BT’s response to the Competition and Markets Authority’s consultation document

“Price control appeals under section 193 of the Communications Act 2003: CMA guidance”

4 September 2017

1. Executive Summary

This is BT's response to the consultation published by the Competition & Markets Authority (the "CMA") on 24 July 2017 on the CMA's proposed guidance for price control appeals under section 193 of the Communications Act 2003 (the "Act")(the "Consultation").

BT provides comments in relation to:

- **Changes to the CMA's standard of review in light of the Digital Economy Act 2017** (the DEA17"). In particular, BT suggests that the guidance should make it clear that whilst determining an appeal using the same principles as would be applied by a court on an application for judicial review, the CMA will ensure that the merits of the case before it are duly taken into account, so as to comply with Article 4 of the Framework Directive[1] (see further section 2 below).
- **Changes to the CMA's process, hearings and documents**. In particular, BT agrees with the CMA's proposals to dispense with written core submissions. BT supports the use of clarifications hearings which provide the parties with the opportunity to briefly present their case, identifying what they consider to be the kernel of the issues between them, and outline why, in simple terms, they consider Ofcom has erred (or not). BT notes that depending on the facts and circumstances of each case, timings may need to be adjusted to allow for interveners to file pleadings and more than 3 weeks may be required for the appellant to submit a reply to Ofcom's defence (see further section 3 below).
- **Changes to the CMA's approach to remedies in light of the DEA17**. In particular, BT does not consider changes in the DEA17 mean that the CMA is precluded from holding a remedies hearing where appropriate (for example to discuss what guidance could be provided to Ofcom to correct errors identified) (see further section 4 below).
- **The CMA's clarification of its approach to costs**. In particular BT welcomes the CMA's expansion of its guidance in relation to the recovery of costs. Transparency of the approach that the CMA will take is of importance to potential appellants at the time when they are contemplating bringing an appeal as well as to parties who may be facing a potential costs order at the conclusion of the case. BT suggests that it would be helpful for the CMA to provide further transparency by setting out in the body of the guidance how it will decide whether it will seek to recover some or all of the costs that it has incurred, and the types of information it will disclose to parties during the consultation stage (see further section 5 below).
- **Other matters**. BT provides a number of comments in relation to other matters set out in the CMA's draft guidance (see further section 6 below).

[1] Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services (the "Framework Directive").

2. Standard of Review

1. The CMA new guidance reflects amendments to the standard of review for price control appeals under section 193 of the Act made by section 87 of the DEA17. Section 87(2) of the DEA17 amends section 193(2) of the Act such that in its determination of the price control matter, the CMA must have regard to the principles to be applied by the Tribunal under section 194A(2) of the Act. Section 194A(2) of the Act provides that the Competition Appeal Tribunal (the "CAT") must decide the appeal, by reference to the grounds of appeal set out in the notice of appeal, by applying the same principles as would be applied by a court on an application for judicial review.
2. As the CMA notes at paragraph 2.2, section 192 to 196 of the Act implement Article 4 of the Framework Directive. Whilst the DEA17 amends the standard of review such that the CMA must now apply the same principles as would be applied by a court on an application for judicial review, the CMA must nevertheless also comply with Article 4 of the Framework Directive. Article 4 of the Framework Directive requires that effective mechanisms must exist for those affected by an NRA's decision to appeal it, and that Member States shall ensure that the merits of the case are duly taken into account.
3. As such, whilst determining an appeal using the same principles as would be applied by a court on an application for judicial review, the CMA must ensure that the merits of the case before it are duly taken into account. Lord Keen made this clear at the second sitting of the House of Lords considering the Digital Economy Bill on 20 March 2017[2],

   > *"Of course, appeals in the communications sector are required to ensure that, "the merits of the case are duly taken into account", as a matter of EU law under Article 4 of the EU framework directive. That will remain the case under a judicial review standard."*

   BT considers that it would be beneficial for the CMA to be equally explicit in its guidance that the standard of review will continue to comply with Article 4 of the Framework Directive.
4. BT therefore suggests that the CMA adds "*and duly taking into account the merits of the case as required by Article 4 of the Framework Directive*" after the references in paragraphs 2.2 and 2.3 to "*applying the same principles as would be applied by a court on an application for judicial review*" and the reference in paragraph 2.7 to "applying a judicial review standard in doing so".

