BT's Response to the consultation by the Competition and Markets Authority (CMA):

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

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Executive summary

BT considers that it is sensible for the Competition Commission's Guidelines to be amended to include a section setting out what will be the CMA's approach to costs recovery in telecoms price control references. However, the proposed guidance lacks detail and would benefit from being further fleshed out in order to provide all parties to such references with a sufficiently clear indication as to how the CMA will likely exercise its discretion to direct payments towards its costs in practice.

In summary, BT identifies the following issues which should be considered and addressed before the Guidance is finalised:

- It would help if the Guidance set out the principles it will use to calculate the costs that it has incurred in any particular case. The Draft Guidance is silent regarding how the CMA will calculate the costs that it has incurred;
- The Guidance should clarify that the process for recovery of costs applies only to the costs of the procedure before the CMA itself and not to any eventual review of a final determination by the CAT;
- The Guidance should set out more detail on how the CMA will notify a party of a proposed Costs Order: BT suggests that a preliminary indication of the CMA's views on costs should be set out in its provisional determination;
- It would be helpful if the types of matters to be covered in the parties' submissions regarding a proposed Costs Order were described in greater detail in the Guidance – BT makes suggestions as to what these matters are likely to be;
- The CMA should consider how appeals against Costs Orders would function in practice and, if possible, provide more detail on this in the Guidance; and
- The CMA should re-state in the Guidance its adherence to the principles of independence.

1. Introduction.

BT welcomes the opportunity to comment on the CMA's Draft Guidance on the approach it will take to costs recovery in telecoms price control references (the Draft Guidance). Given the number and nature of telecoms references, it will be important to all those involved to understand the way in which the CMA will exercise its discretion and the use of the new power given to it as a result of the amendments made to the Communications Act 2003 (CA03) by the Enterprise and Regulatory Reform Act 2013. Clear guidance on costs implications will also assist communications providers to take appropriate commercial decisions on whether, and if so, to what extent, they wish to undertake or engage with a price control review.

Whilst the Draft Guidance is helpful in that it reprises succinctly the legislative powers to be granted to the CMA, it is silent on a number of conceptual and procedural aspects which will be important in practice. We identify below a number of issues that we anticipate may arise once the new regime is in operation and invite the CMA to extend the Draft Guidance to cover these.

2. Identifying the way in which the CMA will calculate its costs.

The Draft Guidance is entirely silent on how the CMA will calculate the costs that it has incurred in any particular telecoms price control review.

We understand that the CA03 rules are broadly similar to those which apply in the water industry under the Water Industry Act 1993. We have reviewed the way in which the Competition Commission (CC) dealt with the making of a costs order in the 2010 Bristol Water plc water price limits determination case. Unfortunately, the CC's decision in Bristol Water gives no indication of how costs were calculated in that case. The final determination[1] merely stated at paragraph 11.2:

> *Our costs (which Bristol Water will have to pay to the Secretary of State under the conditions of its licence) amounted to approximately £650,000 (including external engineering consultants).*

The CMA's consultation document states that the costs incurred by the CC in the last four price control references ranged between £250,000 and £750,000 (i.e. of similar size to Bristol Water). However, there is no description as to how those sums are calculated or breakdown of what cost elements were included. In particular, no indication is given as to whether the costs are calculated based on some form of nominal hourly rate or based on an allocation of the relevant direct salary costs of the relevant individuals. Nor is there any discussion as to how fixed or shared cost should be allocated, if at all, between the various services, including price control references, benefiting from those costs.

We recognise that an order for the costs of the CMA is different to an inter-partes costs order but, nonetheless, we find it hard to imagine a situation where costs at such a level would normally be determined on the basis of a "bottom line" number only. We suggest that it is not unreasonable for the CMA to set out "on the record" the key parameters it anticipates it will use when calculating its costs and we invite the CMA to include this in its Draft Guidance. It is worth noting in this regard the

[1] http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2010/fulltext/558_final_report.pdf

recent observations of the Competition Appeal Tribunal, where a potential method for calculating such costs was espoused.[2]

We suggest that there is a distinction between the process of calculating how much any price control reference has cost the CMA and the decision as to the size of any particular Costs Order. The formula for determining costs actually incurred should be standard from case to case, whilst the process of determining the quantum of any particular Costs Order will remain a matter of discretion in each particular case. This particular proposal is only concerned with the first of those two issues.

