



Price control appeals under section 193 of the
Communications Act 2003:
Competition Commission Guidelines

April 2011



Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines

Contents

	<i>Page</i>
Section 1: Introduction	4
Section 2: Background	5
Section 3: CC process	7
Overview	7
Pre-reference stage	9
Initial stage	9
Clarification and analysis	10
Provisional determination	10
Remedies	11
Report to the CAT and subsequent steps	12
Section 4: Key documents	13
Pleadings	13
Core submissions	13
Provisional determination	14
Responses to provisional determination	14
Remedies letter	14
Responses to remedies letter	15
Final determination	15
Section 5: Hearings and meetings	16
Hearings	16
Bilateral hearings	16
Multi-party hearings	17
Staff meetings	17
Section 6: Written questions and oral enquiries	18
Section 7: Transparency and confidentiality	19
Annex A: Administrative matters	20
Handling of confidential materials	20
Format for responses and submissions	21
Annex B: Principles for the consideration of remedies	22

Section 1: Introduction

- 1.1 These guidelines have been prepared to assist parties and their advisers involved in price control references under [section 193](#) of the Communications Act 2003 (the Act). It is not intended to be binding and may be adapted to take account of the particular circumstances of a reference.¹
- 1.2 These guidelines have been prepared following a review of the Competition Commission's (CC's) processes after the first five references under the Act. Whilst many aspects of the procedures set out in this document correspond to those adopted hitherto, certain changes to procedures will be made as a result of that review, including, in particular, the introduction of a 'core submission' (see paragraphs 4.4 to 4.9).
- 1.3 These guidelines should be read in conjunction with the CC's Rules of Procedure² with which CC groups must comply, and with the Competition Appeal Tribunal (CAT) Rules.³ The CC's Rules of Procedure apply subject to the CAT Rules, which govern all appeals to the CAT including those brought in accordance with the Act, and any directions given to the CC by the CAT in exercise of powers conferred by those rules.⁴
- 1.4 The guidelines provide some background and then set out the various stages of the CC's process before discussing various specific procedural topics. The main document is structured as follows:
 - [Section 2](#) sets out the background to price control appeals, and describes the CC's role in the overall process.
 - [Section 3](#) sets out and describes the various stages of the CC's process.
 - [Section 4](#) discusses the key documents used in the CC's consideration of the appeal.
 - [Section 5](#) discusses hearings and meetings.
 - [Section 6](#) discusses written questions and oral enquiries.
 - [Section 7](#) discusses transparency and confidentiality.
- 1.5 Various administrative matters are described in [Annex A](#) in order to assist parties. Principles that the CC would generally follow for the consideration of remedies are set out in [Annex B](#).

¹These guidelines will be reviewed periodically in the light of the CC's experience of conducting price control references and any relevant judgments.

²CC1, *Competition Commission Rules of Procedure*, 2006:
www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc1.pdf.

³Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372) and Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (SI 2004 No 2068).

⁴CC1, Rule 17.3.

Section 2: Background

- 2.1 The Act gives Ofcom the power to impose various kinds of specific condition on communications providers, including conditions on operators that Ofcom has determined to have significant market power, ‘SMP conditions’.⁵ The provisions of the Act relating to SMP conditions implement Articles 14 to 16 of the Framework Directive⁶ and Articles 8 to 13 of the Access Directive.⁷ The Act sets out the various conditions that may be imposed as SMP conditions, including price controls.⁸
- 2.2 Sections 192 to 196 of the Act implement Article 4 of the Framework Directive and provide appellants with a right to appeal to the CAT against certain decisions of Ofcom, including those setting SMP conditions and setting price controls. The CAT must decide these appeals 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 Ofcom with appropriate directions.
- 2.3 Section 193 of the Act requires the CAT to refer any price control matter⁹ raised by the appeal to the CC for determination, and to apply the CC’s determination when deciding the appeal.¹⁰ The CC must determine the reference made by the CAT in accordance with any directions given by the CAT and using such procedures as the CC considers appropriate. Therefore a price control reference to the CC is a mandatory part of the CAT’s process for handling appeals that include price control matters. Figure 1 illustrates the framework.
- 2.4 The CC endeavours to provide a clear and final resolution to the matters subject to its determination. The first five of the CAT’s references have expressed a preference for the CC to provide clear directions as to how any error on a price control should be remedied, rather than remitting matters back to Ofcom. As references generally apply to current price controls, it is usually desirable that any errors are corrected as rapidly as practicable.
- 2.5 The CAT refers any price control matters in the form of reference questions, which are based upon the errors alleged within the appellant’s Notice of Appeal. The CC answers the reference questions on the basis of the arguments and evidence within the parties’ pleadings. The scope of the CC’s determination is limited to the grounds of appeal put forward by the appellant which is reflected in the CAT’s reference.

⁵Section 45(2)(b).

⁶Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services (‘the Framework Directive’). Under Article 14(2) of the Framework Directive an undertaking is deemed to have SMP if it enjoys ‘a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers’.

⁷Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (‘the Access Directive’). Article 13 of the Access Directive makes provision for price control obligations on undertakings designated as having SMP.

