

BCMR Telecoms Appeals

CityFibre Infrastructure Holdings plc v Office of Communications

Case 1261/3/3/16

TalkTalk Telecom Group plc v Office of Communications

Case 1259/3/3/16

Determination on Costs

Contents

	<i>Page</i>
Introduction	3
Legal framework in relation to costs	7
The Communications Act 2003	7
CMA Guidance (CMA5)	8
Payment of the CMA's costs	10
CMA Costs	11
Statement of CMA Costs.....	11
Proportion of costs to be paid	12
Parties' views	12
Our assessment.....	14
Final costs determination	19
Final Costs Order	20
Appendix A: Statement of CMA costs	21
Overview	21
CMA Costs	23
Overheads	23
Staff costs	23
The Group costs	26
Non-staff costs	28

Introduction

1. On 28 April 2016, the Office of Communications (Ofcom) published the details of, and gave effect to, the decisions taken in the Business Connectivity Market Review (BCMR)¹ in its 'Final Statement',² taken pursuant to [section 87\(9\)](#) and [section 88\(1\)\(a\)](#) of the Communications Act 2003 (the Act).
2. In the Final Statement, Ofcom, in exercise of its statutory obligations, imposed a number of obligations on British Telecommunications plc (BT) to offer access to its network to provide wholesale leased lines services. These decisions are appealable to the Competition Appeal Tribunal (the Tribunal), including the market definition decisions and the choice and design of access remedies.
3. In addition to the requirements to offer wholesale access to its network, Ofcom imposed a number of obligations on BT in respect of the level of charges for wholesale leased lines services in markets where it has significant market power. These obligations are described as the Leased Lines Charge Control (LLCC).
4. TalkTalk Telecom Group plc (TalkTalk),³ BT⁴ and CityFibre Infrastructure Holdings plc (CityFibre)⁵ lodged appeals in the Tribunal under [section 192](#) of the Act against the decisions contained in the Final Statement.
5. In accordance with the Act, the Tribunal refers to the Competition and Markets Authority (CMA) matters within the appeal which relate to the setting of prices, which are described as 'specified price control matters'.
6. At a case management conference on 29 September 2016, the Tribunal decided⁶ that no specified price control matters arose in BT's appeal⁷ and that, in TalkTalk's appeal⁸ and CityFibre's appeal,⁹ the following price control matters arose:
 - (a) In TalkTalk's appeal: the challenge to Ofcom's decision that the Non-Domestic Rate (NDR) costs to be deducted from the price of the reference active products in deriving the price for Dark Fibre Access

¹ The BCMR assesses the market conditions in respect of the sale of wholesale leased lines services amongst communications providers, which may then on-sell the leased line to a business customer or use the leased line for the purpose of managing their own network.

² [Final Statement](#), 28 April 2016.

³ [Case 1259/3/3/16](#).

⁴ [Case 1260/3/3/16](#).

⁵ [Case 1261/3/3/16](#).

⁶ [Order of the Tribunal](#) made on 29 September 2016.

⁷ [Case 1260/3/3/16](#).

⁸ [Case 1259/3/3/16](#).

⁹ [Case 1261/3/3/16](#).

(DFA) at paragraph 10.C.1 of the Condition should be based on an attribution of BT's rates costs to the fibre (rather than on some other appropriate measure) for reasons set out in paragraphs 32 to 44 of the TalkTalk Notice of Appeal (TalkTalk NoA).

(b) In CityFibre's appeal: the challenge to Ofcom's decision to set the LLCC by reference to BT's costs of replacement of its network (albeit with modern equivalent technology, specifically BT's Current Cost Accounting Fully Allocated Cost (CCA FAC)), instead of the costs of a reasonably efficient operator (REO) or a modified equally efficient operator (MEEO), for the reasons set out in Grounds 3 and 4(b) of the CityFibre Notice of Appeal (CityFibre NoA), having regard, in particular, to any or all of the arguments in the following paragraphs of the CityFibre NoA:

(i) paragraphs 32 to 36, summarising the arguments under Grounds 3 and 4(b);

(ii) paragraphs 57 to 60, alleging failures to comply with Ofcom's duties under sections 3 and 4 of the Act; and

(iii) paragraphs 59 to 69 and paragraph 80, alleging failures to use the appropriate measure of costs and to take properly into account pricing in the Central London Area (CLA) and CityFibre's discounting relative to BT's prices.

7. Furthermore, the Tribunal gave permission¹⁰ for a number of interventions in the appeals as follows:

(a) (i) BT; (ii) CityFibre; (iii) Hutchison 3G UK Limited (Three) and Vodafone Limited (Vodafone) (together 'the NDR Interveners') and (iv) Gamma Telecom Holdings Limited (Gamma) to intervene in the TalkTalk appeal.

(b) (i) CityFibre; (ii) Colt Technology Services (Colt), TalkTalk, Three and Vodafone (collectively 'the CP Group'), (iii) Gamma and (iv) Virgin Media Limited (Virgin Media) to intervene in the BT appeal.

(c) (i) BT; (ii) the CP Group; and (iii) Gamma to intervene in the CityFibre appeal.