Providing such transparency of how the CMA calculates the costs it incurs in any particular case will have two benefits. Firstly, it may help parties to understand the costs they might be likely to incur in any future case they bring (and lose) and therefore help the decision making process of whether or not to bring an appeal. Secondly, it will help a party facing a Costs Order to frame its response to the notification of the proposed order in a fair way, rather than having to "shoot in the dark".

We anticipate that any such statement of cost calculation principles would need to cover:

- Whether the CMA will calculate its costs only by reference to external costs incurred (e.g. counsel, or any other experts it instructs) or whether it will only include internal labour costs and/or other shared or fixed costs;
- If internal labour costs will be included, the grade/qualifications of people likely to be involved in any particular matter and the likely charge rates for those people. Again, it is worth taking account of the CAT's comments in the recent mobile call termination costs judgment;
- If other shared or fixed costs are to be included, how those cost will be allocated.

Then, when notifying a party of its proposal to make a costs order, the CMA could identify if it has adhered to its published guidance or, if not, the extent to which it has departed from the guidance and the reasons for it.

3. The limits to a Costs Order

BT's understanding is that CMA may not seek to include in a Costs Order the costs incurred by the CMA in making representations to, or appearing before, the CAT if one of the parties to a price control review was to apply to the CAT for a judicial review of the CMA's final determination, it being a matter for the CAT as to whether to make a cost order in such circumstances. Our understanding of section 193A is that the CMA's power to make a Costs Order will be limited to the costs incurred up to and including the making of the final determination, but no further.

We invite the CMA to confirm this point in the final Guidance.

[2] *BT and others v Ofcom (Mobile Call Termination)* [2012] CAT 30, paragraph 39.

4. The process for notification of the CMA's proposal to make a Costs Order against a party and provision of an opportunity to comment.

Section 193A CAO3 requires that, if it is minded to make a Costs Order, the CMA must (a) give the party against whom the order will be made the opportunity to comment in writing and (b) make the order as soon as reasonably practicable after the making of its determination.

We understand that in the Bristol Water plc case the question of costs was not dealt with until the very end of the case. In particular, costs were not addressed at the provisional determination stage. This does not appear to be a particularly satisfactory way of dealing with the issue of the CMA's costs in communications cases where there may be a number of parties, both appellants and interveners, interested in the CMAs costs proposals in a given case.

Assuming that the CMA will adopt broadly the same processes as the CC has to date, we suggest that if it is minded to make a Costs Order, this is a matter which the CMA could identify in its provisional determination. The subject party could then provide its comments in writing at the same time as responding to the provisional determination.

This approach would have the following benefits. Firstly, it would not introduce delay into the process which might occur if the question of costs only came up for consideration for the first time after the CMA had issued its final determination and disputes then arose about the principle of the order or the amount. Secondly, it would make it clear whether the CMA regarded a particular party as having "won" or "lost".

We recognise that Section 193A requires that a Costs Order must set out the total costs incurred by the CMA in connection with the reference (as well as specifying the proportion of those costs to be paid by each party) and that at the point in time when it issues its provisional determination the total costs may not be known (because the CMA will not know how extensive the responses to the provisional determination will be, or how much work the remedies stage will involve). However, we believe that at the provisional determination stage the CMA could at the least identify (a) who it is minded to make an order against, (b) the proportion of costs to be paid by that party including any aggravating or limiting factors and (c) the basis on which the CMA is minded to calculate its costs and (d) the amount of costs incurred to date on that basis. If then, in the final determination (having considered the representations from the party which is to be the subject of the Costs Order) the CMA decided to make a Costs Order, the only issue remaining to be determined would be the amount of costs to be paid for the period between the provisional determination and the final determination.

