Cost recovery in telecoms price control references: Guidance on the CMA's approach

Consultation document CMA5con – July 2013

Herbert Smith Freehills LLP Response

Introduction

1. This is the response of Herbert Smith Freehills LLP to the CMA's consultation on its draft guidance which the CMA proposes to issue in order to explain its new power to recover the costs it incurs in connection with price control matters under section 193 of the Communications Act 2003 (the **"Act"**) in certain circumstances (the **"Draft Guidance"**). Herbert Smith Freehills LLP has represented clients in many of the price control matters which have been brought before the Competition Commission pursuant to section 193.

2. The comments in this response are those of Herbert Smith Freehills LLP and do not represent the views of our individual clients.

Paragraph 6 of the Draft Guidance: exemption in respect of Ofcom

3. While Ofcom is exempt from paying some or all of the CMA's costs pursuant to section 193A(2) of the Act, the guidance should reflect the principle that any costs attributable to Ofcom should not be charged to another party (in particular, for example, if Ofcom's conduct had led to an appeal being brought (even though the appeal was unsuccessful), prolonged the proceedings or if it had otherwise caused additional cost to be incurred). It may therefore be necessary as part of the costs assessment process for the CMA to assess the impact of Ofcom's conduct on costs even though Ofcom is itself exempt.

Paragraph 6 of the Draft Guidance: approach to costs against interveners

4. As regards liability of costs for interveners (as opposed to appellants), while there is no legislative exemption from costs liability for interveners (unlike, for example, Ofcom), we suggest that the CMA's practice should not operate to discourage interventions (which have been permitted by the Competition Appeal Tribunal).

5. Accordingly, we suggest that the CMA adopts – and reflects in its guidance – an approach which is generally consistent with the practice of the Tribunal.

6. The general principle in the Tribunal is that costs should lie where they fall for interveners: they are generally not entitled to costs if they are successful, nor are they usually liable for costs should they be unsuccessful.[1] This approach reflects the principle that, as the Tribunal put it:

[1] See, e.g., *London Metal Exchange v OFT* [2006] CAT 19; *Institute of Independent Insurance Brokers v D–G of Fair Trading* [2002] CAT 2, 78; *Freeserve.com plc v D–G of Telecommunications* [2003] CAT 6;

"*[t]here is a strong public benefit in not discouraging legitimate interventions, either in support of or in opposition to regulatory decisions. Equally, the Tribunal recognises the public interest in not unduly encouraging interventions, as to do so may have implications for the expeditious conduct of proceedings to the detriment of the main parties. For those reasons, the Tribunal's general approach to interveners' costs has been neutral.*"[2]

7. These principles apply equally to interventions in price control matters referred to the Competition Commission / CMA pursuant to section 193 of the Act.

8. Indeed price control matters referred pursuant to section 193 are a part of appeals brought before the Tribunal pursuant to section 192 of the Act, and the Tribunal controls the admission and treatment of interveners as parties in such appeals pursuant to its rules and case law. It is therefore appropriate that interveners' liability for costs in the Competition Commission / CMA part of proceedings is treated consistently with the practice in the Tribunal. Moreover, the Tribunal recognises that interveners acting properly can contribute to the proceedings and that, therefore, the approach to costs should not operate to discourage interventions. The appropriate place to control the admission and scope of interventions is at the time the Tribunal decides on applications to intervene and when the Tribunal makes directions which are applicable to interveners (which the Tribunal regularly does; for example, by limiting the scope of interventions and/or minimising duplication).

9. It is therefore suggested that the CMA should adopt the principle that it will not ordinarily seek costs from interveners, unless an intervener has materially added to the costs of the inquiry, for example, by going beyond the scope of intervention provided for by direction of the Tribunal, and that this principle should be reflected in the Guidelines.

10. More generally, we suggest that the Guidelines should clarify that, if the CMA seeks a costs order against a party, that party will only be liable for the costs attributable to it, and will not be liable for additional costs caused by other parties including parties which may not themselves be liable for costs (such as interveners or Ofcom).

Paragraph 7 of the Draft Guidance: proposal to make a Costs Order against a party

11. Paragraph 7 of the Draft Guidance provides that "*when the CMA proposes to make a Costs Order against a party, it will give them the opportunity to comment in writing.*"

12. In circumstances where a party is faced with a potential costs order, it will be important for them to understand the basis of that order as well as (as is currently contemplated in the Draft Guidance) having an opportunity to respond. Accordingly, we suggest that the CMA should

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Pernod-Ricard SA and Campbell Distillers Ltd v OFT [2005] CAT 9, 16; *Hutchison 3G (UK) Ltd v Ofcom* [2006] CAT 8; *Vodafone Ltd v Ofcom* [2008] CAT 39, 25; *Independent Media Support Ltd v Ofcom* [2008] CAT 27.

2 *Vodafone Ltd v Ofcom* [2008] CAT 39, 25.

provide at least the following information when the CMA informs a party that it proposes to make a Costs Order against it (and the Guidance should confirm this):

a. the proposed amount of costs which it would seek against the relevant party, as well as any costs it seeks against any other parties;

b. an explanation of the breakdown of the proposed amount of costs, how they have been derived, and, if applicable, how they have been allocated amongst relevant parties and the reasons for such allocation;[3] and

c. the proposed wording of the Costs Order.

13. Circumstances may arise where a party disagrees with the CMA's proposal. If agreement cannot be reached between the party and the CMA, we suggest that there should be a mechanism whereby the matter can be resolved independently, for example by an independent third party costs assessor at the request of the party challenging the costs order. Such a mechanism is envisaged in Ofcom's recent Guidelines on Payment of Costs and Expenses in Regulatory Disputes[4] and a similar mechanism could be adopted by the CMA in the present context (see, for example, paragraph 3.34 of Ofcom's Guidelines).

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[3] The points set out in paragraph 3.30 of Ofcom's Guidelines on Payment of Costs and Expenses in Regulatory Disputes (4 September 2013) (http://stakeholders.ofcom.org.uk/binaries/consultations/payment-costs/statement/guidance.pdf) could be reflected in the CMA's Guidelines.

[4] Ibid.