

Title: Ofcom Appeals IA No: RPC Reference No: Lead department or agency: DCMS Other departments or agencies:	Impact Assessment (IA)			
	Date: 12/05/2016			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
	Contact for enquiries: Laurence Ridgway Laurence.ridgway@culture.gov.uk			
Summary: Intervention and Options				RPC Opinion: GREEN

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
£0m	£0m	£0m	In scope	Qualifying provision

What is the problem under consideration? Why is government intervention necessary?

Whilst regulation is required to remedy certain market failures in the electronic communications market, it is essential that an effective appeals mechanism is available for both regulated bodies and communication users, as a robust appeals process safeguards parties' rights and raises the standard of regulatory decision making. However, the current appeals process - where appeals are decided by an 'on the merits' system - is inefficient and overly burdensome, and goes beyond the requirements set by the European Framework Directive. This can delay the implementation of regulatory decisions, which has negative consequences for the market and for consumers.

What are the policy objectives and the intended effects?

The Government's objective is to deliver a more efficient appeals process, which is less costly for the appellants, Ofcom and the appeal bodies, but still ensures a robust process and an ability to challenge Ofcom decisions where a material error is identified. It is also the aim of Government to minimise the gold-plating of European Directives and therefore ensure that the appeals regime more closely reflects the requirements of the Framework Directive. By improving the efficiency of the appeals process, Ofcom's decisions can be implemented more quickly and thus the benefit to consumers will not be delayed.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Option 1. Do nothing. Make no change to the regulatory framework and the standard by which appeals are made.

Option 2. Amend the standard of appeals. This option would remove the requirement for appeals cases to be decided "on the merits", instead requiring the CAT to apply the same principles as would be applied by a court on an application for judicial review. This would effectively ensure that the merits of the case are "duly taken into account". The change will ensure that the requirements of Article 4(1) are met but not exceeded, while also ensuring that industry's rights of appeal are fully protected.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: Month/Year					
Does implementation go beyond minimum EU requirements?			No		
Are any of these organisations in scope?		Micro Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister :  **Date:** 24 May 2016

Summary: Analysis & Evidence

Policy Option 1

Description: Amended Standard of Appeals

FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0	0

Description and scale of key monetised costs by 'main affected groups'

This policy could impact the balance of income between firms in the market, ie a transfer of wealth between firms. Any cost to one set of firms would be exactly balanced by the benefit to another set of firms. This level of transfer could illustratively, based on analysis of past cases, be in the region of £10m - £40m.

Other key non-monetised costs by 'main affected groups'

The appeals body, the CAT, could face a temporary increase in costs if more cases are brought following the change in standard, as firms test the parameters of the new regime.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0	0

Description and scale of key monetised benefits by 'main affected groups'

This policy could impact the balance of income between firms in the market, ie a transfer of wealth between firms. Any cost to one set of firms would be exactly balanced by the benefit to another set of firms. This level of transfer could, illustratively, based on analysis of past cases, be in the region of £10m - £40m.

Other key non-monetised benefits by 'main affected groups'

The CAT would also benefit from the reduced time taken on each case, as they save administration costs. These benefits would also apply to Ofcom, who would face lower administration burdens when defending appeals.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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Our key assumption is that the risk of different regulatory outcomes occurring under the new standard of review than otherwise would have occurred under the current standard of review applies predominantly to price control appeals, and not to appeals against Ofcom decisions relating to other matters.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs: 0	Benefits: 0	Net: 0	
			0

Supporting Evidence

1. Background

1.1 European Framework Directive

The regulation of the telecommunications sector in the UK must comply with the EU's Electronic Communications Framework – a series of rules which apply to EU Member States. Central to this framework is 'Directive 2002/21/EC of the European Parliament and of the Council of 07 March 2002 on a common regulatory framework for electronic communications networks and services', also known as the "Framework Directive". The Framework Directive specifies the principles for the establishment of national regulatory authorities and their independence, as well as the right of appeal against those national regulatory authorities. Article 4(1) of the Framework Directive deals with appeals made against decisions of the national regulatory authority, and states (relevantly) that:

*"...Member States shall ensure that **the merits of the case are duly taken into account** and that there is an effective appeal mechanism."*

1.2 UK Transposition and Interpretation

Since December 2003, the national regulatory authority for electronic communications networks and services throughout the UK has been the Office of Communications ("Ofcom"). In the UK, any person affected can appeal against the majority of decisions taken by Ofcom (and certain decisions of the Secretary of State) under the provisions of sections 192 – 196 of the Communications Act 2003 ("the Communications Act"). The tribunal that hears these appeals in the first instance is the Competition Appeal Tribunal ("CAT"). Section 195 of the Act sets out how the CAT must make its decisions in the appeals process. Section 195(2) states that:

*"the Tribunal [the CAT] shall decide the appeal **on the merits** and by reference to the grounds of appeal set out in the notice of appeal."*

The exact meaning of "on the merits" in this context has developed through case law. For instance, in its ruling in its ruling of 17 March 2015 on CAT 1211/3/3/13, the CAT noted that "it is to be stressed that an appeal before the Tribunal is not a de novo hearing". Nevertheless, the very fact that the CAT was compelled to seek to clarify this matter shows that this transposition could be interpreted as requiring a full rehearsal of the case by the CAT, by which the CAT must decide the appeal 'on the merits' instead of simply taking the merits 'duly into account'.