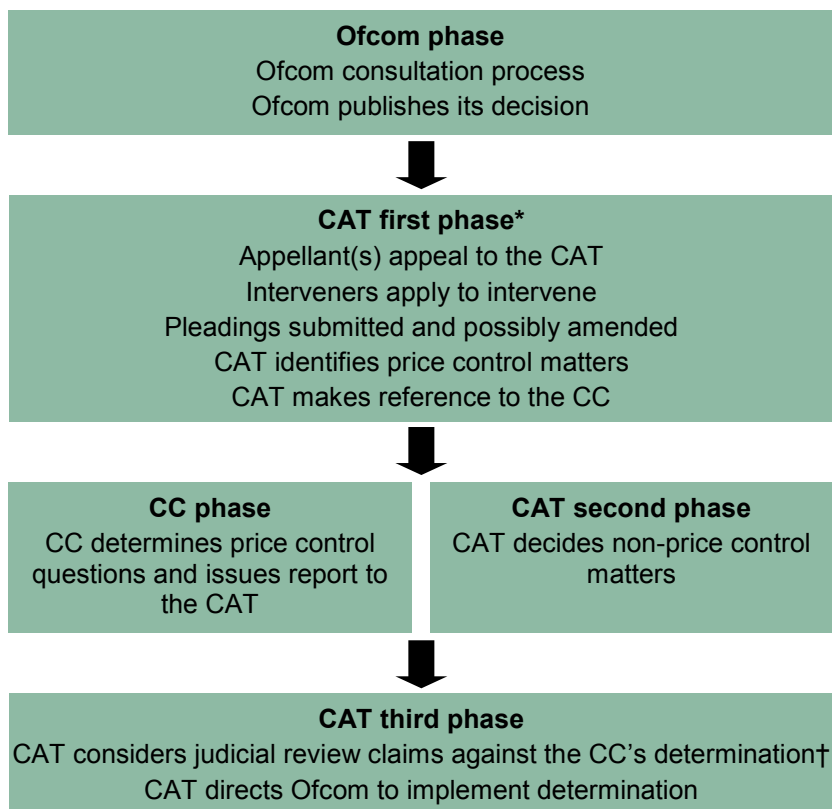
⁸Which may be set in accordance with sections 87(9), 91 or 93(3).

⁹‘Price control matter’ is defined as an imposition of any form of price control authorized by sections 87(9), 91 or 93(3) of the Act.

¹⁰The CC’s determination may be challenged in the CAT on judicial review grounds.

FIGURE 1

The context of the appeals



*This description of the CAT process in three phases is purely for the purpose of the current document.

†Further challenge possible in Court of Appeal.

- 2.6 The CC's role in these appeals is essentially to decide between the parties' claims rather than to conduct an investigation. However, the CC may undertake the necessary inquiries and analysis to develop a remedies package where appropriate and will need to carry out analysis for the purpose of discharging its functions satisfactorily. Thus the CC does not conduct the appeals as 'bare adjudications', and its process is intended to allow sufficient flexibility to permit assessment of the strength of the case being made on each side and, where appropriate, remedies to be devised.
- 2.7 The CC proceedings will be confined to the parties to the case, the appellant, Ofcom and any interveners that the CAT formally admits, and will not involve third parties or the public. Due to the nature of its role and the fact that the summary of case and the reference questions are available on the CAT's website, the CC does not publish details of the conduct of its determination on its website, but in due course publishes a non-confidential version of the final determination (see paragraphs 4.19 and 4.20).
- 2.8 The CC is an expert body which conducts its work by using groups of its members who are appointed on the basis of experience, ability and background; these arrangements are described in *CC4, The Competition Commission's General Advice and Information*. The Act requires that at least one member of an Appeal Group be drawn from the Communications Panel, appointed for the purposes of deciding appeals under the Act. The CC's members are supported by a team of specialist staff advisers and administrators.

Section 3: CC process

- 3.1 This section provides an overview of the CC's process and then considers each step in more detail.

Overview

- 3.2 Whilst the reference from the CAT forms the official start of the CC's task, the CC will engage with the CAT and parties to the appeal before that point. The CC will commence preparations for its determination when it appears that a reference from the CAT is both likely and reasonably imminent.¹¹ The CC will seek to attend CAT case management conferences where they are likely to concern matters relevant to any price control reference.
- 3.3 Ahead of referring any price control matters to the CC, the CAT will generally deal with initial case management issues, including establishing a confidentiality ring where the appeal concerns commercially sensitive information. The CC will distribute confidential versions of documents only to members of this confidentiality ring.
- 3.4 The CAT will set the deadline for the CC's response to the reference at the time of making the reference. The time allowed for the CC's phase of the appeal is decided by the CAT and is normally informed by submissions from the CC and the parties. Although the CAT rules indicate a timetable of four months, the complexity of cases considered so far, the desire for a definitive remedy for any errors and the CC's preference for issuing a provisional determination (see paragraphs 3.21 to 3.23) have led to a longer period being adopted. The CC will endeavour to conduct cases as quickly as possible; the time needed to conduct a determination will be determined by the complexity of the issues and the evidence, and whether or not a remedies stage is necessary. The CC will usually make representations to the CAT in relation to the duration to be allowed for the determination ahead of any reference.
- 3.5 In order to conduct an efficient process, the CC expects that parties will treat agreed timetables as 'hard' deadlines. Should it become apparent to a party that it will struggle to adhere to a deadline, the CC should be contacted as soon as possible.
- 3.6 If the CC considers it necessary or appropriate to seek an extension to the timetable during a reference, it will approach the CAT to do so. The CC will also consult with parties if appropriate.
- 3.7 The CC answers the CAT's reference questions on the basis of the arguments and evidence advanced in the parties' pleadings and developed in their core submissions (see paragraphs 4.4 to 4.8), hearings and responses to clarificatory questions.
- 3.8 The CC phase has the following key stages:
- (a) Pre-reference stage: the CC will initiate a dialogue with the parties to plan its process and to start obtaining a proper understanding of the case. The cooperation of parties during the pre-reference phase assists the CC and the parties in making an effective start to the appeal.

