In both sets of questions (“the Reference Questions”) the Tribunal asked the Commission to consider whether OFCOM had erred in the way it set the relevant price controls as alleged in the two Notices of Appeal
6. Pursuant to section 193(4) of the Act, the Commission notified its determination of the Reference Questions (the “Determinations”) to the Tribunal on 27 March 2013. The Commission identified errors in the Statement under Reference Questions 1(ii), (iv), (vi) and (vii) of the BT Appeal and under Reference Questions 1(i) and (ii) of the Sky TalkTalk Appeal. In accordance with the Tribunal’s directions to it, the Commission determined the consequential adjustments to the price controls that it considered were necessary to correct those errors.
7. Section 195(2) of the Act provides that the Tribunal shall decide an appeal under section 192 on the merits and by reference to the grounds of appeal. Section 193(6) of the Act provides that in cases raising specified price control matters, the Tribunal, in deciding the appeal on the merits, is bound to decide the matters in accordance with the Commission’s determination of those matters. That obligation does not apply, according to section 193(7) of the Act to the extent that the Tribunal decides, applying the principles applicable on an application for judicial review, that that determination would fall to be set aside.
8. On 17 April 2013, each of the parties confirmed to the Tribunal<sup>2</sup> that it did not intend to raise any challenge to the Determinations pursuant to section 193(7) of the Act.

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<sup>2</sup> As they were required to do by paragraph 1 of an Order of the Chairman made on 11 March 2013.

9. The Tribunal has decided that there is no aspect of the Determinations that falls to be set aside applying the principles applicable on a judicial review and will therefore decide the merits of both the Sky TalkTalk Appeal and the BT Appeal in accordance with the Determinations.

10. Pursuant to subsections 193(6) and 195(2) of the 2003 Act the Tribunal, therefore, unanimously decides that those grounds of appeal encapsulated in:

(a) Reference Questions 1(i) and (ii) of the Sky TalkTalk Appeal; and

(b) Reference Questions 1(ii), (iv), (vi) and (vii) of the BT Appeal,

are upheld to the extent found in the Determinations. The other grounds of appeal are dismissed.

11. Section 195(3) stipulates that the Tribunal's decision must include a decision as to what, if any, is the appropriate action for OFCOM to take in relation to the Statement. The Tribunal has decided that the appropriate action for OFCOM to take is, in principle, to make the adjustments described by the Commission in the Determinations.

12. The Tribunal is also required to remit the Statement to OFCOM with directions for giving effect to those adjustments (see section 195(4) of the Act). Attached to this ruling therefore are the directions to OFCOM that we consider are appropriate to give effect to our decision. It is now the duty of OFCOM in accordance with section 195(6) of the Act to comply with these directions.

13. Following the notification of the Determinations, the parties agreed that there needed to be a change to the figures set out in Table 14.17 of the Determinations, following paragraph 14.189. In that Table, the Commission set out its "Estimate of consequential adjustments to charge control for 2013/14". One of the figures underlying that adjustment was an assumed rate of RPI, the Retail Price Index, used by the Commission to forecast inflation over the relevant period. BT informed the

Tribunal and the other parties that, in its view, the rate of RPI used should have been the actual rate (3.2%), as opposed to the assumed rate (3%). After some correspondence, an appropriate adjustment to the figures in Table 14.17 was agreed by all parties and the figures in the directions we now give reflect that agreed revision of the numbers set out in the Determinations.

14. The parties notified the Tribunal that they had reached agreement on appropriate draft directions, and, having considered them, the Tribunal now gives directions to OFCOM in those terms pursuant to section 195(3) and (4) of the Act. The final directions are annexed to this ruling.