1.3 Government Consultations

In September 2010, the Government consulted on this standard of review in section 192-196 appeals as part of a broader consultation on the implementation of the 2009 reforms to the Electronic Communications Framework. In this consultation, the Government stated that it "*believes that the interpretation of the current transposition goes beyond what is required by the Directive and we propose to clarify the position by amending the relevant section of the Communications Act 2003*".

The Government decided to consult in more detail on this issue, and so published a further consultation with specific proposals in August 2011¹². Following this consultation, the Government decided against

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/72909/Electronic_Communications_Sector_August2011_Appeals_condoc2.pdf

making a change to the standard of appeal at that time, but noted that it remained concerned about the matter and did not rule out future legislative change.³

In June 2013, the Government again consulted on this issue as part of a broader consultation on a set of proposals for streamlining regulatory and competition appeals across a variety of sectors.⁴⁵ Following this consultation, the Government progressed work to reform procedures of the CAT, publishing a further consultation on the detail of these procedures in February 2015 and a response in September 2015 which set out a number of new rules of procedure for the CAT.

The Government is now minded to take forward work to make a change to the standard of review in appeals of those Ofcom decisions to which the appeals provisions in sections 192 – 196 of the Communications Act 2003 apply.

2. Problem under consideration

2.1 Regulatory appeals

The issue under consideration in this impact assessment is the appeals process that currently operates in the electronic communications sector under the provisions of the Communications Act 2003.

Any person affected by a decision of Ofcom (or the Secretary of State) to which the appeals provisions set out in sections 192 – 196 of Communications Act 2003 apply has a right to appeal that decision to the CAT. In the UK, there is a range of different standards of review across different types of regulatory appeal, including reviews on judicial review principles or reviews “on the merits”.

Under a “judicial review” standard of appeal, the court or tribunal will review the decision on grounds of illegality, irrationality and procedural impropriety. The intensity of this review is flexible, dependent on the circumstances of the case.

Under a review “on the merits”, the court or tribunal considers the merits of the decision under appeal. In a full “merits” review, the court or tribunal would decide the issues for itself and therefore accord no margin of appreciation to the decision maker.

The grounds on which parties can appeal, and the standard of review to which regulatory decisions are subjected, should strike a reasonable and proportionate balance between appropriate regulatory accountability and availability of justice on the one hand, and effective regulatory decision-making on the other hand. To achieve these objectives, it is right that the grounds of appeal should take account of both the economic sector and on the type of regulatory decision being made, and that the intensity of review at appeal may vary depending on the outcome that best achieves the objectives.

2.2 Telecommunications appeals

2 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/72915/Electronic_Communications_Sector_June2011_-_Appeals_IA.pdf

3 <https://www.gov.uk/government/consultations/consultation-on-implementing-the-revised-eu-electronic-communications-framework-appeals>

4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf

5 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207702/bis-13-924-regulatory-and-competition-appeals-impact_assessment.pdf

The standard of review in appeals against decisions made by Ofcom must be consistent with the requirements of European legislation. The EU Framework Directive states that “*Member States shall ensure that the merits of the case are duly taken into account*”.

In the UK, the right and process of appeal against Ofcom decisions is set out in a number of different Acts, depending on the legislative basis of the decision being appealed. For instance, the right and process of appeal against decisions made by Ofcom under powers provided by the Competition Act 1998 are set out in Chapter IV of the Competition Act 1998.

Section 192 of the Communications Act 2003 sets out the rights of appeal to the CAT against decisions made by Ofcom, and the Secretary of State, using powers provided by the Communications Act 2003 and the Wireless Telegraphy Act 2006 (Section 192 also sets out that certain decisions, listed under Schedule 8 of the Communications Act 2003, are not subject to appeal to the CAT and as such are subject to judicial review in the High Court). Section 195(2) states that “*the Tribunal [the CAT] shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.*”

It could be argued that this requires a full rehearsal of the case by the CAT. Whilst the CAT has confirmed that this is incorrect, the Government nevertheless considers that the appeal standard provided for in the Communications Act goes beyond the requirements of Article 4(1) of the Framework Directive, and sets an unnecessarily high standard of appeal - effectively a ‘gold plating’ of EU legislation.

2.3 Problem with current process

The interpretation of the current legislation by appellants, and the CAT on occasions, arguably exceeds the requirements under the EU framework, which can result in a significantly more time-consuming and costly process than is necessary, including extensive cross-examination of experts. In addition to the increased operational and financial resources required to defend the challenges, the current process can hinder Ofcom’s ability to make effective and timely policy decisions to increase competition in the interests of citizens and consumers, in accordance with the duties given to Ofcom by Parliament. This delay in implementing Ofcom’s decisions may have a negative impact on consumers.

The Government considers that a judicial review standard is both sufficiently flexible to meet the requirements of Article 4 as necessary in any given case, and sufficient to afford affected persons an appropriate right of appeal. It provides a more proportionate balance between properly holding the regulator to account, and enabling the regulator to satisfy the functions and duties that Parliament has set for it, in the interests of citizens and consumers.