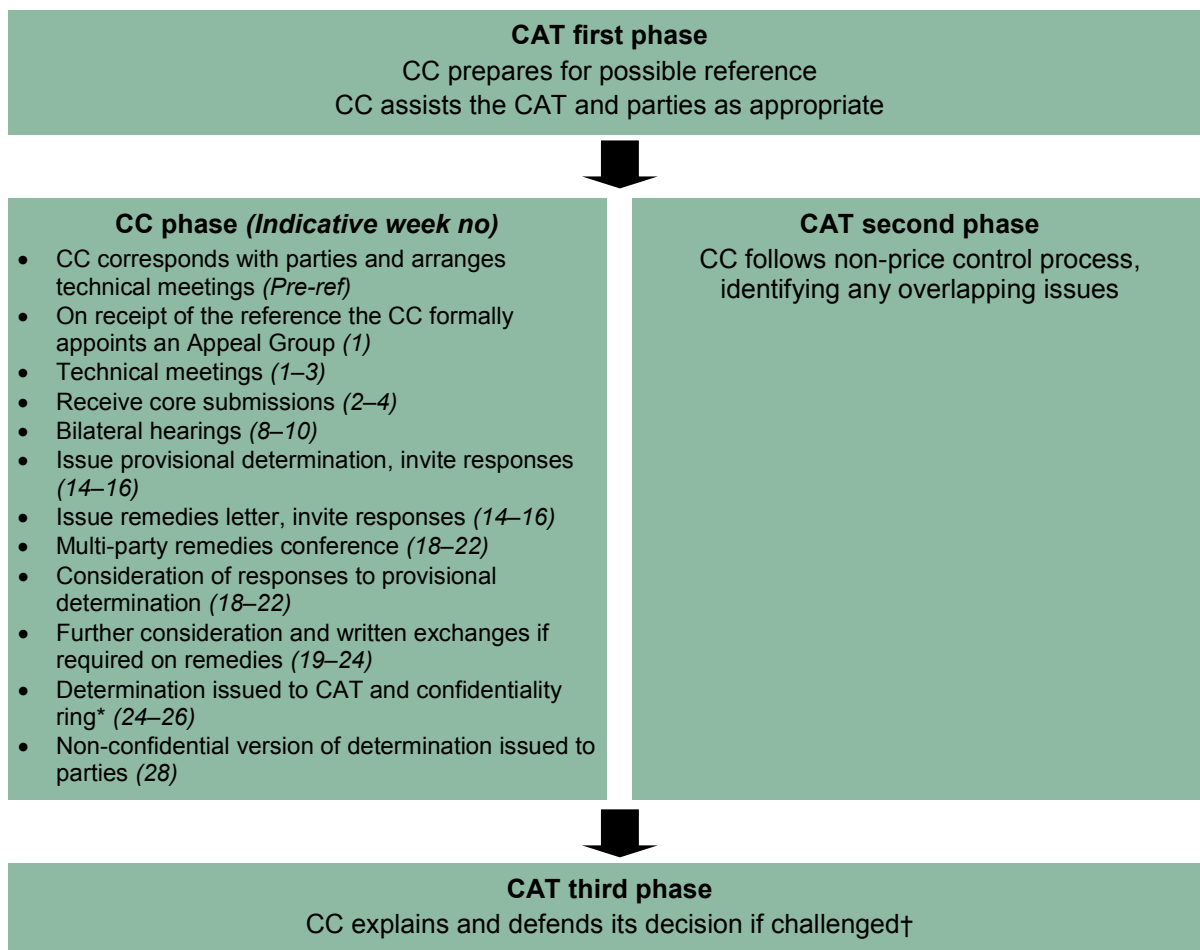
¹¹In most cases it will be clear at an early stage whether an appeal raises price control matters. Rule 3 of the [CAT \(Amendment and Communications Act Appeals\) Rules 2004](#) provides that appellants, respondents or interveners may include a statement in their pleadings in relation to the extent to which the appeal concerns price control matters.

