

This content was withdrawn on 18 October 2017. It has been replaced by Price control appeals under section 193 of the Communications Act 2003: Competition and Markets Authority guidance (CMA72)



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

© Crown copyright 2014

You may reuse this information (not including logos) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit [www.nationalarchives.gov.uk/doc/open-government-licence/](http://www.nationalarchives.gov.uk/doc/open-government-licence/) or write to the Information Policy Team, The National Archives, Kew, Richmond, Surrey, TW9 4DU, or email: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

Any enquiries regarding this publication should be sent to us at: Policy, Precedent and Procedures Unit, Competition and Markets Authority, Victoria House, 37 Southampton Row, London, WC1B 4AD or by email to [guidance@cma.gsi.gov.uk](mailto:guidance@cma.gsi.gov.uk).

This publication is also available at: [www.gov.uk/cma](http://www.gov.uk/cma).

## Contents

	<i>Page</i>
8 Recovery of the CMA's costs.....	1
A. Status of CC guidance documents .....	5

**TEXT TO BE INSERTED AS NEW SECTION 8 IN CC13: *Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines***

## **8 RECOVERY OF THE CMA'S COSTS<sup>1</sup>**

- 8.1 Where a determination is made on a price control matter referred under section 193 of the Communications Act 2003 (the Act), the Competition and Markets Authority (CMA) may make an order in respect of the costs it incurred in connection with the reference (Costs Order).<sup>2</sup> The CMA will normally expect to exercise its discretion under section 193A of the Act to make a Costs Order but will proceed on a case-by-case basis, retaining flexibility to meet circumstances as they arise.
- 8.2 The CMA's costs for this purpose will comprise all its costs, including the costs of the members and staff allocated to the matter,<sup>3</sup> as well as an allowance for central office overheads and any external costs it may incur by, for example, obtaining the assistance of experts or Counsel. The CMA considers it important that the determination is conducted in a way that is fair and efficient, having regard to the circumstances of the individual case. The CMA will therefore look for a high degree of cooperation from all parties to the appeal to help it do this.
- 8.3 A Costs Order may require the payment of some or all of the CMA's costs by such parties to the appeal which gave rise to the reference, other than Ofcom, as the CMA considers appropriate.<sup>4</sup> It is a matter for the Competition Appeal

---

<sup>1</sup> 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 Act to the CMA on 1 April 2014. The ERRA13 also amended the Act 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 Act and paragraphs 97 to 100 of Schedule 6 to the ERRA13 which made minor and consequential amendments to the Act. This change takes effect on 1 April 2014 subject to the transitional arrangements explained in the *Transitional Arrangements: Guidance on the CMA's approach – Part 1* (CMA14). *Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines* (CC13) has been adopted by the CMA Board.

<sup>2</sup> Also defined in section 193A(1) of the Act.

<sup>3</sup> The costs of the members and staff will be calculated using an hourly or daily rate including an allowance for any national insurance and pension contributions.

<sup>4</sup> Section 193A(2) of the Act. The Act exempts Ofcom from being subject to a Costs Order.

Tribunal (CAT) to determine who are parties to the appeal for the purposes of these references, including any cost determinations.<sup>5</sup>

- 8.4 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 complexity of grounds of appeal raised.
- 8.5 Section 193A(3) of the Act requires the CMA to set out in the Costs Order the total costs incurred by it in connection with the 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. In deciding on 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:<sup>6</sup>
- 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.
- 8.6 In addition to the requirements in section 193A of the Act, the Costs Order will be accompanied by the CMA's reasons for recovering the costs from a party or parties to the appeal in the proportions specified in the Costs Order.
- 8.7 Before the CMA makes a Costs Order, it will give all parties the opportunity to comment on its proposed order. The CMA will seek to provide the proposed order either at the time it sends its final determination to the CAT or as soon as possible thereafter.
- 8.8 If the CMA makes a Costs Order, it must do so as soon as reasonably practicable after the making of its determination.<sup>7</sup> The Costs Order does not take effect unless the CAT decides the price control matter in accordance with

---

<sup>5</sup> 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 and 58) make it clear that the Government intended interveners to be treated as parties to the appeal for the purpose of cost determinations.

<sup>6</sup> Section 193A(4) of the Act.

<sup>7</sup> Section 193A(5)(a) of the Act.

the CMA's determination.<sup>8</sup> Where the CAT decides the price control matter otherwise than in accordance with the CMA's determination, the CMA may make a new Costs Order.<sup>9</sup> In such cases, the CMA must do so as soon as reasonably practicable after this decision of the CAT. A similar notification process, as described in paragraph 8.7 above, will be followed in these cases, although the time given for parties to provide comments on the revised proposed order before it is made may be shorter.

- 8.9 A person affected by a decision of the CMA to which effect is given by a costs order made under section 193A of the Act, may appeal against it to the CAT.<sup>10</sup> The Act requires the CAT to decide the appeal 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 the CMA with appropriate directions.<sup>11</sup>

---

<sup>8</sup> Sections 193A(5) and 193(6) of the Act.

<sup>9</sup> Sections 193A(6) and 193A(7) of the Act.

<sup>10</sup> Section 192 of the Act, as amended by the ERR13. 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 \(SI 2004 No 2068\)](#).

<sup>11</sup> Section 195 of the Act, as amended by the ERR13.

## ANNEXE(S)

---

## A. Status of CC guidance documents<sup>12</sup>

CC code	Title	Status of document	
		Replaced/ obsolete <sup>1</sup>	Adopted by the CMA Board <sup>2</sup>
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	-	✓

<sup>1</sup> CC publications listed in this column have, with effect from 1 April 2014, been replaced, or rendered obsolete, by CMA guidance or publications.

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

---

<sup>12</sup> 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.