3. Rationale for intervention and intended effects

3.1 Rationale

Whilst regulation is required to remedy certain market failures in the electronic communications market, the regulatory regime must be proportionate, accountable and provide legal certainty. It is therefore right that an effective appeals mechanism is available for all persons affected by regulatory decisions that meets the requirements of the EU Framework Directive. In addition, a robust appeals process safeguards parties’ rights and raises the standard of regulatory decision making. However, such a process should also balance the need to ensure that the regulator is able effectively to fulfil the functions and duties set for it by Parliament, in a timely manner. This is of particular concern in the

communications sector – a fast moving environment with rapidly changing technology and constantly evolving markets.

3.2 Objective

The Government's objective is to deliver a faster and more focussed appeals process, which is less costly for the appellants, Ofcom and the appeal bodies, but still ensures a robust process and an ability to challenge Ofcom decisions where a material error is identified. It is also the aim of Government to minimise the gold-plating of European Directives and therefore ensure that the appeals regime meets the requirements of the Framework Directive, but does not extend beyond those requirements. By improving the efficiency of the appeals process, as well as reducing costs for all parties, the government expects that regulatory decisions will be implemented to shorter timescales thereby benefitting consumers. A report from Economic Insight suggests that streamlined appeals processes could create a net benefit of £238m⁶.

4 Policy options considered

4.1 Previous consultations

The June 2013 consultation considered a wide range of options for addressing aspects of the problem currently under consideration. In particular, the consultation sought views on how to change incentives (eg. Ofcom would only bear costs if it had behaved unfairly and unreasonably) and to minimise the length and costs of appeals cases (eg. introducing limited target times for appeals cases) in order to deliver a more focussed appeals process. Some aspects of these proposals have been incorporated into ongoing work following an independent report by Sir John Mummery in 2015 into the CAT's rules procedure. However, this will not address the root of the current problem under consideration.

4.2 Option 1. Do Nothing

Make no changes to the appeals regime. The CAT will continue to decide cases "on the merits" of the decision.

4.2 Option 2. Replace the current "on the merits" grounds for appeal with a judicial review (preferred)

This option would amend the wording of s195(2) of the Communications Act 2003 (and any subsequent changes required for consistency with this change), removing the requirement for the case to be decided "on the merits", instead requiring the CAT to apply the same principles as would be applied by a court on an application for judicial review. A judicial review is sufficiently flexible to enable the courts to interpret the requirements of Article 4(1) of the Framework Directive without a need to specify explicitly that they should have regard to the merits, giving the CAT discretion to determine how the requirements of Article 4(1) should apply. Judicial review is a well-understood legal concept, so the degree of litigation that tests the concepts of new legislation should be reduced. This would effectively ensure that the merits of the case are "duly taken into account". The change will ensure that the requirements of Article 4(1) are met but not exceeded, while also ensuring that industry's rights of appeal are fully protected.

⁶ http://www.economic-insight.com/wp-content/uploads/2016/04/pf_fil_1384172629_6983a038b8.pdf

5. Costs and Benefits

5.1 Inside scope

The scope of the change will correspond with the scope outlined in the 2013 consultation on this matter conducted by the Department for Business, Innovation & Skills.

The proposed change will apply to appeals made under:

- (i) s192(1)(a) of the Communications Act 2003 - a decision made by Ofcom under Part 2 of the Communications Act 2003 and Parts 1 to 3 of the Wireless Telegraphy Act 2006;
- (ii) s192(1)(b) of the Communications Act 2003 - a decision made by Ofcom or another person (eg. the Secretary of State) to which effect is given by a direction, approval or consent relating to a condition set by Ofcom; and
- (iii) s192(1)(c) of the Communications Act 2003 - a decision made by Ofcom or another person (eg. the Secretary of State) to which effect is given by the modification or withdrawal of a direction, approval or consent; and
- (iv) section 192(1)(e) of the Communications Act 2003 – a decision by the CMA relating to a costs order associated with a price control matter referred to the CMA by the CAT under section 193.

Currently, appeals to the CAT against price control decisions made by Ofcom must be referred by the CAT to the Competition & Markets Authority (CMA), which must hear those cases using the same standard of appeal as would have been applied by the CAT had the CAT decided the matter. Article 4(1) of the Framework Directive does not differentiate between price control and non-price control appeals. Therefore it is logical that we should ensure that the change to the standard of appeal for non-price control appeals also applies to price control appeals. Ensuring that the change also applies to price controls appeals also has the benefit of providing consistency across telecommunications sector appeals, which is important, especially as it is not always easy to differentiate price control matters from non-price control matters in an appeal.

The proposed change will also apply to appeals against a decision by the Secretary of State to which effect is given by a direction to Ofcom under s132 of the Communications Act 2003 (the power to suspend or restrict a communications provider's entitlement at a time of emergency). This is because an appeal under s192(1)(a) would include a decision by Ofcom to make a direction under s132 of the Communications Act 2003, and appeals under s192(1)(b) and s192(1)(c) include decisions made by the Secretary of State. Therefore it is logical to include appeals made under s192(1)(d)(iii) - against a decision of the Secretary of State to direct Ofcom to give a section 132 direction - within scope.

The proposed change will also apply to appeals against decisions of Ofcom under the Mobile Roaming (European Communities) Regulations 2007 (SI 2007/1933), the Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations 2010 (SI 2010/672) and the Open Internet Access (EU Regulation) Regulations 2016 (SI 2016/607). This is because these rights of appeal are outside the Communications Act 2003, but are analogous to the rights of appeal under the 2003 Act.

