

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

Draft for consultation

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1. Introduction

- 1.1 This guidance describes the procedure that the Competition and Markets Authority (CMA) will use when determining price control references under section 193 of the Communications Act 2003 (the Act). It is not intended to be binding and may be adapted to take account of the particular circumstances of a reference.¹ It should be read in conjunction with CMA17 *CMA rules of procedure for merger, market and special reference groups*, which apply to the conduct of any CMA group considering price control references under section 193 of the Act.
- 1.2 The procedure that the CMA uses when determining price control references under section 193 of the Act is subject to the relevant provisions of the Competition Appeal Tribunal (CAT) Rules² and any directions given to the CMA by the CAT.³
- 1.3 This guidance, which was adopted by the CMA on [insert], supersedes the Competition Commission's *Price control appeals under section 193 of the Communications Act 2003 Guidelines* (CC13), in light of the amendments to the Act that were introduced by section 87 of the Digital Economy Act 2017. It is structured as follows:
- Section 2 sets out the background to price control references, and describes the CMA's role in the overall process.
 - Section 3 sets out and describes the various stages of the CMA's process.
 - Section 4 discusses the key documents used in the CMA's consideration of the reference.
 - Section 5 discusses hearings and meetings.
 - Section 6 discusses written questions and oral enquiries.
 - Section 7 discusses transparency and confidentiality.
 - Section 8 discusses recovery of CMA's costs.

Various administrative matters are described in Annex A in order to assist parties.

¹ This guidance will be reviewed periodically in the light of the CMA's experience of conducting price control references and any relevant judgments.

² Competition Appeal Tribunal Rules 2015 (SI 2015 No 1648).

³ Section 193(2) of the Act.

2. Background

- 2.1 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).⁴ The provisions of the Act relating to SMP conditions implement Articles 14 to 16 of the Framework Directive⁵ and Articles 8 to 13 of the Access Directive.⁶ The Act sets out the various conditions that may be imposed as SMP conditions, including price controls.⁷
- 2.2 Sections 192 to 196 of the Act implement Article 4 of the Framework Directive and provide appellants with a right to appeal to the CAT against certain decisions of Ofcom, including those setting SMP conditions and setting price controls. The CAT must decide these appeals, 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.⁸ The CAT may 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.⁹
- 2.3 Section 193 of the Act requires the CAT to refer any price control matter¹⁰ raised by the appeal to the CMA for determination. The CMA must make its determination by reference to the grounds of appeal and having regard to the same principles as would be applied by a court on an application for judicial review.¹¹ The reference should be conducted in accordance with the CAT Rules, any directions given by the CAT and using such procedures as the CMA considers appropriate.¹²

⁴ Section 45(2)(b) of the Act.

⁵ 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'.

⁶ 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.

⁷ Which may be set in accordance with sections 87(9), 91 or 93(3) of the Act.

⁸ Section 194A(2) of the Act.

⁹ Section 194A(3)(a) and (b) of the Act.

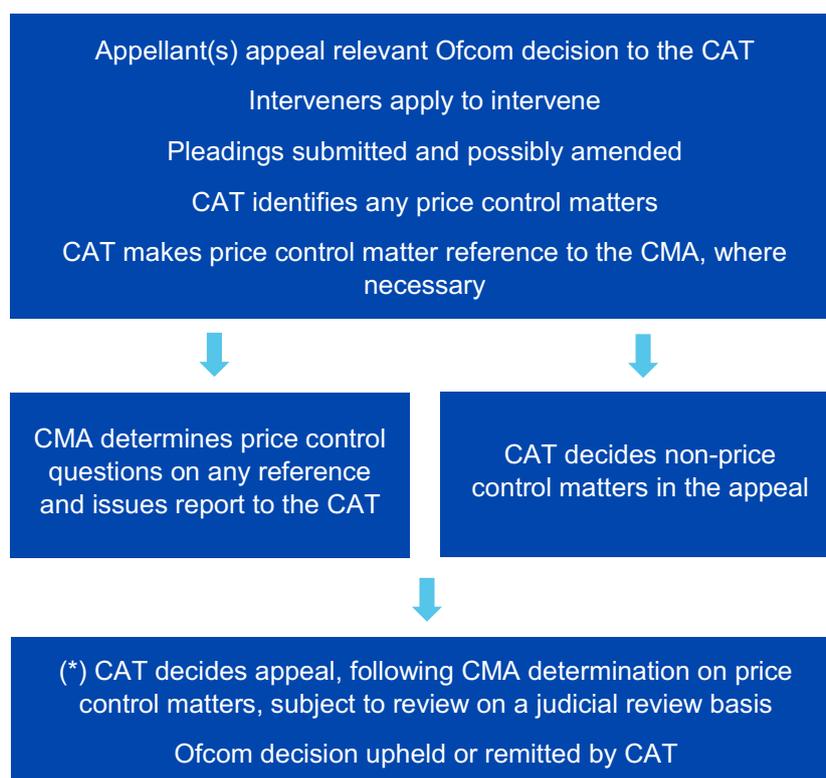
¹⁰ Pursuant to section 193(10), a 'price control matter' is defined as an imposition of any form of price control authorised by sections 87(9), 91 or 93(3) of the Act.