8. By Orders dated 17 November 2016, the Tribunal referred specified price control matters arising: (i) in TalkTalk's appeal; and (ii) in CityFibre's appeal

¹⁰ Order of the Tribunal made on 29 September 2016.

against the decisions contained in the Final Statement to the CMA for determination ('the Reference'), in accordance with [section 193](#) of the Act.¹¹

9. In both appeals, the Tribunal directed that the CMA must determine the issues which had been referred to it by 7 April 2017 and must notify the parties to the appeal of its determination at the same time as it notifies the Tribunal.¹²
10. The CMA notified the parties to the appeal of its [Final Determination](#) on 6 April 2017.¹³
 - (a) The CMA's determination on the reference question referred to it by the Tribunal in the CityFibre appeal was that Ofcom was not wrong to set the LLCC by reference to BT's costs of replacement of its network, instead of the costs of an REO or MEEO.
 - (b) The CMA's determination on the reference question referred to it by the Tribunal in the TalkTalk appeal was that Ofcom was wrong to decide that, in the absence of a change to the rating rules by the Government, the NDR costs to be deducted from the price of the reference active products in deriving the price for DFA should be based on an attribution of BT's rates costs to the fibre (rather than on some other appropriate measure).
11. The CMA's 6 April 2017 letter, which accompanied its [Final Determination](#), advised CityFibre, TalkTalk, Ofcom, interveners to the appeals and the Tribunal (the Parties) that the CMA intended to exercise its power to make a Costs Order in respect of the costs incurred in connection with the determining these appeals.
12. On 4 May 2017, the CMA sent a letter to the Parties providing further details on the CMA's intention to make an Order in respect of the costs incurred in determining these appeals. It reiterated that the CMA appointed group of panel members to determine these appeals (the Group) had decided that a Costs Order was appropriate in this case and that the CMA's costs for these purposes would comprise all of its costs, including the costs of the panel members and staff allocated to the matter, as well as an allowance for central office overheads and any external costs the CMA may have incurred by, for example, obtaining the assistance of experts or Counsel. It also noted that [section 193\(5\)](#) of the Act stated that if the CMA makes a Costs Order, it must do so 'as soon as reasonably practicable after the making of the

¹¹ [Order of the Tribunal](#) made on 17 November 2016.

¹² See paragraph 1 of each of the Orders of the Tribunal dated [17 November 2016](#) and [10 March 2017](#).

¹³ On 10 April 2017, the Tribunal [published a non-confidential version of the CMA's Final Determination](#) in respect of the specified price control matters that were referred to it for determination in the TalkTalk v Ofcom ([Case 1259/3/3/16](#)) and CityFibre v Ofcom ([Case 1261/3/3/16](#)) appeals.

determination'. However, on 8 September 2016, BT [appealed](#)¹⁴ to the Tribunal against the [Costs Order decision](#) of the CMA in respect of the costs incurred by the CMA in connection with the reference made in BT's appeal¹⁵ against a decision by Ofcom in its 19 March 2015 statement entitled 'Fixed Access Market Reviews: Approach to the virtual unbundled local access (VULA) margin'. The Tribunal had yet to give judgment in respect of this appeal and therefore unless the CMA received any objection from parties, it considered it appropriate to wait for the Tribunal's decision prior to making the Costs Order in relation to the BCOMR Telecoms Appeals.

13. On 2 June 2017, the Tribunal handed down its judgment in relation to the BT appeal, in which it dismissed BT's appeal.¹⁶ The Tribunal did note however that it would be good practice for the CMA to provide further details of how it calculated its total costs and the proportion of the costs to be paid pursuant to the Costs Order at the consultation stage. The Tribunal considered this would allow parties to better understand the basis of the costs being ordered and assist in seeking to narrow issues which may avoid the need for costly appeals. The Tribunal considered this should take the form of the table produced in the course of those particular proceedings, which set out the name, grade, recovery rate, hours and a description of work for each staff/panel member, together with a breakdown of travel costs, disbursements and an explanation of the overhead rate applied.
14. Further to the CMA's notification of its [Final Determination](#) to the Tribunal on 6 April 2017, on 29 June 2017, the Tribunal accordingly made Orders allowing TalkTalk's appeal in Case 1259/3/3/16, and remitting the NDR Decision to Ofcom for re-determination,¹⁷ but dismissing Grounds 3 and 4(b) of CityFibre's appeal in Case 1261/3/3/16.¹⁸
15. On 11 August 2017, the CMA sent a letter to the parties explaining the proposed approach to determining costs following completion of the appeal process and before making the Costs Order, in accordance with paragraph 8.7 of the CMA guidance '[Cost recovery in telecoms price control references: Guidance on the CMA's approach \(CMA5\)](#)',¹⁹ also gave the Parties the opportunity to comment on the proposed Costs Order.

¹⁴ [Case 1267/3/12/16](#).

¹⁵ [Case 1238/3/3/15](#).

¹⁶ *BT v CMA* [2017] CAT 11.

¹⁷ [Order of the Tribunal](#) made on 29 June 2017 in relation to [Case 1259/3/3/16](#).

¹⁸ [Order of the Tribunal](#) made on 29 June 2017 in relation to [Case 1261/3/3/16](#).

¹⁹ [CMA5](#) has now been replaced by [CMA72: Price Control Appeals under section 193 of the Communications Act 2003](#). However, at the time of these proceedings, the relevant guidance document was [CMA5](#).

16. Representations were received on 15 September 2017 from CityFibre.²⁰
17. Following consideration of CityFibre’s response, the CMA has made its final determination on costs for the BCMR Telecoms Appeals and its Order requiring the payment of costs. This determination on costs covers the legal framework in relation to costs, includes a statement of the CMA’s costs and presents our assessment of the cost award for the CMA’s costs.

