

**Competition and Markets
Authority (CMA)**

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

Consultation document

July 2013

CMA5con

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Any enquiries regarding this publication should be sent to us at: BIS CMA Transition Team on behalf of the CMA, Department for Business Innovation, and Skills, 3rd Floor, Orchard 2, 1 Victoria Street, London SW1H 0ET, or email cmaconsultation@bis.gsi.gov.uk.

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

Scope of this consultation

Topic of this consultation

This consultation seeks views on the attached draft guidance which the BIS CMA Transition Team (the Transition Team) (on behalf of the Competition and Markets Authority (CMA), and in consultation with the Office of Fair Trading (OFT) and the Competition Commission (CC)) proposes to issue in order to explain the CMA's new power to recover the costs it incurs in connection with a price control appeal under section 193 of the Communications Act 2003 in certain circumstances (the Draft Guidance). This change was introduced by the Enterprise and Regulatory Reform Act 2013 (ERRA13) and comes into force on 1 April 2014.

This consultation and the accompanying guidance have been drafted by the Transition Team which has been appointed by the CMA Chair Designate and the Chief Executive Designate, and consists of individuals from the OFT, the CC and elsewhere.

Geographical scope

The geographical scope of this consultation is primarily the UK.

Basic information

This consultation is aimed at those who have an interest in the CMA's functions to hear regulatory references from sector regulators and appeals against sector regulator decisions in relation to certain price controls, access charges and other licence modifications. In particular, it may be of interest to businesses and their legal and other advisors.

How to respond

We welcome comments either of a general nature or on any specific points. Please provide supporting evidence for your views where appropriate.

You can respond to this consultation:

By email to cmaconsultation@bis.gsi.gov.uk

By post to:

The BIS CMA Transition Team on behalf of the CMA

(c/o Xinru Li and Easha Lam)

Department for Business, Innovation and Skills

3rd Floor, Orchard 2

1 Victoria Street

London

SW1H 0ET

When responding to this consultation, please state whether you are responding as an individual or whether you are representing the views of an organisation. If responding on behalf of an organisation, please make it clear whom the organisation represents and, where applicable, how the views of members were assembled.

Please also indicate whether you are happy for your response to be made available on the CMA's website. Further information regarding our use of data received during this consultation is provided below.

Enquiries

If have any questions relating to this consultation please contact Xinru Li or Easha Lam on the email address above or by telephone on 020 7215 2078 or 020 7215 2044.

Closing date

Responses should be received by 5pm on Friday 6 September 2013.

Next Steps

The Transition Team will consider the responses to this consultation document and make amendments to the guidance where appropriate. The CMA Board (once established) will make the decisions on the matters being consulted on and the content of the final guidance, to be published in advance of 1 April 2014.

Compliance with the Cabinet Office Consultation Principles

This consultation complies with the Cabinet Office Consultation Principles. A list of the key criteria, along with a link to the full document, can be found at Annexe A.

Consultation Period

The deadline for responses to this consultation is eight weeks. While this represents an expedited consultation period, we note that the in-depth Government consultation exercise which led to the decision to create the CMA asked a number of questions and yielded a number of valuable responses on issues related to this consultation, which have informed the contents of the Draft Guidance. Furthermore, the timetable for the formation of the CMA requires that consultation on numerous proposed guidance documents be carried out within a very short period of time. We feel that, given these considerations, the eight week consultation period is an appropriate one to obtain responses from interested parties.

Feedback about this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Mr John Conway

Department for Business, Innovation and Skills

Consultation Coordinator

1 Victoria Street

London

SW1H 0ET

Telephone John on 020 7215 6402 or email to: john.conway@bis.gsi.gov.uk

Data use statement for responses

Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of all information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to publish or refer to comments received in response to this consultation in future publications. In deciding whether to do so, we will have regard to the need for excluding from publication, as far as that is practicable, any information relating to the private affairs of an individual or any commercial information relating to a business which, if published, would or might, in our opinion, significantly harm the individual's interests, or, as the case may be, the legitimate business interests of that

business. If you consider that your response contains such information, that information should be marked 'confidential information' and an explanation given as to why you consider it is confidential.