¹¹ Sections 193(2) and 194A(2) of the Act.

¹² Ibid.

- 2.4 Section 193 of the Act requires the CAT to apply the CMA’s determination when deciding the appeal,¹³ unless the CAT decides that the CMA’s determination would fall to be set aside on an application for judicial review.¹⁴
- 2.5 A price control reference to the CMA is a mandatory part of the CAT’s process for handling appeals that include price control matters. Figure 1 illustrates the framework.

Figure 1: Telecoms appeals to the CAT – process



* This description of the CAT process in three broad stages is purely for the purpose of the current document.

- 2.6 The CAT refers any price control matters in the form of reference questions, which arise out of the issues set out in the respective pleadings of the parties. The CMA answers the reference questions on the basis of the arguments and evidence within the parties’ pleadings. The scope of the CMA’s determination is limited to the issues raised by the parties in their pleadings and which are reflected in the CAT’s reference. Any decision by the CMA as to whether to admit or exclude further evidence in the price control reference will be taken having regard to Rule 21 of the CAT Rules.

¹³ Section 193(6) of the Act.

¹⁴ Section 193(7) of the Act.

- 2.7 The CMA's role in these appeals is to answer the questions referred to it by the CAT, applying a judicial review standard in doing so. It is not its function to conduct its own investigation into the price control matters referred.
- 2.8 The CMA proceedings will be confined to the parties to the case, the appellant, Ofcom and any interveners that the CAT formally admits, and will not involve third parties or the public. The CMA does not normally publish details of the conduct of its determination on its website, but in due course publishes a non-confidential version of the final determination (see paragraph 4.9).
- 2.9 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 by the CMA Chair and consisting of at least three CMA panel members.¹⁵ 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.¹⁶ The CMA's group is supported by a team of CMA specialist staff.

¹⁵ 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).

¹⁶ Schedule 4, paragraph 38(1) and (4) to the Enterprise and Regulatory Reform Act 2013 (ERRA13).

3. CMA process

- 3.1 This section provides an overview of the CMA's process and then considers each step in more detail.

Overview

- 3.2 Although the reference from the CAT marks the formal start of the CMA's task, the process in effect begins with the making of an appeal to the CAT, and continues with the filing of Ofcom's defence. The more clearly that the Notice of Appeal provides for focused grounds of appeal, the easier it will be for the CAT to identify any price control matters and to frame its reference to the CMA. The ability of the CMA to perform that task effectively depends on the clarity of the appeal and defence to the appeal made to the CAT.
- 3.3 The following timetable is based on the assumption that on the date that the reference is received from the CAT, the CMA will have received Ofcom's defence in response to the appellant's Notice of Appeal.
- 3.4 The CMA will commence preparations for its determination when it appears that a reference from the CAT is both likely and reasonably imminent.¹⁷ The CMA will seek to attend CAT case management conferences where they are likely to concern matters relevant to any price control reference.
- 3.5 Ahead of referring any price control matters to the CMA, the CAT will generally deal with initial case management issues, including establishing a confidentiality ring where the appeal concerns commercially sensitive information. The CMA will distribute confidential versions of documents only to members of this confidentiality ring.
- 3.6 The CAT will set the deadline for the CMA's response to the reference at the time of making the reference.
- 3.7 The CMA notes that the CAT Rules provide that unless the CAT directs otherwise, the CMA must determine every price control matter within four months of it having received the reference.¹⁸ The CMA will typically seek to

¹⁷ In most cases, it will be clear at an early stage whether an appeal raises price control matters. Rule 9(5) of the CAT Rules 2015 provides that the notice of appeal shall include a statement indicating the extent to which the appeal relates to price control or a specified price control matter arises in the appeal. Rule 15(4) of the CAT Rules 2015 provides that the defence shall include a statement indicating the extent to which the appeal relates to price control or a specified price control matter arises in the appeal, including (where applicable) a statement of a rebuttal under Rule 9(5).