Legal framework in relation to costs

The Communications Act 2003

18. The CMA has a power under [section 193A](#) of the Act (added as one of the reforms made by the Enterprise and Regulatory Reform Act 2013) to recover its costs of determining a price control matter reference made by the Tribunal:
 - (1) Where a determination is made on a price control matter referred by virtue of [section 193](#), the CMA may make an Order in respect of the costs incurred by it in connection with the reference (a “Costs Order”).
 - (2) A Costs Order may require the payment to the CMA of some or all of those costs by such parties to the appeal which gave rise to the reference, other than Ofcom, as the CMA considers appropriate.
 - (3) A Costs Order must—
 - (a) set out the total costs incurred by the CMA in connection with the reference, and
 - (b) specify the proportion of those costs to be paid by each party to the appeal in respect of whom the Order is made.
 - (4) In deciding on the proportion of costs to be paid by a party to the appeal the CMA must, in particular, consider—
 - (a) the extent to which the determination on the reference upholds Ofcom’s decision in relation to the price control matter in question,
 - (b) the extent to which the costs were attributable to the involvement in the appeal of the party, and

²⁰ ‘The Appellants comments dated 15 September 2017 on the Respondent’s proposed Costs Order’ (the CityFibre response).

- (c) the conduct of the party.
- (5) A Costs Order —
- (a) must be made as soon as reasonably practicable after the making of the determination on the reference, but
 - (b) does not take effect unless the Tribunal, in deciding the appeal which gave rise to the reference, decides the price control matter which is the subject of the reference in accordance with the determination of the CMA (see [section 193\(6\)](#)).
- (6) In a case where the Tribunal decides the price control matter in question otherwise than as mentioned in subsection (5)(b), the CMA may make an Order under this subsection in respect of the costs incurred by it in connection with the reference.
- (7) Subsections (2) to (4) apply in relation to an Order under subsection (6) as they apply in relation to an Order under subsection (1); but for that purpose the reference in subsection (4)(a) to the determination on the reference is to be read as a reference to the decision of the Tribunal mentioned in subsection (6).
- (8) An Order under subsection (6) must be made as soon as reasonably practicable after the decision of the Tribunal mentioned in that subsection.
- (9) An amount payable to the CMA by virtue of an Order made under this section is recoverable summarily as a civil debt (but this does not affect any other method of recovery).
- (10) The CMA must pay any sums it receives by virtue of this section into the Consolidated Fund.
- (11) The functions of the CMA under this section, other than those under subsections (9) and (10), are to be carried out on behalf of the CMA by the group constituted by the chair of the CMA in relation to the reference in question.

CMA Guidance (CMA5)

19. The CMA's guidance '[Cost recovery in telecoms price control references: Guidance on the CMA's approach \(CMA5\)](#)' makes further provision in relation to costs. Under the Enterprise and Regulatory Reform Act 2013, [schedule 4](#), paragraph 52 and the '[Rules of procedure for merger, market and special](#)

reference groups (CMA17)', Rule 6.10, Groups are required to have regard to guidance issued by the CMA Board.

20. CMA5 notes that:

8.1 [...]. The CMA will normally expect to exercise its discretion under [section 193A](#) of the Act to make a Costs Order but will proceed on a case-by-case basis, retaining flexibility to meet circumstances as they arise.

8.2 The CMA's costs for this purpose will comprise all its costs, including the costs of the members and staff allocated to the matter, as well as an allowance for central office overheads and any external costs it may incur by, for example, obtaining the assistance of experts or Counsel. [...].

[...]

8.4 The actual amount of costs that the CMA will incur in connection with a price control reference will vary from case to case, sometimes considerably. Factors affecting the level of the CMA's costs are likely to include the number of parties to the appeal and the number and complexity of grounds of appeal raised.

[...]

8.6 In addition to the requirements in [section 193A](#) of the Act, the Costs Order will be accompanied by the CMA's reasons for recovering the costs from a party or parties to the appeal in the proportions specified in the Costs Order.

8.7 Before the CMA makes a Costs Order, it will give all parties the opportunity to comment on its proposed Order. The CMA will seek to provide the proposed Order either at the time it sends its final determination to the CAT or as soon as possible thereafter.

[...]

8.9 A person affected by a decision of the CMA to which effect is given by a Costs Order made under [section 193A](#) of the Act, may appeal against it to the CAT. The Act requires the CAT to decide the appeal on the merits, by reference to the grounds of appeal set out in the Notice of Appeal and, if the appeal is allowed, remit the decision to the CMA with appropriate directions.

21. The CMA may also draw guidance from previous decisions of the CMA and the Competition Commission (CC) made under similar legislative regimes in relation to the determination of costs, where relevant. However, the CMA is of the view that decisions on costs in respect of matters that are within the CMA's discretion should not be allowed to harden into rigid rules²¹ – in other words, they do not constitute binding precedent. A number of aspects of a determination on costs are a matter of judgement and the CMA will seek to arrive at a result that is just in all the circumstances of the case.
22. Similarly, the CMA may, if relevant, have regard to the wider decisions of the Tribunal in respect of each case which is referred to the CMA by the Tribunal. However, once it has been referred by the Tribunal, the case represents a separate administrative matter to be determined by the CMA, and we consider our costs order on that basis.

Payment of the CMA's costs

23. As noted in paragraph 10(a) above, the CMA dismissed the challenge in the CityFibre appeal.
24. In deciding on the CMA's costs and their apportionment between the parties in the CityFibre appeal, we have also had regard to the following principles:
 - (a) The CMA may recover all its costs incurred in connection with the appeal, not just its direct costs.²²
 - (b) The CMA must make a broad, soundly based judgement as to its costs.²³
 - (c) There is no statutory requirement as to the proportionality or reasonableness of the CMA's costs.²⁴ However, the CMA is not entitled to make an Order in relation to costs incurred unreasonably or unnecessarily.²⁵

²¹ See, by analogy, *IBA Health v OFT* [2004] CAT 6, at [35] and the dictum of Lord Lloyd of Berwick in *Bolton Metropolitan District Council v Secretary of State* [1995] 1 WLR 1176, at page 1178E that in respect of matters on costs that are within the discretion of the court 'a practice, however widespread and long-standing, must never be allowed to harden into a rule'.