- (b) Initial stage: the CC will hold meetings with the parties to understand the technical aspects of the price control and of Ofcom's decision.
- (c) Clarification and analysis: the CC will consider the parties' core submissions (see paragraphs 4.4 to 4.8), raise written questions and conduct bilateral hearings with parties.
- (d) Provisional determination: the CC will prepare and issue to the parties its provisional answers to the reference questions. If it provisionally considers Ofcom has erred, it will also issue a remedies letter. The CC will consider responses to its provisional determination.
- (e) Remedies: if the provisional determination finds in favour of the appellant on any point, the CC will in parallel consider remedies and normally hold a multi-party remedies meeting.
- (f) Report to the CAT and subsequent steps.

3.9 These stages (and the activities within each stage) may overlap to some extent. They are shown in Figure 2.

FIGURE 2

CC involvement in the various phases



*Confidentiality rings are described in paragraph 7.1.

†Further challenge possible in Court of Appeal on judicial review grounds.

Note: Timings run from the date of the reference to the CC. There is, in particular, some flexibility in relation to the timings during the remedies stage (see paragraph 3.34).

Pre-reference stage

- 3.10 When an appeal that appears likely to lead to a CC reference has been notified to the CAT, the CC will identify staff to engage with the parties to the appeal and the CAT. During this stage the CC will be ready to assist parties and the CAT as appropriate.
- 3.11 When it appears that a reference from the CAT is both likely and reasonably imminent, the CC will start to plan its work. This will enable it to make submissions to the CAT as to the likely period required to conduct its determination (see paragraph 3.4) and to identify those technical issues with which it will need to become familiar. It will seek to set up meetings with the parties to discuss such issues; these arrangements will normally be made before the CC has received a reference. The meetings themselves will normally be held shortly after or even before the reference is made.

Initial stage

- 3.12 Following receipt of the reference the CC will formally appoint an Appeal Group. The CC will write to the parties at this point, advising them of various procedural matters

(such as points of contact) and providing further direction if appropriate. The CC will publish an administrative timetable for the reference on its website.

- 3.13 The CC will familiarize itself with the technical background to the case and to Ofcom's decision. This is likely to involve:
- (a) Meetings with Ofcom to understand its approach to the price control, particularly modelling issues. The other parties will normally be invited to send observers (see paragraph 7.5).
 - (b) Meetings with all parties to understand technical aspects of the relevant part of the industry.
- 3.14 In some cases the CC may decide to conduct a site visit or visits to the premises of relevant parties. The other parties will normally be invited to send observers to such visits (see paragraph 7.5).
- 3.15 During this initial stage it is expected that parties will prepare and submit 'core submissions' (see paragraphs 4.4 to 4.8).

Clarification and analysis

- 3.16 Following the initial stage, the CC will follow a process of clarification and analysis. The main vehicles for this process will be bilateral hearings (see paragraphs 5.6 to 5.10) with each of the parties and written questions (see paragraphs 6.1 to 6.3).
- 3.17 The bilateral hearings will enable the CC to ask questions and the parties to engage with the decision-makers. The CC will generally provide a topics letter before each hearing to assist parties' preparation; however, parties should be prepared to discuss all aspects of their cases.
- 3.18 The CC will also raise written questions on various points. Typically these points will be complementary to those raised at hearings, and are likely to involve points unsuited to discussion at hearings.
- 3.19 Parties should be aware that intentional or reckless provision of false or misleading information, or intentional alteration, suppression or destruction of any documents a person is required to produce, is a criminal offence.¹²
- 3.20 During this stage, on certain technical issues, including, in particular, cost of capital issues, the Appeal Group may consult with the CC's Finance and Regulatory Group (FRG). In such cases, the FRG would provide advice to the Appeal Group who will make all decisions related to the appeal. The FRG's role is described on the CC website.¹³

Provisional determination

- 3.21 Subject to the timetable allowed by the CAT for the CC determination, the CC will normally issue to the parties a provisional determination of the reference questions as to whether Ofcom has erred typically 14 to 16 weeks from the reference being made (see Figure 2). The provisional determination has two purposes. First, it allows

¹²Section 193(8) of the Act.

¹³www.competition-commission.org.uk/about_us/our_organisation/workstreams/frg.htm.

parties to comment on the CC's reasoning and the accuracy of arguments and evidence relied upon. Second, it establishes the context for any necessary consideration of remedies.

- 3.22 Parties will be invited to provide written responses commenting on the CC's reasoning and the factual accuracy of the CC's analysis. A deadline will be set for written responses; subject to CAT directions, this will typically be two to three weeks from the date of issue. At this stage the parties will not be permitted to provide new evidence or argument. To demonstrate how their responses correspond to the evidence and argument previously submitted, parties' written responses must cross-refer to their core submissions and pleadings.
- 3.23 The CC will consider the written responses to the provisional determination in parallel with its remedies stage (should one be necessary). The CC may decide that it requires further dialogue with parties as a result of the responses, or to take account of comments received in its remedies stage. However, unless the CC advises otherwise, parties should proceed on the working assumption that the final determination will largely correspond with the provisional determination. If necessary the CC will initiate further correspondence or meetings to finalize its determination.