¹⁸ CAT Rules 2015, Rule 117(1).

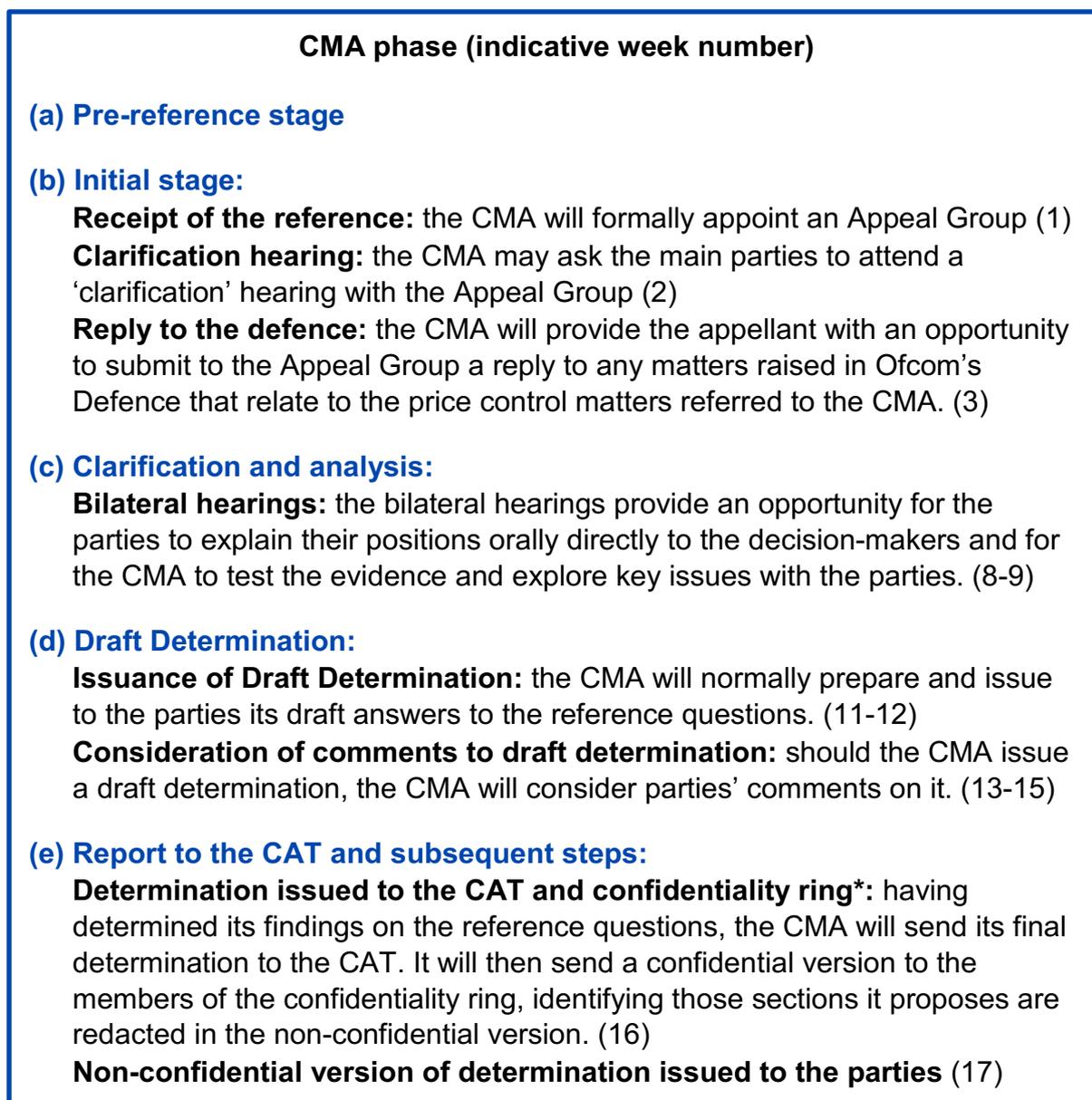
make a determination within this period.¹⁹ If the CMA considers that more time is required, it will make representations to the CAT in relation to the duration to be allowed for the determination, ahead of any reference. This guidance operates on the basis of a four-month 'default' timetable for determining a reference, though a different one might be set by the CAT in certain cases.