The proposed change will also apply to appeals against decisions made by Ofcom in the exercise of its Broadcasting Act powers for a competition purpose as specified under s317 of the Communications Act 2003. This is because the Government considers that it is right to aim for consistency where there is increasing convergence in both the market for, and hence also the competition regulation of, telecoms

and broadcasting matters - for example a number of major industry participants now offer a bundle of services including voice calls, data (broadband), mobile services and pay-tv services.

5.2 Outside scope

The proposed change will not apply to appeals made against a decision by the Secretary of State under s192(1)(d)(i), s192(1)(d)(ii), s192(1)(d)(iia) or s192(1)(d)(iv) of the Communications Act 2003. This is because the policy objective is to improve the current system of appeals carried against decisions of the national regulatory authority (Ofcom). As there is not any precedent of appeals carried to the CAT under s192 of the Communications Act 2003 against decisions made by the Secretary of State, we do not consider that there is a sufficient basis of evidence on which to consider including Secretary of State decisions within the proposed change to the standard of review.

The amended wording to s195(2) of the Communications Act 2003 will not affect the process for appealing regulatory decisions under Schedule 8 of the Communications Act 2003, which will continue to be by way of a judicial review.

5.3 Impacts on business

Assessment of counterfactual

The proposal is to change the standard of review for appeals against Ofcom's regulatory decisions. Appeals would therefore be considered against a different standard of review, which means it is possible the appeals bodies may reach different conclusions on appeals than they would have under the old system. Given that Ofcom's regulatory decisions directly affect firms, the proposal could change the impact of those decisions on firms. If the relevant appeals body would make a different decision under the new system than it would have under the old system, then the impact on firms of that decision would be different from the counterfactual (ie. a continuation of the status quo). This differential therefore forms the basis of our assessment of impacts on business.

In order to make an assumption about the likelihood of this situation occurring, we can analyse the history of appeals made against Ofcom. Essentially, if in the past there have been cases where the appeals body has directed Ofcom to alter its original decision, and, importantly, if these changes would not have been made, or would have been made differently, under the proposed new system, then it is reasonable to suggest that there are likely to be future cases heard under the new system, where the outcome on appeal is different to the outcome that would have been reached under the old system (the counterfactual).

This analysis is by its nature subjective, as we cannot say for certain how judgments may have differed between the two systems. Furthermore, we cannot say for sure whether there would be any such cases in the future. However, given that there is a *risk* of this scenario occurring, we must then attempt to understand how the impacts on individual firms would materialise. The analysis of past cases can offer an insight into how previous appeal judgments have affected firms, and thus how the changed standard of appeals may affect firms in the future.

Analysis of previous cases

In the past 5 years, there have been 24 appeals cases brought before the CAT against Ofcom decisions (2011 to April 2016). Of these, Ofcom has not lost a single case before the CAT in its entirety. Ofcom's decision has been upheld in full on 9 occasions, there has been a mixed result on 5 occasions, 4 of these appeals have been withdrawn and the remaining 6 are ongoing or have been stayed.

On the external advice of expert legal counsel, we have identified four determinations, since 2007 (at time of publication), in which we consider that the eventual outcome of the relevant appeals might have been different had those determinations been made under a "judicial review" standard of appeal.

The four determinations identified were all appeals against Ofcom decisions relating to price controls. In these four cases, the CAT referred the matter to the CMA (previously Competition Commission), which is obliged to make its decision on the same basis as the CAT (ie 'on the merits'). These four cases were:

1. CAT 1192/3/3/12 - BskyB and TalkTalk v Ofcom; and 1193/3/3/12 - BT v Ofcom (LLU/WLR charge control March 2012)
2. CAT 1180/3/3/11 - BT v Ofcom; 1181/3/3/11 - EE Ltd v Ofcom; 1182/3/3/11 - Hutchinson 3G (UK) v Ofcom; and 1183/3/3/11 - Vodafone v Ofcom (Mobile Call Termination)
3. CAT 1112/3/3/09 - Cable & Wireless UK & Others v Ofcom (Leased Lines)
4. CAT 1111/3/3/09 - The Carphone Warehouse Group v Ofcom (LLU).

Note: LLU refers to local loop unbundling, the process by which Openreach (the infrastructure arm of BT) is required to offer their broadband infrastructure network to third party retail broadband providers (such as Vodafone, Sky etc.). Wholesale line rental (WLR) is used by communications companies to offer voice telephone services to consumers using lines rented from Openreach.

This analysis of the counterfactual is subjective given that we cannot conclusively determine the final outcome of past appeals under a different standard of review for appeals. Nevertheless, these price controls cases offer a relatively clear method for analysing how, in this example, the revision of Ofcom's original decision by the appeals body had an impact on business. Case 1 and case 4 were both appeals made against Ofcom's setting of the prices BT is allowed to charge other firms for using their broadband infrastructure network. In both cases, the original prices set by Ofcom were revised following the appeal. The impact on industry - the change in the transfer of income between BT and LLU operators - is the difference between Ofcom's original price and the price set following the appeal, multiplied by the number of lines to which the adjustment applies. The net impact on industry as a whole is zero. The gains to the LLU operators are exactly matched by the losses to BT.

