



COST RECOVERY IN TELECOMS PRICE CONTROL REFERENCES: GUIDANCE ON THE CMA'S APPROACH

EE response to July 2013 consultation
document

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Introduction

EE Ltd (EE) welcomes this consultation by the Competition and Markets Authority (CMA). As the UK's leading digital communications company, the ability to rely upon an efficient, effective and stable appeals regime which promotes robust, proportionate and well-reasoned administrative decisions is paramount to EE's ability to continue to thrive and invest in the UK economy.

Costs orders represent an important way of ensuring that appeals are responsibly conducted by all concerned. Based on past costs incurred by the Competition Commission (CC), the costs incurred by the CMA in determining telecommunications price control references under the Communications Act 2003 (CA03) are likely to continue to be significant.¹ The way in which the CMA exercises its new powers of cost recovery under section 193A of CA03 and the guidelines it issues in this respect are therefore an important aspect of ensuring that the telecommunications industry can continue to enjoy an effective, accessible and efficient appeal mechanism.

Comments on new draft guidance

Flexibility

EE supports the proposed inclusion in section 8(1) of the wording confirming that the CMA will proceed in each instance on a case by case basis, retaining flexibility to meet circumstances as they arise. In EE's experience, no two price control references under CA03 are exactly alike and it is important that the CMA does retain flexibility to handle each case individually to ensure a just and fair outcome which best promotes the interests of consumers in relevant markets.²

Costs orders for interveners

EE has some reservations about the reference to interveners proposed to be included at footnote 3 to section 8(2) of the guidance. EE considers that the CMA should be careful to ensure that neither the guidance nor the exercise of the CMA's new powers to make cost recovery orders as applied to interveners act as an inadvertent barrier to helpful, focused, and non-duplicative interventions in support of one of the main parties to the appeal.

CMA costs

EE welcomes the acknowledgement in section 8(2) of the draft guidelines that a costs order may relate to only *some* of the CMA's costs, which is consistent

¹ See §1.7 of the consultation, which estimates these as ranging between £250,000 and £750,000 in the last four price control references under CA03.

² We note that the CAT has recently given support to this principle in its response to the Department of Business, Innovation and Skills' (BIS') consultation on *Streamlining Regulatory and Competition Appeals* – see §87 - <http://catribunal.org.uk/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html>

with the wording of CA03 section 193A(2). Consistent with Competition Appeal Tribunal (CAT) Rule 10, a price control reference to the CMA will only be made in circumstances where the CAT has already determined that the appeal is valid and not vexatious. Given this, it would seem to be appropriate, regardless of whether or not a reference succeeds, for the CMA to bear some of the costs it incurs in considering any reference. It may be helpful for the guidelines to provide further clarity on this point.

In relation to section 8(3), EE would like to see an acknowledgement by the CMA that it will strive to run its internal operations efficiently, so as to keep the costs it incurs to the minimum necessary to perform its functions fully and effectively.

In relation to section 8(5), in addition to comments along the lines of those suggested above, EE would also like to see the guidelines include a statement that the CMA will provide a sufficiently detailed breakdown of its costs to the parties on which it proposes to impose a costs order to enable them to verify that the costs are based on reasonable rates, and that the CMA has not included any costs for duplicated or unnecessary work done or unreasonable amounts of time spent.

Costs orders where Ofcom is unsuccessful

EE considers that section 8(6) of the draft guidelines should be deleted.

The fact that the CMA cannot require Ofcom to pay any of its costs is already covered in section 8(4) of the draft guidelines. The first sentence of section 8(6) is therefore redundant.

In relation to the second sentence, EE appreciates that the CMA appears to have sought to cast the guidance in neutral terms. However, EE is concerned that even the mere inclusion of text in the draft guidelines regarding the possibility for the CMA to make costs orders against successful parties (i.e. where Ofcom is unsuccessful) may be misinterpreted as an implicit indication by the CMA that such an approach may be considered appropriate in some cases. This would involve a departure from the CAT's current approach that: *"In very general terms, the CAT's starting point is that the 'loser pays' and this principle tends to be applied whether the loser is a regulator or a privately funded party"*.³ It could also risk deterring smaller operators from appealing regulatory decisions, even if the decisions are clearly wrong, putting in jeopardy the concept that access to justice should be available to all firms and affected parties. EE therefore recommends that the guidelines are silent on this point, which will leave the CMA with full flexibility to apply its powers under the CA03 without the risk of creating any unintended consequences.

³ §88 of the CAT response to the BIS consultation on *Streamlining Regulatory and Competition Appeals* - <http://catribunal.org.uk/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html>