

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

Summary of responses to the consultation

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This publication is also available at: www.gov.uk/cma.

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1 INTRODUCTION AND SUMMARY

Background

- 1.1 The Enterprise and Regulatory Reform Act 2013 (ERRA13) establishes the Competition and Markets Authority (CMA) as the UK's competition and consumer authority. The CMA will take on the functions of the Competition Commission (CC) and many of the competition and consumer functions of the Office of Fair Trading (OFT). The CMA was established on 1 October 2013 and will gain its full functions and powers on 1 April 2014, when the OFT and CC will be abolished. The CMA will be a single centre of expertise in UK markets focusing on public competition and consumer enforcement, guidance, advocacy and leadership for the UK. Its primary duty will be to promote competition, both within and outside the UK, for the benefit of consumers.
- 1.2 Like the CC, the CMA will have a range of regulatory appeal and reference functions under various sector specific legislation. These functions will include the ability to determine references of price control matters¹ made by the Competition Appeal Tribunal (CAT) under section 193 of the Communications Act 2003 (CA03) (price control references).
- 1.3 A series of draft guidance documents were prepared to assist the business and legal communities and other interested parties in their interactions with the CMA. *Cost recovery in telecoms price control references: Guidance on the CMA's approach* (CMAcon5) (Draft Guidance) was one of a number of draft guidance documents published for public consultation on 15 July 2013.² The Draft Guidance explained the new power introduced by the ERRA13 to make an order in respect of the costs the CMA incurs in connection with a price control reference.³ The consultation document accompanying the Draft Guidance (Consultation Document) sought comments either of a general nature or on any specific points. The consultation (the Consultation) on these documents closed on 6 September 2013.
- 1.4 In parallel with the Consultation, the Department for Business, Innovation & Skills (BIS) consulted on a non-binding ministerial statement of strategic priorities for the CMA (the Steer), alongside a first tranche of draft secondary

¹ A 'price control matter' is defined as the imposition of any form of price control by a significant market power (SMP) condition authorised by sections 87(9), 91 or 93(3) of the CA03.

² These documents are available at www.gov.uk/government/consultations/competition-and-markets-authority-guidance-part-1.

³ Section 193A of the CA03.

legislation relevant to the CMA's exercise of some of its other functions.⁴ Although referred to in this document, the proposed secondary legislation fell outside the scope of the Consultation Document. BIS has published a response to its consultation on the Steer⁵ and will be publishing a separate response to its consultation on the draft secondary legislation.

Purpose of this document

- 1.5 Four written consultation responses relating to the Draft Guidance were received.⁶ This document sets out a summary of the responses received on the Draft Guidance and the CMA's views on those responses.
- 1.6 This document should be read in conjunction with the Consultation Document. It is not intended to be a comprehensive record of all views expressed by respondents: respondents' full responses are available on www.gov.uk/cma. Nor is this Summary of Responses a definitive statement of the CMA's policy or procedures in relation to the exercise of its cost recovery powers under section 193A of the CA03. Parties seeking guidance on those procedures should refer to the final published version of *Cost recovery in telecoms price control references: Guidance on the CMA's approach* (CMA5) (Guidance), also available on www.gov.uk/cma. The Guidance will be incorporated into the existing CC guidance (*Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines* (CC13)) which has been adopted by the CMA Board.

⁴ Available at www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation.

⁵ Available at www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation.

⁶ Annexe A lists the 4 organisations that provided responses on the Draft Guidance.

2 ISSUE BY ISSUE COMMENTS

The CMA's costs

Summary of responses

- 2.1 All respondents asked for more detail on what the CMA's costs may comprise. In particular, more detail was sought on:
- the types of costs that the CMA may recover (for example, whether it includes the CMA's internal costs) and
 - the calculation of those costs (for example, whether hourly rates would be used or salary costs of staff).
- 2.2 Some respondents said this level of transparency is important because it helps parties to understand the costs they might be likely to incur in any future case and therefore helps parties to decide whether or not to bring an appeal. They also said it will help a party facing a costs order to frame its response to the notification of the proposed order.
- 2.3 Although recognising the differences with inter partes costs, one respondent pointed to the recent observations made by the CAT, where a potential method of calculating such costs was espoused (*British Telecommunications plc and others v Ofcom (Mobile Call Termination)* [2012] CAT 30).

The CMA's views

- 2.4 The CMA's costs refer to the costs of the organisation in determining the price control reference and are therefore not limited to those costs that are typically recoverable in litigation (that is, inter partes costs). The costs the CMA will seek to recover will include all of its staff costs and member costs, as well as an allowance for central office overheads and any costs associated with obtaining external advice (legal or otherwise).
- 2.5 When calculating the CMA's internal costs, the CMA expects staff and members costs to be calculated using hourly or daily rates including an allowance for any national insurance and pension contributions.
- 2.6 The CMA agrees that transparency is important and acknowledges that more detail on what its costs will comprise can assist parties in deciding whether or not to bring an appeal or to intervene in an appeal. The CMA has therefore reviewed the Guidance and amended and added to it in light of these comments (see paragraph 8.2).