Note: Net impact on business

It is important to note that with price control matters, the direct 'impact' on one particular firm of the change in prices will be directly balanced in the short term by an equal and opposite impact on another firm. In effect, the change in the price creates a transfer of income between one business and another. Therefore, the impact of price changes following an appeal will always have a zero net cost to business as a whole. It is also important to note that some impacts - such as the transfer of income - are 'direct' impacts as they will occur as a consequence of the legislative change only, and do not rely on behavioural changes from any party. Other impacts - such as the competition impacts described below - are 'indirect' as they require behavioural change to materialise.

In the longer term, it is possible that shifting the balance of wealth between firms in the industry could have second order effects on those firms, on the industry as a whole, and on consumers. For example, a reduction in the price BT, a firm with significant market power, can charge other firms, could promote competition in the market as barriers to entry are reduced. This increased competition could lead to lower prices and improved service for consumers in the long run. However, it is important to ensure that

incentives to invest are maintained. Increased competition in a market can lead to a fall in sectoral investment, particularly in infrastructure, and particularly in a market where one player has significant market power⁷. For example, if there was a transfer of income away from a firm with significant market power, in a way that reduced incentives to invest, there could be a negative impact on infrastructure investment, which would in turn have consequences for consumers through coverage and upgrading. Any such impacts would be ‘indirect’

How these impacts (both direct and indirect) materialise, and the direction in which any transfers of income flow, cannot be predicted, as they depend entirely on the individual cases and their judgments on appeal. However, we can explore how the direct impacts materialised in past cases, as a proxy for the future.

Analysis of cases 1 and 4 – LLU/WLR price control cases

Case 1 and case 4 relate to the price BT Openreach could charge third parties to use their fixed broadband infrastructure, which is set by Ofcom. In each case, the price set by Ofcom was challenged by LLU operators, referred to the Competition Commission (now CMA) by the CAT, who, following the appeal hearing, directed Ofcom to amend the price. In both cases, the price being appealed related to a single year. To assess the impact of the Competition Commission’s intervention, we take the difference in price between Ofcom’s original decision and the subsequent revision, multiplied by the volumes that BT sell, to give an estimate of the transfer of income between BT and the LLU operators.

Our analysis, which can be found in Annex A, shows that the appeals body’s decision to amend the price set by Ofcom in case 1 resulted in a transfer of income of **£11.76m** from BT to the third parties in 2010/11, in 2010/11 prices, compared with what would have occurred had Ofcom’s decision not been changed on appeal. In case 4, this again resulted in a transfer of income away from BT to other firms, with a value of around **£38.5m** in 2013/14, in 2013/14 prices. This transfer is effectively the lost revenue BT would otherwise have received, and the reduction in costs for the other firms. It is difficult to assess the extent to which, if at all, these transfers to the LLU operators were passed on to consumers in the form of retail price drops.

Summary of impact on business

Based on the analysis of previous cases, we estimate that on four occasions since 2007 appeals have successfully been carried from which the final outcome was dependent on a determination made “on the merits”, and from which that final determination may not have been made under the proposed judicial review standard of appeal. These cases have all been related to price controls matters determined by the Competition Commission (now the CMA). It is therefore reasonable to assume that there could in the future be cases that would have been successfully appealed under the old system, but which are not successfully appealed under the proposed new system.

It is not possible to quantify accurately the impact on firms of these potential cases, as we cannot predict the nature or details of those cases, or indeed say for certain that the change in the standard of appeals will in fact lead to different decisions being made than otherwise would have been under the

⁷ This relationship is discussed in more detail by Jérôme Mathis and Wilfried Sand-Zantman in their paper ‘Competition and Investment: What do we know from the literature?’

current standard of review. However, through analysis of two of the four previous cases, we can illustratively show what the effects could be if similar cases were appealed.

It is important to note that either or both of the supplier and purchaser of a service can make appeals. Ofcom has also faced appeals where arguments have been set out that Ofcom's charges are too low, with other arguments made by other parties that they are too high. It is possible that decisions made by appeals bodies in the future may have the opposite impact to those cases set out above, ie a transfer of income from LLU operators to BT.

It is also important to note again that any negative impact on a particular firm would be balanced completely by positive impacts on other firms. The numbers given above should be seen in this light and therefore described more accurately as the level of the transfer between firms, rather than the cost to business as a whole. There could potentially be indirect impacts on industry in the long run, for example through reduced competition, that do have a positive (or negative) cost to industry as a whole, as wealth is transferred from consumers to industry (or vice versa).

We are assuming that there is a risk of only price control decisions being made differently under the new system than they otherwise would have been, and not Ofcom decisions relating to other matters. Given that price control matters will always have a net direct impact on business of zero, **we conclude that the preferred option will have zero net cost to business.**

Direct Costs to business

The main potential direct cost to business would be the transitional costs of familiarisation to the new standard of review for appeals. This should be very limited as judicial review is already a well-tested standard of appeal that also exists in other regulated sectors such as appeals under section 57 of the Postal Services Act 2011.