²² In *BT v CMA* [2017] CAT 11 at [32], the Tribunal set out the level of detail the CMA should give of its costs which makes it clear that it is not just the CMA's direct costs which can be recovered.

²³ *BT v CMA* [2017] CAT 11 at [24].

²⁴ *BT v CMA* [2017] CAT 11 at [27].

²⁵ *BT v CMA* [2017] CAT 11 at [29].

CMA Costs

Statement of CMA Costs

25. In the interest of efficiency, and as the Reference included matters which were common to both appeals, the CMA decided that the same CMA group of panel members (the Group) and staff team should consider both appeals in parallel when determining the questions raised in the Reference.
26. The total costs incurred by the CMA in connection with the Reference were £479,890.36 (see Appendix A for a detailed statement of costs). These costs include:
 - (a) CMA staff and the Group's costs;
 - (b) CMA overhead allowance (defined as a standard percentage uplift of staff and panel member costs); and
 - (c) Non-staff costs (eg external advisers' costs (eg Counsel), travel and subsistence, and transcription services).
27. Furthermore, the total costs have been calculated by reference to three categories of time spent by the CMA staff team and the Group in conjunction with the appeal:
 - (a) the pre-reference stage and the stage up to the core submissions hearing (Friday 2 December 2016) where the matters under consideration were in the most part common to both appeals and the majority of time was allocated jointly between the two cases;
 - (b) time spent during the reference after the core submissions hearing (Monday 5 December 2016) which was on general matters relevant to both CityFibre's appeal and TalkTalk's appeal, such as project management; and
 - (c) time spent during the appeal which was specific to CityFibre's appeal or to TalkTalk's appeal.
28. CityFibre's appeal raised a number of issues, which required more economic analysis than the issues raised in TalkTalk's appeal. This meant that the time spent during the appeal on economic analysis of issues specific to CityFibre's case was significantly different from the time spent on economic analysis in TalkTalk's case, and the CMA's time costs reflect this.

Proportion of costs to be paid

29. As noted in paragraph 18 above, the Act requires the CMA to specify the proportion of those costs to be paid by each party to the appeal in respect of whom the Order is made. In deciding the proportion of costs to be paid by a party to the appeal, section 193A(4) of the Act requires the CMA, in particular, to consider:
- (a) the extent to which the determination on the Reference upholds Ofcom's decision in relation to the price control matter in question;
 - (b) the extent to which the costs were attributable to the involvement in the appeal of the party; and
 - (c) the conduct of the party.

Parties' views

30. The parties' views on the apportionment of the CMA's costs are set out below.
31. CityFibre submitted:²⁶
- (a) that no Costs Order is appropriate in this case, given the context of the case in the Tribunal, where the Tribunal made a decision which supported CityFibre's case;
 - (b) that CityFibre, as an entrant and small and medium-sized enterprise (SME), should not have to pay the CMA's costs; and
 - (c) that the CMA's costs are overstated, that they imply unduly high costs, and that there should be adjustments to reflect the costs of interveners.

CityFibre's submissions that it should face no liability for costs

32. CityFibre's 'Primary Submission on the Order' (paragraphs 28 to 44) submitted that "the appropriate award for costs should be to impose a nil liability on the Appellant and the Order be one of the following:
- (a) First, CityFibre submitted that no Order for costs should be made as a result of the Appellant succeeding in its appeal. It submitted that this was consistent with the statements of the Tribunal, including that:²⁷

²⁶ CityFibre response.

²⁷ CityFibre response, paragraph 29.

- (i) the purpose of [section 193A](#) is to enable the CMA to recover for the public purse costs incurred by it in connection with an unsuccessful appeal; and
 - (ii) [the CMA] is not a party to adversarial litigation and its costs are only recoverable in the event of an appeal failing.
- (b) Second, CityFibre said that there should be no Order for costs, as the appropriate order would be against Ofcom, and that as result of the Respondent's inability to order costs against Ofcom when it is Ofcom who should be liable for the costs, there should be no Costs Order at all."²⁸
33. Finally, CityFibre said that, in the case that there was any Order for costs, there should be an Order for Wasted Costs against the Tribunal. CityFibre submitted that it had made it clear that the Tribunal was putting the 'cart before the horse' in considering the specified price control matters before the non-specified matters.²⁹

CityFibre's submissions on its position as an SME

34. CityFibre also submitted that no Costs Order was appropriate given its position as an entrant in the market.
35. First, CityFibre submitted that it was an SME and a new entrant emerging into the market which is dominated by very large corporate players. It is precisely the kind of business that the Respondent wishes to encourage in this market to create much needed competition.³⁰
36. CityFibre stated that there was a broad public policy interest in encouraging SMEs to use appeal processes. It stated that a Costs Order against CityFibre would act contrary to our broader competition duties.

CityFibre's submissions on reasonableness

37. CityFibre said that the level of costs was 'extraordinary'. It said that the costs were not efficient. It compared the number of Staff employed by the CMA (16) with its own number of fee earners (5).

²⁸ CityFibre response, paragraphs 36–37.

²⁹ CityFibre response, paragraphs 40–41.

³⁰ CityFibre response, paragraph 46.