3. CMA Process, Hearings and Documents

Period for Reply

5. Given that there will not, in future, be written core submissions, the appellant's reply will potentially assume greater significance as the final element of the written submissions. BT notes that the CMA's indicative timings shown in Figure 2 provide for the appellant to submit a reply to Ofcom's defence in week 3. BT notes that where the CAT refers the price control matters to the CMA on or around the date of Ofcom's defence, 3 weeks may well be unlikely to be sufficient time for the appellant to prepare its fully detailed reply. BT suggests that in such circumstances, 4 weeks, or in the largest cases 5 weeks, may be more appropriate. Of course the precise time required at each stage will likely depend on the facts and circumstances of each case. BT suggests that as a minimum the CMA makes this clear and indicates that where Ofcom's defence has only just been filed, depending on the nature of the case, a 4 or 5 week period may be considered.

Interveners Pleadings

6. BT notes that section 3 and section 4 do not make provision for the service of pleadings by interveners where appropriate. In some cases, the case management timetable ordered by the

[2] https://hansard.parliament.uk/Lords/2017-03-20/debates/C4F30769-C3D1-493F-BE23-0A488EF6ACF8/DigitalEconomyBill Column 135.

CAT will provide for pleadings on behalf of all or some of the interveners to be filed after the defence. If the reference to the CMA is made on or around the same time as the defence, the CMA process may need to provide time for receipt of these pleadings before the appellant can complete its reply to Ofcom's defence and the intervention statement(s). Clearly, the precise time required to close pleadings will depend on the facts and circumstances of each case. BT suggests that the CMA refers to the possible need to receive pleadings from some or all of the interveners in advance of the appellant submitting a reply to Ofcom's defence at paragraph 3.11, Figure 2 and in Section 4. BT suggests that as a minimum, appellants are likely to require 2 weeks from the date of receipt of the last of interveners' pleadings, to file a reply, in order to have sufficient time to take into account any points made in the intervention(s).

No core submissions process

7. BT notes that the CMA's draft guidance does not provide for a core submissions process, in contrast to its previous guidance[3]. Subject to the point in paragraph 5 above in relation to the appellant's reply, and its comments below in relation to clarification hearings, BT agrees with the CMA's proposal for no written core submissions. BT considers that efforts of both parties and the CMA are better directed at considering pleadings already submitted as part of the CAT process (including preparation of the reply), and preparing for clarification, technical and bilateral hearings.

Technical meetings, modelling sessions and clarification hearings.

8. BT agrees that at the outset of a reference, **technical meetings and modelling sessions** often provide valuable learning for the CMA. BT suggests that indicative timings for such meetings are included in Figure 2.
9. BT understands the proposal, at paragraphs 5.6 to 5.9 the CMA's draft guidance, for a "**clarification hearing**", fulfils the role in part of what was previously known as the "core submissions hearing". BT's experience is that the core submissions hearing (typically coming soon after any technical meeting and modelling session) is often a valuable and important stage in the price control reference process. Such hearings provide the parties with the opportunity to briefly present their case, identifying what they consider to be the kernel of the issues between them, and outline why, in simple terms, they consider Ofcom has erred (or not). Thereafter they provide the Appeal Group with an opportunity to ask questions of clarification. BT agrees that, to the extent this is what is envisaged by the clarifications hearing, such hearings will be a valuable exercise, particularly so if there are not to be separate written core submissions. They should assist in the efficient analysis of the reference by the CMA, allowing the Appeal Group, in a timely and time-effective way to understand at an early stage how the parties have put their case and what really matters to them. BT suggests that the assumption should be that they will normally be held as part of the Initial Stage of the process.
10. BT notes that in terms of indicative timing proposed by the CMA for holding clarification hearings, the CMA intends for such hearings to be held around week 2 of the reference process (during the initial stage). BT agrees that this is a reasonable time frame.
11. BT suggests that where there is to be a technical meeting, modelling session and clarification hearings, the parties ought to be given sufficient time for preparation. BT suggests that as a minimum, at least 1 week between any technical/modelling sessions and the clarification hearing. This might suggest that the technical meeting and modelling sessions should be held around week 2 and the clarification hearing around week 3.
12. With this in mind, and given that in BT's experience, holding "the full suite" of technical meetings, modelling sessions and core submission (now clarification) hearings at an early stage is beneficial, helping to ensure the efficient progress of a case, BT would suggest that:

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[3] CC13 "*Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines*", published by the Competition Commission in April 2011 and adopted unamended by the CMA board.