Direct Benefits to business

We anticipate that a change from the existing "on the merits" standard of review for appeals to basis of judicial review where merits can be duly taken into account will reduce the volume and length, and thus cost, of appeals litigation. In the June 2013 consultation⁸, the Department for Business, Innovation & Skills (BIS) noted that between 2008 and 2012, appeals cases heard by the CAT on a full merits standard of review lasted around 11 months, whereas cases heard by the CAT on a judicial review standard over the same period lasted around 4 months. Similarly, BIS noted that the average length of hearing for cases heard at the CAT on a full merits standard of review was 6 days, compared to 1.5 days for those heard under a judicial review standard. Stakeholder responses to that consultation, published by BIS, have challenged these assumptions, and suggested that, when outlier cases are removed, the average length of appeals hearings before the CAT is 2.54 days for on the merits appeals and 2.38 days for judicial review applications. This has led us to estimate that altering the standard of appeal from "on the merits" to judicial review would reduce the time cases take by 5%-15%. We approximate this to a 10% reduction in costs for all parties to the litigation.

However, we must assume that firms who appealed cases in the past derived some benefit from making the appeal, which would have had to outweigh the resource costs of making the appeal.

⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf

5.4 Impact on the CAT

Costs to the CAT

In the June 2013 consultation, the Department for Business, Innovation & Skills acknowledged that there may be a *temporary* increase in the number of appeals as firms test the new regime. We continue to acknowledge the possibility that there could be an increase in cases taken on appeal to the Court of Appeal, or beyond, of which some may result in the original appeal being referred back to the CAT for a further determination.

There is no direct UK precedent of changing the standard of review for appeals against the decisions of national regulatory authority in a comparable sector from an “on the merits” basis to a judicial review basis. However, changes to the appeals regime, including the introduction of specified grounds of appeal against certain decisions, have been introduced in recent years in the energy and aviation sectors. These may give some indication of the possible increase in litigation that could arise from the standard of review being the subject of a further appeal to a higher court, which then returns the original appeal to the CAT as the boundaries of a new revised standard of appeal are “tested”.

The Electricity and Gas (Internal Markets) Regulations 2011 introduced a new ex-post appeals process to the CMA for the gas and electricity networks sectors. Since then only two appeals have been lodged against the price control decisions of the energy regulator (GEMA) under the new appeals regime introduced by the 2011 legislation. These two simultaneous cases were lodged in March 2015, following which the CMA gave a final determination in September of the same year. Neither case was appealed further. The Civil Aviation Act 2012 introduced a new system of economic regulation for airports, allowing certain decisions to be challenged before the CAT or CMA based on an error of fact or of law, or an error made in the exercise of discretion. Since then, no appeals cases under the Civil Aviation Act’s revised regime have been taken before the CAT or the CMA.

Therefore, we consider there to be a low risk of a significant impact on the CAT’s resources. While it is impossible to estimate the exact increase in the volume of litigation that could result from the proposed measure, we consider, as illustrative examples, temporary increases of 10% and 20% in a single year.

In 2014/15, the running costs for the CAT amounted to £3,380,000. In the same period, the CAT provided 25 judgments on cases. Thus a simple ‘cost per judgment’ could be estimated as £135,200 (£3.38m / 25). However, given that 88% of the CAT’s costs are fixed costs - rent, service charge etc. - the marginal cost of one extra case is likely to be significantly less. Assuming no increase in fixed costs from one extra case, then the marginal cost could be estimated as £16,224 (£3.38m x 0.12 / 25).⁹ The marginal cost per judgment can be estimated as £18,490 in 2013/14 following the same calculations based on the CAT’s annual report, and £20,079 in 2012/13. Fixed costs as a percentage of total running costs are not provided in previous annual reports. This provides us with an average marginal cost per judgment of **£18,264** which, given the trend over the past three years, is likely to be a high estimate.

In 2014/15, 7 of the 25 judgments made by the CAT were on cases brought under s192 of the Communications Act 2003 (28% of the total). There have been a total of 129 judgments made on cases by the CAT over the past four reporting periods (2011/2 to 2014/15), an average of 32.25 judgments per year. Of these 129 judgments, 37 judgments have been made on cases that are within scope of the change being proposed. On average, 28.7% of judgments made by the CAT would have been in scope of the changes – **9.26** judgments per year.

⁹ http://www.catribunal.org.uk/files/AnnualReview_14_15.pdf

Therefore, as an *illustrative* example:

If the CAT saw an increase of 10% in the average number of cases brought to it in any one year – and so an equivalent increase in the number of judgments given – as a result of the changes currently being proposed, then there could be a public sector cost of **£16,905** ($9.26 \times £18,264 \times 0.10$) in that year.

If the CAT saw an increase of 20% in the average number of cases brought to it in any one year as a result of the changes currently being proposed, then there could be a public sector cost of **£33,810** ($9.26 \times £18,264 \times 0.20$) in that year.

Of course, the number of cases relating to the telecommunications sector that require judgment from the CAT in any one year can vary greatly, and is driven largely by Ofcom's regulatory activity. For instance, in 2012/13, 41.4% of judgments related to cases that would be within the scope of the proposed change (12 out of 29 judgments). In the following reporting year (2013/14), only 21.4% of judgments related to cases that would be within the scope of the proposed change (6 out of 28 judgments). This equates to a 50% fall in the actual number of judgments relating to telecommunications, and a 51.69% fall in the amount of telecommunications judgments as a proportion of the total judgments made by the CAT in a 12 month period.

It would therefore be highly speculative to try to establish *ex post* the degree to which a change in the volume of cases brought before the CAT could be attributable to the changes being proposed to the standards of review for appeals under s192 and s317 of the Communications Act 2003.

