



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

Case Number: 1238/3/3/15

B E T W E E N:

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

-and-

**TALKTALK TELECOM GROUP PLC**  
**SKY UK LIMITED**

Interveners

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**REFERENCE OF SPECIFIED PRICE CONTROL MATTERS TO THE COMPETITION  
AND MARKETS AUTHORITY**

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1. Having regard to:

- (a) the decision (“the Decision”) contained in a Statement entitled “*Fixed Access Market Reviews: Approach to the VULA margin*” dated 19 March 2015, issued by the Office of Communications (“Ofcom”) (“the Statement”);
- (b) the price control imposed on British Telecommunications plc (“BT”) by SMP services condition 14 in Schedule 1 to Annex 2 of the Statement and the related guidance set out at Annex 3 of the Statement (the “Price Control”);
- (c) the Notice of Appeal (“Am NoA”) dated 19 May 2015 and as amended on 2 September 2015 filed by BT against the Decision;
- (d) the order of the Tribunal dated 17 July 2015, as amended on 7 August 2015, providing the Tribunal’s case management directions in respect of BT’s appeal;
- (e) the Defence and supporting evidence filed by Ofcom on 5 October 2015;
- (f) the Statements of Intervention and supporting evidence filed by each of the Interveners on 23 October 2015 and;

- (g) the Reply and supporting evidence filed by BT on 11 November 2015;
2. The Tribunal, pursuant to Rule 116(2) of the Competition Appeal Tribunal Rules 2015 (SI 2015 No. 1648) and section 193 of the Communications Act 2003 (the “2003 Act”), hereby refers to the Competition and Markets Authority (the “CMA”) the following questions for determination of the specified price control matters arising in this appeal
3. By this reference, the Tribunal orders the CMA to determine the following questions:

### **Questions 1-5**

Whether in setting the Price Control Ofcom erred in law, in fact and/or in the exercise of its discretion in one or more of the following respects alleged in the Am NoA taken individually or, if appropriate, in combination:

#### **Question 1**

Did Ofcom fail to take “utmost account” of the views of the European Commission, for the reasons set out in paragraphs 106 to 134 of the Am NoA?

#### **Question 2**

Did Ofcom fail to comply with the general principles of EU law, and in particular with the principle of legal certainty, for the reasons set out in paragraphs 135-159 of the Am NoA?

#### **Question 3**

Did Ofcom err in one or more of the following respects:

- (a) in applying a LRIC+ test that is alleged by BT to be unduly rigid in requiring that BT’s new retail superfast broadband subscribers make a defined contribution to fixed and common costs (alleged by BT to constitute a form of Fully Allocated Cost standard), for the reasons set out in paragraphs 161(a) and 164-169 of the Am NoA?
- (b) by applying the requirement set out at (a) above on a month-by-month basis, for the reasons set out in paragraphs 161(b) and 170-172 of the Am NoA?
- (c) in applying a static approach to the design of the Price Control, taking no account of reasonably anticipated future changes in margin across the average customer life (“ACL”) of the relevant customers, for the reasons set out in paragraphs 161(c) and 173-174 of the Am NoA?
- (d) in (i) adjusting the ACL used in the Price Control to a period shorter than that for BT’s own retail broadband customers; and/or (ii) using the shorter 60-month ACL throughout the control period, for the reasons set out in paragraphs 161(d) and 175-189 of the Am NoA?
- (e) by applying the Price Control on a pass/fail basis in any given month with no tolerance for the extent to which BT is found to have failed or the reasons for or consequences of any such failure, for the reasons set out in paragraphs 161(e) and 190-195 of the Am NoA?