Vivien Rose

Jonathan May

Stephen Wilks

Charles Dhanowa OBE, QC  
(*Hon*)  
Registrar

Date: 29 April 2013

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**ANNEX TO RULING ON DISPOSAL OF THE APPEALS**  
**DIRECTIONS TO OFCOM**

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**UPON** the Competition Commission (the "Commission") notifying the Tribunal on 27 March 2013 of its determinations of the Reference Questions ("the Determinations");

**AND UPON** the parties agreeing the consequential directions that follow from the Determinations;

**AND UPON** the Office of Communications ("OFCOM") setting out in a letter to the Tribunal dated 22 April 2013 the basis upon which it intends to comply with paragraph 3 of these Directions;

**IT IS ORDERED** that:

1. For the purposes of these Directions:
  - (a) "Act" means the Communications Act 2003;
  - (b) "Analogue Core WLR Rental" has the meaning in Condition AAAA4(WLR).13 in Part IV, Schedule 1, to Annex 12 of the Statement
  - (c) "BT" means British Telecommunications plc;
  - (d) "BT's Appeal" means Case 1193/3/3/12;
  - (e) "MPF Rental" has the meaning in Condition FAA4(A).18 in Part I, Schedule 1, to Annex 12 of the Statement;
  - (f) "MPF Transfer" has the meaning in Condition FAA4(A).18 in Part I, Schedule 1, to Annex 12 of the Statement;
  - (g) "SMPF Connection" has the meaning in Condition FAA4(A).18 in Part I, Schedule 1, to Annex 12 of the Statement;
  - (h) "SMPF Rental" has the meaning in Condition FAA4(A).18 in Part I, Schedule 1, to Annex 12 of the Statement;
  - (i) "Statement" means OFCOM's statement entitled "Charge control review for LLU and WLR services" dated 7 March 2012.
  - (j) "Reference Questions" means the questions referred to the Commission in paragraph 2 of the Order dated 24 July 2012 (in relation to BT's Appeal) and in paragraph 2 of the Order dated 28 September 2012 (in relation to Sky and TalkTalk's Appeal) respectively, setting out the specified price control matters to be determined by the Commission pursuant to section 193 of the Act (and

- each reference to a numbered "Reference Question" shall be interpreted accordingly);
- (k) "RPI" has the meaning in Condition FAA4(A).18 in Part I, Schedule 1, to Annex 12 of the Statement.
  - (l) "Sky" means British Sky Broadcasting Limited;
  - (m) "Sky and TalkTalk's Appeal" means Case 1192/3/3/12;
  - (n) "TalkTalk" means TalkTalk Telecom Group plc;
  - (o) "Second Relevant Year" means the period beginning on 1 April 2013 and ending on 31 March 2014; and
  - (p) "unelapsed period of the Second Relevant Year" means the date from when OFCOM adopts a revised price control Condition AAAA4(WLR) or Condition FAA4(A) (as applicable) to 31 March 2014.
2. In order to correct the errors identified in Reference Questions 1(ii), (iv), (vi) and (vii) in BT's Appeal and Reference Question 1(i) in Sky and TalkTalk's appeal, OFCOM shall:
- (a) amend Condition AAAA4(WLR) in Part IV, Schedule 1, to Annex 12 of the Statement, so that the charge ceiling for Analogue Core WLR Rental in the unelapsed period of the Second Relevant Year is £93.27;
  - (b) amend Condition FAA4(A) in Part I, Schedule 1, to Annex 12 of the Statement, so that the charge ceiling for MPF Rental in the unelapsed period of the Second Relevant Year is £84.26;
  - (c) amend Condition FAA4(A) in Part I, Schedule 1, to Annex 12 of the Statement, so that the charge ceiling for SMPF Rental in the unelapsed period of the Second Relevant Year is £9.75; and
  - (d) amend Condition FAA4(A) in Part I, Schedule 1, to Annex 12 of the Statement, so that the charge ceiling for each of MPF Transfer and SMPF Connection in the unelapsed period of the Second Relevant Year is £30.65.
3. In relation to the error identified in Reference Question 1(ii) of Sky and TalkTalk's Appeal, OFCOM shall correct the error in accordance with the Determinations, taking account of the guidance set out in paragraph 14.186 of the Determinations, and amend Conditions FAA4(A) in Part I, Schedule 1, to Annex 12 of the Statement and AAAA4(WLR) in Part IV, Schedule 1, to Annex 12 of the Statement accordingly as soon as reasonably practicable.
4. There shall be no order as to costs.

5. There shall be liberty to apply.

**Vivien Rose**  
Chairman of the Competition Appeal Tribunal

Made: 29 April 2013  
Drawn: 29 April 2013