- 3.8 In order to conduct an efficient process, the CMA expects that parties will treat agreed timetables as 'hard' deadlines. Should it become apparent to a party that it will struggle to adhere to a deadline, the CMA should be contacted as soon as possible.
- 3.9 If the CMA considers it necessary or appropriate to seek an extension to the timetable during a reference, it will approach the CAT to do so. The CMA will also consult with parties if appropriate.
- 3.10 The CMA answers the CAT's reference questions on the basis of the arguments and evidence advanced in the parties' pleadings and developed in their later submissions (see paragraph 4.4), hearings and responses to clarificatory questions.
- 3.11 The CMA phase has the following key stages, which are outlined in greater detail below:
 - (a) Pre-reference stage: the CMA will initiate a dialogue with the parties to plan its process and to start obtaining a proper understanding of the case. The cooperation of parties during the pre-reference phase assists the CMA and the parties in making an effective start to the reference.
 - (b) Initial stage: the CMA may hold meetings with the parties if it is necessary to understand the technical aspects of the price control and of Ofcom's decision.
 - (c) Clarification and analysis: the CMA will consider the parties' submissions, raise written questions and conduct both clarification and bilateral hearings with parties. The appellant(s) will also be invited to provide the CMA with a reply to Ofcom's defence in respect of price control matters.
 - (d) Draft determination: the CMA will normally prepare and issue to the parties a draft of its answers to the reference questions. Should the CMA issue a draft determination, the CMA will consider parties' comments on it.

¹⁹ As noted in paragraph 3.3, this schedule is based on the CMA having received the notice of appeal, or amended notice of the appeal, and Ofcom's defence in advance of, or alongside receipt of the reference questions.

- (e) Report to the CAT and subsequent steps.
- 3.12 The CMA phase and key stages are shown in Figure 2. These stages (and the activities within each stage) may overlap to some extent.

Figure 2: CMA involvement in the various stages



* Confidentiality rings are described in paragraph 7.1.

Pre-reference stage

- 3.13 When an appeal that appears likely to lead to a CMA reference has been notified to the CAT, the CMA will identify staff to engage with the parties to the appeal and the CAT. During this stage the CMA will be ready to assist parties and the CAT as appropriate.

3.14 When it appears that a reference from the CAT is both likely and reasonably imminent, the CMA will start to plan its work. This will enable it to make submissions to the CAT as to the likely period required to conduct its determination (see paragraph 3.6) and to identify those technical issues with which it will need to become familiar. The CMA will seek to set up a meeting with the parties to discuss case management issues and might also set up a meeting to understand technical aspects of the relevant part of the industry, though the technical aspects will likely be discussed at the clarification hearing (see paragraphs 5.6 to 5.9 for a discussion of clarification hearings); these arrangements will normally be made before the CMA has received a reference. The meetings themselves will normally be held shortly after or even before the reference is made.

Initial stage

3.15 Following receipt of the reference the CMA will formally appoint a specialist communications reference group (hereafter an 'Appeal Group'). The CMA will write to the parties at this point, advising them of various procedural matters (such as points of contact) and providing further direction if appropriate. The CMA will publish an administrative timetable for the reference on its website.

3.16 The CMA will familiarise itself with the technical background to the case and to Ofcom's decision. This may involve:

(a) Meetings with Ofcom to understand its approach to the price control, particularly modelling issues. The other parties will normally be invited to send observers (see paragraph 7.5).

(b) Meetings with all parties to understand technical aspects of the relevant part of the industry.

Clarification and analysis

3.17 Following the initial stage, the CMA will follow a process of clarification and analysis. This may involve clarification hearings (see paragraphs 5.6 to 5.9) and will include bilateral hearings (see paragraphs 5.10 to 5.16) with each of the parties, as well as written questions (see paragraphs 6.1 to 6.3).

3.18 The clarification and bilateral hearings will enable the CMA to ask questions and the parties to engage with the decision-makers. The CMA will generally provide a topics letter before each bilateral hearing to assist parties' preparation; however, parties should be prepared to discuss all aspects of their cases.