5. The process for commenting in writing on a proposed Costs Order

Paragraph 7 of the Draft Guidance merely states that when the CMA proposed to make a Costs Order against a party, it will give them the opportunity to comment in writing. Again, we believe that amplification of the guidance to explain how such representations might be framed, and how the CMA will form a view on any representations received would be helpful.

The key areas on which representations may be necessary are:

Eligibility for a Costs Order:

- Whether the party which is the subject of the proposed Costs Order has in fact won or lost and hence whether they are "eligible" to be the subject of a Costs Order;
- Whether an order is appropriate if the CMA rules that Ofcom "took the wrong route" but that in the particular circumstances the outcome was only marginally affected.

The proportion of the costs to be borne by the "losing" party:

- If the subject has lost in whole or in part, and hence the extent to which the CMA has upheld that party's arguments;
- The extent to which the costs were attributable to the involvement in the appeal of the party; and
- The conduct of the party.

BT is particularly concerned about the position of a party, who as the subject of a price control matter intervenes on behalf of Ofcom in support of the regulators defence, and where the appellant wins. This is discussed in section 8 below.

The calculation of the actual costs incurred by the CMA:

- How are the costs of the CMA calculated – BT would suggest this should be by reference to published costs calculation principles as described in section 2 above.

Whether the costs of the CMA were reasonably incurred:

- Did the CMA undertake more work than was necessary to deal with any particular relevant issue – in other words, has there been inefficiency on the part of the CMA? The parties to the proceedings should not be required to cover all costs, regardless of whether or not they have been efficiently incurred. Indeed, we believe it would be in the interests of all parties if the CMA was subject to a spur to be efficient, i.e. if it knew that if it was inefficient, it would not recover its costs.
- Has the CMA caused work to be undertaken which was not necessary? If so, and if it is clear the work in question was not relevant to disposal of the issues the subject of the review, then the parties should not be expected to foot the bill for this. An example of this might be if the CMA wished to discuss and test out remedies which are, in truth, wholly fanciful.

Other relevant factors that may need to be considered before a Costs Order is made:

- In circumstances where an appeal was lost, but the ruling of the CMA determined important issues of principle that would be of use in other price control reviews in future, the CMA should consider whether in those particular circumstances an order was appropriate;
- Similarly the CMA should be able to consider if it is appropriate to make an order if the reason for the appeal was because there was a singular lack of clarity in the regulator's decision;
- Whether the making of a very large Costs Order against a small CP could be seen by other CPs as a potential "barrier to appealing" in future.

We believe it would be helpful to all parties if the CMA were to signal in its final Guidance a willingness to hear submissions in any of these areas.

6. Appeals against Costs Orders

Paragraph 9 of the Draft Guidance notes that a Costs Order made by the CMA under CA03 can be appealed to the CAT, but it provides no guidance as to how this would work in practice. It may be that this is ultimately a matter for the CAT, but we believe it is a relevant point to raise now so that consideration can be given to how the process could, in practice, work most efficiently on an end to end basis.

At one end of the spectrum, it may be argued that the Costs Order is a "new decision" and hence that any challenge to it would have to be by way of a separate new appeal following the conclusion of the price control review. We consider, however, that that would be a wholly inefficient way of proceeding, even though as currently drafted, that would mean that the appeal would be heard "on the merits" and hence, could, presumably, be corrected by the CAT making its own final ruling on the matter.

We believe that it would be preferable for any appeal against a Costs Order to be dealt with by the CAT as soon as practicable and whilst the issues are still fresh in the parties minds. This suggests that the logical way for the appeal against the costs order to be disposed of would be for it to be heard by the CAT as soon as the matter has been returned to the CAT from the CMA, i.e. either alongside or immediately after any judicial review hearing by the CAT of the CMA's decision and before the CAT makes its final decision[3].