Remedies

- 3.24 If the CC has provisionally determined that Ofcom has erred, and the CAT has included consideration of remedies in its reference, it will generally be necessary to determine whether and how this error should be corrected. This is termed the 'remedies stage'.
- 3.25 Subject to and in accordance with the CAT's reference, the CC expects to identify a clear and precise remedy to any error identified. This will include, as far as practicable, determining an adjustment to the level of the price control. However, the setting of price controls often involves matters of considerable complexity. The CC will, therefore, engage closely with the parties to establish an appropriate remedy to any error(s) identified.
- 3.26 In some cases, the nature of the CC's provisional determination might clearly suggest how the error should be corrected and the remedies issues would be largely related to the appropriate implementation of the correction.
- 3.27 Other cases may be more complicated. Establishing that Ofcom had erred might not of itself establish what Ofcom should have done. Moreover, taking account of factors such as the time remaining for the price control, it may not be appropriate for the remedy to correspond exactly with a corrected original decision. (Certain principles that the CC would generally follow for the consideration of remedies are set out in [Annex B](#).)
- 3.28 At the same time as issuing its provisional determination, the CC will issue a remedies letter, setting out what it sees as the key issues in remedying any error(s) and requesting the views of the parties on these issues. With regard to implementation issues, the CC will generally request that Ofcom makes an initial proposal as to how a remedy be implemented because Ofcom will generally be best placed to advise on this.
- 3.29 A remedies conference will be held to facilitate the CC's decision-making. This may be held in two parts:

- (a) a multi-party remedies hearing where the CC asks questions of the parties and the parties engage with the decision-makers; and
 - (b) a multi-party meeting, facilitated by the CC, at which the parties will be invited to explain their positions taking account of the submissions made by other parties and to establish areas of agreement and disagreement. The CC will have regard to the arguments advanced by the parties and to the areas of agreement; however, it will make its own determination which may not be the same as the parties' common position (if any). The CC recognizes that Ofcom may not wish to express a view on certain points bearing in mind its role as industry regulator.
- 3.30 Following the remedies conference, the CC will develop its views on the various issues and put them to the parties. It might also request that the parties continue discussions on various technical points.
- 3.31 To support the remedies stage, the CC needs a good understanding of the principles and dependencies of Ofcom's price control calculations. However, the CC expects that parties will assist with determination of the final price control using their knowledge of the models adopted in the original decision. The CC would generally ask Ofcom to carry out remodelling on its behalf and to its specification, identifying any additional assumptions or choices that are necessary. It will invite other parties to review these.
- 3.32 The CC will not issue a provisional determination on remedies. Its decision on remedies will be included in its final determination.
- 3.33 During the remedies stage the CC may have regard to evidence relating to the period following Ofcom's decision which would not have been available to Ofcom at the time of its decision. For example, if the CC finds that Ofcom has allowed a regulated company too much latitude in price setting, whether that latitude had been abused could be relevant to the choice of remedy.
- 3.34 Determination of some remedies issues may require a number of iterations. Parties should expect a degree of flexibility in the CC's timetable during the remedies stage and are encouraged to make points of principle as soon as possible, for example in response to the remedies letter, even where detailed proposals (for example, on levels of charges) are not yet available.

Report to the CAT and subsequent steps

- 3.35 Having determined its findings on the reference questions, including those relating to remedies, the CC will send its final determination to the CAT. It will then send a confidential version to the members of the confidentiality ring, identifying those sections it proposes are redacted in the non-confidential version.
- 3.36 The CC will endeavour to agree redactions with each relevant party so that it can supply the CAT, within about one week, with a non-confidential version of its final determination, suitable for publication. In due course, the CAT would normally publish the non-confidential version on its website; the CC will also publish this on its website shortly after the CAT's publication.
- 3.37 Should the CC's determination be challenged on judicial review grounds, the CC will normally respond to give its views to the CAT and if appropriate to explain its findings.

Section 4: Key documents

Pleadings

- 4.1 The case before the CAT, and the CC, is set out in the parties' pleadings: the appellant's Notice of Appeal, Ofcom's Defence and any interveners' Statements of Intervention.
- 4.2 The pleadings are governed by the CAT's rules. However, it will assist the CC if:
- (a) the pleadings set out the alleged errors as clearly as possible and focus on the key grounds of appeal;
 - (b) the Notice of Appeal clearly and succinctly sets out the alleged error and the factual and expert evidence supporting this allegation of error. It is important that the Notice of Appeal identifies where in the evidence the alleged errors are substantiated;
 - (c) the Notice of Appeal sets out as clearly and in as much detail as possible the proposed relief/remedies;
 - (d) the Notice of Appeal sets out, as far as possible, estimates of the scale of the alleged errors and arguments as to materiality; and
 - (e) the Notice of Appeal includes a glossary and an explanation of the industry and technological structure that supports the supply of services subject to price control. This should be written so as to facilitate a working knowledge of those matters by people who are not experts in technology.
- 4.3 The CC suggests that it will assist all parties if the Notice of Appeal includes proposals for the CAT's reference questions for the CC on price control issues or sets out an explanation of any issues that the CAT should first decide.