- 3.19 The CMA will also raise written questions on various points. Typically, these points will be complementary to those raised at hearings.
- 3.20 Parties should be aware that intentional or reckless provision of false or misleading information, or intentional alteration, suppression or destruction of any documents a person is required to produce, is a criminal offence.²⁰

Draft determination

- 3.21 Subject to the timetable allowed by the CAT for the CMA determination, the CMA will normally issue a draft determination of the reference questions to the parties, typically 11 to 12 weeks from the reference being made (see Figure 2). The main purpose of the draft determination is to allow the parties to comment on the factual accuracy of matters in the draft decision on each of the reference questions, confidentiality matters and any key issues in need of clarification.
- 3.22 A deadline will be set for written comments; this will typically be one to two weeks from the date of issue. At this stage the parties will not be permitted to provide new evidence or argument. To demonstrate how their comments correspond to the evidence and argument previously submitted, parties' written comments must cross-refer to their pleadings and reply.
- 3.23 The CMA will consider the written comments on the draft determination. Unless the CMA advises otherwise, parties should proceed on the working assumption that the final determination will largely correspond with the draft determination. Once the CMA has issued a draft determination, there will normally be no more opportunities to have hearings with the Appeal Group.

Report to the CAT and subsequent steps

- 3.24 Having determined its findings on the reference questions, the CMA will send its final determination to the CAT. It will then send a confidential version to the members of the confidentiality ring, identifying those sections it proposes are redacted in the non-confidential version, having regard to any confidentiality comments already made on the draft determination.
- 3.25 The CMA will endeavour to agree redactions with each relevant party so that it can supply the CAT, within about one week, with a non-confidential version of its final determination, suitable for publication. In due course, the CAT

²⁰ Section 193(8) of the Act.

would normally publish the non-confidential version on its website; the CMA will also publish this on its website shortly after the CAT's publication.

- 3.26 Should the CMA's determination be challenged on judicial review grounds, the CMA will normally respond to give its views to the CAT and, if appropriate, to explain its findings.

4. Key documents

Pleadings

- 4.1 The case before the CAT, and the CMA, is set out in the parties' pleadings: the appellant's Notice of Appeal, Ofcom's Defence and any interveners' Statements of Intervention.
- 4.2 The pleadings are governed by the CAT's Rules. The CMA expects that the move to a judicial review standard of review means that pleadings and proposed reference questions (see paragraph 4.3 below) with respect to price control matters will be more focused and less wide-ranging than they were under the previously applicable 'merits' standard of review. Furthermore, it will assist the CMA if:
- (a) the pleadings set out grounds of challenge as clearly as possible;
 - (b) the Notice of Appeal clearly and succinctly sets out the alleged reasons why, on judicial review grounds, the appeal should succeed. It is important that the Notice of Appeal identifies where in the evidence the appellant's allegations are substantiated; and
 - (c) the Notice of Appeal includes a glossary and an explanation of the industry and technological structure that supports the supply of services subject to price control. This should be written so as to facilitate a working knowledge of those matters by people who are not experts in technology.
- 4.3 The CMA suggests that it will assist all parties if the Notice of Appeal includes proposals for the CAT's reference questions for the CMA on price control issues or sets out an explanation of any issues that the CAT should first decide.

Reply to the defence

- 4.4 The CMA will provide the appellant with an opportunity to submit to the Appeal Group a reply to any matters raised in Ofcom's Defence that relate to the price control matters referred to the CMA. The appellant should submit such a reply to the CMA within three weeks of the date that the price control matter reference is made to the CMA. The reply should be concise, should

include cross references to the Notice of Appeal and Defence, and may be subject to a limit on length and limitations on supplementary materials.²¹

Draft determination

- 4.5 Any draft determination that the CMA produces in a reference will be in the same general form as the expected final determination. The final determination will be primarily written for the CAT; it is likely to make use of technical language (as used in Ofcom's decisions and parties' pleadings), and be based on an expectation that the reader has a general knowledge of the industry and regulatory context.
- 4.6 The CMA will not publish its draft determination on its website. Separate versions will be issued for use within and outside of any confidentiality ring (see paragraph 7.1). For ease of reference, these are described as confidential and non-confidential versions, but as noted in paragraph 7.6, non-confidential versions should not be circulated beyond those individuals involved in an appeal.

Comments on the draft determination

- 4.7 These are discussed in paragraphs 3.21 to 3.23.

Final determination

- 4.8 The CMA's final determination answering the CAT's reference questions will be sent to the members of the confidentiality ring at the same time as it is sent to the CAT. Parties will be asked to check the document as to (i) whether any other points not already identified need to be treated as confidential, and (ii) that all the items marked as confidential will need to be treated as such.
- 4.9 A non-confidential version of the CMA's final determination will be published on the CMA's website when the CAT issues its final judgment in relation to the price control matters.