Please note that information provided in response to this consultation, including personal information, may be the subject of requests from the public for information under the Freedom of Information Act 2000. In considering such requests for information we will take full account of any reasons provided by respondents in support of confidentiality, the Data Protection Act 1998 and our obligations under Part 9 of the Enterprise Act 2002.

If you are replying by email, these provisions override any standard confidentiality disclaimer that is generated by your organisation's IT system.

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1 OVERVIEW

Summary of legal framework

- 1.1 The Communications Act 2003 (CA03) gives the Office of Communications (Ofcom) the power to impose various kinds of conditions on communications providers, including conditions on operators that Ofcom has determined to have significant market power (SMP conditions).
- 1.2 The CA03 sets out the various conditions that may be imposed as SMP conditions, including price controls. Sections 192 to 196 of the CA03 provide appellants with a right to appeal to the Competition Appeal Tribunal (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.
- 1.3 Section 193 of the CA03 requires the CAT to refer any price control matter raised by the appeal to the CC for determination, and to apply the CC's determination when deciding the appeal. 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.¹
- 1.4 The CC has published *Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines* (CC13) to assist parties and their advisers involved in these references.²

The changes

- 1.5 The ERR13 will transfer the functions of the CC in relation to price control references under section 193 of the CA03 to the CMA, with effect from 1 April 2014.³ The ERR13 also amends the CA03 to provide the CMA with the power to recover the costs it incurs in connection with a price control

¹ Note: the Government is currently consulting on proposals to reform certain aspects of this appeal regime. For more information see *Streamlining Regulatory and Competition Appeals: Consultation on Options for Reform*, available at: www.gov.uk/government/consultations/regulatory-and-competition-appeals-options-for-reform

² Available at: www.competition-commission.org.uk/publications/cc-rules-and-guidance

³ An overview of the changes introduced by the ERR13 is contained in CMA1 Towards the CMA.

reference from parties to the appeal (other than Ofcom). New section 193A of the CA03 sets out this power.⁴ This change will also take effect from 1 April 2014, subject to the transitional arrangements described in the Draft Guidance.⁵

1.6 These changes implement the proposals set out in *Growth, Competition and The Competition Regime: A Response to Consultation* (March 2012), in which the Government stated that it had decided:⁶

- 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,
- that interveners should also be liable for the costs to the CMA caused by their intervention, again to the extent to which the side on which they intervened lost,
- the CMA will not have the power to recover costs from Ofcom, [and]
- the exact costs figures for each appeal should be determined at the discretion of the CMA.

Key points

1.7 The actual amount of costs that the CMA will incur in connection with a price control reference will vary from case to case, sometimes considerably. Factors affecting the level of the CMA's costs are likely to include the number of parties to the appeal and the number and range of grounds of appeal raised. By way of example, the costs that the CC incurred in the last four price control references⁷ under section 193 of the CA03 ranged between £250,000 and £750,000. These figures are included for illustrative purposes only and should not be seen as indicative of the costs the CMA will incur in any particular reference. The Transition Team, like the CC, considers it

⁴ Section 54 of the ERA13 inserts section 193A in the CA03 and paragraphs 97 to 100 of Schedule 6 to the ERA13 makes minor and consequential amendments to the CA03.

⁵ Whilst the policy of these transitional arrangements form part of the Transition Team's CMA Guidance consultation, the Secretary of State is responsible for incorporating the transitional arrangements in law where necessary. The legislative drafting will reflect the proposed transitional arrangements as set out in the Draft Guidance. As a general principle, it is proposed that all CMA powers and/or procedures will come into force as of 1 April 2014 and will be applied prospectively.

⁶ *Growth, Competition and The Competition Regime: A Response to Consultation* (March 2012), pages 109-111.