- In paragraph 5.6 of the guidance, rather than stating that the CMA "*may*" invite the parties to such a hearing, it should state that the CMA "*will normally expect*" to do so;
- Paragraph 3.11 (a) and (b) are recast to say that at the initial stage the CMA will usually hold an initial clarification hearing with the parties for them to explain the essence of their case, and that the CMA may hold meetings to understand technical or modelling aspects in advance of this.
- The final sentence of the current 3.11 (c) referring to the provision by the appellant of its reply becomes a separate sub-paragraph of its own, coming after the initial hearings but before the bi-lateral hearings.
- Figure 2 is amended to reflect to be consistent with the above.

13. BT understands the reference at paragraph 5.7 of the draft guidance to the fact that *"parties other that the main parties may also be invited to present to and reply to questions from the Appeal Group at a clarification hearing*", to mean that interveners may be invited to attend the clarification hearing. This is not clear from paragraph 5.6 of the guidance, which suggests that only the main parties (the appellant(s) and Ofcom) will be invited to attend the main hearing. BT suggests that in the interests of transparency, as a minimum, all parties should be invited to attend and observe the clarification hearing.

4. Remedies

14. The CMA notes, at paragraph 1.8 of its consultation document, that the section 87 DEA17 amendments revise the decisions the CMA and CAT may take, such that in future where the CAT quashes the whole or part of a decision to which an appeal relates, it may remit the matter back to Ofcom with a direction to reconsider and make a new decision in accordance with its ruling.
15. At paragraph 1.12 of the consultation document, the CMA appears to interpret this amendment to mean that there is no requirement for the CMA to provide a process (i.e. remedies hearings which allow relevant parties the opportunity to make representations) to consider and formulate remedies for any errors identified in Ofcom's price control decisions. With respect to the CMA, BT does not consider this is a correct interpretation of the section 87 DEA17 amendments.
16. Under section 194A(3)(b) of the Act, where the CAT quashes the whole or part of a decision it may "*remit the matter back to Ofcom with a direction to reconsider and make a new decision <u>in accordance with its ruling</u>*". The CMA is, therefore, not precluded from providing guidance or making recommendations as to the way in which errors by Ofcom specified in the draft determination might be remedied, for example, how Ofcom should approach any adjustments required to the charge control. BT particularly considers this to be the case given that the CMA, albeit that it will determine the review by applying judicial review principles, must ensure that the merits of the case before it are duly taken into account pursuant to Article 4 of the Framework Directive.
17. Whilst remedies hearings may not always be necessary, if the CMA is minded to make a particular ruling on the new decision that Ofcom should make in order to rectify an identified error, there should be an opportunity for the parties to make representations on this. This is particularly so where there is a range of possible alternative approaches which might suffice to correct the errors identified and the CMA may have to decide between them in order to make its ruling. In such circumstances, clearly a remedies hearing would still be justified.
18. The approach taken by the CMA in relation to remedies may also be relevant to the question of the costs order that the CMA might be minded to make. If the CMA has engaged with the parties by way of a remedies hearing and has made a direction as to how Ofcom should reconsider the matter and make a new decision, this will inform the position in relation to the CMA's administrative costs that it may be appropriate to recover from any of the parties by way of a Costs Order (in relation to which, see paragraph 21 below). Otherwise, if the CMA, has just found, on the judicial review based standard, that Ofcom's decision was flawed and has remitted

it to Ofcom for reconsideration, BT assumes that the fact of the remittal should be treated as the appellant having won its appeal so that no costs order can be made against it.