²¹ Our expectation is that under most circumstances, further written pleadings, including written core submissions, should not be required, but the CMA will request further submissions if necessary.

5. Hearings and meetings

Hearings

- 5.1 The CMA will not normally conduct its hearings on these references in public.
- 5.2 Hearings will be held with the Appeal Group and CMA staff will also participate. CMA staff may also conduct meetings with parties.
- 5.3 Hearings are formal, and will normally be led by the Chairman of the Appeal Group.
- 5.4 During the course of the hearing, it may become clear that an oral answer to a question may have to be supplemented by further material. In such cases, the party will normally be given one week to produce the necessary material.
- 5.5 Verbatim transcripts are taken of hearings. Transcripts will be sent to the relevant party after the hearing for checking and the identification of confidential material. The agreed transcript will then be circulated to all parties (see paragraph 7.4). Other parties may comment on the admissibility and factual accuracy of the evidence and arguments discussed during hearings.

Clarification hearings

- 5.6 In order to better understand any technical or other key issues relating to the reference, the Appeal Group may invite the main parties (the appellant(s) and Ofcom) to attend a clarification hearing. Any such clarification hearing will be held at an early stage of the reference, usually within one to two weeks of the CMA receiving the reference questions from the CAT.
- 5.7 At a clarification hearing, each main party should make a brief presentation to the Appeal Group clarifying the points and arguments in its pleadings that relate to the reference. The presentation should refer to the applicable legal framework and any related matters in so far as they might affect the CMA's determination of the CAT's reference. The Appeal Group is likely following each presentation to ask each party questions of clarification about their presentation and/or pleadings. Parties other than the main parties may also be invited to present to, and reply to questions from, the Appeal Group at a clarification hearing.
- 5.8 The clarification hearing is not an opportunity to raise new grounds of appeal or defence, or to present new evidence. Nor will such a hearing present an opportunity for examination or cross-examination of witnesses by parties. Furthermore, parties will not be permitted to respond substantively to each

other's presentations made, or answers provided, during a clarification hearing.

- 5.9 The CMA will not expect the parties to provide written summaries of their presentations in advance of a clarification hearing, though they may do so if they wish.

Bilateral hearings

- 5.10 Bilateral hearings provide an opportunity for the parties to explain their positions orally directly to the decision-makers and for the CMA to test the evidence and explore key issues with the parties. They form part of the CMA's process of clarifying and understanding the parties' positions. They are not an opportunity for parties to put questions to the CMA.
- 5.11 The staff team will contact parties to arrange an appropriate date for this hearing early in the reference process. The CMA will endeavour to schedule bilateral hearings for mutually agreeable dates but without delaying its overall timetable.
- 5.12 Bilateral hearings will take place after the clarification hearing and will proceed on the basis that parties have already made developed arguments to the CMA. At the hearing, the CMA will ask questions relating to particular themes arising from the party's pleadings and evidence in order to test the arguments and their evidential basis. To assist the parties' preparations, the CMA will generally send an annotated hearing agenda to the party ahead of the hearing.
- 5.13 Whilst the CMA will not generally be prescriptive as to who should represent parties at hearings, the CMA is likely to wish to discuss the case and evidence with the business and technical specialists from the parties themselves.
- 5.14 While such hearings are conducted bilaterally, observers from the other parties to the appeal that are in the confidentiality ring may attend. The CMA will seek to avoid discussion of confidential material during bilateral hearings unless such discussion should be necessary. In exceptional circumstances, where observers from the other parties to the appeal that are not in the confidentiality ring are in attendance, the CMA will inform the parties and those observers who are not in the confidentiality ring will be asked to leave for the duration of the discussion. Should a matter concerning confidential material arise during the course of a bilateral hearing, the CMA will, as far as practicable, ask for the parties to comment in writing.

- 5.15 A party may, at the CMA's discretion, be offered an opportunity to make opening and/or closing statements. Should a party wish to make such statements, it should request this in advance. Where the CMA agrees to such a request, it may impose a time limit on any such statement.
- 5.16 The CMA may, exceptionally, hold other hearings where doing so would assist the CMA. Although as noted in paragraph 3.23 above, once the CMA has issued a draft determination, there will be no more opportunities to have hearings with the Appeal Group.

Staff meetings

- 5.17 The CMA may conduct meetings or make phone calls to clarify specific facts; for example, CMA staff may hold meetings with Ofcom or other parties to discuss modelling issues. A transcript will not normally be taken, but, where practical, other parties will be invited to send observers. A note of any meetings or phone calls will be circulated to all the parties.