Furthermore, it is worth again noting that the increase in the number of cases, and therefore the increase in costs, would be likely to occur only immediately following the change to the standard of review, as industry tests the parameters of the new regime. This should be very limited as judicial review is already a well-tested standard that also exists in other regulated sectors such as appeals under section 57 of the Postal Services Act 2011. As a result, the number of cases would more likely continue according to the existing norm, and we anticipate the volume of litigation to fall as a result of the proposed change.

Benefits to the CAT

As noted, we anticipate that a change from the existing "on the merits" standard of review for appeals to a judicial review basis will reduce the volume and length, and thus cost, of appeals litigation. We approximate this to a 10% reduction in costs.

Again, as an *illustrative* example:

If the CAT saw no increase in the number of cases – and so no increase in the number of judgments given – but each case related to the telecoms sector cost 10% less, then there would be a saving of **£16,905** ($£18,264 \times 10\% \times 9.26$).

If the CAT saw a 20% increase in the number of cases, but each case related to the telecoms sector cost 10% less, then there would be a cost increase of **£13,530** ($£18,264 \times 0.9 \times (9.26 \times 1.2) - (£18,264 \times 9.26)$).

5.5 Impacts on the regulator

Costs to the regulator

Overall, we anticipate that the proposed change will result in savings to all parties, including Ofcom, due to the reduction in resources that will be expended on litigation following a limitation in the scope of the standard of review for appeals.

One possible increase in the resource burden on Ofcom that could arise from the proposed change is a requirement to reassess complex regulatory decisions following remittal. Currently, the CAT is able to remit decisions back to Ofcom with specific directions as to how to remedy the problem identified. However, this will not be the case under a judicial review standard of appeal, and the work currently undertaken by the CMA would need to be undertaken by Ofcom instead.

However, Ofcom currently typically already does much of the work to enable the CAT to give it specific directions in this way, in the course of the CMA's remedies phase. This means that in price control appeals, Ofcom should be able to reach a new answer in materially the same timeframe as the current remittal process, and be able to do so at no significant additional cost compared to its obligations under the current regime.

Benefits to the regulator

One of the aims is to reduce the amount of time and resource spent during the appeals process. There will be an immediate benefit to Ofcom through the reduced resource spent on defending appeals.

Table 1 below outlines Ofcom's direct costs associated with Communication Act appeals, including legal costs and staff time, for cases lodged between 2011 and 2015. Since 2011, Ofcom has spent over £4 million defending appeals, some of which were ongoing as of 2015.

Table 1. Source: Ofcom¹⁰

Year	Number of Cases	Staff costs	External counsel costs	Total Cost
2015	1	£127,494	£50,488	£177,982
2013	5	£912,390	£1,090,380	£2,002,770
2012	2	£555,313	£111,716	£667,029
2011	4	£759,843	£410,597	£1,170,440
Totals:		£2,355,040	£1,663,181	£4,018,221

As noted, we anticipate that a change from the existing "on the merits" standard of review for appeals to basis of judicial review where merits can be duly taken into account will reduce the volume and length, and thus cost, of appeals litigation. We approximate this to a 10% reduction in costs.

5.6 Impact on competition and consumers

Ofcom's principal statutory duty is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

¹⁰ The variances in costs year to year reflect the varying nature of cases brought and the varying length of cases.

We anticipate that a reduction in the length and costs of appeals litigation will enable Ofcom to focus its resources on other projects to further the interests of citizens and consumers, and enable regulatory decisions to be implemented to shorter timescales thereby benefitting consumers.

An example of a scenario in which litigation may have delayed the implementation of an Ofcom decision made in pursuit of its primary statutory duties is provided by the '2.6 GHz case'. In April 2008, following two years of consultation, Ofcom made and published a decision to auction spectrum in the 2.6GHz band for LTE and WiMAX use. Different industry players had strong, directly competing material interests in the Ofcom's sequencing of the auction. Following Ofcom's decision to hold the award as soon as possible, legal appeals were launched in the CAT which, after eight months, were eventually dismissed.

6. EANDCB, NPV

Our analysis shows that the preferred option would have zero net cost to business, therefore the **EANDCB is zero**. We have identified and attempted to illustrate the impact on the public sector, and although the illustrative examples have provided quantified impacts, we cannot make a reasonable central assumption. Therefore, we conclude that the **NPV and business NPV are also zero**.

7. Small and Micro Business Assessment

Policy Position

If small and micro businesses were excluded, and the changes to the standard of appeals only applied to larger businesses, the policy would not achieve its objective of improving the efficiency of the appeals process. Furthermore, the benefits to consumers of faster decisions would be reduced. Another objective of the policy is to minimise gold plating of European Framework Directive, which the exemption of small and micro firms would undermine.

Having a different standard of appeals for small/micro firms and for large firms would both be practically difficult to implement and would also introduce perverse incentives. A lack of uniformity across the Ofcom appeals process would lack clarity both legally and practically.