Core submissions

- 4.4 All parties will be invited, and main parties required, to make a core submission to the CC. The purpose of the core submission is to provide a mechanism for parties to set out all essential elements of the argument on which they are relying, taking account of developments during the CAT phase and incorporating any points of reply to the pleadings.
- 4.5 Core submissions are intended to refine, rather than replace, the pleadings made to the CAT and will supersede the requirement for an appellant's Reply on the price control matters. They should cover the applicable legal framework and any related matters in so far as they affect the CC's determination of the CAT's reference. Core submissions should also address potential remedies issues and, as far as possible, estimate the scale of the alleged errors to assist the consideration of materiality.
- 4.6 Core submissions will be submitted by all parties at the same time, within a stipulated period (typically two to four weeks) of the reference being made. The core submissions should be concise and will be subject to a limit on length and to rules as to any supplementary materials.

- 4.7 The core submission itself should not include new grounds of appeal or defence, nor should it contain new evidence. In the exceptional circumstance that new evidence is required by the appellant to respond to new points made in the Defence or any Statements of Intervention, it should be contained in an annex. Core submissions must be cross-referenced to the arguments in the pleadings to demonstrate admissibility.
- 4.8 With the exception of challenges on the basis of admissibility and factual accuracy, parties will not be permitted to provide written submissions responding substantively to the core submissions of other parties. Challenges to admissibility and factual accuracy should be as concise as possible and, where relevant, contain cross references to the pleadings or evidence upon which the challenge can be substantiated.
- 4.9 Other than the parties' core submissions, and replies to questions raised by the CC, the CC will not expect to consider further written submissions prior to the provisional determination.

Provisional determination

- 4.10 The provisional determination will be in the same general form as the expected final determination. The final determination will be primarily written for the CAT; it is likely to make use of technical language (as used in Ofcom's decisions and parties' pleadings), and be based on an expectation that the reader has a general knowledge of the industry and regulatory context.
- 4.11 The CC will not publish its provisional determination on its website. Separate versions will be issued for use within and outside of any confidentiality ring (see paragraph 7.1). For ease of reference, these are described as confidential and non-confidential versions, but as noted in paragraph 7.6, non-confidential versions should not be circulated beyond those individuals involved in an appeal.

Responses to provisional determination

- 4.12 These are discussed in paragraph 3.22.

Remedies letter

- 4.13 Where the CC finds, in its provisional determination, that Ofcom has erred in relation to any of the grounds of appeal, it will issue a remedies letter. The remedies letter will generally be issued at the same time as the provisional determination.
- 4.14 The remedies letter will invite the parties to make further submissions on remedies issues, in particular whether the provisional determination necessitates adjustments to the price control; and, if they do, whether the CC should determine the adjustments or whether the matter is better remitted to Ofcom.
- 4.15 The remedies letter will set out the CC's initial proposals as to the way in which errors by Ofcom specified in the provisional determination might be remedied, having regard to the remedies sought by the appellant in its Notice of Appeal. Parties will be invited to comment on these proposals but this does not preclude the parties from making their own submissions on remedies.

Responses to remedies letter

- 4.16 Parties will typically have two to three weeks to respond to the remedies letter.
- 4.17 Parties' proposals concerning remedies must be fully reasoned, explaining why any proposed remedy would be appropriate. The CC considers the timeliness of implementation to be an important factor in assessing the suitability of any remedy. It will assist the CC if the parties make submissions on the materiality threshold that should apply, including both the materiality of individual adjustments and at an aggregate level. The reasoning in support of a proposal will be particularly important where it is proposed that the CC should adopt a methodology different from that adopted by Ofcom in its decision. Parties may also comment on any consequential issues arising from the proposals.
- 4.18 The CC welcomes submissions that have been agreed by the parties. Where agreement on remedies is not possible, parties should nonetheless seek to agree on the appropriate methodology to adopt in determining a remedy.

Final determination

- 4.19 The CC's final determination answering the CAT's reference questions, including, as appropriate, any questions as to the correction of any errors identified, will be sent to the members of the confidentiality ring at the same time as it is sent to the CAT. Parties will be asked to check the document as to (i) whether any other points not already identified need to be treated as confidential, and (ii) that all the items marked as confidential will need to be treated as such.
- 4.20 A non-confidential version of the CC's final determination will be published on the CC's website when the CAT issues its final judgment in relation to the price control matters.

Section 5: Hearings and meetings

Hearings

- 5.1 The CC will not normally conduct its hearings on these references in public.
- 5.2 Hearings will be held with the Appeal Group and CC staff will also participate. CC staff may also conduct meetings with parties.
- 5.3 Hearings are formal, and will normally be led by the Chairman of the Appeal Group.
- 5.4 During the course of the hearing, it may become clear that an oral answer to a question may have to be supplemented by further material. In such cases, the party will normally be given one week to produce the necessary material.
- 5.5 Verbatim transcripts are taken of hearings. Transcripts will be sent to the relevant party after the hearing for checking and the identification of confidential material. The agreed transcript will then be circulated to all parties (see paragraph 7.4). Other parties may comment on the admissibility and factual accuracy of the evidence and arguments discussed during hearings.