The contents of the costs order

Summary of responses

- 2.7 All respondents requested the costs order contain more detail than proposed in the Draft Guidance and include, for example, a breakdown of the costs the CMA is proposing to recover and how they have been derived. Two respondents said this would 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.

The CMA's views

- 2.8 The ERR13 requires the costs order to set out the total costs incurred by the CMA in connection with the price control reference and to specify the proportion of those costs to be paid by each party to the appeal in respect of whom the order is made. The CMA notes that it may provide additional information in relation to the make up of its costs on a case-by-case basis.
- 2.9 The CMA will also set out its reasons for apportioning the costs as specified in the costs order and a statement to this effect has therefore been included in the Guidance.
- 2.10 The CMA has reviewed the Guidance and amended and added to it in light of these comments (see paragraphs 8.5 and 8.6).

Consultation on the proposed costs order

Summary of responses

- 2.11 Most respondents requested more detail on how the costs order would be made and how parties would be consulted.
- 2.12 One respondent listed the types and level of information the CMA should provide a party when it informs them that it proposes to make a costs order and give them an opportunity to respond.
- 2.13 Another respondent suggested that the CMA's provisional determination could include a draft 'statement of costs'. They said at this stage in the process the CMA could at least identify: who it is minded to make an order against, the proportion of costs to be paid by that party including any aggravating or limiting factors, the basis on which the CMA is minded to calculate its costs and the amount of costs incurred to date on that basis.

The CMA's views

- 2.14 The CMA agrees that parties should be given the opportunity to comment on its proposed costs order before it is made. The Guidance has been amended to clarify this commitment. The CMA has not included a precise period of time within which it expects to make its costs order nor how long parties will have to comment on the proposed order. The CMA will determine these matters on a case-by-case basis. It is important that the CMA has flexibility in this process, particularly in the early stage of this reform.
- 2.15 The CMA acknowledges but does not agree with the suggestion that a draft 'statement of costs' should be provided at the provisional determination stage. The CMA considers that the appropriate time to inform the parties of the costs the CMA has incurred is when it makes the final determination. The CMA's total costs, the portion of those costs it proposes to recover and from whom, will depend on the substantive outcome in the final determination and the time and effort expended by the CMA in connection with the price control reference. The consultation process (as described in paragraph 8.7 of the Guidance), means that parties will have the opportunity to make representations on the proposed costs order (including the CMA's cost figures and apportionment of them) before it is made.

Apportioning costs***Summary of responses***

- 2.16 Several respondents expressed concern that the Draft Guidance implies the possibility of the CMA making a cost order against a successful party where Ofcom is unsuccessful and sought clarity on this matter.
- 2.17 Another respondent said the way this issue is addressed in the Draft Guidance could also risk deterring small operators from appealing regulatory decisions and recommended that the Guidance is silent on this point, leaving the CMA with full flexibility to apply its powers without the risk of creating unintended consequences.

The CMA's views

- 2.18 The Draft Guidance emphasised that the CMA's approach to apportioning costs will develop on a case-by-case basis. It is particularly important that the CMA retains the flexibility to do this, having regard to all the relevant circumstances of the case including, for example, how it deals with situations where Ofcom is an unsuccessful party. The CMA believes the Draft Guidance

was clear on its approach to this issue and did not imply the possibility of the CMA making a costs order against a successful party. The CMA has therefore decided to retain the approach in the Draft Guidance, but has made some minor changes to the Guidance to clarify this position.

- 2.19 The CMA notes the requests for more guidance about the way it will recover some or all of its costs, particularly in situations where Ofcom is an unsuccessful party. While it has retained the approach in the Draft Guidance, the CMA notes the following:
- the Government's primary objective for introducing this cost recovery provision was to cause potential appellants to consider carefully which points in Ofcom's decision are worth appealing. It was not intended to guarantee that the CMA recovered all of its costs
 - the concept of a successful/unsuccessful party is not binary. For example, one party may 'win' on some but not all of the points raised in the appeal. The CC's past experience in determining these cases supports this observation,
 - in circumstances where Ofcom has 'lost' on some or all of the points raised in the appeal, the CMA would not expect to recover any portion of its costs from other parties to the appeal that are directly attributable to Ofcom.

Interveners

Summary of responses

- 2.20 All respondents asked for more guidance on how any interveners will be treated, with a preference expressed for the CMA to adopt the general principle of the CAT (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). Most respondents also noted that the CMA needed to be careful to exercise its new cost recovery powers so as not to discourage interventions (which have been permitted by the CAT).

The CMA's views

- 2.21 The CMA expects to have regard to the approach adopted by the CAT in other appeals under section 192 of the CA03. In its recent response to the Government's consultation on Streamlining Regulatory and Competition Appeals, the CAT said that it has 'an extremely broad discretion in relation to

costs' and 'it is important for the CAT to be able to be flexible in the costs orders it can impose, rather than straight-jacketed. The present regime is characterised by a wide discretion in the CAT, which has been developed in the case-law and acknowledged by the Court of Appeal.'⁷ The extent of an intervener's exposure to a costs order will depend on the role played by that intervener and the CMA, like the CAT, needs the flexibility to determine the liability of any interveners on a case-by-case basis. The CMA has therefore decided to retain the approach in the Draft Guidance.