⁷ Two of these price control references were heard together.

important that the process is managed in a way that is fair and efficient, having regard to the circumstances of the individual reference.

- 1.8 The Transition Team proposes to make some minor changes to the existing CC guidelines (CC13) to reflect the reforms described above in paragraphs 1.5 and 1.6. The proposed text to be inserted into CC13 is set out in the Draft Guidance (in Annexe B). The amended CC13 will then – together with other relevant existing CC guidance documents – be put to the CMA Board (once established) for adoption.⁸ The Annexe to the Draft Guidance lists other existing relevant CC documents that it is currently proposed will also be put to the CMA Board for adoption.⁹ Those adopted guidance documents will however, be kept under review once the CMA is in operation, in the light of its developing practice and case experience.

⁸ As those pre-existing documents were published prior to the amendments to the Enterprise Act 2002 and the CA03 made by the ERRA13, they will (if and when adopted) need to be read subject to the Draft Guidance and to certain other 'global' changes resulting from the coming into force of the ERRA13 (for example, reading references to the CC as referring in each case to the CMA).

⁹ For completeness, it is noted that this Annexe has been drafted (in common with the remainder of the Draft Guidance) as assuming that the CMA has been established and that the existing CC documents listed have been adopted by the CMA Board. Notwithstanding this drafting, the list represents only the Transition Team's current proposal as to which documents will be put to the CMA Board for adoption. It (and any other references in the Draft Guidance to CC documents having been adopted by the CMA) is therefore provisional and subject to change.

ANNEXES

A. CONSULTATION CRITERIA

[The Civil Service Reform Plan](#) commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

As a result the Government is improving the way it consults by adopting a more proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and focussing on real engagement with key groups rather than following a set process.

The key Consultation Principles are:

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before,
- departments will need to give more thought to how they engage with and consult with those who are affected,
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy, and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

The full Cabinet Office Consultation Principles can be found on the Cabinet Office website at: www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance

This guidance replaces the [Code of Practice on Consultation](#) issued in July 2008 on the BIS website.

B. DRAFT GUIDANCE

PROPOSED TEXT TO BE INSERTED AS NEW SECTION 8 IN CC13

Section 8: Recovery of the CMA's costs¹

1. Where a determination is made on a price control matter referred under section 193 of the CA03, the CMA will normally expect to exercise its discretion under section 193A of the CA03 to make an order in respect of the costs it incurred in connection with the reference (a Costs Order²). The CMA will, however, proceed on a case by case basis, retaining flexibility to meet circumstances as they arise.
2. A Costs Order may require the payment of some or all of the CMA's costs by such parties to the appeal³ which gave rise to the reference, other than Ofcom, as the CMA considers appropriate.⁴
3. The actual amount of costs that the CMA will incur in connection with a price control reference will vary from case to case, sometimes considerably. Factors affecting the level of the CMA's costs are likely to include the number of parties to the appeal and the number and range of grounds of appeal raised.
4. If the CMA decides to make a Costs Order, it may require costs to be paid by any party to the appeal (other than Ofcom) but it expects that it will normally order an unsuccessful party (other than Ofcom) to pay the costs the CMA

¹ The Enterprise and Regulatory Reform Act 2013 (ERRA13) transferred the functions of the CC in relation to price control references under section 193 of the CA03 to the Competition and Markets Authority (CMA) on 1 April 2014. The ERRA13 also amended the CA03 to provide the CMA with the power to recover the costs it incurs in connection with a price control reference in certain circumstances. See Section 54 of the ERRA13 which inserted section 193A in the CA03 and paragraphs 97 to 100 of Schedule 6 to the ERRA13 which made minor and consequential amendments to the CA03. This change takes effect on 1 April 2014 subject to the transitional arrangements explained at paragraph 10. Annex C explains which CC guidance documents containing information relevant to price control references have been adopted by the CMA Board, and which documents have been replaced or rendered obsolete by CMA guidance or publications.