38. CityFibre said that the CMA should only recover the same number of hours as incurred by CityFibre itself, which would be around 900 hours, rather than 5,300 hours.
39. Finally, CityFibre said that we were proposing to recover costs of interveners from CityFibre, as we had made no adjustment to costs to reflect time taken in reviewing interveners' submissions.

Our assessment

CityFibre's submissions that it should face no liability for costs

40. As discussed above (paragraphs 32 and 33), CityFibre argued that no Costs Order was appropriate, due to the outcome of the related case in the Tribunal, where CityFibre argued that Ofcom's market definition was wrong, a position the Tribunal supported. Its 'Primary Submission on the Order' is that "the appropriate award for costs should be to impose a nil liability on the Appellant and the Order be one of either:
 - (a) No Order for costs – as a result of the Appellant succeeding in their appeal; and/or it being appropriate to do so; or
 - (b) No Order for costs – as a result of the Respondent's inability to order costs against Ofcom when it is Ofcom who should be liable for the costs; or
 - (c) An Order for Wasted Costs against the Tribunal".
41. For the following reasons, the CMA considers that this submission does not accord with either the relevant statutory provisions or the relevant facts.

The statutory framework

42. [Section 193\(1\)](#) of the Act requires the Tribunal, in accordance with the Tribunal rules, to refer price control matters arising in an appeal, made under [section 192](#) of the Act, to the CMA for determination. Where the CMA determines a price control matter, it must notify the Tribunal of the determination it has made ([section 193\(4\)](#)) and unless [section 192\(7\)](#) applies, the Tribunal, in deciding the appeal, must decide that price control matter in accordance with the determination of the CMA ([section 193\(6\)](#)).
43. [Section 193A](#) of the Act provides that the CMA may recover its administrative costs incurred by it in connection with the reference by making a "Costs Order".

44. [Section 193A](#) of the Act specifies that the Costs Order: may require the payment to the CMA of some or all of those administrative costs by such parties to the appeal which gave rise to the reference, other than Ofcom, as the CMA considers appropriate; must set out the total costs incurred by the CMA in connection with the reference; and must specify the proportion of those costs to be paid by each party to the appeal in respect of whom the Order is made.
45. In deciding on the proportion of costs to be paid by a party to the appeal the CMA must, in particular, consider (a) the extent to which the determination on the reference upholds Ofcom's decision in relation to the price control matter in question; (b) the extent to which the costs were attributable to the involvement in the appeal of the party; and (c) the conduct of the party.
46. Neither [section 193A](#) of the Act, nor the Tribunal rules, give the CMA any power to make a Costs Order, or indeed any other kind of Order, against the Tribunal.

The relevant facts

47. On 17 November 2016, Mr Justice Snowden, for the Tribunal, having heard representations from the parties, including representations from CityFibre as to the terms of the relevant questions, made an Order referring Grounds 3 and 4(b) of CityFibre's appeal as a specified price control matter for determination by the CMA on or before 31 March 2017 (this deadline was subsequently extended to 7 April 2017).³¹
48. On 6 April 2017, the CMA submitted its [Final Determination](#) on the price control matters to the Tribunal. This included the CMA's determination that Ofcom was not wrong to set the LLCC by reference to BT's costs of replacement of its network, instead of the costs of a REO or MEE0.
49. On 29 June 2017 Mr Justice Snowden made an Order disposing of Grounds 3 and 4(b) of CityFibre's appeal in accordance with the CMA's determination. The terms of this Order were that Grounds 3 and 4(b) of CityFibre's appeal are dismissed and that CityFibre must pay Ofcom's reasonable costs in

³¹ [Order of the Tribunal](#) made on 17 November 2016. On 3 March 2017, Ofcom wrote to the CMA requesting an extension of one week to the deadline set by the CMA for responses to its provisional determination. The CMA received no objections to Ofcom's request for an extension, but considered that, given the timetable for the Reference, in order to be able to grant such an extension to Ofcom, it would be necessary for the CMA also to be given more time by the Tribunal in which to make its [Final Determination](#) of the Reference. On 7 March 2017, the CMA therefore requested the Tribunal give directions extending by seven days the date by which the CMA must determine the Reference (ie until 7 April 2017). By [Order of the Tribunal](#), on 10 March 2017 it granted the CMA an extension for determination to 7 April 2017.

relation to the Specified Price Control Matter (the amount payable to be assessed if not agreed).

50. It is, therefore, indisputable that, so far as the price control matters in CityFibre's appeal (Grounds 3 and 4(b)) are concerned, Ofcom's decision has been upheld, CityFibre's appeal has been unsuccessful and CityFibre has been ordered to pay Ofcom's costs in relation to Grounds 3 and 4(b) (price control matters) of CityFibre appeal.
51. There is no basis for CityFibre's submission that for the purposes of the CMA Costs Order, "there should be No Order for Costs, as a result of the Appellant (ie CityFibre) succeeding in their appeal", because CityFibre did not 'succeed' as regards Grounds 3 and 4(b) (price control matters) of its claim. The Tribunal has dismissed these grounds and required CityFibre to pay Ofcom's costs in respect of them.
52. In a related appeal by BT³² against the decisions contained in Ofcom's Final Statement (see paragraphs 4 and 6 above), the Tribunal handed down a short ruling on 26 July 2017, which set out its findings that Ofcom had erred as regards three non-price control matters and that Ofcom's decisions in respect of all three matters will therefore be quashed.³³ Its provisional non-confidential judgment was handed down on 10 November 2017.³⁴ The CMA notes that following its [Final Determination](#), CityFibre applied to the Tribunal to amend its Notice of Appeal so as to remove those aspects of its appeal concerning market definition and to amend the corresponding portions of its Statement of Intervention in BT's appeal. CityFibre therefore did not take part in the hearing which ultimately took place during 10 April 2017 to 24 May 2017. On 6 September 2017, Mr Justice Snowden made a Reasoned Order granting CityFibre's application to remove the market definition aspects of its Notice of Appeal (and corresponding portions of its Statement of Intervention in BT's appeal) and dismissing an application made by the CP Group that CityFibre pay certain of their costs arising from the amendment.³⁵

