

Price control appeals under section 193 of the Communications Act 2003: CMA guidance

Consultation document

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1. Introduction

- 1.1 The Competition and Markets Authority (CMA) is consulting on draft guidance describing the procedure that the CMA will use when determining price control matter references under section 193 of the Communications Act 2003 (the Act), following the coming into force of amendments to that Act by the Digital Economy Act 2017.

Background

- 1.2 The Act gives Ofcom the power to impose various kinds of specific condition on communications providers, including conditions on operators that Ofcom has determined to have significant market power (SMP conditions).¹ The provisions of the Act relating to SMP conditions implement Articles 14 to 16 of the Framework Directive² and Articles 8 to 13 of the Access Directive.³ The Act sets out the various conditions that may be imposed as SMP conditions, including price controls.⁴
- 1.3 Sections 192 to 196 of the Act implement Article 4 of the Framework Directive and 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. Section 193 of the Act requires the CAT to refer any price control matter⁵ raised by the appeal to the CMA for determination. Section 193 of the Act requires the CAT to apply the CMA's determination when deciding the appeal,⁶ unless the CAT decides that the CMA's determination would fall to be set aside on an application for judicial review.⁷
- 1.4 Under section 193 of the Act, the determination of a price control reference is to be carried out on behalf of the CMA by a group, constituted for the purpose

¹ Section 45(2)(b) of the Act.

² Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services ('the Framework Directive'). Under Article 14(2) of the Framework Directive an undertaking is deemed to have SMP if it enjoys 'a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers'.

³ Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ('the Access Directive'). Article 13 of the Access Directive makes provision for price control obligations on undertakings designated as having SMP.

⁴ Which may be set in accordance with sections 87(9), 91 or 93(3) of the Act.

⁵ Pursuant to section 193(10), a 'price control matter' is defined as an imposition of any form of price control authorised by sections 87(9), 91 or 93(3) of the Act.

⁶ Section 193(6) of the Act.

⁷ Section 193(7) of the Act.

by the CMA Chair and consisting of at least three CMA panel members.⁸ At least one, but not more than three, member(s) of the group appointed to decide references under the Act must be drawn from the CMA's Specialist Communications Panel appointed for this purpose.⁹ The CMA's group is supported by a team of CMA specialist staff.

Changes made by the Digital Economy Act 2017

- 1.5 Section 87 of the Digital Economy Act 2017 (DEA17) makes a number of amendments to the Act in order among other things to change the standard of review that the CAT applies in determining certain appeals.
- 1.6 The section 87 DEA17 amendments will enter into force on 31 July 2017. As result of these amendments the CAT will be required to determine certain appeals, including those against decisions of Ofcom imposing SMP conditions and setting price controls, by reference to the grounds of appeal set out in the Notice of Appeal and by applying the same principles as would be applied by a court on an application for judicial review;¹⁰ and the CMA will be required to make its determination on a section 193 price control matter reference having regard to judicial review principles.¹¹ Hitherto, the CAT has been required to decide appeals under section 192 of the Act on the merits and by reference to the grounds of appeal set out in the Notice of Appeal¹² and the CMA has had regard to this standard when making its determination of price control matter references.
- 1.7 The requirement that the price control matter reference to the CMA must be determined in accordance with the CAT Rules, any directions given by the CAT and using such procedures as the CMA considers appropriate will remain.¹³
- 1.8 The section 87 DEA17 amendments also revise the decisions the CMA and CAT may take: in future, the action that the CAT may take following an appeal is to dismiss the appeal or quash the whole or part of the decision to which it relates and where it quashes the whole or part of that decision, remit the matter back to Ofcom with a direction to reconsider and make a new decision in accordance with its ruling.¹⁴

⁸ The group appointed to decide price control references under the Act constitutes a special reference group for the purpose of the application of the [CMA rules of procedure for merger, market and special reference groups](#) (CMA17).

⁹ Schedule 4, paragraph 38(1) and (4) to the Enterprise and Regulatory Reform Act 2013.

¹⁰ Section 194A(2) of the Act, when it enters into force.

¹¹ Sections 193(2) and 194A(2) of the Act, when the amendments enter into force.

¹² Section 195(2) of the Act.

¹³ Ibid.

¹⁴ Section 194A(3)(a) and (b) of the Act.

- 1.9 The CMA understands that the section 87 DEA17 amendments will enter into force on 31 July 2017.

Scope and purpose of this consultation

- 1.10 The Competition Commission, one of the CMA's predecessor bodies, published CC13 *Price control appeals under section 193 of the Communications Act 2003: Competition Commission Guidelines* (April 2011) in order to assist parties and their advisers involved in price control references under section 193 of the Act. This guidance was adopted unamended by the CMA board.
- 1.11 The CMA proposes to publish new guidance based on CC13 that describes the procedure that the CMA will use when determining price control references under section 193 of the Act, taking into account, as appropriate, the amendments made to the Act by section 87 DEA17. The draft of this guidance is the focus of this consultation.
- 1.12 In view of these legislative changes, the draft guidance does not provide for a process under which the CMA will consider and formulate remedies for any errors it had identified in Ofcom's price control decision. This is a significant change from CC13. Similarly, the CMA now proposes among other things to provide in the draft guidance a sample four-month time frame for determination, based upon the default period provided for in the CAT Rules.¹⁵ CC13 set out an example time frame of 28 weeks. In addition, the draft guidance, in contrast to CC13, does not provide for a core submissions process. The draft guidance instead states that the Appeal Group may invite the main parties (the appellants and Ofcom) to attend a clarification hearing, in order for the group to better understand any technical or other key issues relating to the price control matter reference.
- 1.13 In addition, the draft guidance incorporates, as appropriate, the text of CMA5, *Cost recovery In telecoms price control references: Guidance on the CMA's approach*, which was published by the CMA in January 2014. CMA5 had formed Section 8 of CC13.

Question for consultees

- 1.14 We are asking consultees the following question:

Do you have any comments on the draft guidance *Price control appeals under section 193 of the Communications Act 2003*?

¹⁵ See Rule 117(1) of the CAT Rules 2015, SI 2015/1648.

2. Consultation process

2.1 This consultation is being published on the CMA webpages.

2.2 The CMA is seeking views on the following question:

Do you have any comments on the draft guidance *Price control appeals under section 193 of the Communications Act 2003*?

2.3 When responding to this consultation, please state whether you are responding as an individual or are representing the views of a group or organisation. If the latter, please make clear who you are representing and their role.

2.4 In accordance with its policy of openness and transparency, the CMA will publish non-confidential versions of responses on its webpages, along with a summary of responses received that fall within the scope of the consultation. Respondents will be notified when they are available.

2.5 If your response contains any information you regard as sensitive and that you would not wish to be published, please also provide a non-confidential version for publication and explain why you regard the information excluded as sensitive.

2.6 The consultation will run for six weeks, from 24 July 2017 to 4 September 2017. Responses should be submitted by post or email, **by no later than 5pm on 4 September 2017** and should be sent to:

The Regulatory Appeals Team
Competition and Markets Authority
Victoria House
37 Southampton Row
London
WC1B 4AD

Email: steven.preece@cma.gsi.gov.uk

Compliance with government consultation principles

2.7 In consulting, we have taken into account the government consultation principles, which set out the principles that government departments and other public bodies should adopt when consulting with stakeholders. Full details can be found on GOV.UK

Data use statement for responses

- 2.8 Personal data received in the course of this consultation will be processed in accordance with the Data Protection Act 1998. Our use of information received (including personal data) is subject to Part 9 of the Enterprise Act 2002. We may wish to 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.
- 2.9 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.