

**In the matter of a reference under section 193 of the
Communications Act 2003**

**British Telecommunications plc v Office of Communications
(Case no. 1238/3/3/15)**

**TalkTalk Telecom Group plc v Office of Communications
(Case no. 1237/3/3/15)**

THE BT/TALKTALK COSTS ORDER 2016

Background

1. On 15 and 19 May 2015, TalkTalk Telecom Group plc (TalkTalk) and British Telecommunications plc (BT) respectively filed Notices of Appeal at the Competition Appeal Tribunal (CAT) challenging a decision by the Office of Communications (Ofcom) contained in a statement entitled '*Fixed Access Market Reviews: Approach to the VULA margin*' dated 19 March 2015.
2. On 2 June 2015, the CAT received a request for permission to intervene from TalkTalk in Case 1238/3/3/15 ('the BT Appeal'). On 5 June 2015, Sky UK Limited (Sky) applied for permission to intervene in the BT Appeal and, on 9 June 2015, BT made an application for permission to intervene in Case 1237/3/3/15 ('the TalkTalk Appeal').
3. On 18 June 2015, a case management conference took place before the CAT and, on 29 June 2015, the CAT issued a Ruling which determined that:
 - (a) Grounds 2 to 6 (excluding Ground 5(A) and the matters stated in paragraphs 260(a) and 262) of BT's Notice of Appeal were specified price control matters that must be referred to the CMA pursuant to section 193(1) of the Communications Act 2003 ('the Act').
 - (b) Grounds 1 and 5(A) (including the matters stated at paragraphs 260(a) and 262 of BT's Notice of Appeal) were not specified price control matters and therefore fell to be considered by the CAT.
 - (c) Permission to intervene be granted to Sky and TalkTalk in respect of the BT Appeal and to BT in respect of the TalkTalk Appeal.

4. On 2 September 2015, BT filed an Amended Notice of Appeal and, on 5 October 2015, Ofcom filed its Defence and supporting evidence.
5. On 23 October 2015, Sky and TalkTalk¹ filed Statements of Intervention in the BT Appeal and BT filed a Statement of Intervention in the TalkTalk Appeal.
6. By Orders dated 5 January 2016, the CAT referred to the CMA for determination a number of reference questions in each of the appeals. These Orders required the CMA to send its final determination of the reference questions in each appeal to the CAT by 5 July 2016.
7. On 13 June 2016, the CMA sent to the CAT its final determination which incorporated its determination of the reference questions in both appeals.
8. In relation to the BT Appeal, the CMA determined that Ofcom had erred in relation to reference question 3(b) in its decision to impose a one-month compliance period. In relation to the remainder of the reference questions in the BT Appeal, the CMA found that Ofcom did not err.
9. In light of the CMA's determination in the BT Appeal, the CMA included in the final determination, pursuant to reference question 6 of the CAT's Order of 5 January 2016, guidance to the CAT on how the error identified should be remedied.
10. As to the TalkTalk Appeal, the CMA determined that Ofcom did not err in respect of reference question 1 or 2. As a result, it was not necessary to go on to consider reference question 3.
11. Pursuant to section 193A(1) of the Act, the CMA has decided to exercise its discretion and make an order against BT and TalkTalk in respect of the costs incurred by it in connection with these references ('a Costs Order'). No order as to costs is made against (i) Ofcom,² (ii) Sky or TalkTalk as interveners in the BT Appeal, or (iii) BT as intervener in the TalkTalk Appeal.
12. On 23 June 2016, in accordance with paragraph 8.7 of the CMA's guidance '*Cost recovery in telecoms price control references: Guidance on the CMA's approach*' (CMA5), the CMA sent to the parties a proposed Costs Order in order to give the parties an opportunity to comment on it.
13. On 30 June 2016, the CMA received comments from the parties on the proposed Costs Order, which the CMA has taken into account.

¹ Albeit TalkTalk's Statement of Intervention was limited to those matters the CAT had determined to be non-specified price control matters, ie matters that fell to be decided by the CAT.

² The CMA has no power to require payment of its costs by Ofcom: see section 193A(2) of the Act.

14. Accordingly, the CMA now issues this Order today, 8 July 2016.

THE ORDER

The CMA makes this Order pursuant to section 193A(1) of the Communications Act 2003.

1. Title, application and interpretation

1.1 The title of this Order is 'The BT/TalkTalk Costs Order 2016'.

1.2 The Interpretation Act 1978 shall apply to this Order as it does to Acts of Parliament.

1.3 The purpose of this Order is to require payment of the Competition and Markets Authority's costs in respect of the references made by the Competition Appeal Tribunal to the Competition and Markets Authority under section 193 of the Communications Act 2003 in (i) *British Telecommunications plc v Office of Communications* (Case 1238/3/3/15), and (ii) *TalkTalk Telecom Group plc v Office of Communications* (Case 1237/3/3/15).

1.4 In this Order:

Act means the Communications Act 2003;

Appeals means the appeals brought by BT in Case no. 1238/3/3/15 and TalkTalk in Case no. 1237/3/3/15;

BT means British Telecommunications plc;

BT Appeal means the appeal brought by BT in the CAT in Case no. 1238/3/3/15;

CAT means the Competition Appeal Tribunal;

CMA means the Competition and Markets Authority;

Costs Order is given the same meaning as in section 193A(1) of the Act, namely an order in respect of the costs incurred by the CMA in connection with a reference under section 193 of the Act;

Final Determination means the final determination of the CMA in relation to the reference questions referred to it by the CAT in the BT Appeal and the TalkTalk Appeal, which was sent to the CAT on 13 June 2016;

References means the references made by the CAT, pursuant to the Orders of 5 January 2016, in the BT Appeal and TalkTalk Appeal;

TalkTalk means TalkTalk Telecom Group plc;

TalkTalk Appeal means the appeal brought by TalkTalk in the CAT in Case no. 1237/3/3/15.

2. Date on which the Order takes effect

2.1 This Order shall take effect on the date on which the CAT decides the price control matters which are the subject of the References in accordance with the Final Determination.³

3. Total costs incurred by the CMA

3.1 The total costs incurred by the CMA in connection with the determination of the References is as follows:⁴

(a) BT Appeal – £636,552; and

(b) TalkTalk Appeal – £112,333.⁵

4. Apportionment of costs

4.1 Pursuant to paragraph 193A(3)(b) of the Act and having particular regard to the factors set out in paragraph 193A(4):

(a) there shall be a reduction of 10% in respect of the costs to be paid by BT in the BT Appeal to reflect the fact that BT succeeded in part, namely in respect of reference question 3(b) where Ofcom was found to have erred in setting a one-month compliance period; and

(b) TalkTalk shall be liable for all of the costs incurred by the CMA in the TalkTalk Appeal.

5. Costs Order

5.1 BT shall pay the CMA's costs in relation to the BT Appeal in the sum of £572,897.

³ See section 193A(5)(b) of the Act.

⁴ See paragraph 193A(3)(b) of the Act.

⁵ These figures are based on an apportionment of 85% of the CMA's overall costs being attributable to the BT Appeal and 15% being attributable to the TalkTalk Appeal.

5.2 TalkTalk shall pay the CMA's costs in relation to the TalkTalk Appeal in the sum of £112,333.

5.3 There shall be no order as to costs against (i) Sky or TalkTalk as interveners in the BT Appeal, or (ii) BT as intervener in the TalkTalk Appeal.

6. Payment of costs

6.1 BT and TalkTalk shall make payment of these costs within 14 days of the date on which this Order takes effect.

Alasdair Smith
Inquiry Panel Chair
8 July 2016