- 2.22 The CMA also notes that the approach taken in the Draft Guidance to the potential liability of interveners is consistent with the Government's objectives for introducing this cost recovery power. In *Growth, Competition and The Competition Regime: Government Response to Consultation* (March 2012), the Government said that, in deciding to introduce a system of one-way cost recovery in which appellants are liable for the CMA's costs to the extent that their appeal is unsuccessful, 'interveners should also be liable for the costs to the CMA caused by their intervention, to the extent to which the side on which they intervened lost. Recovering costs from interveners is in line with the overarching objectives of recovering costs and of incentivising the 'right' appeals, a principle which equally applies to interventions.'⁸

Disputing the CMA's costs order

Summary of responses

- 2.23 A couple of respondents requested more detail on how disputes about the CMA's proposed costs order will be resolved. One respondent suggested an independent third party costs assessor could be used where there are disagreements. Such a mechanism is envisaged in Ofcom's *Guidelines on Payment of Costs and Expenses in Regulatory Disputes* (published on 4 September 2013). Another respondent noted that the Draft Guidance provides no detail about how an appeal to the CAT against a costs order decision of the CMA will work in practice and raised some matters it would like to see covered in the final document.

⁷ Available at: www.catribunal.org.uk/247-8143/Streamlining-Regulatory-and-Competition-Appeals.html . See, in particular, paragraphs 26 and 87.

⁸ See paragraph 12.23 at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/31879/12-512-growth-and-competition-regime-government-response.pdf.

The CMA's views

- 2.24 The CMA does not consider it appropriate to use a third party costs assessor in situations where a party does not agree with the CMA's proposed costs order. As described above, parties will be given the opportunity to comment on the CMA's proposed costs order before it is made. Should a party wish to dispute the costs order after it has been made, section 195 of the CA03 (as amended by the ERA13) provides that a party affected by the decision may appeal to the CAT.
- 2.25 The CMA has made some minor changes to the Guidance to clarify the consultation process and the right to appeal the CMA's costs order decision to the CAT (see paragraphs 8.7 to 8.9).

Other matters

Summary of responses

- 2.26 One respondent considered 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 the Steer.
- 2.27 Another respondent would like to see a statement in the Guidance that the CMA 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.

The CMA's views

- 2.28 The CMA's decision to make a costs order will be taken by a CMA group, as an independent and impartial appeal body and the CMA does not consider that the Government's Steer affects the CMA group's capacity to do so. In addition, the CMA notes that:
- the Steer focuses on strategic priorities, setting out the high-level policy goals of the Government in relation to competition and growth. It does not dictate how the CMA should go about deciding its cases, and

- it is clear from the general, high level nature of the Steer published on 1 October 2013 that the Government is not seeking to compromise the independence of the CMA nor influence its day to day work.⁹

2.29 The CMA agrees it is important that a fair and efficient process is conducted within the timeframe set by the CAT. The CMA will look for a high degree of cooperation from all parties to help it do this. There are benefits for all involved in doing so, including minimising costs. A statement to this effect has been added to the Guidance (see paragraph 8.2).

Adoption of existing CC guidance relating to price control references

Summary of responses

2.30 Of the two respondents who commented, both supported the proposal to amend the CC's existing guidelines (CC13) to include a section setting out the approach to costs recovery.

The CMA's views

- 2.31 The Annexe of the Draft Guidance proposed that the *CC Rules of procedure for merger reference groups, market reference groups and special reference groups* (CC1) would be put to the CMA Board for adoption. However, the CMA considers it would be helpful to make some minor revisions to CC1 to reflect recent changes to legislation and current CC practice. It therefore proposes to conduct a short consultation, prior to 1 April 2014, on the minor revisions it proposes to the rules in CC1.
- 2.32 Given the comments received, the CMA has chosen not to make any additional amendments to that list. The guidance documents in the Annexe to the Guidance (and identified in the column 'Adopted by the CMA Board') have now been adopted by the CMA Board.
- 2.33 The CMA is mindful of the need to minimise risks of confusion arising from the continued existence of guidance which does not take account of the creation of the CMA. The CMA will therefore seek, when making such documents available on www.gov.uk/cma, to state clearly the basis on which those documents should be read (including adding 'health warnings' to those documents where appropriate).

⁹ Available at: www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation.

Transitional arrangements

Summary of responses

2.34 None of the respondents commented specifically on the proposed transitional arrangements set out in paragraphs 10 and 11 of the Draft Guidance.

The CMA's views

2.35 In the absence of any disagreement in relation to the CMA's proposed transitional arrangements, the CMA considers it appropriate to retain these. It falls to BIS to make the transitional provisions by secondary legislation, and BIS intends to do so early in 2014.

2.36 The overview of the CMA's proposed approach included in paragraphs 10 and 11 of the Draft Guidance has been moved into a separate document (*Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14)) along with transitional arrangements related to other CMA functions and published on www.gov.uk/cma.

ANNEXE(S)

A. List of respondents

- Bird & Bird LLP
- BT Group
- EE Limited
- Herbert Smith Freehills LLP