The CMA's decision on CityFibre's primary submission

53. Whether the Tribunal's ruling in *BT v Ofcom*³⁶ has a bearing as regards the non-price control matters in CityFibre's own appeal, including the award of litigation costs in that appeal, is a matter for the Tribunal. For the following reasons, however, the CMA consider that this is not relevant to the question

³² [Case 1260/3/3/16](#).

³³ *BT v CMA* [2017] [CAT 17](#).

³⁴ *BT v Ofcom (Market Definition)* [2017] [CAT 25](#).

³⁵ [Reasoned Order of the Tribunal](#) made on 6 September 2017.

³⁶ *BT v Ofcom and CityFibre v Ofcom* [2017] [CAT 20](#).

of the recovery of the CMA's administrative costs incurred in determining the price control reference from the Tribunal:

- (a) the reference was made by the Tribunal after receiving representations from CityFibre as to the matters to be determined by the CMA;
- (b) the CMA is required to make a price control matter determination which the Tribunal refers to it, and to do so within the period of time fixed by the Tribunal; it has no power to request, or to refuse to carry out, a price control matter reference;
- (c) the CMA has no involvement in the other, non-price control, aspects of CityFibre's appeal, or in CityFibre's appeal generally;
- (d) The CMA is a decision-making body when making its determination. It is not a party to the appeal, even less is it a 'Respondent' to CityFibre's claims in the appeal, as stated in paragraph 37 of CityFibre's submission;
- (e) the Tribunal has disposed of the price control matter grounds in CityFibre's appeal against CityFibre and in favour of Ofcom, and has awarded litigation costs against CityFibre and in favour of Ofcom;
- (f) the Tribunal does not decide the CMA's costs, as these are not litigation costs, but are recovered by an administrative order in accordance with the provisions of [section 193A](#) of the Act, in respect of the CMA's actual costs incurred in making the price control matter determination referred to it by the Tribunal.³⁷

- 54. Therefore, the conditions set out in the Act for the recovery of the CMA's administrative costs incurred in determining the price control matters in the reference are all satisfied.
- 55. While this does not oblige the CMA to recover the costs associated with CityFibre's appeal, we have decided that it is consistent with both the intention and the context of this case that we should do so. CityFibre, in bringing an appeal to the CMA, was aware that this provided it with the opportunity for an improved outcome under the price control but that it might have to cover the CMA's costs. We note that the Tribunal has already made a comparable Order on the basis that CityFibre was unsuccessful on the price control matters.
- 56. The CMA, in acting as a public body, is expected to recover its administrative costs from parties for the benefit of the public purse where it is appropriate to

³⁷ Any challenge to the CMA's costs order is by way of appeal to the Tribunal under section 192(e) of the Act.

do so, and this is reflected in the CMA's guidance. For the reasons above, we have decided that this is also appropriate in this case.

The CMA's decision on CityFibre's submission on its position as an SME

57. CityFibre's second case is that it is an SME, and that it would be consistent with the CMA's broader objectives to promote competition that it should not be required to pay the CMA's costs.
58. We do not agree with CityFibre that this is a reason not to make a Costs Order in this case. Like other parties to an appeal, CityFibre made a commercial decision to bring an appeal. We do not consider that its size should make it immune to costs. We also note that, in the context of appeals, the CMA is acting as an administrative body, and it is expected that our costs will be recovered from parties, as is the case in other non-discretionary aspects of the CMA's case work.

The CMA's decision on CityFibre's submissions on reasonableness

59. Finally, we have reviewed CityFibre's case that the CMA's costs are too high, and should be reduced to be similar in terms of hours to those of CityFibre.
60. We do not agree, for the following reasons:
 - (a) The CMA has satisfied itself that the costs were properly incurred in the conduct of the appeal in this case. The cost methodology is based on the methodology used the previous appeal under [section 193](#) of the Act where a Costs Order was made. This approach was upheld by the Tribunal in its judgment in *BT v CMA* [2017] [CAT 11](#).
 - (b) The quantum of CMA's costs should not be expected to be comparable to an appellant's costs to an appeal, as the CMA is considering all the relevant issues afresh, whereas an appellant has been a party to the relevant price control decision.
 - (c) The CMA has to consider all parties submissions relating to the relevant price control appeal, and write a decision reflecting all those submissions.
 - (d) The CMA's costs in this case are not unusually high compared to other appeals.
61. We have also reviewed CityFibre's submission that, in not awarding costs against interveners, we should make an adjustment to CityFibre's costs. We agree that, in this case, appellants should not pay the costs incurred by the CMA in reviewing interveners' submissions, even to the extent that these

supported an appellants case. We have also reduced the amount to take account of recoverable VAT that had been included in the amount for non-staff costs. We have therefore reduced the costs to be paid by CityFibre to reflect these exclusions.