We note that if the CAT makes a decision which is different from the CMA's final determination, then the CMA can make a new/different Costs Order which has regard to the CAT's decision. In such circumstances, if the CAT overturns the CMA's determination and then the CMA makes a new Costs Order, we see no reason why the matter could not then be remitted straight back to the CAT for any appeal against the new Costs Order to be heard. Although this would involve a degree of toing and froing, we believe it would still be considerably more efficient than if a completely new appeal had to be commenced completely de novo.

7. Maintenance of the CMA's Quasi-Judicial Independence

An appeal against Ofcom's decision on a price control review is the first instance judicial appeal of an administrative decision. The role of the CMA in price control review appeals will remain essentially an adjudicatory function (especially so if price control matters are in future referred directly to the CMA)[4]. However, the CMA is ultimately an administrative body.

[3] We note, though, that this would be an appeal under Section 192(1)(e) CA03,and hence would be heard on the merits, pursuant to section 195 – with the appellant having to specify the grounds of appeal as per the requirements of section 195.

[4] We make no comment here on whether or not that would be a good thing, but are merely noting that this possibility is contemplated in the BIS consultation on Streamlining Regulatory and Competition Appeals.

BT considers there would be merit in the CMA re-stating its adherence to principles of independence in order to avoid any undue allegations that decisions of the CMA in relation to Costs Orders could be influenced by Government policy through its *Strategic Steer.*

8. Recognising the differences between price control references in the telecoms sector and other industries

Generally, telecoms markets are considerably more competitive than other regulated utility sectors. Decisions of Ofcom on telecoms price control reviews matter not only to the communications provider which will be subject to the regulatory control, but also to other communications providers who purchase the services provided by the regulated company.

The consequence is, put shortly, that if Ofcom is perceived to be overly generous to the regulated party, an appeal will be brought by other communications providers who believe they are being asked to pay too much. On the other hand, if Ofcom is perceived by the regulated company to have made a decision which is too harsh, the regulated company will appeal.

A review of all the price control review appeals under the CA03 shows that price controls imposed on the mobile operators tend to be appealed by both the regulated mobile operators and other parties who buy the relevant services from them. Price controls imposed on BT (as a fixed line operator) have been challenged more often than not by parties other than BT, and so on many occasions, BT has intervened in support of Ofcom rather than to oppose Ofcom.

This environment can be contrasted from, say the water industry where the appeals brought by each of Bristol Water plc and Sutton and East Surrey Water plc were simple "regulated party against regulator" appeals.

This is an important distinction which is likely to be of particular relevance in considering the position of an intervener who intervenes in support of Ofcom, only to find that the decision they support is over-turned. In such circumstances, the costs of the CMA cannot be recovered from Ofcom. But what proportion of them should be recovered from the intervener who has supported Ofcom? Presumably, in the interests of fairness, the starting point will <u>not</u> be that all of the costs should be paid by the intervener, and we assume that the CMA will consider the extent to which costs were attributable to the involvement of that intervener and its conduct. Indeed, in such a case the intervener's involvement may well be vital to the efficient disposal of the reference given the unique evidential position that the intervener holds. Absence of clarity as to how the CMA will approach parties in such a position may discourage such interventions with a consequential impact on the quality of determinations and therefore justice.

We suggest that the starting point should be to consider the extent to which the intervener added to the duration of the case over and above the actions of Ofcom in defending it. However, the CMA should also, in such circumstances, consider the conduct of Ofcom as well as the conduct of the intervener. It may be that Ofcom decides to "*go light*" in its defence of its original decision and that the intervener finds that it is left to "*do the running*" in support of the original decision. In such circumstances, where a significant proportion of what the intervener does is in fact the job that Ofcom

would have done had it not "gone light" in its defence of its decision, then it would be unreasonable to pass those costs to the intervener.

For this reason, we suggest that the reference, in the third bullet in paragraph 4 of the guidelines, to "*the conduct of the party*" should be broadened to cover "*the conduct of the parties*" – so as to make it clear that the CMA is entitled to take into account how other parties (in the example given above this would mean Ofcom) have behaved.

BT plc
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