6. Written questions and oral enquiries

- 6.1 During the clarification and analysis stage of the determination, the CMA may raise written questions on the arguments and evidence contained in the parties' pleadings. Questions will be raised in writing, rather than at hearings, when they are likely to involve points of detail or where timely answers will facilitate decision-making.
- 6.2 Whilst full answers to the CMA's questions will be expected, these answers should focus on the relevant question, cross-referencing as appropriate to the pleadings and reply. Answers to written questions should not be used as a means of making broader points and the CMA may disregard material that it considers not to be relevant.
- 6.3 The CMA will copy questions to all parties and the responding party should do the same in line with the procedure outlined in Section 7. Other parties may comment on the admissibility and factual accuracy of the answers to the CMA's written questions.
- 6.4 At various times, and particularly when preparing its reports, the CMA will send documents to parties for the purposes of enabling them to verify that they properly cite their arguments and evidence and to identify confidential material. As far as practicable, the source of all material cited will be identified in order to assist the parties in checking such papers.

7. Transparency and confidentiality

- 7.1 In order to take account of the need for disclosure in the interests of fairness and legitimate claims to the confidentiality of sensitive information, the CAT may order that disclosure is made solely within a 'confidentiality ring' normally comprising the parties' named legal representatives and, possibly, other external advisers or experts such as accountants and economists, rather than to the parties themselves.²²
- 7.2 The CMA's approach to confidentiality will be consistent with that adopted by the CAT. In particular, the CMA will use any confidentiality ring(s)²³ set up by the CAT. Should parties require that additional individuals be admitted to the confidentiality ring, they should apply to the CAT.
- 7.3 Exceptionally, claims may be made that certain information is of such sensitivity that it should not be disclosed within the confidentiality ring. Parties should be aware that the CMA may not be able to rely upon material that has not been disclosed within the confidentiality ring. In the absence of prior agreement to the contrary, parties should assume that any information submitted will be made available to the confidentiality ring.
- 7.4 Subject to the provisions on confidentiality below, all documents and emails sent by parties, other than those of a purely administrative nature, should be copied to all parties and to the CAT. The CMA will also adhere to this practice and transcripts of hearings and written questions will be circulated similarly.
- 7.5 As a general practice, in the event that the CMA holds substantive meetings (other than formal hearings) with parties, other parties will be invited to send observers to these meetings. Observers may need to be members of any confidentiality ring (see paragraph 7.1) and the CMA may impose limits on the number of observers for any given party.
- 7.6 The CMA proceedings will be private and the CMA does not expect parties to circulate the case materials more widely than necessary. Even non-confidential versions of the draft determination may be sensitive.²⁴ These materials will be shared with the parties to facilitate proper assessment of, and adjudication between, the parties' arguments. Parties should not communicate the CMA's draft determination beyond those employees and advisers directly involved in the case.

²² [CAT Guide to Proceedings 2015](#), paragraphs 7.37 & 7.38.

²³ In general, it is expected that there will be one confidentiality ring, and this has been the CAT's practice to date; the CMA will adapt its procedure to fit with the CAT's approach.

²⁴ Parties should be aware that misuse of market sensitive information may give rise to civil and criminal penalties under the Financial Services and Markets Act 2000 and the Criminal Justice Act 1993.

8. Recovery of the CMA's costs

- 8.1 Where a determination is made on a price control matter referred under section 193 of the Act, the CMA may make an order in respect of the costs it incurred in connection with the reference (Costs Order).²⁵ 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,²⁶ 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.²⁷ It is a matter for the CAT to determine the parties to the appeal for the purposes of these references, including any cost determinations.²⁸
- 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 and the resulting reference questions.
- 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.²⁹ In deciding on the proportion of costs to be paid by

²⁵ Also defined in section 193A(1) of the Act.

²⁶ 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.

²⁷ Section 193A(2) of the Act. The Act exempts Ofcom from being subject to a Costs Order.

²⁸ In past price control references, the CAT has treated interveners as parties to the appeal and the Explanatory Notes to the ERR13 (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.