Bilateral hearings

- 5.6 Bilateral hearings provide an opportunity for the parties to explain their positions orally directly to the decision-makers and for the CC to test the evidence and explore key issues with the parties. They form part of the CC's process of clarifying and understanding the parties' positions. They are not an opportunity for parties to put questions to the CC about its substantive analysis.
- 5.7 The staff team will contact parties to arrange an appropriate date for this hearing early in the appeal process. The CC will endeavour to schedule bilateral hearings for mutually agreeable dates but without delaying its overall timetable.
- 5.8 Bilateral hearings will take place after core submissions have been filed and will proceed on the basis that parties have already made developed arguments to the CC. At the hearing, the CC will ask questions relating to particular themes arising from the party's pleadings and evidence in order to test the arguments in the core submission and their evidential basis. To assist the parties' preparations, the CC will generally send an annotated hearing agenda to the party ahead of the hearing.
- 5.9 Whilst it will assist proceedings at the hearing if the party has a principal spokesperson who will respond to questioning, the CC will not generally be prescriptive as to who should represent parties at hearings. Whilst a party is likely to be accompanied by its legal or other professional advisers, the CC is likely to wish to discuss the case and evidence with the business and technical specialists from the parties themselves.
- 5.10 A party may, at the CC's discretion, be offered an opportunity to make opening and/or closing statements. Should a party wish to make such statements, it should request this in advance.

Multi-party hearings

- 5.11 The CC may hold a multi-party hearing with parties shortly after the receipt of the reference to discuss technical aspects of the relevant industry. Where possible, it would assist the CC if the parties agree between themselves the substance of a presentation on the technical issues, though each party will have an opportunity to discuss the technical aspects of the appeal from its own perspective.
- 5.12 The CC will also hold a multi-party remedies hearing, discussed in paragraph 3.29, and may, exceptionally, hold other multi-party hearings where the CC would be assisted in its assessment of the reference by such hearings.
- 5.13 Though the CC will seek to avoid discussion of confidential material during multi-party hearings and meetings, should such a discussion be necessary the CC will inform the parties and those participants who are not in the confidentiality ring will be asked to leave for the duration of the discussion. Should a matter concerning confidential material arise during the course of a multi-party hearing, the CC will, as far as practicable, ask for the parties to comment in writing.

Staff meetings

- 5.14 The CC may conduct meetings or make phone calls to clarify specific facts; for example, CC staff may hold meetings with Ofcom or other parties to discuss modelling issues. A transcript will not normally be taken, but, where practical, other parties will be invited to send observers. A note of any meetings or phone calls will be circulated to all the parties.

Section 6: Written questions and oral enquiries

- 6.1 During the clarification and analysis stage of the determination, the CC may raise written questions on the arguments and evidence contained in the parties' pleadings. Questions will be raised in writing, rather than at hearings, when they are likely to involve points of detail or where timely answers will facilitate decision-making.
- 6.2 Whilst full answers to the CC's questions will be expected, these answers should focus on the relevant question, cross-referencing as appropriate to the core submission and pleadings. Answers to written questions should not be used as a means of making broader points and the CC may disregard material that it considers not to be relevant.
- 6.3 The CC will copy questions to all parties and the responding party should do the same in line with the procedure outlined in [Section 7](#). Other parties may comment on the admissibility and factual accuracy of the answers to the CC's written questions.
- 6.4 At various times, and particularly when preparing its reports, the CC will send documents to parties for the purposes of enabling them to verify that they properly cite their arguments and evidence and to identify confidential material. As far as practicable, the source of all material cited will be identified in order to assist the parties in checking such papers.

Section 7: Transparency and confidentiality

- 7.1 In order to take account of the need for disclosure in the interests of fairness and legitimate claims to the confidentiality of sensitive information, the CAT may order that disclosure is made solely within a ‘confidentiality ring’ normally comprising the parties’ named legal representatives and, possibly, other external advisers or experts such as accountants and economists, rather than to the parties themselves.¹⁴
- 7.2 The CC’s approach to confidentiality will be consistent with that adopted by the CAT. In particular, the CC will use any confidentiality ring(s)¹⁵ set up by the CAT. Should parties require that additional individuals be admitted to the confidentiality ring, they should apply to the CAT.
- 7.3 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring. Parties should be aware that the CC may not be able to rely upon material that has not been disclosed within the confidentiality ring. In the absence of prior agreement to the contrary, parties should assume that any information submitted will be made available to the confidentiality ring.
- 7.4 Subject to the provisions on confidentiality below, all documents and emails sent by parties, other than those of a purely administrative nature, should be copied to all parties and to the CAT. The CC will also adhere to this practice and transcripts of hearings and written questions will be circulated similarly.
- 7.5 As a general practice, in the event that the CC attends site visits or holds substantive meetings (other than formal hearings) with parties, other parties will be invited to send observers to these meetings. Observers may need to be members of any confidentiality ring (see paragraph 7.1).
- 7.6 The CC proceedings will be private and the CC does not expect parties to circulate the case materials more widely than necessary. Even non-confidential versions of the provisional determination and the remedies letter may be sensitive.¹⁶ These materials will be shared with the parties to facilitate proper assessment of, and adjudication between, the parties’ arguments. They should not communicate the CC’s provisional determination beyond those employees and advisers directly involved in the case.