Impact on small and micro firms

Our critical assumption is that the risk of decisions being made differently under the new system than they otherwise would have been applies predominantly to appeals against certain price control decisions and not to appeals against Ofcom decisions relating to other matters. Therefore, an impact on small or micro firms would be likely to arise only if these firms were involved in appeals relating to price control decisions. In the four occasions relating to price controls that were examined earlier (CAT 1192/3/3/12, CAT 1180/3/3/11, CAT 1112/3/3/09, CAT 1111/3/3/09 and connected appeals), none of the appellants were small or micro firms (as defined by having fewer than 50 employees). Therefore, we consider that it is unlikely that small or micro firms will be directly affected by this measure.

However, it is still useful to examine the number of appeals made under section 192 of the Communications Act 2003 relating to other matters that involved small or micro firms. Of all Ofcom appeals examined, only the following cases involved what appear likely to have been small or micro

firms. In each of these cases, the appeal was ultimately unsuccessful. This further supports our conclusion that there is unlikely to be a direct impact on small and micro firms. We anticipate that, as with other parties to any appeal, small and mirco firms bringing an appeal would likely benefit from the anticipated reduction in the length and cost in appeals litigation.

Table 2. SaMBA Appeals Cases

Case	Small or micro firm involved	Outcome
CAT 1053/3/3/05	Media Marketing Promotions	CAT found in Ofcom favour
CAT 1027/2/3/04 CAT 1074/2/3/06(IR)	VIP Communications Ltd	Original decision upheld
CAT 1079/3/3/07	Bracken Bay Kitchens	Appeal rejected by CAT
CAT 1087/2/3/07	Independent Media Support Ltd	CAT found in Ofcom favour

Annex A – Analysis of the impacts of previous price control decision being changed following appeal.

For this analysis, we have examined the price in each case as it was set by Ofcom and the price following the appeal. This price difference, multiplied by the volume of units sold by Openreach, gives an estimate of the lost revenue to BT, and the fall in costs to the other firms, ie the transfer between firms.

Each case is regarding the price set by BT in a specific year, so the impacts quantified are one off impacts in the year that the price relates to. Each year's price is determined individually, so the impact of a change in one price would not have an effect on the price in any other year.

Table 1. Rental service volumes (millions)¹¹

	<u>09/10</u>	<u>10/11</u>	<u>11/12</u>	<u>12/13</u>	<u>13/14</u>	<u>14/15</u>	<u>15/16</u>	<u>16/17</u>
Total WLR Rentals	22.20	20.69	19.40	18.29	17.44	16.57	15.81	15.12
Total MPF Rentals	2.22	3.75	4.96	6.18	7.09	7.99	8.86	9.65
Total SMPF Rentals	12.09	11.28	11.17	11.12	11.01	10.93	10.81	10.63
Total Openreach Lines	24.42	24.44	24.36	24.46	24.53	24.56	24.66	24.77

Table 2. Prices before and after appeal in Case 1: LLU 2009 Appeal¹²¹³

Service	01/04/10-14/10/10 (i.e. year 2 of the glide path in the original 2009 LLU and WLR Statements)	15/10/10-31/03/11 (i.e. adjusted to reflect the outcome of the LLU and WLR Appeals set out in the CAT rulings)
MPF Rental	£90.46	£89.10
SMPF Rental	£15.63	£15.04

In this case, the impact is the difference between the MPF Rental Price originally set by Ofcom, and the MPF Rental Price set by the CAT ruling, multiplied by the MPF Rental Service Volumes, with the same

¹¹ <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/fixed-access-market-reviews-2014/statement-june-2014/volume2.pdf>

¹² http://stakeholders.ofcom.org.uk/binaries/consultations/llcc/statement/LLCC_decision_final.pdf

¹³ http://stakeholders.ofcom.org.uk/binaries/consultations/talktalk-openreach-mpf/responses/Openreachs_comments.pdf

calculation for SMPF rental. This impact would have been a one off effect, and would have occurred in 2010/11, in the year that the price relates to.

MPF: Original price (£90.46) - price after CAT ruling (£89.10) * volume (3.75m)
 = £1.36 * 3.75m = £5,100,000.

SMPF: Original price (£15.63) - price after CAT ruling (£15.04) * volume (11.28m)
 = £0.59 * 11.28m = £6,655,200.

Total impact: £5,100,000 + £6,655,200 = **£11,755,200**

Table 3. Prices before and after appeal in Case 4: LLU/WLR 2012 Appeal¹⁴

Service	Pre-appeal 2013/14 charge ceiling (£ per line)	Corrected 2013/14 charge ceiling (£ per line)
MPF Rental	£85.04	£84.26
SMPF Rental	£10.40	£9.75
WLR Rental	£94.75	£93.27

The calculation here is the same as for case 1. The difference in price between Ofcom's original decision and the price after the CAT ruling, multiplied by volumes. This impact would also have been a one off effect, and would have occurred in 2013/14, in the year that the price relates to.

MPF: Original price (£85.04) - price after CAT ruling (£84.26) * volume (7.09m)
 = £0.78 * 7.09m = £5,530,200.

SMPF: Original price (£10.40) - price after CAT ruling (£9.75) * volume (11.01m)
 = £0.65 * 11.01m = £7,156,500.

WLR: Original price (£94.75) - price after CAT ruling (£93.27) * volume (17.44m)
 = £1.48 * 17.44m = £25,811,200.

Total impact: £5,530,200 + £7,156,500 + £25,811,200 = **£38,497,900**

¹⁴ <http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/fixed-access-market-reviews-2014/statement-june-2014/volume2.pdf>