²⁹ At paragraph 24 of its judgment in *British Telecommunications plc v Competition and Markets Authority* (VULA CMA Costs) [2017] CAT 11, the CAT noted that section 193A of the Act requires the CMA to make 'a broad soundly based judgment as to its costs and as to the proportion of those costs for which the paying party is to be made liable but not that it should engage in a process analogous to a detailed assessment of costs under CPR Part 44 or Rule 104 of the Tribunal Rules.'

a party to the appeal, the CMA will have regard to all the circumstances but it must, in particular, consider:³⁰

- 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. In this regard, the CMA shall endeavour to provide, at the consultation stage, details of how it has calculated its total costs and the proportion of the costs to be paid pursuant to the Costs Order, provided that this can be done without imposing a significant burden on the CMA.³¹ 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.³² The Costs Order does not take effect unless the CAT decides the price control matter in accordance with the CMA's determination.³³ 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.³⁴ 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.³⁵

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. Section 194A(2) of the Act requires the CAT to decide the appeal by

³⁰ Section 193A(4) of the Act.

³¹ At paragraph 32 of its judgment in the VULA CMA Costs appeal, the CAT outlined certain types of information that the CMA may wish to consider disclosing during the consultation stage.

³² Section 193A(5)(a) of the Act.

³³ Sections 193A(5) and 193(6) of the Act.

³⁴ Sections 193A(6) and 193A(7) of the Act.

³⁵ Section 192 of the Act, as amended by the ERRA13. For costs of any appeal to the CAT, see the Competition Appeal Tribunal Rules 2015 (SI 2015 No 1648).

reference to the grounds of appeal set out in the Notice of Appeal, by applying the same principles as would be applied by a court on an application for judicial review. The CAT may 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 the CMA with a direction to reconsider and make a new decision in accordance with its ruling.³⁶

³⁶ Section 194A(3)(a) and (b) of the Act.

Annex A: Administrative matters

1. The CMA's proposed approach to administrative matters in a given case will be described in correspondence with the parties, including the first day letter. The comments below are included in this annex for the assistance of parties.
2. Prior to the reference of the price control matters to the CMA the parties, when filing pleadings at the CAT, should also provide copies of the same documents to the CMA in the manner described below. The serving party should provide two physical copies of the pleadings provided to the CAT. Each copy should be a complete copy of the party's pleadings, ie including witness statements and exhibits, as well as supporting documents. In addition, the serving party should send an electronic copy of the set of documents served on the CAT to the CMA.³⁷ Parties are requested to provide a Microsoft Word copy of any main pleadings and witness statements.
3. The CAT Rules apply to the filing and service of pleadings. Unless agreed otherwise, service of documents concerning the CMA's determination of the price control reference on parties will be effected by service on their nominated legal representatives. Subject to the CMA's remarks concerning confidentiality, the form of the document is also a matter to be agreed between the parties. However, the parties should advise the CMA of the arrangements that have been made for service, and should notify the CMA where and how service of documents has been effected.

Handling of confidential materials

4. In relation to documents served on the CMA, and subject to prior agreement with the CMA, confidential and non-confidential versions should be served at the same time.
5. Documents served on the CMA and Ofcom should include all the confidential material on which a party relies. The CMA will normally expect material served on the CMA to be available to all the members of the confidentiality ring. The CMA is not ordinarily able to rely on any material which has not been the subject of disclosure between the principal parties without their agreement.
6. In order to assist the CMA and the parties:

³⁷ The CMA's IT systems will not usually accept emails exceeding 15MB in size. Parties may wish to submit a CD/USB stick instead.

- (a) confidential versions of documents should indicate where material is to be excised for the non-confidential version of the document; and
 - (b) non-confidential versions of documents should indicate where material has been excised.
- 7. In relation to service on parties other than Ofcom, documents to be received outside the confidentiality ring should exclude material in respect of which confidentiality is claimed.
- 8. Where there is any dispute as to whether material should be regarded as confidential, the CMA would hope that this could be resolved by agreement between the CMA and parties. However, if necessary, the CMA or parties will be able to apply to the CAT for directions.

Format for responses and submissions

- 9. Parties should send correspondence to the CMA electronically or on disc/USB stick wherever practicable, in a format compatible with Microsoft Office programs, or as tagged PDF files. Spreadsheets, charts and all other digital source data files should be submitted, as far as possible, in Microsoft Excel or their equivalent original format, to facilitate our internal analysis. Spreadsheets should include underlying formulae.
- 10. When sending material electronically or making up discs/USB sticks, parties should ensure that each file is given a fully explanatory title and that the files are sent without being grouped into folders and subfolders. 15MB is the limit for acceptance by the CMA system of emailed material in any one message.
- 11. In the case of urgent material, parties should check in advance that the recipient is available to receive it.
- 12. The CMA will send some documents to parties as tagged PDF files and some as Microsoft Word files.