5. Costs

19. Information in relation to the way in which the CMA will deal with potential costs orders is helpful to parties to an appeal at the end of the case. But, additionally, it is also of importance to potential appellants at the time when they are contemplating bringing an appeal. Without adequate information about the potential costs consequences of bringing an appeal, there is a risk that smaller parties might be dis-incentivised from bringing an appeal against a transparently regulatory decision primarily on the basis that it might be too costly for them. In these circumstances, enforcement would suffer, the regulator might not be held fully to account, and the appeal systems could fall into disrepute accordingly.
20. BT therefore welcomes the CMA's expansion of its guidance in relation to the recovery of costs which is in line with the Ombudsman's *Principles of Good Administration* which require inter alia that public bodies are open and accountable, act fairly and proportionately, and seek continuous improvement. BT suggests, however, that there are further changes that could further aid transparency and make parties better informed.
21. In paragraph 8.3 of its draft guidance, the CMA identifies that section 193A (2) of the Act provides that the CMA may require payment of "*some or all*" of its costs. However the guidance provides no explanation of how it will decide whether it is appropriate in the circumstances to seek repayment of all of the costs that it has incurred or only a proportion of them. Whilst BT recognises that, as the CMA notes in its draft guidance at paragraph 8.4 the actual amount of costs the CMA will incur in connection with a price control reference will vary from case to case, it would be helpful to potential appellants (and those who, at the conclusion of a price control appeal may be making representations to the CMA on a draft costs order) for the CMA to identify the types of factors that it might take into account in making the preliminary decision of whether to recover *some or all* costs in any particular case.
22. BT notes that paragraph 8.7 of the CMA's draft consultation indicates that it will endeavour to provide at the consultation stage details of how it has calculated its total costs and the proportion of costs to be paid pursuant to the Costs Order. Footnote 31 refers to paragraph 32 of the CAT's judgment in the VULA CMA Costs appeal[4]. BT considers that it would aid transparency of process if the guidance listed the types of information referred to by the CAT in paragraph 32 of its judgment within the text of the CMA's guidance. BT suggests that paragraph 8.7 should be amended to read as follows:

    Before the CMA makes a Costs Order, it will give all parties the opportunity to comment on its proposed order. In this regard, the CMA shall endeavour to provide, at the consultation stage, details of how it has calculated its total costs and the proportion of the costs to be paid pursuant to the Costs Order. The sort of information that the CMA shall endeavour to provide, provided that this can be done without imposing a significant burden on the CMA, is:

    a) Details of the names, grades and cost recovery rate for each of the staff and panel members who worked on the references together with the number of hours worked and a brief description of the issues on which each staff and panel member worked.

    b) The travel and subsistence costs incurred in the references.

    c) A breakdown of fees charged by contractors, consultants and Counsel.

    d) Direct costs.

[4] *British Telecommunications plc v Competition and Markets Authority (VUlA CMA Costs)* [2017] CAT 11 (the "VULA CMA Costs Appeal").

e) *An explanation of how the CMA's overhead rate has been calculated.*

The CMA will seek to provide the proposed order (and the relevant information in support of it) either at the time it sends its final determination to the CAT or as soon as possible thereafter.

23. Paragraph 8.6 states that the Costs order will be accompanied by the CMA's reasons. BT notes that at the conclusion of the VULA price control review, the CMA published its final Costs Order, but that this contained little, if any, explanation of how the CMA had arrived at its decisions or of how its claim was quantified. It would aid transparency (and be a guide for potential appellants) for the CMA to publish this information and reasoning on its website - possibly by publishing a non-confidential version of the CMA's letter of explanation as sent to the parties setting out its claim the reasons for its decisions.
24. Several of the recent price control reviews undertaken by the CMA have involved two appeals which have been heard together. In such circumstances, and if both appeals fail, the CMA is empowered to recover from each appellant only those of its costs which are incurred in connection with "*the reference*" (sing.) (cf. s.193A(1), (3)(a), etc.). BT suggests that it would be helpful for the guidance to address this point and to make it clear that the CMA will take reasonable steps to ensure that the costs of each reference can be identified. [REDACTED – Confidential to BT and CMA]

6. Other matters

25. BT has two other comments on the CMA's guidance, as set out below.
26. Paragraph 2.6 notes that the CMA will answer the reference questions "*on the basis of the arguments and evidence within the parties' pleadings*". Paragraph 3.10 makes the same point but unpacks this in greater detail, instead noting that the CMA will answer the reference questions "*on the basis of the arguments and evidence advances in the parties' pleadings and developing in their later submissions see paragraph 4.4), hearings and responses to clarificatory questions*". We suggest that to ensure consistency the CMA should amend paragraph 2.6 to reflect to wording used in paragraph 3.10.
27. Paragraph 8.9 of the guidance refers to the right of a person affected by a costs order decision may appeal against it to the CMA. BT's experience in the VULA costs appeal is that it is a significant step to have to institute a whole new appeal to the CAT. Paragraph 8.7 indicates that the CMA will seek to provide the proposed order either at the time it sends it final determination to the CAT or as soon as practicable thereafter. BT invites the CMA to consider if it would be possible, and would fit within the legal framework, for the costs order to be made in a sufficiently timely manner that would allow any challenge to this to be considered by the CAT on the judicial review basis at the final stage of the main proceedings, rather than as a completely new and separate appeal.