¹⁴CAT guide to proceedings, paragraph 13.10: www.catribunal.org.uk/files/Guide_to_proceedings_October_2005.pdf.

¹⁵In general it is expected that there will be one confidentiality ring, and this has been the CAT’s practice to date; the CC will adapt its procedure to fit with the CAT’s approach.

¹⁶Parties should be aware that misuse of market sensitive information may give rise to civil and criminal penalties under the Financial Services and Markets Act 2000 and the Criminal Justice Act 1993.

Annex A: Administrative matters

1. The CC's proposed approach to administrative matters in a given case will be described in correspondence with the parties, including the first day letter. The comments below are included in this annex for the assistance of parties.
2. Prior to the reference of the price control matters to the CC, the parties, when serving pleadings on the CAT, should also provide copies of the same documents to the CC in the manner described below. The serving party should provide two physical copies of the pleadings provided to the CAT. Each copy should be a complete copy of the party's pleadings, ie including witness statements and exhibits, as well as supporting documents. In addition, the serving party should send an electronic copy of the set of documents served on the CAT to the CC.¹⁷ Parties are requested to provide a Microsoft Word copy of any main pleadings and witness statements.
3. The CAT Rules apply to the filing and service of pleadings. Unless agreed otherwise, service of documents concerning the CC's determination of the price control reference on parties will be effected by service on their nominated legal representatives. Subject to the CC's remarks concerning confidentiality, the form of the document is also a matter to be agreed between the parties. However, the parties should advise the CC of the arrangements that have been made for service, and should notify the CC where and how service of documents has been effected.

Handling of confidential materials

4. In relation to documents served on the CC, and subject to prior agreement with the CC, confidential and non-confidential versions should be served at the same time.
5. Documents served on the CC and Ofcom should include all the confidential material on which a party relies. The CC will normally expect material served on the CC to be available to all the members of the confidentiality ring. The CC is not ordinarily able to rely on any material which has not been the subject of disclosure between the principal parties without their agreement.
6. In order to assist the CC and the parties:
 - (a) confidential versions of documents should indicate where material is to be excised for the non-confidential version of the document; and
 - (b) non-confidential versions of documents should indicate where material has been excised.
7. In relation to service on parties other than Ofcom, documents to be received outside the confidentiality ring should exclude material in respect of which confidentiality is claimed.
8. Where there is any dispute as to whether material should be regarded as confidential, the CC would hope that this could be resolved by agreement between the CC and parties. However, if necessary, the CC or parties will be able to apply to the CAT for directions.

¹⁷The CC's IT systems will not usually accept emails exceeding 10MB in size. Parties may wish to submit a CD instead.

Format for responses and submissions

9. Parties should send correspondence to the CC electronically or on disc wherever practicable, in a format compatible with Microsoft Office programs, or as tagged PDF files. Spreadsheets, charts and all other digital source data files should be submitted, as far as possible, in Microsoft Excel or their equivalent original format, to facilitate our internal analysis. Spreadsheets should include underlying formulae.
10. When sending material electronically or making up discs, parties should ensure that each file is given a fully explanatory title and that the files are sent without being grouped into folders and subfolders. 10MB is the limit for acceptance by the CC system of emailed material in any one message.
11. In the case of urgent material, parties should check in advance that the recipient is available to receive it.
12. The CC will send some documents to parties as tagged PDF files and some as Microsoft Word files.

Annex B: Principles for the consideration of remedies

1. The CC will not expect to devise any remedies other than those that are directly necessary to correct any errors identified in its finding, provided this does not lead to an unreasonable outcome.
2. Remedies will normally follow an approach that is consistent with that adopted in Ofcom's original decision.
3. Simplicity and ease of implementation will be a key consideration in selecting remedies.
4. In general, the CC will try to bring the price control to where it would have been if Ofcom had not made the identified error. It may be that Ofcom would or could have made a number of different decisions at that stage. Under these circumstances the CC would normally seek to diverge as little as possible from the path that Ofcom actually took.
5. Remedies are only imposed to address problems with the challenged price control. Whilst the CC's determination of the reference questions may be taken to provide some guidance for subsequent price controls, remedies will not be designed with this in mind.

Competition Commission publications

www.competition.commission.org.uk

- CC1 Competition Commission Rules of Procedure
- CC2 Merger Assessment Guidelines (Revised)
- CC3 Market Investigation References: Competition Commission Guidelines
- CC4 General Advice and Information
- CC5 Statement of Policy on Penalties
- CC6 Chairman's Guidance to Groups
- CC7 Chairman's Guidance on Disclosure of Information in Merger and Market Inquiries
- CC8 Merger Remedies: Competition Commission Guidelines
- CC9 Water Merger References: Competition Commission Guidelines
- CC10 Competition Commission: The Energy Code Modification Rules
- CC11 Guide to Appeals in Energy Code Modification Cases
- CC12 Disclosure of information by the Competition Commission to other public authorities