² Also defined in section 193A(1) of the CA03.

³ It is a matter for the CAT to determine who are parties to the appeal. In past price control references, the CAT has treated interveners as parties to the appeal and the Explanatory Notes to the ERRA13 (at pages 57-58) make it clear that the Government intended interveners to be treated as parties to the appeal for the purpose of cost determinations.

⁴ Section 193A(2).

incurred in connection with the reference. In deciding what order to make (including the proportion of costs to be paid by a party to the appeal), the CMA will have regard to all the circumstances but it must, in particular, consider:⁵

- the extent to which the CMA's determination on the reference upholds Ofcom's decision in relation to the price control matter in question,
- the extent to which the costs were attributable to the involvement in the appeal of the party, and
- the conduct of the party.

5. A Costs Order must:⁶

- set out the total costs incurred by the CMA in connection with the reference, and
- specify the proportion of those costs to be paid by each party to the appeal in respect of whom the order is made.

6. The CA03 exempts Ofcom from being subject to a Costs Order. This means the CMA cannot require Ofcom to pay some or all of the CMA's costs even if it is an unsuccessful party.⁷ The CMA's approach to when it will consider it appropriate to make a Costs Order and if so, the requirements of any such order made under section 193A of the CA03, including, for example, how it deals with situations where Ofcom is an unsuccessful party, will develop on a case by case basis.

7. When the CMA proposes to make a Costs Order against a party, it will give them the opportunity to comment in writing.

8. If the CMA makes a Costs Order, it must do so as soon as reasonably practicable after the making of its determination. The Costs Order does not take effect unless the CAT decides the price control matter in accordance with the CMA's determination.⁸ Where the CAT decides the price control matter otherwise than in accordance with the CMA's determination, the CMA

⁵ Section 193A(4).

⁶ Section 193A(3).

⁷ Section 193A(2).

⁸ Sections 193A(5) and 193(6).

may make a new costs order.⁹ If the CMA makes a new costs order, it must do so as soon as reasonably practicable after the decision of the CAT mentioned above.

9. A costs order made by the CMA under the CA03 can be appealed to the CAT.¹⁰

Transitional arrangements

10. The CMA's power to recover its costs in connection with references made under section 193 of the CA03 will apply to appeals lodged with the CAT after 1 April 2014.
11. Other functions exercisable by the CC in relation to price control references under section 193 of the CA03 will be exercised by the CMA in relation to all references after 1 April 2014.

⁹ Sections 193A(6) and 193A(7).

¹⁰ Section 192, as amended by the ERA13. For costs of any appeal to the CAT, see the CAT Rules: [Competition Appeal Tribunal Rules 2003 \(SI 2003 No 1372\)](#) and [Competition Appeal Tribunal \(Amendment and Communications Act Appeals\) Rules 2004 \(SI 2004 No 2068\)](#).

ANNEXE: STATUS OF CC GUIDANCE DOCUMENTS¹¹

CC CODE	TITLE	STATUS OF DOCUMENT	
		Replaced/ obsolete ¹	Adopted by the CMA Board ²
CC1	Competition Commission rules of procedure for merger reference groups, market reference groups and special reference groups	-	✓
CC4	Competition Commission: general advice and information	✓	-
CC6	Competition Commission: guidance to merger reference groups, market reference groups and special reference groups	✓	-
CC13	Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines	-	✓

¹ CC publications listed in this column have, at the date of publication of this revised guidance been replaced, or rendered obsolete, by CMA guidance or publications.

² CC publications listed in this column have been adopted by the CMA Board (subject to any guidance prepared by the CMA in the future).

¹¹ This table indicates the status of relevant CC guidance documents that had been published and were in effect prior to the transfer of the CC's functions to the CMA from 1 April 2014. Certain of those documents have been adopted by the CMA Board in order to facilitate transition and to minimise disruption to parties and the CMA.