Final costs determination

62. Taking the considerations set out in section 193A(4) of the Act and CityFibre's submission into account, the CMA has decided that:
- (a) as the CMA's determination in TalkTalk's appeal did not uphold Ofcom's decision and the Tribunal has made an Order allowing TalkTalk's appeal, no costs should be claimed from TalkTalk;
 - (b) as the CMA's determination in CityFibre's appeal upheld Ofcom's decision, and the Tribunal has made an Order dismissing Grounds 3 and 4(b) of CityFibre's appeal, and has ordered costs against CityFibre in respect of its own costs decision, CityFibre should pay 100% of the CMA's costs incurred in respect of the CityFibre appeal, other than time spent on matters specific to interveners' submissions.
 - (c) We consider that the following proportion of the CMA's costs incurred with the appeals should be allocated to the CityFibre appeal. The calculation reflects the CMA's view that of the time spent on detailed consideration of general matters relevant to both appeals, more time was spent on matters which were relevant to CityFibre's appeal than to TalkTalk's appeal:
 - (i) 50% of the joint costs incurred by the CMA at the pre-reference stage, up to the core submissions hearing (Friday 2 December 2016);
 - (ii) 60% of the cost incurred in connection with general matters relevant to both appeals during the reference, from Monday 5 December 2016 to Friday 7 April 2017; and
 - (iii) 100% of the costs specifically attributable to the price control matter referred in CityFibre's appeal.
63. The CMA considers that the interventions were limited in scope, assisted the CMA in making its determination and generally saved the CMA time it would otherwise have spent considering the submissions of the appellants and Ofcom in the Reference, so the CMA has decided that no claim for costs should be made against the interveners. We have excluded from the calculation all the costs directly incurred in considering interveners' submissions in the CityFibre appeal.

64. Our final determination is that:
- (a) the total costs incurred by the CMA in connection with the Reference were £479,890.36;
 - (b) the proportion of those costs which CityFibre must pay the CMA is £250,260.57; and
 - (c) no proportion of the costs incurred by the CMA in connection with the Reference is to be paid to the CMA by TalkTalk, Ofcom or interveners.
65. The amounts payable calculated above are on the basis of costs incurred by the CMA throughout the Reference.

Final Costs Order

66. An Order has been made according to our final determination on costs and notified to the parties. It has also been published on the CMA [website](#).

Appendix A: Statement of CMA costs

Overview

1. This appendix outlines how the CMA costs were calculated.³⁸ In line with the recommendations of the Tribunal in *BT v CMA* [2017] CAT 11, this appendix provides details of:
 - (a) the names, grades and cost recovery rate for each of the staff and the Group who worked on the Reference, together with the number of hours worked and a brief description of the issues on which each worked;
 - (b) travel and subsistence costs incurred in the Reference;
 - (c) a breakdown of fees charged by Counsel;
 - (d) direct costs; and
 - (e) a description of how the CMA's overhead rate has been calculated.
2. Tables 1 and 2 provide a summary of the costs included in the Costs Order. (A more detailed breakdown of the costs is provided in the further tables below.)

³⁸ Details of the CMA's costs have been provided to CityFibre. We have included redacted tables in this non-confidential version, for the purpose of illustrating the steps taken by the CMA to calculate the costs incurred in connection with the CityFibre appeal.

Table 1: Summary of costs included in the Costs Order

	Pre-core submissions hearing (£)	Post-core submissions hearing (£)			
	General matters &/or work common to both appeals (Joint work) (£)		CityFibre appeal (£)	TalkTalk appeal (£)	TOTAL
Staff costs (including overheads)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Group costs (including overheads)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Non-staff costs	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TOTAL	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	479,890.36

Source: CMA analysis.

Table 2: Summary of costs included in the Costs Order (reflecting the CMA's decisions in relation to recoverable VAT and that appellants should not pay the costs incurred by the CMA in relation to interveners)

	Pre-core submissions hearing (£)	Post-core submissions hearing (£)		
	General matters &/or work common to both appeals (Joint work) (£)		CityFibre appeal (£)	TalkTalk appeal (£)
Staff costs (including overheads)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Group costs (including overheads)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Non-staff costs	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
	Split 50:50		[REDACTED]	[REDACTED]
		Split 60:40	[REDACTED]	[REDACTED]
TOTAL			250,260.57	[REDACTED]

Source: CMA analysis.

[REDACTED]

CMA Costs

Overheads

3. Paragraph 8.2 of [CMA5](#) states that the CMA will include an amount for the recovery of overheads in the amounts that it calculates as costs.
4. The CMA's overhead rate of 47.65% is applied to direct salaried staff costs and is calculated on the basis of the cost of accommodation, IT and central support costs. It reflects:
 - (a) the total direct costs of staff working in CMA front line delivery functions excluding corporate services;
 - (b) the costs of the CMA areas supporting the delivery functions, including the staff costs of the corporate support functions, as well as the non-staff costs, relating to accommodation and IT; and
 - (c) other non-staff costs relating to the CMA were also included, for example, travel and staff training.
5. The overhead rate (as a percentage) is calculated on the basis that the costs of the support areas are fully absorbed in proportion to the staff costs of the delivery functions. This rate is used commonly within the CMA for these purposes.

Staff costs

6. Table 3 below sets out the names, job titles, grades and cost recovery rates (£ per hour) for each member of the staff team who worked on the Reference. It also includes the number of hours worked by each member of the staff team on each appeal and the number of hours of "joint work" for hours up to the core submissions hearing (2 December 2016) and for hours after the core submissions hearing (5 December 2016) and up to notification of the [Final Determination](#) (7 April 2017).