- (f) by including the net costs of BT Sport in the Price Control on a basis that BT alleges fails to take account of: (i) the size of the costs and revenues under consideration; (ii) evidence available to Ofcom as to the long-term trend and seasonality of the net costs of BT Sport; and/or (iii) the nature of competition in content markets and how this affects competition in Standard Broadband and/or Superfast Broadband, in particular between BT and Sky, for the reasons set out in paragraphs 162(f) and 196-203 of the Am NoA?
- (g) in not making allowance for the long term costs of entry that BT alleges it faces in seeking to compete effectively in the provision of sports content, for the reasons set out in paragraphs 162(g) and 204-209 of the Am NoA?
- (h) in adopting an approach to BT's costs of entry in the provision of sports content that BT alleges is inconsistent with the approach adopted by Ofcom in its "Pay TV statement" dated 31 March 2010 ("the Pay TV Statement"), for the reasons set out in paragraphs 162(h) and 210-212 of the Am NoA?
- (i) by rejecting a value-based approach to the application of the Price Control to the supply of sports content by BT, for the reasons set out in paragraphs 162(i) and 213-217 of the Am NoA?
- (j) in its treatment of: (i) BT Sport channel launch costs; and (ii) BT Sport marketing costs as an ongoing cost, for the reasons set out in paragraphs 162(j) and 218 of the Am NoA.

#### **Question 4**

Did Ofcom err in one or more of the following respects:

- (a) in not incorporating a prospective analysis as part of the Price Control imposed, for the reasons set out in paragraphs 241(a) and 242-246 of the Am NoA?
- (b) by applying an adjusted Equally Efficient Operator standard on the facts of the present case, for the reasons set out in paragraphs 241(b) and 247-250 of the Am NoA?
- (c) in applying the Long-Run Incremental Cost Plus standard to bundled services including BT Sport, for the reasons set out in paragraphs 241(c) and 251-252 of the Am NoA?
- (d) in excluding any requirement for evidence either of exclusionary intention or adverse effects on competition in the application of the Price Control, for the reasons set out in paragraphs 241(d) and 253-256 of the Am NoA?
- (e) in imposing a regulatory condition on BT that BT alleges is not objectively justified by, and is disproportionate to, Ofcom's stated regulatory aim in imposing that condition, for the reasons set out in paragraphs 257(e) and 258-260 of the Am NoA?
- (f) in imposing a regulatory condition on BT that BT alleges fails to: promote efficiency; promote sustainable competition; and/or confer the greatest possible benefits on consumers, for the reasons set out in paragraphs 257(f) and 261-263 of the Am NoA?

- (g) in its treatment of BT's investment in the matters to which the Price Control relates (and in particular its investment in its fibre Next Generation Access network and in acquiring sports content), for the reasons set out in paragraphs 257(g) and 264-266 of the Am NoA?
- (h) in imposing a regulatory condition on BT that BT alleges is such as to discriminate unduly against BT, by comparison with the approach taken to Ofcom's regulation of Sky in respect of pay-TV, for the reasons set out in paragraphs 257(h) and 267-268 of the Am NoA?
- (i) in imposing a regulatory condition on BT that BT alleges fails to provide the requisite transparency in relation to what it is intended to achieve, for the reasons set out in paragraphs 257(i) and 269 of the Am NoA.

### **Question 5**

Whether the terms of the Price Control are in breach of the principle of proportionality that is applicable to such conditions as a general principle of EU law and pursuant to Article 8(4) of the Access Directive, having regard to one or more of the following alternatives:

- (a) a discounted cash flow and effects-based analysis, allowing for the recovery of fixed investment costs (including the fixed costs of sports rights) over a longer time period, for the reasons set out in paragraphs 273(a) and 275-277 of the Am NoA?
- (b) the 'value approach' put forward by Compass Lexecon, for the reasons set out in paragraphs 273(b) and 280-281 of the Am NoA?
- (c) the approach adopted by Ofcom itself in the Pay TV Statement, for the reasons set out in paragraphs 273(c) and 278-279 of the Am NoA?
- (d) an approach which corrected for any of the errors identified by the CMA in response to Questions 3 and 4 above.

### **Question 6**

Having regard to the fulfilment by the Tribunal of its duties under section 195 of the 2003 Act, and in the event that the CMA determines that Ofcom did err in one or more of the respects set out above, the CMA is to include in its determination insofar as is reasonably practicable:

- (a) clear and precise guidance as to how such errors found should be corrected; and
  - (b) a determination as to any consequential adjustments to the Price Control.
4. The CMA is directed to determine the issues contained in this reference on or before 5 July 2016
  5. The CMA shall notify the parties to these appeals of its determination at the same time as it notifies the Tribunal pursuant to section 193(4) of the 2003 Act
  6. There be liberty to apply.

**Andrew Lenon QC**  
Chairman

Made: 5 January 2016  
Drawn: 5 January 2016