

# **RESPONSE TO COMPETITION AND MARKETS AUTHORITY CONSULTATION**

**BY BIRD & BIRD LLP**

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

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### **Introduction**

This response is submitted by and on behalf of Bird & Bird LLP, an international law firm with substantial experience of representing and assisting businesses before competition authorities in a number of jurisdictions. The views now expressed are those of Bird & Bird LLP and not necessarily those of the firm's clients.

We welcome the opportunity to respond to the draft Guidance on the CMA's approach to cost recovery in telecoms price control references. We confirm that we are happy for this response to be published on the CMA's website.

### **Overview**

In our view, the draft Guidance fails to provide guidance on the key issues which are or should be of concern to stakeholders concerning costs orders by the CMA in relation to price control references. Rather, the draft Guidance repeats the statutory provisions of the new section 193A of the Communications Act 2003 as introduced by section 54 of the Enterprise and Regulatory Reform Act 2013.

It would be helpful to the electronic communications industry for specific guidance to be provided concerning the types of the costs which will be the subject of such an order and how they will be calculated, and how any costs would be allocated as between parties and especially as between a party and any interveners supporting that party. As these issues are not addressed in the draft Guidance, our present comments are limited to raising questions which we think should be answered by the final version of the Guidance.

### **Specific comments**

The draft Guidance fails to indicate to what extent and on what basis a costs order would cover the CMA's internal costs as opposed to external fees for counsel or other advisors. We think this issue should be addressed. In any event, we also consider that some guidance should be given as to the principles to be applied by the CMA in determining in which circumstances external advisors will be instructed on a price control reference, as opposed to the reference being handled entirely by the CMA's own staff.

Insofar as internal costs would be the subject of such an order, the Guidance should in our view indicate the general approach that the CMA would take to the computation or allocation of such costs. For example, it should be indicated whether the CMA will allocate costs on the basis of the time spent on the relevant reference by the relevant personnel, and if so whether the CMA will require its officers and staff to keep detailed hourly records of time spent on such case references in order to justify and support any subsequent costs order.

Further, in the event that the CMA were to intend to include any element of common costs in a costs order, then the basis of any such approach to allocating common costs should (in our view) be stated in the Guidance. If the CMA were to contemplate the inclusion of such

common costs, this would imply that the CMA's cost accounting will be sufficiently clear and specific to support such an approach.

In any event, we would not advocate the inclusion of internal costs, because in our view any costs incurred by the CMA which are not incremental as a result of the relevant price control reference, should be left out of account.

Whilst the draft Guidance indicates that interveners could be required to pay a share of the relevant costs, the Guidance should in our view go further and explain the normal basis on which the CMA would allocate costs as between a main party and any intervener supporting that party. Further, we note that Ofcom would not be required to pay any of the CMA's costs (see paragraphs 4 and 6). However, in this connection, it would be helpful if the Guidance would indicate how any interveners supporting Ofcom would be treated where Ofcom is the unsuccessful party.

**Bird & Bird LLP**

**London**

**5th September 2013**