Table 3: Staff costs breakdown

Name	Job title	Grade	Recovery rate (£ per hour)	Work/Appeal related category	Time spent (hours)	Direct costs (£)	Overhead (£)*	Total (£)
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]

Name	Job title	Grade	Recovery rate (£ per hour)	Work/Appeal related category	Time spent (hours)	Direct costs (£)	Overhead (£)*	Total (£)
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
[X]	[X]	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]

Source: CMA analysis.

* Overhead figures rounded to 2 decimal places.

7. Table 4 below provides an overall summary of the staff costs and number of hours worked on each appeal and the number of hours of “joint work” up to the core submissions hearing (2 December 2016) and after the core submissions hearing (5 December 2016) and up to notification of the [Final Determination](#) (7 April 2017).

Table 4: Staff costs overall

	Time spent (hours)	Direct costs (£)	Overhead (£)*	Total (£)
CityFibre appeal	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TalkTalk appeal	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Joint work (up to 02.12.16)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Joint work (after 05.12.16)	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Source: CMA analysis.

* Overhead figures rounded to 2 decimal places.

The Group costs

8. Table 5 below sets out the names, job titles, grades and cost recovery rates (£ per hour) for the panel member Chair and panel members who worked on the Reference. It also includes the number of hours worked by each of the panel member Chair and panel members on each appeal and the number of hours of “joint work” for hours up to the core submissions hearing (2 December 2016) and for hours after the core submissions hearing (5 December 2016) and up to notification of the [Final Determination](#) (7 April 2017).

Table 5: The Group breakdown

Name	Job title	Grade	Recovery rate (£ per hour)	Work/Appeal related category	Time spent (hours)	Direct costs (£)	Overhead (£)*	Total (£)
Alasdair Smith	Inquiry Panel Chair	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
Ros Hedley-Miller	Panel Member	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
Michael Hutchings	Panel Member	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
Graham Sharp	Panel Member	[X]	[X]	CityFibre appeal	[X]	[X]	[X]	[X]
				TalkTalk appeal	[X]	[X]	[X]	[X]
				Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
				Joint work (after 05.12.16)	[X]	[X]	[X]	[X]

Source: CMA analysis.

* Overhead figures rounded to 2 decimal places.

9. Table 6 below provides an overall summary of the panel member chair and the panel members costs and number of hours worked on each appeal and the number of hours of “joint work” up to the core submissions hearing (2 December 2016) and after the core submissions hearing (5 December 2016) and up to notification of the [Final Determination](#) (7 April 2017).

Table 6: The Group costs overall

	Time spent (hours)	Direct costs (£)	Overhead (£)*	Total (£)
CityFibre appeal	[X]	[X]	[X]	[X]
TalkTalk appeal	[X]	[X]	[X]	[X]
Joint work (up to 02.12.16)	[X]	[X]	[X]	[X]
Joint work (after 05.12.16)	[X]	[X]	[X]	[X]
Total	[X]	[X]	[X]	[X]

Source: CMA analysis.

* Overhead figures rounded to 2 decimal places.

Non-staff costs

10. Table 7 below sets out the non-staff costs incurred on the Reference and for “joint work” during the Reference, including: Counsel costs, transcription costs, and travel and subsistence costs. The table includes costs up to the core submissions hearing (2 December 2016) and after the core submissions hearing (5 December 2016) and up to notification of the [Final Determination](#) (7 April 2017).

Table 7: Non-staff costs breakdown

Non-staff	Work/Appeal related category	Amount (£)	VAT (£)	Total (£)
Counsel	CityFibre appeal	[X]	[X]	[X]
	TalkTalk appeal	[X]	[X]	[X]
	Joint work (up to 02.12.16)	[X]	[X]	[X]
	Joint work (after to 05.12.16)	[X]	[X]	[X]
Transcription	CityFibre appeal	[X]	[X]	[X]
	TalkTalk appeal	[X]	[X]	[X]
	Joint work (up to 02.12.16)	[X]	[X]	[X]
	Joint work (after to 05.12.16)	[X]	[X]	[X]
Travel & Subsistence	CityFibre appeal	[X]	[X]	[X]
	TalkTalk appeal	[X]	[X]	[X]
	Joint work (up to 02.12.16)	[X]	[X]	[X]
	Joint work (after to 05.12.16)	[X]	[X]	[X]

Source: CMA analysis.

11. Table 8 below provides an overall summary of the non-staff costs for each appeal and for “joint work” up to the core submissions hearing (2 December

2016) and after the core submissions hearing (5 December 2016) and up to notification of the [Final Determination](#) (7 April 2017).

Table 8: Non-staff costs summary

	Amount (£)	VAT (£)	Total (£)
CityFibre appeal	[X]	[X]	[X]
TalkTalk appeal	[X]	[X]	[X]
Joint work (up to 02.12.16)	[X]	[X]	[X]
Joint work (after 05.12.16)	[X]	[X]	[X]
Total	[X]	[X]	[X]

Source: CMA analysis.

Counsel's costs

12. Table 9 below provides a summary of the costs incurred by Counsel on each appeal and for “joint work” up to the core submissions hearing (2 December 2016) and after the core submissions hearing (5 December 2016) and up to notification of the [Final Determination](#) (7 April 2017). Costs are apportioned to the appropriate appeal depending on the tasks carried out. Where it is not possible to differentiate work carried out, costs have been split evenly and attributed to sub-project code Joint work.

Table 9: Counsel costs

	Amount (£)	VAT (£)	Total (£)
CityFibre appeal	[X]	[X]	[X]
TalkTalk appeal	[X]	[X]	[X]
Joint work (up to 02.12.16)	[X]	[X]	[X]
Joint work (after 05.12.16)	[X]	[X]	[X]
Total	[X]	[X]	[X]

Source: CMA analysis.